

Alaska Workers' Compensation Appeals Commission

James G. Huguley,
Appellant,

vs.

City of Unalaska and Alaska Public
Entity Insurance,
Appellees.

Final Decision

Decision No. 206 January 13, 2015

AWCAC Appeal No. 13-024
AWCB Decision No. 13-0139
AWCB Case Nos. 201002900M,
201020713, and 200920528

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 13-0139, issued at Anchorage, Alaska, on October 29, 2013, by southcentral panel members Ronald P. Ringel, Chair, Pamela Cline, Member for Labor, and Linda Hutchings, Member for Industry.

Appearances: James G. Huguley, self-represented appellant; Colby J. Smith, Griffin & Smith, for appellees, City of Unalaska and Alaska Public Entity Insurance.

Commission proceedings: Appeal filed November 25, 2013; briefing completed September 30, 2014; oral argument held on January 8, 2015.

Commissioners: James N. Rhodes, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, James G. Huguley (Huguley), began working for appellee, the City of Unalaska (Unalaska) in 1994.¹ He reported a left shoulder injury occurring on April 20, 2007.² On October 9, 2009, Huguley reported suffering some pain in his left leg, which was diagnosed as ruptured varicose veins.³ He also filed a claim for a work-related

¹ See *James G. Huguley v. City of Unalaska*, Alaska Workers' Comp. Bd. Dec. No. 13-0139 at 3 (Oct. 29, 2013).

² R. 0001. This injury is not the subject of any claim in this appeal. The board assigned number 200706883 to this claim.

³ R. 0014-15. The board assigned number 200920528 to this claim.

hernia which reportedly occurred on March 9, 2010.⁴ Huguley reported another incident in which he injured his left shoulder on March 12, 2010.⁵ Unalaska eventually controverted benefits with respect to all three conditions, the varicose veins, the hernia, and the shoulder injury, although at different times.⁶ However, on August 6, 2013, Unalaska ultimately accepted Huguley's hernia injury as work-related and paid Huguley temporary total disability (TTD) benefits from March 9, 2010, through June 1, 2010.⁷

Huguley's varicose veins, hernia, and 2010 shoulder injury claims went to hearing before the Alaska Workers' Compensation Board (board) on August 20, 2013.⁸ The board ruled that Huguley was not entitled to: 1) benefits for permanent total disability (PTD); 2) additional TTD benefits; 3) permanent partial impairment (PPI) benefits; 4) medical costs related to his varicose veins or shoulder; 5) medical transportation costs; and 6) a reemployment benefits evaluation.⁹ It also held: 1) Huguley is entitled to interest on late-paid TTD and medical benefits related to his hernia; and 2) Unalaska's controversions were not unfair or frivolous and Huguley is not entitled to a penalty.¹⁰

⁴ R. 0020-21. The board assigned number 201020713 to this claim. The board also assigned number 201002900 to this claim. R. 0023-24.

⁵ R. 0002. This claim was also assigned claim number 201002900 by the board, although it relates to a different injury, the shoulder, and a different injury date, March 12, 2010. The board's explanation for the claim numbering confusion is included in the record. R. 0022. The confusion board staff introduced through claim numbering errors contributed to wrong dates of injury being referenced in the reports of some of the medical evaluators.

⁶ R. 0005 (controversion of varicose veins condition); R. 0006 (controversion of 2010 shoulder injury); R. 0007 (controversion of the hernia). All three of these controversions reference claim number 201002900 as well as the same date of injury, March 12, 2010.

⁷ R. 0007.1-07.2.

⁸ *See Huguley*, Bd. Dec. No. 13-0139 at 1.

⁹ *See id.* at 21.

¹⁰ *See id.*

Huguley appealed the board's decision to the Workers' Compensation Appeals Commission (commission). We affirm.

2. Factual background and proceedings.

Huguley was seen at Iliuliuk Family and Health Services on October 29, 2009, complaining of back pain and varicose veins that had recently "popped out" on his left leg. It was also noted on his chart that he reported wanting to retire early and receive social security benefits. Huguley was diagnosed with significant painful varicosities in his upper and lower left leg and instructed to return to the clinic in three months. The chart form includes boxes to check to indicate whether a condition is either directly caused by or exacerbated by work. Neither box was checked.¹¹

On returning to Iliuliuk Family and Health Services on November 30, 2009, and seeing PA-C Natalie Miller, Huguley reported dizziness, near fainting, and vision changes. PA-C Miller attributed the complaints to high blood pressure and restricted Huguley from work until December 2, 2009.¹²

On December 7, 2009, Huguley went to Iliuliuk Family and Health Services again for follow-up. While the exam focused on his high blood pressure, the chart note indicated Huguley was wearing compression stockings for his varicose veins while working and he reported improvement while wearing them.¹³ He was released to light duty work at that time by PA-C Miller.¹⁴

Three months later, on March 9, 2010, Huguley suffered a hernia in connection with lifting buckets of rock salt at work.¹⁵ Three days later, he reported a left shoulder

¹¹ Exc. 069.

