ALASKA WORKERS' COMPENSATION BOARD

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

GLINDA GARWOOD (Widow and personal representative for the Estate of Mark Garwood), Claimant, v. BLACK GOLD EXPRESS, Employer, and INSURANCE CO. OF THE STATE OF PENNSYLVANIA, Insurer.	)	FINAL DECISION AND ORDER AWCB Case No. 201415369 AWCB Decision No. 15-0032 Filed with AWCB Fairbanks, Alaska on March 17, 2015

Black Gold Express and the Insurance Co. of the State of Pennsylvania's (Employer) December 8, 2014 petition to continue the February 5, 2015 hearing on the Estate of Mark Garwood's (Claimant) claim was heard on January 22, 2015. The panel deliberated after the hearing and issued an oral order on January 23, 2015, denying Employer's petition. The hearing on Claimant's September 16, 2014 claim for death benefits, penalty and attorney's fees and costs was heard on February 5, 2015, a date selected on December 3, 2014. Attorney Colby Smith appeared and represented Employer. Attorney John Franich appeared and represented Glinda Garwood, on behalf of the Estate of Mark Garwood (Claimant). Glinda Garwood and Employee's co-worker Michael Lafon testified in person. Employee's supervisor Nik Galloway testified by telephone. The record was held open to receive Glinda Garwood's deposition

transcript. The board received the transcript on February 13, 2015. The record closed when the panel next met and deliberated, on February 19, 2015. This decision memorializes the oral order denying Employer's petition to continue the hearing and decides the merits of Claimant's September 16, 2014 claim for benefits.

ISSUES

Claimant contended no just cause exists to continue the February 5, 2015 hearing on its September 16, 2014 claim. As Employer had not yet asserted an intoxication defense, any evidence related to an intoxication defense was irrelevant to the merits of Claimant's claim for benefits and Employer would not be prejudiced by proceeding to hearing on whether Employee was killed in the course and scope of his employment.

Employer contended it would be prejudiced by proceeding with the February 5, 2015 hearing because despite its due diligence, the trooper investigative report had not yet been issued. Employer contended the hearing should be continued in the interest of judicial economy, as it would be inefficient to hold two separate hearings, the first on course and scope, and a later hearing on Employer's intoxication defense. Employer requested the board continue the February 5, 2015 hearing to allow Employer to obtain the trooper investigation report.

Was the oral order denying Employer's petition to continue the February 5, 2015 hearing correct?

Claimant contends Employee was killed while in the course and scope of his employment with Employer and personal representative Glinda Garwood is entitled to death benefits as a result of Employee's death. Claimant contends Employer sent Employee on a "parts run" from the remote jobsite at Galbraith Lake to Fairbanks, and therefore Employee was performing official work duties for his Employer when he was killed. Alternatively, Claimant contends the purpose of the trip from Galbraith Lake to Fairbanks is irrelevant, as it is undisputed Employee was driving an Employer-owned vehicle with Employer's permission. Claimant seeks an order granting her September 16, 2015 claim for death benefits.

Employer contends no Employer agent ever requested Employee drive to Fairbanks, but that Employee requested a day off to attend a medical appointment in Fairbanks. Employer contends Employee drove to Fairbanks for purely personal reasons and the auto accident on the drive to Fairbanks did not occur within the course and scope of Employee's employment with Employer. Employer seeks an order finding Employee's death was not work-related and denying Claimant's September 16, 2015 claim for death benefits.

Is Claimant entitled to death benefits?

Claimant contends Employer's controversion was not made in good faith as it was not based on any plausible legal defense. Claimant seeks a penalty under AS 23.30.155(e).

Employer did not address Claimant's claim for penalty under AS 23.30.155(e), but it is presumed Employer contends its controversion notice was filed in good faith and Claimant is not entitled to a penalty.

Is Claimant entitled to a penalty for late payment of compensation?

In the event the board finds Employee's death was work-related, Claimant contends she is entitled to an attorney's fee award under both AS 23.30.145(a) and .145(b).

Employer did not address Claimant's claim for attorney's fees, nor did it object to Claimant's claimed hourly rate or dispute the hours Claimant's attorney and paralegal worked.

Is Claimant entitled to an attorney's fee and cost award? If so, in what amount?

FINDINGS OF FACT

The following findings of fact and factual conclusions are established by a preponderance of the evidence:

1) On August 31, 2014, Employee was killed when the Employer-provided pick-up truck he was driving overturned on his drive from a remote worksite at Galbraith Lake to Fairbanks. The specific cause of death was listed as multiple blunt force injuries of head and torso as a result of a

single vehicle accident. (Report of Occupational Injury, September 18, 2014; Certificate of Death, September 3, 2014).

2) After receiving notice of Employee's death, Employer began paying death benefits to Claimant Glinda Garwood. (Record).

3) On September 16, 2014, Claimant filed a workers' compensation claim, requesting death benefits, penalty for late payment of benefits, penalty for late filing of report of injury, and attorney's fees and costs. (Claim, September 16, 2014).

