Alaska Workers' Compensation Appeals Commission

Zorislav M. Stojanovich, Appellant, vs. NANA Regional Corporation, Inc. and ACE American Insurance Company, Appellees.	Final Decision Decision No. 207 January 26, 2015 AWCAC Appeal No. 14-001 AWCB Decision No. 13-0157 AWCB Case No. 201004694

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 13-0157, issued at Fairbanks, Alaska, on December 2, 2013, by northern panel members Amanda K. Eklund, Chair, Rick Traini, Member for Labor, and Krista Lord, Member for Industry.

Appearances: Zorislav M. Stojanovich, self-represented appellant; Robert J. Bredesen, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, NANA Regional Corporation, Inc. and ACE American Insurance Company.

Commission proceedings: Appeal filed January 2, 2014; briefing completed October 21, 2014; oral argument held on January 13, 2015.

Commissioners: James N. Rhodes, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, Zorislav M. Stojanovich (Stojanovich), was employed by appellee, NANA Regional Corporation, Inc. (NANA), which is insured for workers' compensation liability by appellee, ACE American Insurance Company. Stojanovich alleges that on March 23, 2010, he injured his right hip while working for NANA as a kitchen helper on the North Slope. After NANA controverted benefits, Stojanovich filed his first workers' compensation claim with the Alaska Workers' Compensation Board (board) on or about September 10, 2010. He filed subsequent claims on or about December 11, 2012, and April 10, 2013. The board held hearings on Stojanovich's claims on December 27,

2012, May 9, 2013, June 27, 2013, and September 19, 2013. It issued Interlocutory Decisions and Orders (ID&O) on February 22, 2011,[1] October 31, 2012,[2] and January 17, 2013.[3] It issued two Final Decisions and Orders (FD&O), the first on July 25, 2013,[4] and the second on December 2, 2013.[5] Ultimately, the board held that Stojanovich's "disability or need for medical treatment for any body part did not arise out of and in the course of his employment with [NANA]."[6]

Stojanovich filed an appeal of the board's decision in *Stojanovich V* to the Workers' Compensation Appeals Commission (commission), essentially taking issue with the board's reasoning in denying his claims.[7] We affirm.

2. Factual background and proceedings.

The board incorporated all findings of fact in *Stojanovich I, II, III, and IV* in its decision in *Stojanovich V*, and found them to have been established by a

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[1] *See Stojanovich v. NANA Regional Corp.*, Alaska Workers' Comp. Bd. Dec. No. 11-0019 (Feb. 22, 2011)(*Stojanovich I*).

[2] *See Stojanovich v. NANA Regional Corp.*, Alaska Workers' Comp. Bd. Dec. No. 12-0188 (Oct. 31, 2012)(*Stojanovich II*).

[3] *See Stojanovich v. NANA Regional Corp.*, Alaska Workers' Comp. Bd. Dec. No. 13-0008 (Jan. 17, 2013)(*Stojanovich III*).

[4] *See Stojanovich v. NANA Regional Corp.*, Alaska Workers' Comp. Bd. Dec. No. 13-0087 (July 25, 2013)(*Stojanovich IV*).

[5] *See Stojanovich v. NANA Regional Corp.*, Alaska Workers' Comp. Bd. Dec. No. 13-0157 (Dec. 2, 2013)(*Stojanovich V*).

[6] *Stojanovich V*, Bd. Dec. No. 13-0157 at 24. Complicating the procedural history in this matter somewhat is the fact that the parties agreed in *Stojanovich IV* that *Stojanovich III* should have been issued as a final decision, not an interlocutory one, and the board concurred. *See Stojanovich IV*, Bd. Dec. No. 13-0087 at 15-16. This change had an impact on Stojanovich timely and properly pursuing his appeal rights with respect to *Stojanovich III*. The board remedied the error through the simple expedient of declaring that, for the purposes of any appeal to the commission, *Stojanovich III* would be deemed to have been issued on the same date *Stojanovich IV* was issued, namely July 25, 2013. *See Stojanovich IV*, Bd. Dec. No. 13-0087 at 16.

[7] *See* Statement of Grounds for Appeal.

preponderance of the evidence.[8] Those findings, paraphrased to some extent, are as follows.

For several years prior to the alleged work injury, Stojanovich treated with Brent A. Ursel, PA-C, and Robert Reeg, M.D., for chronic lower back pain. Beginning in 2006, he obtained prescriptions for narcotic pain medication from both PA-C Ursel and Dr. Reeg simultaneously and had them filled at different pharmacies. Neither PA-C Ursel nor Dr. Reeg was aware that Stojanovich was obtaining narcotics from more than one source.[9]

On July 19, 2009, Stojanovich appeared at the Providence Seward Medical Center emergency department complaining of heart palpitations. He was diagnosed with recurrent atrial fibrillation. As part of the routine diagnostic procedure, Stojanovich underwent a urine toxicology screen. Despite concurrent narcotic prescriptions provided by PA-C Ursel and Dr. Reeg, his toxicology results were negative for opiates.[10]

At Stojanovich's request, on January 18, 2010, Dr. Reeg wrote a "To Whom It May Concern" letter:

> I am Zorislav Stojanovich's primary care provider. I have reviewed the letter from NMS [NANA Management Services] dated January 14, 2010, in regard to the job description for remote kitchen helper.
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> Based upon the information that I have available and from my interactions with the patient, I do believe that Mr. Stojanovich can perform the requirements of the job without presenting a health or safety risk to himself or anyone else.[11]

Less than a week later, on January 20, 2010, Dr. Reeg reported:

> Patient is a 54 year-old male here to pick up the letter I wrote stating that it would be acceptable to perform a job for which he has applied. He also requests additional opiate prescription as he states that apparently the previous prescription was written for one OxyContin b.i.d. instead of two b.i.d.