¹² R. 0853-58, R. 0387.

¹³ Exc. 071.

¹⁴ R. 420.

¹⁵ Exc. 001-02 (claim No. 201020713).

injury when a supervisor pulled a shovel out of his hand.¹⁶ That same day, March 12, 2010, Huguley was released to work with lifting and pushing/pulling restrictions.¹⁷

On March 16, 2010, PA-C Rebecca Moore diagnosed Huguley's shoulder pain as directly caused by a work injury, and restricted him from work until evaluated by a physician in Anchorage.¹⁸ Huguley was seen again by PA-C Miller for his shoulder, hernia, and varicose veins on March 26, 2010. The chart note states the shoulder pain started 14 days earlier, the hernia began 17 days earlier, and the varicose veins condition began in October 2009. Huguley was referred to physicians in Anchorage for further evaluation and treatment.¹⁹

Huguley was seen by Richard A. Peters, M.D., on April 13, 2010. With respect to his hernia, Dr. Peters noted he had developed a right-sided "bulge" over the last six months. Dr. Peters also reported that Huguley had developed left leg varicose veins after doing heavy lifting. Dr. Peters did not address Huguley's ability to work.²⁰

On April 15, 2010, George D. Rhyneer, M.D., examined Huguley. He noted scars from repairs to his left shoulder 30 years earlier, and referred him for an MRI to determine if he had a rotator cuff tear. Dr. Rhyneer did not address Huguley's ability to work.²¹ An MRI was done that same day. No rotator cuff tear was found, however, changes were noted due to the prior surgery, degenerative joint disease, and a partial-thickness tear of the posterior supraspinatus.²²

Dr. Peters surgically repaired Huguley's right inguinal hernia on April 17, 2010.²³

¹⁶ R. 0002.

¹⁷ Exc. 018.

¹⁸ Exc. 021-22.

¹⁹ Exc. 029-31.

²⁰ R. 0840-42.

²¹ Exc. 037-38.

²² Exc. 039-40.

²³ Exc. 041.

Dr. Rhyneer wrote to Donald G. Hudson, M.D., Huguley's attending physician, on April 20, 2010, recommending injections and six weeks of physical therapy for his shoulder.²⁴

On June 2, 2010, Erik Maurer, M.D., performed an ablation of Huguley's left greater saphenous vein to treat his varicose veins. Dr. Maurer did not address Huguley's ability to work.²⁵

Huguley saw Dr. Rhyneer again on June 3, 2010, who noted he had been unable to complete the physical therapy because of the hernia surgery. Dr. Rhyneer scheduled a diagnostic arthroscopy of Huguley's left shoulder.²⁶ On June 16, 2010, Dr. Rhyneer performed arthroscopic debridement of the left shoulder.²⁷

On October 1, 2010, Huguley filed claims relating to all three injuries: the rupture of his varicose veins on October 9, 2009,²⁸ his inguinal hernia on March 9, 2010,²⁹ and his left shoulder on March 12, 2010.³⁰ With respect to each claim Huguley sought PTD,³¹ TTD, and PPI benefits, as well as medical and related transportation costs, a determination of eligibility for reemployment benefits, penalty, interest, and a finding that Unalaska's controversions were unfair or frivolous.³²

Dr. Rhyneer performed a total left shoulder arthroplasty on September 26, 2011. Dr. Rhyneer's pre- and postoperative diagnoses were osteoarthritis. His report does not mention Huguley's work injury.³³

²⁴ Exc. 076.

²⁵ Exc. 077-78.

²⁶ R. 0710.

²⁷ Exc. 047-48.

²⁸ Exc. 003-04.

²⁹ Exc. 001-02.

³⁰ Exc. 005-06.

³¹ R. 1704.

³² Exc. 002, 004, 006.

³³ Exc. 083-84.