4) On September 17, 2014, the State Medical Examiner issued an autopsy report, confirming the cause of death as stated on the death certificate. The autopsy report noted Employee had a bandage covering his left great toe. (Autopsy Report, September 17, 2014).

5) On October 9, 2014, Employer filed its answer to Claimant's claim, denying Claimant's claims for penalties and stating Employer was voluntarily paying death benefits while conducting its investigation. (Employer's Answer, October 7, 2014).

6) On October 20, 2014, the Department of Public Safety received a toxicology report from Washington State Toxicology Laboratory. A blood sample taken from Employee's body during the autopsy tested positive for amphetamine and methamphetamine (both stimulants) and aminoclonazepam (a tranquilizer). Employee's blood tested negative for opioids. (State of Alaska Dept. of Public Safety Scientific Crime Detection Laboratory Report, October 20, 2014).

7) On October 25, 2014, Employee's co-worker Mike Lafon testified by affidavit:

> 1. Mr. Garwood had requested a personal day off to go back home to attend a personal medical appointment.
> 2. Mr. Garwood was going to borrow a company vehicle to attend this appointment. Mr. Garwood had planned to leave after work on August 31, 2014 to travel home and attend a medical appointment for his toe the following day.
> 3. Mr. Garwood's travel back home on August 31, 2014 was not related to his employment with Black Gold Express and he was not performing any work related tasks while off work and away from the job site.

(Affidavit of Mike Lafon, October 25, 2014).

8) On October 31, 2014, Claimant filed an affidavit of readiness for hearing (ARH) on her September 16, 2014 claim. (ARH, October 30, 2014).

9) On November 12, 2014, Nik Galloway testified by affidavit:

> 1. … I was the supervisor of Mr. Garwood.
> 2. Mr. Garwood had requested a personal day off to go back home to attend a personal medical appointment.
> 3. I allowed Mr. Garwood to borrow a company vehicle to attend this appointment. Mr. Garwood had planned to leave after work on August 31, 2014 to travel home and attend a medical appointment the following day for [a] toe problem that was unrelated to work. Mr. Garwood left the jobsite around 6:15 pm.
> 4. Mr. Garwood's travel back home on August 31, 2014 was not related to his employment with Black Gold Express and he was not performing any work related tasks while off work and away from the job site.

(Affidavit of Nik Galloway, November 12, 2014).

10) On November 21, 2014, Employer filed a Controversion Notice, denying all benefits based on its assertion Employee's death did not arise in the course and scope of his employment with Employer, as Employee "was attending to activities of a personal nature when his injury occurred." (Controversion Notice, November 19, 2014).

11) On December 3, 2014, the parties attended a prehearing conference (PHC). (PHC Summary, December 3, 2014).

> ER's atty states for the record that he was not served with the ARH dated 10/30/14. The ARH indicates that it was served on Griffin and Smith.
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> Parties agree that the issues for hearing [are] death benefits, course and scope, untimely filing of ROI and untimely payment of benefits.
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> ER's atty stated for the record that he reserves the right to file new evidence after he receives and reviews the Alaska State Trooper police report. There is an indication that EE may have been driving under the influence at the time of the accident.
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> EE's atty stated for the record that he objects to adding issues for hearing that are not currently in the pleadings.
>
> Hearing on the Garwood Estate WCC is scheduled for **February 5, 2015**. Witness lists are due on **January 5, 2015.** Written briefs and evidence are due pursuant to the regulations. Preliminary issue to be heard on the day of hearing is whether or not new evidence can be introduced and added as an issue for hearing that is not in the pleadings today.

(PHC Summary, December 3, 2014)(emphasis in original).

12) On December 10, 2014, Employer filed a petition to continue the February 5, 2015 hearing:

> Consistent with 8 AAC 45.074(K) and (L), the employer contends that the hearing set for February 5, 2015, occurred without receiving the employee's Affidavit of Readiness for Hearing. Additionally, as argued at the Prehearing Conference, the employer filed a Medical Summary on November 12, 2014 that included the State of Alaska State Medical Examiner's Offices Toxicology Report. This Report shows that the employee tested positive for Methamphetamines at the time of his motor vehicle accident. Pursuant to AS 23.30.120, workers' compensation benefits are not due if an injury was proximately caused by intoxication of the employee, or proximately caused by the employee being under the influence of drugs, unless the drugs were prescribed by the employee's physician. The employer is awaiting production of the State Trooper Investigative Report which has not yet been released. Until such report exists, the employer has not had ample due process to complete discovery for a possible defense that the intoxication was the proximate cause of the motor vehicle accident.

(Employer's Petition, December 8, 2014).

13) At the January 22, 2015 hearing on Employer's Petition for Continuance, Employer's counsel indicated his office staff had contacted the state troopers at least ten times to request the trooper investigative report, but no report has been issued to date. Employer has not received any indication of when the trooper report may issue, and speculates it is not a high priority for law enforcement, as the accident was a single-vehicle incident with no survivors, and therefore no chargeable offense occurred. Employer has not asserted an intoxication defense, as it lacks sufficient evidence showing Employee's impairment was the proximate cause of his death. Employer contended the February 5, 2015 hearing should be continued in the interest of judicial economy, as a later hearing on the intoxication defense may be necessary, depending on the results of the trooper investigation. (Record).