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[8] *See Stojanovich V*, Bd. Dec. No. 13-0157 at 2.

[9] *See generally,* Brent A. Ursel, PA-C Dep., May 11, 2012; Robert Reeg Dep., May 11, 2012; R. 1554-1690, 1875-1909, 2502-11, 2401-02, 2431-32, 2547-59.

[10] R. 1639-1660.

[11] R. 1685.

> Approximately one week ago, I was contacted by Costco Pharmacy reporting some irregularities in patient filling his medications. He had filled a week's supply of his OxyContin four different times within a 12-day period. This prompted a call from Costco Pharmacy. I initially had been under the impression that patient's prescriptions were filled by Purdue. I had thought that he was getting prescription assistance from Pardue (sic) and had to get his medications there. It came to my attention that patient was seeing Brent Ursel, physician's assistant in town, and getting a monthly supply of Vicodin in addition to having OxyContin and Percocet prescribed by me, so this is a clear violation of his pain contract.
>
> Patient initially denied that he had gotten prescriptions filled at Costco. It is still not clear to me what the role of Purdue Pharmaceuticals has been in filling his prescriptions as it appears that his prescriptions have been filled at Costco. Nonetheless, I had a frank discussion with the patient, stating that his filling opiate prescriptions at two different providers is a clear violation of his pain contract. I will discuss that I will no longer provide opiates for chronic management of his pain. I have asked the Medical Assistant to contact Purdue Pharmaceuticals tomorrow to get further information as to what exactly has been dispensed from them.[12]

The following day, January 21, 2010, at Stojanovich's request, Dr. Reeg prescribed a tapering schedule, to limit the discomfort of opiate withdrawal.[13]

On March 23, 2010, Stojanovich alleged he "turned suddenly to the right and felt sharp pain in [his] right hip, [he] felt something pop inside [his] hip" while working for NANA.[14] The same day, he saw NANA's on-site medic, Jose Diaz, PA. Stojanovich described his injury as "twisted my body to the right and hurt my hip and behind the butt." He indicated the injury occurred at 4:00 a.m. PA Diaz diagnosed right hip pain and recommended over-the-counter pain medications.[15] Later in the day, Stojanovich returned to the on-site medical clinic, where he was diagnosed with "hip pain – probably exacerbation [of] prior personal condition" and received acupuncture

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12 R. 1686.

13 R. 1690.

14 Exc. 035.

15 Exc. 032.

treatment.[16] The following day, March 24, 2010, he was sent home for additional treatment.[17]

On April 2, 2010, Stojanovich saw PA-C Ursel, complaining of right hip pain. He reported he "was at work on March 23rd. He was standing at his station. He went to turn, and heard a click in his right hip. He had immediate pain." PA-C Ursel noted that Stojanovich walked with a limp and had difficulty rising from a chair. X-rays taken that day were negative for fracture or dislocation. PA-C Ursel referred Stojanovich to Richard W. Garner, M.D., an orthopedist and excused him from work until April 15, 2010.[18]

Stojanovich saw Dr. Garner on April 19, 2010, reporting he "was working on [t]he North Slope at a kitchen counter, when he turned suddenly to the right and had immediate sharp, stabbing pain in the anterior right hip." The nurse's notes from that visit indicate Stojanovich "thinks [he] twisted not sure if had foot planted." Dr. Garner ordered a magnetic resonance imaging (MRI) study and diagnosed a probable labral tear. He noted, "It was my comment to the patient that his medication should be more than adequate, and I specifically declined to order him anything additional, nor would I go so far as to use the fentanyl patch, were that my decision."[19]

Stojanovich underwent a hip MRI on April 22, 2010, which revealed subchondral cysts, labral tear, and early degenerative changes in the articular surface of the femoral head.[20] He followed up with Dr. Garner, who diagnosed a labral tear, probably acute, in the right hip superimposed on a moderate degree of osteoarthritis. Stojanovich described his pain as "unrelenting," and he walked with a "markedly antalgic gait on the right." Dr. Garner prescribed Percocet for pain, but noted Stojanovich was already on a fentanyl patch with Norco for breakthrough pain, as prescribed by PA-C Ursel, and "I

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16 R. 1696.