Gregory L. Moneta, M.D., a vascular surgeon, saw Huguley on December 14, 2011, for an employer's medical evaluation (EME) regarding his varicose veins. Dr. Moneta diagnosed left lower extremity varicosities, and post-surgical ablation of the left greater saphenous vein. Dr. Moneta found Huguley's varicosities were not caused by work, but were "consistent with" and "undoubtedly resulted from" the greater saphenous vein insufficiency and not employment activities. The varicosities "do not . . . relate in any way to his . . . work injury or his work for the employer in general." Greater saphenous vein insufficiency is an idiopathic condition and "certainly not related to a single episode of heavy lifting."³⁴

On December 15, 2011, Huguley was seen by Marilyn L. Yodlowski, M.D., an orthopedic surgeon, for an orthopedic EME. Dr. Yodlowski diagnosed him as status post left shoulder replacement. In Dr. Yodlowski's opinion, neither the March 12, 2010, work incident nor his work in general was the cause of the condition. The substantial cause of the need for the replacement was Huguley's history of prior dislocations, and significant loss of glenoid bone which led to the procedure about 25 years ago and subsequent progressive osteoarthritis.³⁵

That same day, December 15, 2011, Huguley was seen by Jack B. Blumberg, M.D., for an EME regarding his hernia. As was the case with Dr. Moneta's EME report,³⁶ Dr. Blumberg referred to March 12, 2010, as the date of injury, not March 9, 2010, as Huguley asserted. Dr. Blumberg referred to PA-C Miller's notes indicating the hernia pre-existed the March 12, 2010, work injury, and he consequently concluded the March 12, 2010, incident was not the cause of the hernia. Dr. Blumberg noted that "[i]t is possible that his lifelong work exposure did contribute to the

³⁴ Exc. 085-92. Dr. Moneta's report mistakenly refers to the date of injury as March 12, 2010.

³⁵ Exc. 093-115.

³⁶ See n.34, *supra*.

development of the hernia.” Dr. Blumberg stated Huguley was medically stable as to the hernia, and had no permanent impairment.³⁷

On January 30, 2012, Unalaska filed a controversion of all benefits related to Huguley’s varicose veins based on Dr. Moneta’s EME report.³⁸ On February 23, 2012, it controverted all benefits related to the left shoulder, based on Dr. Yodlowski’s EME report.³⁹ On March 12, 2012, Dr. Blumberg issued an addendum to his report, clarifying that while Huguley’s lifelong work exposure contributed to the hernia, work conditions were not the substantial cause.⁴⁰ On March 16, 2012, Unalaska controverted all benefits related to his hernia based on Dr. Blumberg’s EME report and addendum.⁴¹

On November 19, 2012, Kenneth J. Hammerman, M.D., examined Huguley for a board-ordered second independent medical evaluation (SIME). Dr. Hammerman diagnosed varicose veins status post ablation of the left greater saphenous vein, right inguinal hernia status post repair, and status post left shoulder arthroscopy. Dr. Hammerman deferred expressing any opinions regarding Huguley’s shoulder to an orthopedist. He explained that Huguley’s varicose veins are related to a progressive degeneration of the collagen and elastic tissue in the wall of veins resulting in progressive dilation of the vein and loss of effective venous valvular function, and it is a gradually progressive degenerative condition. In the examination, Huguley told Dr. Hammerman the varicose veins appeared “about September 2009” when he was carrying rock salt. Dr. Hammerman noted Huguley’s varicose veins were present well before that and were not caused or aggravated by work-related activities, any of the industrial accidents, or any cumulative trauma. In terms of the hernia claim, Dr. Hammerman noted there appeared to be an injury on March 9, 2010, which, if corroborated, would be a substantial cause of the hernia. He explained the March 9,

³⁷ Exc. 116-17.

³⁸ R. 0005.

³⁹ R. 0006.

⁴⁰ Exc. 118.

⁴¹ R. 0007.