14) On January 22, 2015, Employer took Claimant Glinda Garwood's deposition. (G. Garwood deposition, January 22, 2015).

15) Claimant Glinda Garwood credibly testified at hearing, consistent with her deposition, about her relationship with Employee and her understanding of his purpose for driving to Fairbanks on August 31, 2014. Ms. Garwood and Employee were married August 10, 2002. They have no children together. At the time of his death, Employee had worked for Employer for four years. Ms. Garwood drove Employee to the Hilltop Truck Stop on the Elliot Highway on June 14, 2014, where he picked up a company truck and drove up the haul road to the jobsite at Galbraith Lake. Jobs up there typically lasted between six and eight weeks. He came home for one night August 8th or 9th, though she does not remember the purpose, and he carpooled with

another employee in a company truck to return to the jobsite. Employee called her the night before he was killed and told her Employer "wanted him to do a parts run. They needed a volunteer, and he volunteered." He told her he "got to come home for a night" and would drive back the next afternoon. She expected him to arrive in Fairbanks late the night of August 31st. He had no personal vehicle available to him at Galbraith Lake. (G. Garwood).

16) Ms. Garwood was aware of Employee's medical issue with his toe, which was a symptom of gout, a chronic condition Employee had dealt with for some time. They argued "all the time" about his medical treatment, and she "would have been delighted if he had gone to the doctor" about his toe. She was not aware of a scheduled medical appointment in Fairbanks. Employee did not mention his problems with his toe to her on the phone in the days leading up to August 31st. He was clear the purpose of his trip to Fairbanks was for a parts run, and he never mentioned seeing a doctor. *(Id.)*

17) After Employee died, Ms. Garwood retrieved his personal belongings from Employer. Included were eight or nine prescription bottles prescribed to Employee by an Anchorage physician, including bottles of OxyContin and Percocet (both opioids) and clonazepam (a tranquilizer). All the bottles except the clonazepam were empty, and had last been refilled on August 14, 2014 for a thirty-day supply. Ms. Garwood could only speculate as to where the remaining two-week supply of medication was, but stated "his pack had been sitting there awhile," insinuating someone may have taken the pills. Ms. Garwood did not know Employee was taking these medications or seeing a doctor for chronic pain. However, Employee's use of prescription narcotics had been a source of conflict through most of the Garwoods' marriage. Employee had suffered significant injuries in a snow machine accident many years ago, and "after his one and a half months on morphine, Dr. Burger told [Ms. Garwood] it would be a problem." At the time of Employee's death, Ms. Garwood believed Employee had been free from narcotic use for more than a year. When asked if Employee "was always honest in the things that he told [her]," Ms. Garwood responded "no." *(Id.)*

18) Nik Galloway credibly testified about his work for Employer and his interactions with Employee. Galloway was Employee's direct supervisor on the Galbraith Lake job. Galloway testified Employee requested time off about two days in advance to attend a pre-arranged medical appointment. Employee had asked for time off before for medical treatment for his infected toe. In July Employee had traveled to Anchorage to see a specialist, who stopped the

bleeding and bandaged his foot. Employee was released back to work but was told if the toe started bleeding again he would have to return for treatment. Galloway did not ask Employee for a doctor's note or off-work slip because he himself had seen the toe and "it looked pretty bad." Employee had worked for the company for some time and "most of the guys knew him" and "he seemed like a reputable and likeable guy." Employee told Galloway his plan was to finish his shift on Sunday, August 31st, drive to Coldfoot and rest, and that he would have plenty of time before his doctor appointment on Monday. Galloway was clear Employee had mentioned he had an appointment, and it was either at 10:30 or 11:30 am on Monday, September 1st. Employee told him he intended to return Monday afternoon after his appointment. Galloway "felt bad" for Employee, because he "knew he needed to have his toe fixed." Employee was one of the better drivers, and everyone really like him. Employer "wanted to keep him on the job if we could." Galloway took Employee's request "at face value, because I had seen his toe." (Galloway).

19) Galloway denied he or anyone else at Black Gold Express requested Employee make a parts run to Fairbanks. None of Employer's drivers were ever parts runners. When asked how employees are transported to and from the job site, Galloway stated it varies. In Employee's case, they weren't sure if he would fly back, carpool with other employees or drive one of the company trucks back to Fairbanks. After the Galbraith Lake job, some of the employees drove to Prudhoe and flew to Fairbanks from there, some carpooled to Fairbanks, and some drove themselves in a company vehicle. Whatever method was used, however, Galloway made clear it was the company's responsibility to transport its employees home to Fairbanks. *(Id.)*

20) Galloway testified that given the remote nature of the work site at Galbraith Lake, "sometimes the employees get burned out and need a break, so we have a company pick-up for them to use if they need a break…. Sometimes they have personal things they need to do that they can't get done in Galbraith." *(Id.)*

21) Michael Lafon credibly testified about his work for Employer and his interactions with Employee. Lafon is a truck driver for Employer and has known Employee since high school. On Employee's last day working for Employer before his accident, Lafon was at the Galbraith Lake jobsite picking up equipment. That morning, Employee told Lafon he was going back to Fairbanks for a medical appointment for his toe. Lafon testified it was unlikely it would happen that any Black Gold Express employee would make a parts run, as trucks arrive at Galbraith routinely and it would be faster to request a truck already scheduled to arrive to bring needed

parts. Lafon stated it was possible if someone was going to Fairbanks anyway they might ask him to bring back parts, but "someone in Mark's position wouldn't do that." Lafon testified he had no reason not to trust what Employee told him or to doubt he had a medical appointment on Monday [September 1, 2014] for his toe. (Lafon).