17 Exc. 033.

18 Exc. 036; R. 1702.

19 Exc. 037; R. 1711.

20 Exc. 039.

informed him quite adamantly that I am not willing to be a source for this strength and level of pain medication on a regular basis." Dr. Garner recommended Stojanovich undergo a total hip replacement.[21]

On May 3, 2010, Stojanovich sought a second opinion from Gregory L. Schumacher, M.D. Dr. Schumacher noted he "was injured at work developing hip pain while working as a cook. MRI is consistent with a labral tear with some arthritis. He is complaining of acute anterior hip pain that came on out of the blue without any prodromal symptoms and certainly no great history of hip pain." Dr. Schumacher recommended physical therapy and possible arthroscopic surgery.[22]

Stojanovich saw Tina McLean, PT, on May 11, 2010, for physical therapy services. He reported "he was working at counter height when he went to turn and reach or place something behind him to his right. Apparently his right leg was planted on the floor when he felt a 'popping' in the right hip with immediate pain which worsened over the next several days." Stojanovich rated his pain an "8" out of a possible "10," with "0" being no pain and "10" being the worst pain ever.[23]

The following day, May 12, 2010, Stojanovich saw pain management specialist Alfred Lonser, M.D. He reported that he "twisted my hip to the right s[u]ddenly at work." Dr. Lonser noted "[o]n reviewing the records, there is some mention regarding him being fired from his previous physician for filling multiple prescriptions of OxyContin. The patient disagrees with this stating that all of the prescriptions he was given were received from his pain specialist and if he filled multiple prescriptions, it was only because he was given multiple prescriptions."[24]

On June 15, 2010, John W. Swanson, M.D., performed an employer's medical evaluation (EME). Dr. Swanson reviewed the medical records available to NANA at the time. He diagnosed preexisting osteoarthritis of the right hip; possible exacerbation of

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21 Exc. 038.

22 Exc. 040.

23 R. 1722.

24 R. 1728.

symptoms due to preexisting osteoarthritis; preexisting physical dependence and possible psychological addiction to narcotics; preexisting pain medication seeking behavior; possible malingering; and behavioral signs with possible secondary gain. Dr. Swanson was of the opinion no injury occurred at work and any need for treatment was due to Employee's preexisting osteoarthritis.[25]

Dr. Swanson issued an addendum report on June 27, 2010, after reviewing surveillance footage of Stojanovich taken May 7-8, 2010.

> When I saw this examinee on 06/15/10, he indicated that he could walk no more than half a block. He reported that he had to use a cane full-time in his right hand. He reported that he could stand in one spot only for two minutes. He reported difficulty getting in and out of a car. He reported that his wife had to carry the groceries. During the physical examination, the examinee used a cane in his right hand fulltime. He asked his wife to help him arise from a chair as he indicated that he could not do this by himself. He had a right leg antalgic gait. The examinee did not use external support, did not limp, walked significant distances, freely entered and exited a car by himself, and stood for a significant time on the surveillance CD.
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> The difference in the examinee's reported level of function during the history and his observed function during the physical examination on 06/15/10 versus the function observed during the surveillance CD on 05/07/10 and 05/08/10 fits the *AMA Guides to the Evaluation of Permanent Impairment* definition of malingering. Malingering is defined by the *AMA Guides* as a "conscious deception for the purpose of gain." Confirmation of malingering is extremely difficult and generally depends on intentional or inadvertent surveillance. In this examinee's case, intentional surveillance demonstrates an examinee who far exceeds his reported and demonstrated function during the history and physical examination on 06/15/10, indicating malingering, which is not a disease but a volitional deception and requires no treatment.

Dr. Swanson revised his prior diagnosis of possible malingering, to malingering.[26]

On July 7, 2010, Stojanovich had a routine urine toxicology screening. The toxicology report was negative for OxyContin and positive for morphine.[27] At the time,

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[25] Exc. 044-70.

[26] Exc. 071-72.

[27] Exc. 073-74.

Dr. Lonser was prescribing 80 milligrams of OxyContin twice per day and was not prescribing Stojanovich morphine. Dr. Lonser testified he would have expected the OxyContin test to be positive.[28]

NANA filed a controversion notice dated July 23, 2010, denying all benefits, and stating "[t]he work incident of 03/23/10 was not the substantial cause of any injury, and the employee is otherwise malingering."[29]

On September 10, 2010, Stojanovich filed a claim seeking temporary total disability (TTD), medical costs, transportation costs, a second independent medical evaluation (SIME), permanent partial impairment (PPI), and a finding of unfair or frivolous controversion. Stojanovich described the injury: "I suddenly turned to the right and felt big pop and great amount of pain in my right hip. Later I found out that I suffered labral tear in my right hip." In a separate, attached letter, Stojanovich alleged NANA's July 23, 2010, controversion was unfair, frivolous, and "based on lies" by NANA's medical evaluator, Dr. Swanson, who portrayed him as a "[p]sycho, liar and a person who is malingering."[30]

Gary Olbrich, M.D., completed a records review EME on September 20, 2010. Dr. Olbrich, a specialist in addiction medicine and pain management, concurred with Dr. Swanson's EME report and addendum, and further diagnosed opioid dependence and opined Stojanovich was malingering.[31]

On September 30, 2010, NANA filed an answer to Stojanovich's claim, denying all benefits. It asserted various defenses including that the work injury was not the substantial cause of any injury, Stojanovich was malingering, and NANA's controversion was not unfair or frivolous, as it was supported by Dr. Swanson's report.[32] The same day, NANA also filed a controversion notice denying all benefits, stating "[t]he work

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28 Alfred Lonser, M.D., Dep., September 14, 2012, at 11:5-7.

