Alaska Workers' Compensation Appeals Commission

Esther J. Runstrom, Appellant, vs. Alaska Native Medical Center and Alaska National Insurance Co., Appellees.	Final Decision Decision No. 150 March 25, 2011 AWCAC Appeal No. 10-001 AWCB Decision No. 09-0186 AWCB Case No. 200713907

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 09-0186, issued at Anchorage on December 4, 2009, by southcentral panel members Deirdre D. Ford, Chair, David Kester, Member for Industry, Patricia Vollendorf, Member for Labor.

Appearances: Esther J. Runstrom, self-represented appellant; Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, Alaska Native Medical Center and Alaska National Insurance Co.

Commission Proceedings: Appeal filed January 4, 2010; briefing completed November 5, 2010; oral argument held February 3, 2011.[1]

Commissioners: David Richards, Philip Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Following an employment-related incident that occurred on August 26, 2007, the appellant, Esther J. Runstrom (Runstrom), filed a workers' compensation claim dated August 13, 2009, against her employer, appellee, Alaska Native Medical Center, and its insurer, appellee, Alaska National Insurance Co. (collectively ANMC). Following a hearing on November 18, 2009, the Alaska Workers' Compensation Board (board) ruled that Runstrom was not entitled to temporary total disability (TTD) benefits after

[1] Appellant, Esther J. Runstrom, appeared telephonically for oral argument.

December 1, 2007, was not entitled to further counseling, and that ANMC did not unfairly or frivolously controvert benefits.[2] Runstrom appeals those rulings to the commission. We affirm the board in all respects.

2. Factual background and proceedings.

Runstrom was working for ANMC as a patient care assistant when, on August 26, 2007, she was potentially exposed to human immunodeficiency virus (HIV) when fluid (sputum) from a patient's trachea splashed into her left eye.[3] She was immediately treated in the emergency room at ANMC with the prophylaxis Truvada, an antiviral, which was prescribed for her for 28 days.[4] Runstrom tested negative for HIV four times over the next nine months.[5]

Runstrom did not work and was paid TTD benefits beginning September 3, 2007, through December 1, 2007.[6] Eric Goranson, M.D., a psychiatrist, performed an employer's medical evaluation (EME) of Runstrom on October 15, 2007, and produced a report that same day.[7] In his opinion, Runstrom was not medically stable, from a psychiatric standpoint, primarily related to pre-existing problems, and that she would benefit from behavioral therapy. He released her to work.[8] On November 6, 2007, Ellen Lentz, ANP, Runstrom's treating medical provider, agreed with Dr. Goranson's report and released her to work as of November 12, 2007, subject to the condition that Runstrom have no patient contact until December 1, 2007.[9] ANMC controverted ongoing TTD and temporary partial disability benefits on December 10, 2007, on the

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[2] *See Esther J. Runstrom v. Alaska Native Medical Center and Alaska National Ins. Co.,* Alaska Workers' Comp. Bd. Dec. No. 09-0186 (Dec. 4, 2009).

[3] *See* Appellant's Exc. 018.

[4] *See* Appellees' Exc. 163-64.

[5] *See id.* at 169, 170, 174, and 175.

[6] *See id.* at 171-72.

[7] *See* Appellant's Exc. 023-37.

[8] *See id.* at 036-37.

[9] *See id.* at 038-39.

basis of Dr. Goranson's EME report.[10] Dr. Goranson examined Runstrom again on February 4, 2008, and concluded that, although she needed further counseling, the substantial cause of the need for counseling was her pre-existing, non-work-related personality factors.[11]

3. Standard of review.

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 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."[12] "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"[13] and therefore independently reviewed by the commission.[14] The commission exercises its independent judgment in reviewing questions of law or procedure.[15]

4. Discussion.

a. Applicable law.

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

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[10] *See* Appellees' Exc. 173.

[11] *See id.* at 176.

[12] *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)).

[13] *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)).

[14] *See* AS 23.30.128(b).

[15] *See id*.

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.[16] 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[.]"[17] As developed through case law, the employer's evidence would have to satisfy one or the other of two showings.[18] 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.[19]

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)[20] and (b).

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

17 AS 23.30.120(a)(1).

18 *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).

19 *See Miller*, 577 P.2d at 1049.

20 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
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> (footnote continued)

As the commission has observed,[21] 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.[22] Now, pursuant to AS 23.30.010(a), the 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."[23] 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

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> 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.

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

[22] *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).