22) Monday, September 1, 2014 was Labor Day. Medical clinics in Fairbanks, other than the hospital and walk-in clinics, which do not schedule appointments, are typically closed on Labor Day. (Experience, observations).

23) At the conclusion of the February 5, 2015 hearing, Claimant withdrew her claim for penalty for late-filed report of injury. Claimant clarified her claim for late payment penalty applied only to payment of compensation after the November 21, 2014 controversion notice. (Record).

24) On February 6, 2015, Employee filed a supplemental affidavit of attorney's fees, which, combined with his initial affidavit of attorney's fees filed on February 2, 2015, showed an attorney fee itemization billing 32.5 hours at $420.00 per hour (Franich) and 1.9 hours at $400.00 per hour (Beconovich), and a paralegal fee itemization billing 12.2 hours at $210.00 per hour, for a requested attorney fee award totaling $16,972.00. (Affidavit of Attorney's Fees, February 2, 2015; Supplemental Affidavit of Attorney's Fees, February 6, 2015).

25) Employer did not file an objection to Claimant's fee affidavits. (Record).

PRINCIPLES OF LAW

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

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

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

Under the Act, compensability is established "if the accidental injury . . . is connected with any of incidents of one's employment, then the injury both would arise out of and be in the course of employment." *Northern Corp. v. Saari*, 409 P.2d 845 (Alaska 1966). The "arising out of" and the "in the course of" tests should not be kept in separate compartments but should be merged into a single concept of "work connection." *Id.*

> **AS 23.30.395. Definitions**. In this chapter,
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> …
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> (2) "arising out of and in the course of employment" includes employer-required or supplied travel to and from a remote job site; activities performed at the direction or under the control of the employer; and employer-sanctioned activities at employer-provided facilities; but excludes recreational league activities sponsored by the employer, unless participation is required as a condition of employment, and activities of a personal nature away from employer-provided facilities;
>
> …
>
> (24) "injury" means accidental injury or death arising out of and in the course of employment, and an occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury;
>
> …

One exception to the general rule injuries must occur on the work premises to be compensable is the "remote site" exception. The Alaska Supreme Court articulated the rationale for the exception in *Anderson v. Employer's Liability Assurance Corp.,* 498 P.2d 288, 290 (Alaska 1972):

> Although it is often possible for a resident employee in a civilized community to leave his work and residential premises to pursue an entirely personal whim and thereby remove himself from work-connected coverage, the worker at a remote area may not so easily leave his job site behind. The isolation and the remote nature of his working environment is an all encompassing condition of his employment. The remote site worker is required as a condition of his employment to do all of his eating, sleeping and socializing on the work premises. Activities normally totally divorced from his work routine then become a part of the working conditions to which he is subjected.

In *R.C.A. Service Co. v. Liggett*, 394 P.2d 675 (Alaska 1964) the Supreme Court established the "going and coming rule" in Alaska, which generally holds injuries occurring off the employer's premises while the employee is going to or coming for work do not arise in the course of employment. *Liggett,* 394 P.2d at 677-78 (citations omitted). *Liggett* addressed the "special errand" exception to the going and coming rule, which states if an employee is injured traveling to or from work while also providing some benefit to the employer, injuries occurring during the travel are compensable. In that case, the employee worked at a remote worksite in Clear and requested time off to join his family in Fairbanks for Christmas dinner. His employer granted the leave but took no part in arranging or providing the transportation to Fairbanks. The employee chartered a private plane and intended to return to Clear early the day after Christmas. The plane crashed, killing the employee. Citing an analogous case, the Court reversed the board's award of death benefits, finding because Liggett's travel to Fairbanks "was purely one of his own choice and for his own private purpose and convenience" and because the "employer took no part in arranging or paying for the transportation to Fairbanks and exercised no control over the private carrier chartered by the decedent" the special errand rule did not apply.

> If the right to transportation, or the right to reimbursement for the expense of the operation of the employee's own car, is given the employee by the terms of his contract, and his injury is received in connection with such transportation, then his injury is by accident arising out of and in the course of his employment, and is therefore compensable under the act. But on the other hand, if the transportation is not furnished by the employer but is provided by the employee himself for his own personal convenience, it amounts to no part of the employment, and any

> injury received in the course of such transportation will afford no basis for compensation.

Id., at 679 (citation omitted).