29 Exc. 075.

30 Exc. 079-80; R. 0047-48.

31 Exc. 081-99.

32 R. 0054-55.

incident of 03/23/10 was not the substantial cause of any injury, and the employee is otherwise malingering."[33]

On October 25, 2010, NANA took Stojanovich's deposition. He described the March 23, 2010, injury:

> A. . . . And, like I said, I was facing the wall. And then suddenly, you know, because you have to work fast over there. So that's how I do it. And I went like this, you know, to the right, turned to the right, you know what I'm saying? And I'm not sure if that floor contributed or not, you know what I'm saying, to – that I twisted my – I twisted my body, you know what I'm saying, to the right. And I mean, right then, you know, I felt, you know, horrific pain, you know what I'm saying, right in the front of my hip.
>
> Q. Okay. Let me break this down, get a little more detail. Were you holding anything when you felt the pain?
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> A. I don't believe so. I don't believe so, because I turned – I was going to grab something from that – you know what I'm saying, go back here. But then I remember or somebody called me, I'm not sure, because I said my line of touch was broken because of what happened, you know what I'm saying, so I really don't remember.
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> . . . .
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> Q. Were your feet planted? Did you actually – or did you just rotate or did you move your feet?
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> A. Well, I did move my feet, I believe, to the right, you know what I'm saying? A least the right leg, you know what I'm saying, to the right. And like I said, you know, I think that my leg went like this, you know what I'm saying, towards standing up. I never fell, you know. And when I made the movement, you know what I'm saying, and I felt horrific pain, so . . .
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> Q. And how was this movement any different than any other time you would have turned to the right, or was it the same?
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> A. I'm not sure. I don't know. What I'm saying is movement was probably the same, but what I'm saying, what affected, I don't know if I -- if I slipped with my leg, you know, with my foot or not, you know what I'm saying? Something did happen, so I don't know.[34]

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[33] R. 0009.

[34] Zorislav Stojanovich Dep., Oct. 25, 2010, at 64:9–66:5.

On November 21, 2011, Douglas Prevost, M.D., wrote a "To Whom It May Concern" letter, stating Stojanovich's March 23, 2010, incident at work was the substantial cause of his disability and need for medical treatment.

> . . . Mr. Stojanovich has been evaluated for complaints related to his right hip that began on March 23, 2010, when he injured his right hip while he was working as a cook. The patient has had severe pain in his right hip since that time and has been using a cane since May 12, 2010, due to the severity of pain he is experiencing. The patient has been having 10/10 pain in severity and he has been limping due to the severity of his pain. He is also not sleeping well at night. His workup has revealed clear evidence for femoral-acetabular impingement and a labral tear. Additionally, his radiographs show evidence for a cystic change in the superior lateral aspect of his hip and early joint space narrowing. In the history that the patient reported to me, he denied any pain whatsoever in his right hip prior to his injury at work.
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> . . . .
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> My distinct impression of Mr. Stojanovich is that he is not malingering and that his pain is substantial. Mr. Stojanovich clearly does have evidence for osteoarthritis involving his hip, which generally does cause severe pain even at early stages. Examination of Mr. Stojanovich's hip does reveal a decrease in range of motion and significant pain on range of motion testing. His examination is classic for someone with osteoarthritis of the hip and significant pain associated with arthritis of his hip. I have found nothing whatsoever about Mr. Stojanovich's complaints or his history that would even remotely suggest malingering.
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> . . . .
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> Based on the history provided to me, I do feel that Mr. Stojanovich's work injury on March 23, 2010, is the substantial cause for him developing hip pain. The patient denies any history of previous problems with his right hip whatsoever prior to that event. The patient has gone on to show evidence for the development of arthritis since this initial injury. It is my belief that the patient sustained a labral tear from the twisting event and that he may also have sustained some chondral injury at that time as well.[35]

NANA took PA-C Ursel's deposition on May 11, 2012. PA-C Ursel testified that Stojanovich had not disclosed to him he was receiving narcotic pain medication through Dr. Reeg at Providence Seward Medical Center, and that he continued to prescribe a

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[35] R. 2217-18.

"fairly high dose" of hydrocodone for Stojanovich throughout 2007, 2008, and 2009. PA-C Ursel first learned Stojanovich was receiving narcotics from another physician in January 2010.

A. We received a phone call from Costco pharmacy in Anchorage stating that he was receiving narcotics from myself and another provider.

Q. And so what did you do at that point?

A. Well, at that time I told him that we needed to, you know – that this wasn't – that this wasn't good; that, you know, that he was to receive narcotics from only one, you know, provider; that this was – this was not a good thing that he was receiving narcotic medications from two physicians and wasn't notifying either of us that the other one was prescribing.

. . . .

Q. And have you had any further contact with Mr. Stojanovich since you last treated him or met with him on June 24, 2010?

A. That was my last encounter with him.

Q. How about outside the clinical setting; have you had any interactions with him or seen him?

A. I have seen him driving around town. I have seen him at the local grocery store.

Q. Do you recall when you saw him last?

A. I saw him driving in his vehicle this week, I believe it was, and within the last two weeks or so at Safeway.

Q. When you saw him at Safeway, was he walking around at all?

A. Yes, he was walking.

Q. And did he appear to have any difficulties walking?

A. No, he did not.

Q. Did he have a cane?

A. I don't recall if he was carrying a cane or not.

Q. Have you ever seen him outside of your office presenting in the way that he presented to you in your office, the slow, guarded gait sort of presentation?