2010, incident would have aggravated and accelerated the hernia condition, however, Huguley would have been medically stable by June 1, 2010, six weeks after his surgery, and he was physically able to return to his job at the time of injury.⁴²

On November 20, 2012, Thomas L. Gritzka, M.D., an orthopedic surgeon, performed an SIME of Huguley's left shoulder. In describing the work incident, Dr. Gritzka states Huguley "was put into some sort of strangle hold" and "then had a shovel jerked from his hand." He noted Huguley had a 43-year history of left shoulder problems and concluded the preexisting condition was the substantial cause of Huguley's current condition. Dr. Gritzka stated the March 12, 2010, work incident could have produced a strain/sprain which temporarily aggravated Huguley's preexisting condition, although the aggravation would have resolved by the end of May 2010.⁴³

On August 6, 2013, Unalaska accepted Huguley's hernia injury as work-related, based on Dr. Hammerman's SIME report, and paid Huguley TTD from March 9, 2010, through June 1, 2010.⁴⁴ At hearing on August 20, 2013, Unalaska represented that its acceptance of Huguley's hernia claim included medical benefits, and it was processing those payments.⁴⁵ During the hearing, Huguley explained he had not looked for a job since his injuries, but there were "probably a dozen things I can do."^{46 47}

3. Standard of review.

Only the board has the power to determine the credibility of witnesses; its findings concerning the weight to be accorded witnesses' testimony, including medical testimony and reports, are conclusive.⁴⁸ Pursuant to the provisions of AS 23.30.128(b), the commission is to uphold the board's findings of fact if they are supported by

⁴² Exc. 119-130.

⁴³ Exc. 131-146.

⁴⁴ R. 007.1-07.2.

⁴⁵ *See Huguley*, Bd. Dec. No. 13-0139 at 8.

⁴⁶ *See id.*

⁴⁷ Huguley had not sent receipts for medical travel to Unalaska and did not produce any receipts at hearing. *See Huguley*, Bd. Dec. No. 13-0139 at 8.

⁴⁸ *See* AS 23.30.122.

substantial evidence in light of the record as a whole. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴⁹ "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."⁵⁰ The commission exercises its independent judgment in reviewing questions of law or procedure.⁵¹

4. *Applicable law.*

a. *Statutes and regulations.*

AS 23.30.041. Rehabilitation and reemployment of injured workers.

...

(e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" for

- (1) the employee's job at the time of injury; or
- (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."

...

⁴⁹ *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted)).

⁵⁰ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

⁵¹ See AS 23.30.128(b).

AS 23.30.095. Medical treatments, services, and examinations.

(a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.

...

AS 23.30.120. Presumptions.

(a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

- (1) the claim comes within the provisions of this chapter;
- (2) sufficient notice of the claim has been given;
- (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
- (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

(b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

...

AS 23.30.122. Credibility of witnesses.

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

AS 23.30.155. Payment of compensation.

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating

- (1) that the right of the employee to compensation is controverted;
- (2) the name of the employee;
- (3) the name of the employer;
- (4) the date of the alleged injury or death; and
- (5) the type of compensation and all grounds upon which the right to compensation is controverted.

. . .

AS 23.30.180. Permanent total disability.

(a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. If a permanent partial disability award has been made before a permanent total disability determination, permanent total disability benefits must be reduced by the amount of the permanent partial disability award, adjusted for inflation, in a manner determined by the board. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be

- (1) area of residence;
- (2) area of last employment;
- (3) the state of residence; and
- (4) the State of Alaska.

(b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not, by itself, constitute permanent total disability.

AS 23.30.185. Compensation for temporary total disability.

In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

AS 23.30.190. Compensation for permanent partial impairment; rating guides.

(a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.

...

8 AAC 45.082. Medical treatment.

...

(d) Medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and a completed report in accordance with 8 AAC 45.086(a). Unless the employer controverts the prescription charges or transportation expenses, an employer shall reimburse an employee's prescription charges or transportation expenses for medical treatment no later than 30 days after the employer received the medical provider's completed report in accordance with 8 AAC 45.086(a), a written justification of the medical necessity for dispensing a

name-brand drug product if required for the filling of a prescription that was part of the treatment, and an itemization of the prescription numbers or an itemization of the dates of travel, destination, and transportation expenses for each date of travel. If the employer controverts

- (1) a medical bill or if the medical bill is not paid in full as billed, the employer shall notify the employee and medical provider in writing the reasons for not paying all or a part of the bill or the reason for delay in payment no later than 30 days after receipt of the bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and completed report in accordance with 8 AAC 45.086(a);
- (2) a prescription or transportation expense reimbursement request in full, the employer shall notify the employee in writing the reason for not paying all or a part of the request or the reason for delay within the time allowed in this section in which to make payment; if the employer makes a partial payment, the employer shall also itemize in writing the prescription or transportation expense requests not paid.

...