The Court revisited the special errand exception to the going and coming rule in conjunction with the remote site doctrine in *M-K Rivers v. Schleifman,* 599 P.2d 132 (Alaska 1979). In that case, the employee was working at a remote worksite near Glennallen. He completed his workday and took his motorcycle to Glennallen to cash his paycheck. He was severely injured when he lost control of the motorcycle. The board denied benefits, finding Schleifman's employment "in no way contributed to the risk of injury." The superior court reversed, applying the remote site doctrine as Schleifman was "in the duration of employment" while traveling to cash his paycheck. The Court affirmed the superior court, quoting 1 A. Larson*, The Law of Workmen's Compensation,* Sec.16.10 (1965):

> When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

Schleifman, 599 P.2d at 135. The Court reasoned:

> Sourdough camp was a remote site requiring workers to live in the immediate area where they were going to perform their jobs. This residency requirement presents a special situation where certain reasonable activities must be deemed incidents of employment even though those same activities, if conducted at a non-remote site, might not be held to be work-related. Driving from the Sourdough camp to Glennallen to cash one's paycheck is reasonably contemplated and foreseeable by the employment situation. A risk inherent in that activity is that injuries could be sustained en route. Moreover, the trip was connected with some benefit to the employer. The employer paid Schleifman by check, rather than by cash, which was a convenience to the employer. Given the remote site, and the impending leave on the following Monday, it was expectable the Schleifman might travel to Glennallen for the purpose of cashing the check. Such an errand can be viewed as serving the mutual benefit of both the employer and the employee. Given this factor together with the remote situs of Schleifman's employment, it is our opinion that the trip was incident to Schleifman's employment. It follows that his injuries are compensable.

Schleifman, at 135-36.

The Court provided further guidance in *Estate of Milos v. Quality Asphalt Paving, Inc.*, 145 P.3d 533 (Alaska 2006). In that case, the employee had completed his shift at a remote worksite, and without authorization from his employer, borrowed a company ATV and drove it onto a gravel stockpile which at its peak was merely six feet below a power line. The employee grazed the power line and was electrocuted. The Court held there was not a "sufficient nexus between Milos's unauthorized, post-shift actions and his employment with Quality" to find the accident occurred in the course and scope of his employment. *Milos,* 145 P.3d at 541.

In *Excursion Inlet Packing Co. v. Ugale,* 92 P.3d 413 (Alaska 2004), the Court noted in remote site cases, whether the activities the employee is engaged in that cause his injury are related to employment or purely personal is not always relevant. In that case, the employee had voluntarily terminated his employment with the employer, but was awaiting a plane ride home from the remote worksite. Sometime in the 24 hours between his termination and the arrival of his transportation, the employee was killed. The circumstances surrounding his death were unclear, and the board could not determine whether the employee was murdered, committed suicide, or suffered a tragic accident. In awarding benefits, the Court held whether or not the activities that led to Ugale's death were personal activities rather than employer-sanctioned activities was of no matter, and the relevant fact was that Ugale was held at a remote site awaiting transportation home, and "he couldn't easily leave his job site behind him." *Ugale,* 92 P.3d at 418-419.

> **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;

Under AS 23.30.120, an injured worker is afforded a presumption the benefits he or she seeks are compensable. The Alaska Supreme Court held the presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, and applies

to claims for medical benefits and continuing care. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991). An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991).

Application of the presumption to determine the compensability of a claim for benefits involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, the claimant must adduce "some" "minimal," relevant evidence establishing a "preliminary link" between the disability and employment, or between a work-related injury and the existence of disability, to support the claim. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.,* 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to raise the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). The presumption of compensability continues during the course of the claimant's recovery from the injury and disability. *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991). Witness credibility is not weighed at this stage in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989). If there is such relevant evidence at this threshold step, the presumption attaches to the claim. If the presumption is raised and not rebutted, the claimant need produce no further evidence and the claimant prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997).

In *Runstrom v. Alaska Native Medical Center,* AWCAC Decision No. 150 (March 25, 2011), the Alaska Workers' Compensation Appeals Commission held the 2005 legislative amendment to AS 23.30.010 altered the longstanding presumption analysis: "…[W]e 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." *Runstrom,* AWCAC Decision No. 150, at 3. The Commission held the second stage of the presumption analysis now requires the employer

> "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., 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. *Id.* at 7 (emphasis in original).

"Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-612 (Alaska 1999); *Miller* at 1046.

Since the presumption shifts only the burden of production and not the burden of persuasion, the employer's evidence is viewed in isolation, without regard to any evidence presented by the claimant. *Id.* at 1055. Credibility questions and weight to give the employer's evidence are deferred until after it is decided if the employer has produced a sufficient quantum of evidence to rebut the presumption the claimant is entitled to the relief sought. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051 (Alaska 1994); *Wolfer* at 869.

Runstrom held once the employer has successfully rebutted the presumption of compensability,

> [the presumption] 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. *Id.* at 8.