[23] AS 23.30.010(a) (italics added).

treatment, etc.[24] 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.[25]

We noted previously that AS 23.30.010(a) has yet to be interpreted by the Alaska Supreme Court.[26] 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.[27] There is a principle of statutory interpretation that presumes legislatures are aware of existing law when enacting or amending a statute.[28] 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 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.[29] In contrast, under the new, statutory causation standard, the employer may rebut the presumption "by a

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[24] *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).

[25] *See Hansen*, App. Comm'n Dec. No. 146 at 14, 17.

[26] *See id.* at 10.

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

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

[29] *See* n.18, *supra*.

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."[30] To do so, "the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment."[31]

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.,[32] is incompatible with the statutory standard for causation under AS 23.30.010(a). In effect, the 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.[33]

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.[34] Our prior review of the legislative history of the 2005 amendments to AS 23.30.010 did not reveal any intention

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[30] AS 23.30.010(a).

[31] *Id.*

[32] *See, e.g., Tolbert*, 973 P.2d at 611.

[33] 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).

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

on the part of the Alaska Legislature to abandon these two elements of the third step in the analysis.[35] 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[,]"[36] 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 burden of going forward, not the burden of proof."[37] 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.

Here, despite citing AS 23.30.120(a)(1), the statute requiring the application of the presumption of compensability, and AS 23.30.010(a), the statute modifying the presumption analysis, the board applied the three-step analysis under former law.[38]

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

36 AS 23.30.010(a).

37 *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).

38 *See Runstrom*, Bd. Dec. No. 09-0186 at 5-7.

However, the board's findings and rulings are sufficiently detailed so as to allow us to affirm its holding that Runstrom would not prevail on her claim under the statutory presumption of compensability analysis.

b. Runstrom is not entitled to TTD benefits after December 1, 2007.

The board offered alternative bases for denying Runstrom's claim for TTD benefits after December 1, 2007. First, the board found that Runstrom had not presented sufficient evidence to attach the presumption.[39] Second, the board assumed that the presumption had attached and found that ANMC had rebutted the presumption with substantial evidence that ruled out employment as the substantial cause of Runstrom's disability.[40] The evidence was in the form of the medical opinions of Dr. Goranson, the EME psychiatrist, and Ellen Lentz, Runstrom's medical provider, that Runstrom could return to work without restrictions as of December 1, 2007.[41] As we have stated, under AS 23.30.010(a), the employer need only demonstrate that employment is not the substantial cause of the disability, it need not "rule out" employment as the substantial cause. However, because the board held ANMC to a higher standard than required of it to rebut the presumption under the statute, we agree that the presumption was rebutted.[42]

Once the presumption was rebutted and dropped out, Runstrom had to prove by a preponderance of the evidence that employment was the substantial cause of her

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[39] *See Runstrom,* Bd. Dec. No. 09-0186 at 10.

[40] *See id.*

[41] *See id.* at 9-10.

[42] Runstrom argued that Dr. Goranson's report was not "a responsible medical opinion" and that Ellen Lentz did not concur in full with his report. *See* Appellant's Br. 7, Reply Br. 3. However, the commission cannot determine credibility or reweigh medical reports on appeal, "even if the evidence is conflicting or susceptible to contrary conclusions." AS 23.30.122. Runstrom also argued that ANMC improperly influenced Lentz's medical opinion under AS 23.30.095(i). *See* Appellant's Br. 8, Reply Br. 10. We find no evidence of any improper influence in merely seeking Lentz's opinion of Dr. Goranson's report and her opinion on Runstrom's ability to return to work.

ongoing inability to work. The board found that Runstrom presented no medical evidence that she could *not* work after December 1, 2007.[43] Her own medical provider released her to work.[44] In addition, Runstrom actually worked for different employers during the summer of 2008 and collected unemployment benefits.[45] We agree with the board that Runstrom did not meet her burden of proof by a preponderance of the evidence on the TTD issue.[46] We affirm the board that Runstrom is not entitled to TTD benefits after December 1, 2007.

c. Runstrom is not entitled to additional counseling.

The board again applied a presumption of compensability analysis to Runstrom's claim for continued counseling.[47] It found that 1) Runstrom's statements that her mental health problems were the result of her exposure to HIV were enough to attach the presumption; 2) the presumption was rebutted by the opinion of Dr. Goranson that Runstrom's need for additional counseling is due to pre-existing personality factors; and 3) without any supporting medical evidence, Runstrom was unable to prove by a preponderance of the evidence that her need for ongoing counseling is work-related.[48]

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[43] *See Runstrom,* Bd. Dec. No. 09-0186 at 10-11.