A. I have seen him in various presentations around town. I don't think anything quite as memorable as how he presented in the clinic.

Q. Do you ever form opinions as to whether or not somebody requires a surgery or not, such as a hip replacement surgery?

A. Yes.

Q. And when you have seen him, particularly recently, walking, did you see any indications for a right hip replacement surgery, if you can answer?

A. Did I see, you know, any indications? Possibly. Was my impression that this was a man who needed a total hip replacement? No.

. . . .

Q. And when you saw him using a cane, I'm not quite sure how to approach this, but I guess in chronic pain situations, there are times when people show up with props. Is that fair to say?

A. That's fair to say.

Q. And is it easy to tell when they are bringing you a prop as opposed to using a device because they actually need it?

A. It depends upon – it depends upon the person. Over the years of, you know, practice, my being burned several times by patients, I like to think that I'm reasonably astute at trying to ferret out those that are attempting to – attempting to seek, for whatever reason, I can't say that I am a hundred percent, you know, at it, and occasionally people do, you know, are successful in presenting with other than their condition. . . .

Q. . . . When you have seen Mr. Stojanovich with a cane, did you ever form an impression either way as to whether he seemed to be using the cane for good cause or was he was using it at as a prop?

A. My casual observations of Mr. Stojanovich and his use of the cane was that he was not using it as an assistive device as it was intended.[36]

NANA took Dr. Reeg's deposition the same day as PA-C Ursel's. Dr. Reeg testified when he first began treating Stojanovich he had him sign a pain contract, in which Stojanovich agreed to only receive narcotic medication from one source and to take his medication as prescribed. Dr. Reeg testified Stojanovich did not disclose to him he was treating with PA-C Ursel and receiving narcotics through him.

Q. At what point do you recall learning about the involvement of Mr. Ursel, the physician's assistant?

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[36] Ursel Dep. at 12:4-23, 14:16-22, 15:22–16:7, 25:10–26:18, 28:2-25.

A. I received a phone call from the pharmacy in Anchorage about some irregularities in his prescription, and so I spoke with that pharmacist, and he then informed me by faxing me a report of all the medications that he had received by different providers, and I reviewed it and I saw that he had been receiving medications from Mr. Ursel.

Q. And so what did you do in response to that?

A. At the next visit with Mr. Stojanovich, I declined to prescribe any further medications – any opiate medications.

. . . .

A. Mr. Stojanovich was apologetic and respectful. He had understood that the irregularities were against what our agreement was, and yeah, it was fairly uneventful.

. . . .

Q. When you initially terminated his narcotics prescription, I understand you didn't initially provide a tapering schedule.

A. Uh-huh.

Q. What sort of withdrawal symptoms would you normally expect someone to have given the medications he was on at the time?

A. Nausea, vomiting, abdominal pain, sweating, agitation, anxiety.

. . . .

Q. What outward signs – let's say a coworker, what sorts of things might they observe?

A. Those same symptoms.[37]

On July 17, 2012, NANA took Dr. Prevost's deposition. Until that time, Dr. Prevost had been unaware Stojanovich had received narcotic pain medications on a regular basis prior to his treatment with him. He was also unaware Stojanovich had been fired for pain contract violations by another medical provider.

Q. [by Mr. Bredesen]

. . . Is there anything in the [April 22, 2010 MRI report] which indicates that any of the abnormalities are acute?

A. Well, the report says that there are two, possibly three small subchondral cysts. Those are the cysts that we've referred to in the bone. Those are not acute; those are chronic in nature.

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[37] Reeg Dep. at 11:3–12:2, 21:5-17, 22:11-14, 23:9-17, 23:21-23.

They do comment that there's a tear in the labrum. And that seems to communicate with these cysts. And the labral tear, it's difficult to determine age of that based on an MRI, but a labral tear could be an acute finding.

They do also say they see some early degenerative change in the cartilage surface of the femoral head, which would not be an acute finding; although, there can be cartilage injury to a joint that occurs from an injury that you may not – that can be acute that you wouldn't necessarily see on an MRI.

So, in a joint that – for instance in this situation, where the joint's not entirely healthy, you can damage the cartilage further from some new injury, and it would be difficult to differentiate and identify that on a – on an MRI what's new and what's old.

Q. Okay. Is it fair to say that the only way you can tell whether any of that is acute or not is based more on the symptom history provided to you, rather than what you actually see on the study?

A. That's correct.

. . . .

Q. You say . . . you do feel that Mr. Stojanovich's work injury, on March 23, 2010, is the substantial cause for him developing hip pain. I take it, that is based entirely on the history he gave to you.

A. It is.

Q. And I note that the letter does not go on to say that you believe the work incident is the substantial cause of the need for hip replacement surgery. Correct?

A. It does not say that.

Q. Do you have an opinion on that point?

A. Well, I always hate answering that question.

Q. I always hate asking it.

A. Very, very difficult. I mean, it's – you know, the – he had no symptoms before the injury; he had symptoms that started at the time of the injury, and he's had symptoms ever since then. So my feeling on it is that the substantial reason why he's coming in to see me and why we're considering a hip replacement is because he had that injury occur.