> **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 23.30.145. Attorney fees**. . . .
> (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to

> compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

Where an employer resists payment of benefits, and a claimant employs an attorney in the successful prosecution of the claim, an award of attorney fees may be made under AS 23.30.145(b). *Harnish Group, Inc. v. Moore, 160 P.3d 146, 153 (Alaska 2007).* In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986), the Alaska Supreme Court held attorney fee awards under AS 23.30.145(b) should be "both *fully compensatory and reasonable* so that competent counsel will be available to furnish legal services to injured workers" (emphasis in original). In determining a reasonable fee under AS 23.30.145(b), the board is required to consider the contingency nature of representing injured workers, the nature, length, and complexity of the services performed, the resistance of the employer, the benefits resulting from the services obtained, the fee customarily charged in the locale for similar services, and the experience, reputation and ability of the lawyer performing the services. *Id.* at 975.

In *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011) the Commission addressed the employer's claim the board erred by awarding attorney's fees under both §§ 145(a) and (b). Though the commission vacated the board's decision on other grounds, it discussed attorney's fee awards anticipating the issue would arise again, and affirmed the board's reasoning:

> Uresco makes two arguments regarding the attorney fees award. Uresco argues that the board cannot award 'duplicative' fees based on both AS 23.30.145(a) and (b) and that the board should have reduced the award because Porteleki did not prevail on the issue of frivolous or unfair controversion. We address these arguments because they are likely to arise again on remand if the board decides that Porteleki prevailed on his claim for medical benefits.
>
> The board awarded reasonable fees under AS 23.30.145(b), but concluded "the employee is entitled to mandatory statutory minimum attorney fees under AS 23.30.145(a) when, and if, the statutory minimum amount based on the payment of past and future medical, indemnity, and all other benefits exceeds the attorney fee awarded under AS 23.30.145(b)". Although the Supreme Court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive.

Porteleki, AWCAC Decision No. 152, at 14-15 (citations omitted).

> **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.
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> …
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final

> determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
>
> …
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125….

In *Harp v. ARCO Alaska, Inc.,* the Alaska Supreme Court addressed when to assess a penalty under AS 23.30.155(e): " When nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." However, a controversion filed in good faith will protect an employer from a penalty. *Harp v. ARCO Alaska, Inc.* 831 P.2d 352, 358 (Alaska 1992)(citation omitted).

In *Irby v. Fairbanks Gold, Inc.,* 203 P.3d 1138 (Alaska 2009), the Supreme Court held that a controversion need not be fact-based to constitute a good faith controversion; "a good-faith controversion can be based on a legal defense" that, even if not successful, is "not legally implausible." *State of Alaska v. Ford,* AWCAC Dec. No. 133 (April 9, 2010) at 17 (citing *Irby,* 203 P.3d at 1147).

> **AS 23.30.215. Compensation for death.**
>
> (a) If the injury causes death, the compensation is known as a death benefit and is payable in the following amounts to or for the benefit of the following persons:
>
> (1) reasonable and necessary funeral expenses not exceeding $5,000;
>
> (2) if there is a widow or widower or a child or children of the deceased, the following percentages of the spendable weekly wages of the deceased:

(A) 80 percent for the widow or widower with no children;
(B) 50 percent for the widow or widower with one child and 40 percent for the child;
(C) 30 percent for the widow or widower with two or more children and 70 percent divided equally among the children;
(D) 100 percent for an only child when there is no widow or widower;
(E) 100 percent, divided equally, if there are two or more children and no widow or widower;

(3) if the widow or widower remarries, the widow or widower is entitled to be paid in one sum an amount equal to the compensation to which the widow or widower would otherwise be entitled in the two years commencing on the date of remarriage as full and final settlement of all sums due the widow or widower;
4) if there is no widow or widower or child or children, then for the support of father, mother, grandchildren, brothers and sisters, if dependent upon the deceased at the time of injury, 42 percent of the spendable weekly wage of the deceased to such beneficiaries, share and share alike, not to exceed $20,000 in the aggregate;
(5)$5,000 to a surviving widow or widower, or equally divided among surviving children of the deceased if there is no widow or widower.

(b) In computing death benefits, the spendable weekly wage of the deceased shall be computed under AS 23.30.220 and shall be paid in accordance with AS 23.30.155 and subject to the weekly maximum limitation in the aggregate as provided in AS 23.30.175 , but the total weekly compensation may not be less than $75 for a widow or widower nor less than $25 weekly to a child or $50 for children.

(c) All questions of dependency shall be determined as of the time of the injury, or death.

(d) Compensation under this chapter to aliens not residents, or about to become nonresidents, of the United States or Canada is the same in amount as provided for residents, except that dependents in a foreign country are limited to widow or widower and child or children, or if there is no widow or widower and child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for a period of one year before the date of injury. The board, at its option, or upon the application of the insurance carrier, may commute all future installments of compensation to be paid to an alien dependent who is not a resident of the United States or Canada by paying or causing to be paid to the alien dependent one-half of the commuted amount of the future installments of compensation as determined by the board.