[44] *See* Appellant's Exc. 038-39. *See Grove*, 948 P.2d 458-59 (finding claimant's doctor's conclusion that the claimant could return to work constituted substantial evidence on which the board could rely to deny TTD, despite claimant's testimony that he could not work).

[45] *See* Nov. 18, 2009, Hr'g Tr. 22-27. *See Bailey v. Litwin Corp.*, 713 P.2d 249, 254 (Alaska 1986) (stating that the board was able to rely on claimant's actual return to work in concluding the employer rebutted the presumption).

[46] Like the board, we do not view Runstrom's claim as one for "mental injury caused by mental stress," under AS 23.30.010(b). Instead, she is claiming that a discreet incident, the potential exposure to HIV, caused her mental stress, as distinguished from mental stress arising out of the performance of her ordinary duties as a patient care assistant. Consequently, the commission is not applying the test in AS 23.30.010(b) for mental injury, to which, incidentally, the presumption of compensability does not apply. *See* AS 23.30.120(c).

[47] *See Runstrom,* Bd. Dec. No. 09-0186 at 11.

[48] *See id.*

We agree 1) that Dr. Goranson's report amounts to substantial evidence rebutting the presumption that employment was the substantial cause of Runstrom's need for further counseling;[49] and 2) that Runstrom could not prove by a preponderance of the evidence that in relation to other causes, her employment with ANMC was the substantial cause of her need for additional counseling.[50] We affirm the board on the counseling issue.

d. ANMC's controversions were in good faith and not unfair or frivolous.

ANMC's controversions[51] were based, in whole or in part, on Dr. Goranson's reports and the concurring opinion of Ellen Lentz, Runstrom's treating provider. The board concluded that the controversions were in good faith and not unfair or frivolous.[52] Applying our independent judgment to this legal question, we agree with the board.

"For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the [b]oard would find that the claimant is not entitled to benefits."[53] Ordinarily, reliance by the employer and its workers' compensation carrier on responsible medical opinion is adequate for this

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[49] The board stated that Dr. Goranson "ruled out work as the basis for additional medical treatment." *Runstrom*, Bd. Dec. No. 09-0186 at 11. As we did with the TTD issue, we find that the board held ANMC to a higher standard than the statute requires, thus satisfying the statute's criterion to rebut the presumption.

[50] Runstrom argued that because her friends' recommendation letters and prior medical records do not show "any substantial mental defects, this [proves] I had none." Appellant's Reply Br. 13. However, timing or sequence alone does not prove causation. *See Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 954 (Alaska 2005).

[51] There are four controversions that are relevant here, respectively dated December 10, 2007, May 1, 2008, September 2, 2009, and November 12, 2009. *See* Appellees' Exc. 173, 176, 177, and 178.

[52] *See Runstrom*, Bd. Dec. No. 09-0186 at 12.

[53] *Harp v. Arco Alaska, Inc.,* 831 P.2d 352, 358 (Alaska 1992) (citing *Kerley v. Workmen's Comp. App. Bd.*, 4 Cal.3d 223, 93 Cal.Rptr. 192, 197, 481 P.2d 200, 205 (1971)).

purpose.[54] Here, because the controversions were supported by responsible medical opinion and, according to the board, Runstrom never produced any medical evidence to the contrary, they were filed in good faith.

Similarly, the board concluded that the controversions were not unfair or frivolous.[55] In particular, the board thought that Ellen Lentz's agreement with Dr. Goranson's opinions eliminated any concern that his opinions were biased and unfair, as Runstrom maintained.[56] We concur.

Therefore, we affirm the board's conclusions that the controversions were in good faith and not unfair or frivolous.

5. Conclusion.

The commission AFFIRMS the board's rulings in *Runstrom, supra,* Bd. Dec. No. 09-0186 (Dec. 4, 2009), that Runstrom was not entitled to TTD benefits after December 1, 2007, was not entitled to further counseling, and that ANMC did not controvert benefits in bad faith, unfairly, or frivolously.

Date: *25 March 2011* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David Richards, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

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[54] *See Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37, 42 (Alaska 1974).

[55] *See Runstrom*, Bd. Dec. No. 09-0186 at 12.

[56] *See id.*

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed 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 and the workers' compensation board are not parties.

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

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 within 30 days of this decision being distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of two commas and the words "if believed" removed on page 7 line 9, this is a full and correct copy of the Final Decision No. 150 issued in the matter of *Runstrom v. Alaska Native Medical Center*, AWCAC Appeal No. 10-001, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 25, 2011.

Date: *April 5, 2011*

Signed
B. Ward, Commission Clerk