So the question is, if he had never had that injury, would he be in to see me for his hip. And the assumption is, not as immediately, not right away. At some point, based on his x-rays, he would have been

in to see me. But at – you know, in the immediacy that I'm seeing him, right then and there, and why we're getting ready to talk about hip replacement, my feeling is that we would not be there had he not had that injury happen right then.

Q. Okay. And that, again, is based entirely on his subjective reporting to you –

A. That's correct.

Q. -- and his presentation to you?

A. That's correct.

. . . .

Q. [by Stojanovich]

Is it possible that – I'm going to talk about the day I got injured – that I was standing towards the counter – is it possible that, you know when, I twist sharply to the right – I'm not going to try now, because I ain't going to – I don't want to screw up my back again – or hip – what I'm saying is, the unsafe floor contributed to acceleration, or whatever – you know what I'm saying? – how I turned and stuff like that, if the floor was slick?

A. Well, if there was slipping, in addition to a twisting, you know, that should – that could really dramatically increase the force that the cartilage would see or the labrum would see.

Q. That's exactly what happened.

. . . .

Q. [by Mr. Bredesen]

You asked him before what happened on the date of injury, correct?

A. I did.

Q. Did he mention any slipping?

A. I didn't record any of that in the chart. I remember mostly a twisting event that was described to me.

Q. And if he had mentioned a slip, in addition to the twist, would you likely have recorded that?

A. Probably.[38]

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[38] Douglas P. Prevost, M.D. Dep., July 17, 2012, at 8:6–9:24, 17:15–18:18, 42:16–44:4, 52:12–53:2, 54:3-12.

On October 15, 2012, Stojanovich underwent a hip MRI, which revealed an extensive labral tear and subchondral cysts, both larger than on the previous MRI.[39]

Stojanovich filed a second workers' compensation claim on December 13, 2012, alleging an injury while working for NANA on March 10, 2010, and seeking a compensation rate adjustment.[40] NANA controverted the claim on December 18, 2012.[41] On April 15, 2013, Stojanovich filed a third claim, alleging he suffered a "right hip labral tear from a slip and twist on known unsafe floors that were never treated" on March 23, 2010, and stating "now I have neck and back injuries from the slip and twist hip injury." Stojanovich sought permanent total disability (PTD) benefits, medical and transportation costs, penalty, and interest.[42]

Dr. Swanson performed a second EME on August 5, 2013. In his report, he reiterated his opinion Stojanovich was magnifying his symptoms for secondary gain and engaging in drug-seeking behavior.[43]

On September 9, 2013, Roberta Richardson (Richardson) testified in a video deposition taken by NANA. Richardson was the human resources business partner for camp services for NANA. She credibly testified Stojanovich had received a poor performance evaluation and the Slope operations manager and head chef were in the process of counseling him on performance issues when, on March 7, 2010, he lodged a formal complaint of sexual harassment by a supervisor. Richardson investigated the allegation, and was not able to substantiate or refute it. The supervisor in question did not return to work and was terminated for job abandonment. Because the source of

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[39] R. 2376.

[40] R. 1006-07.

[41] Exc. 179.

[42] Exc. 180-81.

[43] Exc. 184-211. Dr. Swanson submitted a third report dated August 19, 2013. Exc. 213-219.

the alleged harassment was no longer in the workplace, Richardson considered the situation remedied.[44]

The same day, September 9, 2013, NANA took the video deposition of David Grinde (Grinde). Grinde is the director of operations for NANA Management Services, a subsidiary of NANA Regional Corporation. He testified sometime in 2009 employees began filing a series of "near-miss reports," reporting kitchen floor slipping incidents that did not result in injuries. The issue was raised at numerous safety meetings, and in November 2009 the kitchen floor was replaced. Unfortunately, the new floor was not much better than the old one, and employees continued to complain the floor was slippery. At a December 28, 2009, safety meeting, "we realized we still had a problem with the floor, so we just upped an awareness campaign, just trying to remind people on a daily basis we still got a slippery floor here, you know, just pay attention, and you know, manage that risk. Put out wet floor signs and, you know, asked our chefs to really elevate awareness on a continual basis around that exposure." Despite the increased caution, employees continued to file near-miss reports, and the safety team decided to lay temporary carpet runners throughout the server and kitchen area, anywhere "people were likely to place their feet." Carpets were in place in all locations by February 28, 2010. No near-miss reports were filed after that time. Grinde is not aware of any slipping incidents since the temporary carpets were placed in the kitchen and serving area.[45]

Stojanovich testified that sometime between 3:00 and 4:00 a.m. on March 23, 2010, he "made a sudden turn, felt a pop, heard a pop, felt pain and screamed." The injury was not witnessed. He described it as a "sharp, stabbing pain." He contends the kitchen floor was slippery. He "cannot say 100% I slipped, but something did happen to my body to extend my leg." He told Megan Imhoff, his supervisor, he had been injured, and she asked if he needed an ambulance, but he declined. At about 5:00 or

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[44] Roberta Richardson Dep., Sept. 9, 2013, at 4:20-22, 5:2-18, 6:2–8:20.

[45] David Grinde Dep., Sept. 19, 2013, at 4:8-10, 9:7–12:2.