(e) Death benefits payable to a widow or widower in accordance with (a) of this section shall abate as that person ceases to be entitled and does not inure to persons subject to continued entitlement. In the event a child ceases to be

entitled, that child's share shall inure to the benefit of the surviving spouse subject to adjustment as provided in (f) of this section.

(f) Except as provided in (g) of this section, the death benefit payable to a widow or widower shall terminate 12 years following death of the deceased employee.

(g) The provisions of (f) of this section do not apply to a widow or widower who at the time of death of the deceased worker is permanently and totally disabled. The death benefits payable to a widow or widower are not subject to reduction under (f) of this section after the widow or widower has attained the age of 52 years.

(h) In the event a deceased worker is survived by children of a former marriage not living with the surviving widow or widower, then those children shall receive the amount being paid under a decree of child support; the difference between this amount and the maximum benefit payable under this section shall be distributed pro rata to the remainder of those entitled.

(i) In the event the total amount of all benefits computed under (a)(2) of this section exceeds the maximum benefit provided in AS 23.30.175, the maximum benefit under AS 23.30.175 shall be prorated among entitled survivors.

8 AAC 45.074. Continuances and cancellations.
(a) A party may request the continuance or cancellation of a hearing by filing a
(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness
(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and
(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;
(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,
(1) good cause exists only when
(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;
(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;
(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;
(E) the hearing was set under 8 AAC 45.160(d);
(F) a second independent medical evaluation is required under AS 23.30.095(k);
(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;
(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;
(I) the parties have agreed to and scheduled mediation;
(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);
(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or
(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;
(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection.

(c) Except for a continuance or cancellation granted under (b)(1)(H) of this section,
(1) the affidavit of readiness is inoperative for purposes of scheduling another hearing;
(2) the board or its designee need not set a new hearing date at the time a continuance or cancellation is granted; the continuance may be indefinite; and
(3) a party who wants a hearing after a continuance or cancellation has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070.

ANALYSIS

Was the oral order denying Employer's petition to continue the February 5, 2015 hearing correct?

Continuances are disfavored and will not be routinely granted. A hearing may be continued only for good cause. In its petition, Employer cites 8 AAC 45.074(b)(1)(K) and (L), which state good cause exists when:

> (K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
>
> (L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing….

Employer contends its inability to obtain the state trooper investigative report on Employee's accident causes undue prejudice warranting continuing the February 5, 2015 hearing on whether Employee died in the course and scope of his employment. The panel understands Employer's frustration. Employer has not asserted an intoxication defense because, as its counsel stated at hearing, "out of an abundance of caution," it would not assert the defense without evidence in hand showing Employee's impairment caused the accident. At the same time, Employer has

been diligent in attempting to obtain the evidence, but the state troopers lack Employer's motivation to investigate the accident. However, speculation that evidence supporting a new defense may materialize in the future is insufficient to show just cause to continue the hearing. The issue for the February 5, 2015 hearing is whether Employee died in the course and scope of his employment with Employer. There is no dispute Employee was driving from Galbraith Lake to Fairbanks on August 31, 2015 when the company truck he was driving overturned and he was killed as a result of the accident. These facts are already supported in the record, and evidence concerning whether Employee was impaired is not relevant to determine the course and scope issue. Employer has not demonstrated just cause exists to continue the hearing. Employer's petition will be denied.

Is Claimant entitled to death benefits?

Applying the AS 23.30.120 presumption analysis and without considering witness credibility, Claimant attached the presumption Employee's death arose in the course and scope of his employment with Glinda Garwood's testimony and the state medical examiner's autopsy report, showing Employee died as a result of an auto accident while driving from Galbraith Lake to Fairbanks.

Once the presumption is raised, Employer must rebut the presumption with substantial evidence, which is viewed in isolation and without considering credibility. Employer rebuts the presumption with the affidavits and testimony of Mike Lafon and Nik Galloway, showing Employer did not request Employee make a parts run to Fairbanks, and the purpose of his trip was purely personal. The burden now shifts to Claimant to prove by a preponderance of the evidence Employee died while in the course and scope of his employment with Employer. *Runstrom.*

The parties agree Employee was driving a company-provided pick-up from Galbraith Lake to Fairbanks when he was killed in an auto accident. The parties agree Galbraith Lake is a remote worksite for purposes of determining compensability under the Act. Ms. Garwood credibly testified her husband told her he had been asked to make a parts run to Fairbanks and he would be able to spend a night at home. Lafon and Galloway credibly testified no one asked Employee to do a parts run, that it is unlikely anyone in Employee's position would ever be asked to do a parts run, and that

Employee requested a day off to attend a medical appointment in Fairbanks for his infected toe. The autopsy noted Employee's toe was bandaged, and Ms. Garwood testified Employee had suffered problems with the toe for some time. However, she was adamant he did not mention any medical appointment and that to her knowledge no appointment was ever scheduled. The panel takes note Monday, September 1st was Labor Day, and it is unlikely Employee could have had a set appointment. Nonetheless, Galloway was positive Employee mentioned a specific appointment, either at 10:30 or 11:30 on Monday morning.