8 AAC 45.142. Interest.

(a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

(b) The employer shall pay the interest

- (1) on late-paid time-loss compensation to the employee or, if deceased, to the employee's beneficiary or estate;
- (2) on late-paid death benefits to the widow, widower, child or children, or other beneficiary who is entitled to the death benefits, or the employee's estate;
- (3) on late-paid medical benefits to
 - (A) the employee or, if deceased, to the employee's beneficiary or estate, if the employee has paid the provider or the medical benefits;

(B) to an insurer, trust, organization, or government agency, if the insurer, trust, organization, or government agency has paid the provider of the medical benefits; or

(C) to the provider if the medical benefits have not been paid.

*b. The presumption of compensability.*⁵²

In the past, whether a workers' compensation claim was ultimately compensable involved the application of a three-step presumption of compensability analysis. The first step in the analysis was derived from a statute, AS 23.30.120(a)(1), which provides: "In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this chapter." On the basis of this statute, to attach the presumption, the employee had to establish a "preliminary link" between his or her disability, need for medical treatment, etc., and his or her employment.⁵³ If the employee attached the presumption, in the second step of the analysis, the employer could rebut the presumption with "substantial evidence to the contrary[.]"⁵⁴ As developed through case law, the employer's evidence would have to satisfy one or the other of two showings.⁵⁵ Third, if the employer rebutted the presumption, it dropped out and the employee had to prove all elements of his or her claim by a preponderance of the evidence.⁵⁶

⁵² This discussion of the presumption of compensability first appeared in the commission's decision in *Runstrom v. Alaska Native Medical Center*, Alaska Workers' Comp. App. Comm'n Dec. No. 150 at 3-8 (Mar. 25, 2011).

⁵³ See, e.g., *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999).

⁵⁴ AS 23.30.120(a)(1).

⁵⁵ See, e.g., *Tolbert*, 973 P.2d at 611 (explaining that to rebut the presumption "an employer must present substantial evidence that either '(1) provides an alternative explanation which, if accepted, would *exclude* work-related factors as a substantial cause of the disability; or (2) directly eliminates *any reasonable possibility* that employment was a factor in causing the disability.'" (italics in original, footnote omitted); *Miller v. ITT Arctic Servs.*, 577 P.2d 1044, 1046 (Alaska 1978).

⁵⁶ See *Miller*, 577 P.2d at 1049.

The Alaska Workers' Compensation Act (Act), AS 23.30.001 — .395, was amended in 2005. The Act, as amended, applies to Runstrom's claim because the incident giving rise to it occurred in 2007. Prior to the 2005 amendments, AS 23.30.010, in its entirety, read: "**Sec. 23.30.010. Coverage.** Compensation is payable under this chapter in respect of disability or death of an employee." When amended in 2005, AS 23.30.010 was divided into subsections (a)⁵⁷ and (b).

As the commission has observed,⁵⁸ prior to the 2005 amendments to the Act, case law required that employment be "a substantial factor" in causing the employee's disability, need for medical treatment, etc.⁵⁹ Now, pursuant to AS 23.30.010(a), the

⁵⁷ AS 23.30.010(a) reads:

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

⁵⁸ See *City of Seward v. Hansen*, Alaska Workers' Comp. App. Comm'n Dec. No. 146 (Jan. 21, 2011) (*Hansen*).

⁵⁹ See *Pietro v. Unocal Corp.*, 233 P.3d 604, 616 n.31 (Alaska 2010) (noting that the Alaska Legislature changed the causation standard when it amended AS 23.30.010); *Hansen*, App. Comm'n Dec. No. 146 at 10 (citations omitted).

board “must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment.” This subsection further provides that “[c]ompensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, *in relation to other causes*, the employment is *the substantial cause* of the disability or death or need for medical treatment.”⁶⁰ Under AS 23.30.010(a), as has always been required of the employee under the presumption of compensability analysis, to attach the presumption, the employee must first establish “a causal link” between employment and his or her disability, need for medical treatment, etc.⁶¹ However, as explained below, applying our independent judgment to this legal issue, in the commission’s view, the amended version of the statute modifies the last two steps of the presumption analysis.⁶²

We noted previously that AS 23.30.010(a) has yet to be interpreted by the Alaska Supreme Court.⁶³ As an issue of first impression, it falls to the commission to adopt the rule of law that is most persuasive in light of precedent, reason, and policy.⁶⁴ There is a principle of statutory interpretation that presumes legislatures are aware of existing law when enacting or amending a statute.⁶⁵ Here, with full knowledge of the three-step presumption analysis as articulated and applied by the supreme court in the past, the Alaska Legislature nevertheless enacted amendments to AS 23.30.010 that stated the analysis differently. Given this sequence of events, we conclude that the

⁶⁰ AS 23.30.010(a) (italics added).