6:00 a.m., Mark LaPlume arrived for his shift and sent Stojanovich to the clinic to be evaluated. He flew back to Seward the next day.[46]

When asked if he underwent a urinalysis to test for narcotics in his system at the time he was admitted to the hospital experiencing atrial fibrillation, Stojanovich responded, "I don't remember." When asked if ten days prior to his hospital admission he had filled a prescription for 180 hydrocodone pills, he answered, "I don't remember." When asked about why the toxicology screens showed no traces of narcotics in his body during the period he was being prescribed high doses of hydrocodone, Stojanovich testified the report was "in error." He admitted obtaining narcotics from two different doctors without their knowledge, and stated, "Did I make a mistake? Yes. But it is irrelevant. That is between me and my doctor only." When asked why a drug test performed in July 2010 by Dr. Lonser showed morphine in his system, but not the drug Dr. Lonser had prescribed him, Stojanovich testified it was a "typo mistake."[47]

Debbie Stojanovich credibly testified she and Stojanovich have been married for 19 years. She described her husband as an "honest person" and testified Stojanovich did not have any hip injury before he went to work on the North Slope. His hip has slowly deteriorated to the point he is in constant pain and cannot drive.[48]

The board found that Stojanovich was not credible.[49]

3. Applicable law.

a. Statutes.

AS 23.30.010. Coverage.

> (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of

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46 Hr'g Tr. at 13:18–16:24, Sept. 19, 2013.

47 Hr'g Tr. at 82:5-9, 110:9-17.

48 Hr'g Tr. at 57:24–60:7.

49 *See Stojanovich V*, Bd. Dec. No. 13-0157 at 16.

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.

. . .

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[.]

. . .

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.

b. The presumption of compensability.

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable.[50] To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment.[51] Under old law, if the employee establishes the link, in the past, the presumption may be overcome when the employer presents substantial evidence that the injury was not work-related.[52] If the board finds that the employer's evidence is sufficient, then the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence.[53] This means that the employee must "induce a belief" in the minds of the board members that the facts being asserted are probably true.[54]

However, the Alaska Workers' Compensation Act, AS 23.30.001 — .395, as amended in 2005, applies to Stojanovich's claims because the incident giving rise to it

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[50] *See, e.g., Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996).

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

[52] *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).

[53] *Miller*, 577 P.2d at 1046.

[54] *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

occurred in 2010. Elsewhere,[55] in accordance with the 2005 amendments to AS 23.30.010, including the division of this section into subsections (a) and (b), we concluded that, to be compensable, subsection (a) requires employment to be, "in relation to other causes," "the substantial cause of the disability or . . . need for medical treatment."[56]

In another case, the commission decided that the amended version of the statute, AS 23.30.010(a), modified the last two steps of the presumption analysis.[57] Under the new, statutory causation standard, the employer can rebut the presumption, the second step in the analysis, "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."[58] To do so, "the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment."[59] We held: "[I]f the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the [need for medical treatment], etc., the presumption is rebutted."[60] In terms of the third step in the presumption analysis, we concluded:

> [T]he 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). . . . 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

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55 *See Uresco Constr. Materials, Inc. v. Porteleki*, Alaska Workers' Comp. App. Comm'n Dec. No. 152 (May 11, 2011).

56 AS 23.30.010(a).

57 *See Runstrom v. Alaska Native Medical Center,* Alaska Workers' Comp. App. Comm'n Dec. No. 150, 6 (Mar. 25, 2011).

58 AS 23.30.010(a).

59 *Id.*

60 *Runstrom*, App. Comm'n Dec. No. 150 at 7.

treatment, etc. Should the employee meet this burden, compensation or benefits are payable.[61]

4. Standard of review.

"The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."[62] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[63] "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"[64] and therefore independently reviewed by the commission.[65]

We exercise our independent judgment when reviewing questions of law and procedure.[66]

The board has the sole power to determine the credibility of a witness and a board finding concerning the weight to be accorded a witness's testimony is conclusive even if conflicting or susceptible to contrary conclusions.[67] The board's findings regarding the credibility of witness testimony are binding on the commission.[68]

5. Discussion.

Appropriately, the board applied a presumption of compensability analysis to the issue whether Stojanovich's claims for disability and medical treatment arose out of and

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61 *Runstrom*, App. Comm'n Dec. No. 150 at 8.

62 AS 23.30.128(b).

63 *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).

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

65 *See* AS 23.30.128(b).

66 *See* AS 23.30.128(b).

67 *See* AS 23.30.122.