⁶¹ See AS 23.30.010(a) (providing that “[t]o establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment.”). *Cf., e.g., Tolbert*, 973 P.2d at 610; *Grainger v. Alaska Workers’ Comp. Bd.*, 805 P.2d 976, 977 (Alaska 1991).

⁶² See *Hansen*, App. Comm’n Dec. No. 146 at 14, 17.

⁶³ See *id.* at 10.

⁶⁴ See *Rivera v. Wal-Mart Stores, Inc.*, Alaska Workers’ Comp. App. Comm. Dec. No. 122, 7 (Dec. 15, 2009).

⁶⁵ See *Young v. Embley*, 143 P.3d 936 (Alaska 2006).

legislature intended to modify the second and third steps of the presumption analysis by amending AS 23.30.010 as it did.

As for the second step of the analysis, to rebut the presumption under former law, the employer's substantial evidence had to either (1) provide an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the injury, etc.; or (2) directly eliminate any reasonable possibility that employment was a factor in causing the injury, etc.⁶⁶ In contrast, under the new, statutory causation standard, the employer may rebut the presumption "by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment."⁶⁷ To do so, "the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment."⁶⁸

In applying AS 23.30.010(a), what showing is required of the employer to rebut the presumption? We think that, similar to one of the alternative showings under former law, the employer can rebut the presumption with substantial evidence that excludes any work-related factors as the substantial cause of the employee's disability, etc. In other words, if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the disability, etc., the presumption is rebutted. However, the alternative showing to rebut the presumption under former law, that the employer directly eliminate any reasonable possibility that employment was *a factor* in causing the disability, etc.,⁶⁹ is incompatible with the statutory standard for causation under AS 23.30.010(a). In effect, the

⁶⁶ See n.55, *supra*.

⁶⁷ AS 23.30.010(a).

⁶⁸ *Id.*

⁶⁹ See, e.g., *Tolbert*, 973 P.2d at 611.

employer would need to rule out employment as *a factor* in causing the disability, etc. Under the statute, employment must be more than *a factor* in terms of causation.⁷⁰

If the employer successfully rebuts the presumption, under former law, the supreme court consistently held that in the third step of the analysis, 1) the presumption dropped out, and 2) the employee was required to prove all elements of his or her claim by a preponderance of the evidence.⁷¹ Our prior review of the legislative history of the 2005 amendments to AS 23.30.010 did not reveal any intention on the part of the Alaska Legislature to abandon these two elements of the third step in the analysis.⁷² On the other hand, as we said earlier, the legislature enacted the amendments to AS 23.30.010 with full knowledge of the supreme court's wording of the presumption analysis under former law, yet it worded the third step in the analysis differently: "[I]f, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment[,]"⁷³ compensation or benefits are payable.

What form should the third step of the analysis now take? In light of the foregoing considerations, the commission believes the two elements of the third step in the presumption analysis under former law, that the presumption drops out and the employee must prove the claim by a preponderance of the evidence, should be engrafted on the third step of the analysis under AS 23.30.010(a). We come to this conclusion because the supreme court has held that "[t]he presumption shifts only the

⁷⁰ As in the past, the employer's evidence should still be viewed in isolation without weighing credibility. *See Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 118, 13 (Oct. 23, 2009).

⁷¹ *See, e.g., Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991) (citing *Miller*, 577 P.2d at 1046).

⁷² *See Hansen*, App. Comm'n Dec. No. 146 at 12-14.

⁷³ AS 23.30.010(a).

burden of going forward, not the burden of proof.”⁷⁴ Accordingly, the commission is reluctant to dispense with this burden-allocation feature when applying a third step in the statutory presumption analysis. Therefore, we hold: If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable.

5. Discussion.

a. Is Huguley entitled to PTD benefits?

The board held that Huguley did not establish the causal link between employment and disability.⁷⁵ In other words, he did not trigger the presumption of compensability in relation to his claim for PTD benefits. The board observed that “[t]o establish PTD, an employee must produce both medical evidence that his condition will not improve during the claimant’s lifetime, . . . and that there is no regularly and continuously available work suited to his capabilities.”⁷⁶ It reasoned that Huguley produced no evidence in these two respects.⁷⁷ The commission concurs. We would also add that Huguley testified that he had not looked for a job since his injuries, but there were “probably a dozen things I can do.”⁷⁸ This testimony does not support a finding that Huguley was PTD. For these reasons, we affirm the board’s denial of PTD benefits.

b. Is Huguley entitled to additional TTD benefits?

In denying Huguley additional TTD benefits, the board began its analysis by noting that Unalaska had paid TTD benefits from March 9, 2010, through June 1, 2010,

⁷⁴ *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665 (Alaska 1991) (citations omitted). See also 8 Larson, *Larson’s Workers’ Compensation Law* § 130.06[3][b] at 130-76 (2008).

⁷⁵ See *Huguley*, Bd. Dec. No. 13-0139 at 15.

⁷⁶ *Id.*

⁷⁷ See *id.* at 16.

⁷⁸ *Id.* at 8.

in relation to his hernia claim; for Huguley to be awarded additional TTD benefits, he would have to show he was temporarily, totally disabled outside this timeframe owing to the hernia, the varicose veins condition, and/or the shoulder injury,⁷⁹ otherwise assuming those conditions are compensable.

The board found that in terms of the varicose veins condition, Huguley had attached the presumption of compensability through PA-C Miller's March 26, 2010, report and Huguley's testimony.⁸⁰ It also found that Unalaska had rebutted the presumption through the expert opinion of Dr. Moneta, who stated the varicosities were not caused by work.⁸¹ Turning to whether Huguley proved he was entitled to additional TTD benefits by a preponderance of the evidence, the board found that both Dr. Moneta and Dr. Hammerman agreed that the varicose veins were the result of a progressive degenerative condition and employment was not the substantial cause. Because the varicose veins were not a compensable injury, Huguley was not entitled to any benefits for his varicose veins. We agree with the board that substantial evidence supports a denial of additional TTD benefits resulting from Huguley's varicose veins condition.

As for Huguley's shoulder condition, the board found Huguley had attached the presumption through PA-C Miller's March 26, 2010, report, and that Unalaska had rebutted it through Dr. Yodlowski's opinion that Huguley's osteoarthritis, due to a history of left shoulder injuries, was the substantial cause of his left shoulder condition. In deciding whether Huguley proved by a preponderance of the evidence that he was entitled to additional TTD benefits in relation to his shoulder, the board assigned greater weight to Dr. Yodlowski's and Dr. Rhyneer's opinions and less weight to PA-C Miller's, primarily because Miller did not address any effect of Huguley's history of shoulder injuries. This is a reasonable, relevant basis on which to assign weight to this evidence. Moreover, by statute, "[a] finding by the board concerning the weight to be

⁷⁹ See *Huguley*, Bd. Dec. No. 13-0139 at 16.

⁸⁰ See *id.*

⁸¹ See *id.*

accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions."⁸² Therefore, the commission affirms the board's holding that Huguley's shoulder injury did not entitle him to additional TTD benefits.

The remaining condition to be addressed in terms of whether Huguley is entitled to additional TTD benefits is the hernia. He reported that injury to have occurred on March 9, 2010. Hernia surgery was performed on April 17, 2010. SIME Dr. Hammerman concluded that employment was the substantial cause of the hernia and that Huguley was medically stable with respect to the hernia on June 1, 2010.⁸³ Having accepted the hernia claim as compensable, on August 6, 2013, Unalaska paid Huguley TTD benefits for the March 9, 2010 – June 1, 2010, timeframe.

Clearly, Huguley is not owed TTD benefits, whether initially or additionally, for his left shoulder and varicose veins conditions, because the board found, and the commission agrees with the board, that those conditions were not work-related. He was owed, and belatedly paid, TTD benefits in relation to his hernia, until he was declared medically stable by Dr. Hammerman as of June 1, 2010. We agree with the board's holding in this respect as well, however, it means that Huguley is not entitled to additional TTD benefits on account of his hernia.

c. Is Huguley entitled to PPI benefits?

Applying a presumption of compensability analysis, the board held that, based on a commission decision,⁸⁴ Huguley was required to obtain an impairment rating or present some evidence that contradicted Unalaska's evidence on the issue, however, he failed to do so.⁸⁵ Thus, the board concluded that Huguley failed to raise the

⁸² AS 23.30.122.

⁸³ TTD benefits are owed until the claimant reaches medical stability. *See* AS 23.30.185.

⁸⁴ *See Stonebridge Hospitality Associates, LLC v. Settje*, Alaska Workers' Comp. App. Comm'n Dec. No. 153 (June 14, 2011).