68 *See* AS 23.30.128(b).

in the course of his employment with NANA.[69] It found that Stojanovich had attached the presumption he was injured during his employment with NANA based on his testimony and the reports of his treating providers, PA-C Ursel and Drs. Garner, Lonser, and Prevost.[70] We agree he attached the presumption. The board also found that NANA rebutted the presumption through the reports of Drs. Swanson and Olbrich.[71] The commission agrees the presumption was rebutted. Under these circumstances, the burden shifted to Stojanovich to prove the work-relatedness of his injuries by a preponderance of the evidence.[72] The board found that Stojanovich specifically relied on Dr. Prevost's opinion of November 21, 2011, that the work incident on March 23, 2010, was the substantial cause of his hip pain, and the opinions of PA-C Ursel and Drs. Garner and Lonser to the effect that his hip injury was work-related.[73]

At the heart of the board's analysis is its thoroughly-supported finding that Stojanovich is not credible.[74] Not only must the commission defer to the board in that finding, *see* AS 23.30.122, the commission agrees with the board's credibility assessment. The evidence the board pointed to regarding Stojanovich's lack of credibility included: 1) his varying and sometimes contradictory statements describing the mechanism of injury;[75] 2) his belatedly claiming to have slipped when he was injured, even though the slipperiness of the floor had been remedied prior to the date Stojanovich alleged he was injured;[76] 3) manipulating and deceiving his treating providers by not telling them he was obtaining narcotic prescriptions from multiple sources in violation of his pain contract; and 4) the discrepancies between his

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69 *See Stojanovich V*, Bd. Dec. No. 13-0157 at 21.

70 *See id*.

71 *See id*.

72 *See id*.

73 *See id*.

74 *See id*. at 16.

75 *See id*. at 22.

76 *See id*.

presentation and reported physical abilities to his treating providers and the video surveillance taken on May 7-8, 2010, showing Stojanovich performing many of the activities he asserted he could not do.[77]

The board also found that Stojanovich's untruthfulness had an impact on the accuracy of the opinions offered by his medical providers and their persuasiveness, that is, the weight those opinions should be accorded. Specifically, the board noted that until they were subsequently alerted to his deceptive habits, "[Stojanovich's] treating physicians had no reason to doubt his reported symptoms, medical history, or the alleged mechanism of injury."[78]

As examples, Stojanovich told Dr. Lonser all his prescriptions were generated through his pain specialist, who had given him multiple prescriptions, whereas, in truth, he had violated his pain contract and obtained narcotic prescriptions from both PA-C Ursel and Dr. Reeg.[79] Also, in July 2010, Dr. Lonser was prescribing OxyContin twice daily and no morphine, yet Stojanovich's toxicology screen was negative for OxyContin, which Dr. Lonser did not expect, and positive for morphine.[80] The toxicology screen results are an indication that Stojanovich was being untruthful with Dr. Lonser regarding his pain medication regimen. Furthermore, the board found Stojanovich's explanation of the toxicology screen results, that there were typographical errors, was unconvincing.[81] In another example, until his deposition was taken, Dr. Prevost was not aware of Stojanovich's pain contract violations and his opinion that the work injury was the substantial cause of the hip pain was based entirely on the symptom history provided by Stojanovich.[82]

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77 *See Stojanovich V*, Bd. Dec. No. 13-0157 at 22-23.

78 *See id*. at 23.

79 *See id*.

80 *See id*.

81 *See id*.

82 *See id*.

Given the board's credibility finding, it placed no trust in Stojanovich having provided an accurate medical history or version of the injury event. Summing up, the board stated: "[Stojanovich's] various treating physicians classify his hip condition as a work injury, but they relied on [his] presented symptoms, reported history[,] and alleged mechanism of injury, and were unaware of his prior dishonesty."[83] In finding that the injury did not arise out of or in the course of his employment with NANA, we infer that the board rejected Stojanovich's assertion that the injury occurred when and as he described it, and that it resulted in physical limitations as severe as he portrayed them to his medical providers.[84]

Finally, citing AS 23.30.122 and the commission's decision in *Rockstad v. Chugach Eareckson Support Services*,[85] the board found that, as in *Rockstad*, because Stojanovich was not credible, the opinions of his medical providers who relied on his statements are entitled to little weight.[86] On the other hand, the board noted that the EME doctors, Swanson and Olbrich, had reviewed Stojanovich's complete medical records in rendering their opinions, thus, they were given considerable weight.[87]

Especially in light of the board's credibility and weight findings, we agree with it that substantial evidence supports its conclusions that Stojanovich had not suffered an injury as he alleged and his physical limitations were exaggerated for the benefit of the medical providers who treated or evaluated him.

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[83] *Stojanovich V*, Bd. Dec. No. 13-0157 at 23.

[84] We may disagree with the board's characterization of the issue as to the work-relatedness of the injury, preferring instead to couch the issue in compensability terms, however, the end result is the same: Stojanovich has not proven by a preponderance of the evidence that he is entitled to any workers' compensation benefits.

[85] Alaska Workers' Comp. App. Comm'n Dec. No. 140 (Nov. 5, 2010).

[86] *See Stojanovich V*, Bd. Dec. No. 13-0157 at 23.

[87] As for Stojanovich's second and third claims, in which he contended that his back and neck were affected by the injury to his hip and altered gait, the board rejected them, for the same reasons it rejected his hip claim. *See Stojanovich V*, Bd. Dec. No. 13-0157 at 23-24.

6. Conclusion.

For the reasons stated, we AFFIRM the board's decision denying all benefits to Stojanovich.

Date: *26 January 2015* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, 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).[88] 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 distributed[89] 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.

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[88] 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.

[89] *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. 207, issued in the matter of *Zorislav M. Stojanovich vs. NANA Regional Corporation, Inc. and ACE American Insurance Company*, AWCAC Appeal No. 14-001, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 26, 2015.

Date: *January 28, 2015*

Signed
K. Morrison, Appeals Commission Clerk