⁸⁵ *See Huguley*, Bd. Dec. No. 13-0139 at 18.

presumption with respect to PPI benefits,⁸⁶ finding Huguley “presented no evidence that he will suffer a permanent impairment as a result of his varicose veins, hernia, or shoulder conditions.”⁸⁷ We agree that Huguley did not raise the presumption with respect to PPI benefits.

d. Is Huguley entitled to medical costs related to his varicose veins or shoulder?

Neither Huguley’s varicose veins condition nor his shoulder injury was found to be compensable by the board because the preponderance of the evidence indicated his work with Unalaska was not the substantial cause of either.⁸⁸ Therefore, medical costs incurred in the treatment of the varicose veins condition and the shoulder injury, respectively, are not owed. We affirm the board’s ruling in this respect.

e. Is Huguley entitled to medical transportation costs?

The board held that Huguley would be entitled to an award of medical transportation costs related to the hernia, however, Huguley had failed to raise the presumption of compensability with respect to medical transportation costs because he presented no evidence in this regard at hearing and conceded he had not provided Unalaska with any documentation in that regard.⁸⁹ We agree with the board.

f. Is Huguley entitled to a reemployment benefits evaluation?

The board pointed out that to be eligible for reemployment benefits, a claimant must have a physician predict he will not have the permanent physical capacity to perform either his job at the time of injury or other qualifying jobs held in the ten years before the injury.⁹⁰ Huguley did not prove that his shoulder injury or varicose vein condition were work-related and no doctor predicted that he would be unable to return to his job at the time of injury due to the hernia.⁹¹ Consequently, Huguley had failed to

⁸⁶ See *Huguley*, Bd. Dec. No. 13-0139 at 18.

⁸⁷ *Id.*

⁸⁸ See *id.* at 19.

⁸⁹ See *id.*

⁹⁰ See *id.* citing AS 23.30.041(e).

⁹¹ See *id.*

raise the presumption of compensability in terms of any entitlement to a reemployment benefits evaluation for the hernia. The commission agrees with the board's conclusion that Huguley is not entitled to a reemployment benefits evaluation.

g. Is Huguley entitled to interest on late-paid benefits?

The board decided Huguley is entitled to interest on late-paid TTD and medical benefits for the hernia; interest accrued on the TTD benefits from the date each TTD payment was due until it was paid.⁹² Citing 8 AAC 45.082(d), that medical bills for the hernia must be paid within 30 days of the insurer's receipt of them, it was unclear from the record when Unalaska received them, therefore, the board did not award interest on them. We concur with the board's disposition of the interest-related issues.⁹³

h. Were Unalaska's controversies unfair or frivolous, entitling Huguley to a penalty?

The board began its discussion whether any controversies were unfair or frivolous by noting that, because only the hernia condition was compensable, Unalaska's controversies of the varicose veins and shoulder injury claims were not at issue in this respect.⁹⁴ As for the hernia, its finding was that the controversy was filed in good faith, as it was based on the expert opinion of Dr. Blumberg that Huguley's lifelong work exposure was not the substantial cause of the hernia, sufficed to support the controversy.⁹⁵ The commission agrees.

⁹² See *Huguley*, Bd. Dec. No. 13-0139 at 19-20.

⁹³ Huguley also argued in briefing that a penalty is still owed on the late-paid interest. See Appellant's Br. at 8. Unalaska maintains the penalty was paid on December 19, 2013, as evidenced by Huguley having deposited the check representing that payment in his bank account. See Appellees' Br. at 25. This constitutes substantial evidence the penalty was paid.

⁹⁴ See *Huguley*, Bd. Dec. No. 13-0139 at 20.

⁹⁵ See *id.*

6. *Conclusion.*

Having reviewed the board's decision and the parties' briefing and heard oral argument from the parties, the commission AFFIRMS the board's decision in all respects.

Date: 13 January 2015 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).⁹⁶ For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed⁹⁷ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

⁹⁶ A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

⁹⁷ *See id.*

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

More information is available on the Alaska Court System's website:
<http://www.courts.alaska.gov/>

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that this is a full and correct copy of Final Decision No. 206, issued in the matter of *James G. Huguley vs. City of Unalaska and Alaska Public Entity Insurance*, AWCAC Appeal No. 13-024, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 13, 2015.

Date: January 14, 2015



Signed

K. Morrison, Appeals Commission Clerk