Ms. Garwood testified her husband was not always truthful and that he had struggled with opioid addiction for most of their marriage. She believed he had been drug-free for more than a year at the time of his death. However, she discovered eight or nine empty prescription bottles after his death, for several types of narcotics and tranquilizers, which had been filled only two weeks before. She could only speculate about the missing two weeks supply of medication.

The basic inquiry is whether the injury was substantially caused by, or the result of, the employment relation. *Schleifman.* No one may ever know definitively Employee's intended purpose for his trip to Fairbanks on August 31, 2014, as the preponderance of the evidence shows he was likely untruthful to both his employer and his wife. The panel rejects Claimant's contention Employee was making a parts run for Employer; the facts simply do not support it. However, as in *Ugale*, the specific activities Employee was engaged in at the time of his death are ultimately irrelevant in determining whether his death arose in the course and scope of his employment. As in *Ugale*, by virtue of the remote jobsite, the employment relationship extended beyond Employee's workshift. His ability to attend to personal matters was limited by the remote nature of his workplace. He couldn't "easily leave his job site behind." *Anderson; Ugale.* Galloway himself testified about this issue, noting "sometimes the employees get burned out and need a break, so we have a company pick-up for them to use if they need a break…. Sometimes they have personal things they need to do that they can't get done in Galbraith." By virtue of their weeks-long work stints, an employment arrangement benefitting the Employer, remote-site employees are unable to attend to personal matters as freely as employees who work near their homes and community services.

Employer relies on the *Liggett* case, which found the employee's travel from the worksite to attend Christmas dinner in no way benefited the employer and his death was thus not compensable. However, the present case is distinguishable from *Liggett,* as in this case the transportation was employer-provided. In *Liggett*, the employee chartered a private plane and the employer played no part in the arranging of or payment for the employee's travel to Fairbanks for Christmas dinner. In the present case, Employer granted permission for the travel and provided the transportation in a company pick-up. While Employee requested the time off to attend to personal matters, to do so he was required to drive roughly 350 miles in a company truck. His death in the course of that travel is compensable.

Claimant proved by a preponderance of the evidence Employee's accident arose within the course and scope of his employment with Employer, and Claimant is entitled to death benefits calculated per AS 23.30.215.

Is Claimant entitled to a penalty under AS 23.30.155(e)?

AS 23.30.155 requires an employer to pay compensation "periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer." If the employer "controverts the right to compensation after payments have begun," AS 23.30.155(d) provides "the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due." AS 23.30.155(e) provides that if payment of compensation without an award is not made within seven days after it is due, Employer must pay a 25 percent penalty on the unpaid compensation.

In determining whether a penalty is appropriate, the board must first decide whether the Employer did not act in good faith in filing its controversion. An employer must have specific evidence for a good faith controversion. *Harp.* Even in cases in which benefits are ultimately found payable, a controversion may be found in good faith if it was based on a plausible, though unsuccessful, legal defense. *Irby.*

Here, Employer filed its November 19, 2014 controversion notice based on the affidavits of Nik Galloway and Mike Lafon, who testified Employee's trip from Galbraith Lake to Fairbanks was for purely personal reasons, unrelated to his work for Employer. Employer relied on this evidence to support its defense Employee's death did not occur within the course and scope of his employment. While the board ultimately rejected this legal argument, it was nonetheless a plausible one based in a reasonable interpretation of the law of the case. Employer's controversion notice was filed in good faith, and Claimant is not entitled to a penalty under AS 23.30.155(e).

Is Claimant entitled to an attorney's fee and cost award? If so, in what amount?

In making fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on behalf of the claimant, as well as the benefits resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings, and fully but reasonably compensate attorneys for services performed on issues for which the claimant prevails.

Claimant retained counsel who successfully obtained valuable benefits for her, namely a finding her husband died while in the course and scope of his employment with Employer and the benefits arising from that finding, including significant death benefits. Claimant incurred legal fees and is entitled to a fee and award under AS 23.30.145(b).

Claimant's counsel has specialized in the area of workers' compensation law for several years, and has represented employees at numerous hearings. He provided a verified attorney fee itemization billing 32.5 hours at $420.00 per hour (Franich) and 1.9 hours at $400.00 per hour (Beconovich), and a paralegal fee itemization billing 12.2 hours at $210.00 per hour, for a requested attorney fee award totaling $16,972.00.

Employer has not objected to Claimant's counsel's hourly rate or contested his claimed expended hours. However, the board takes note Claimant's counsel's claimed rate is significantly higher than that of other attorneys representing injured workers in Alaska, including those who have done so for many decades. John Franich has previously been awarded attorney fees at the rate of $350.00 per

hour based on his level of experience representing claimants in work injury cases. *See, e.g, Bockus v. First Student Services,* AWCB Dec. No. 14-0040 (March 24, 2014); *Smith v. State of Alaska*, AWCB Decision No. 13-0037 (April 1, 2013); *Harris v. M-K Rivers*, AWCB Decision No. 13-0014 (January 28, 2013). Likewise, Bob Beconovich has been awarded attorney fees in the $300.00 – 350.00 per hour range in recent cases. *See, e.g., Weed v. State of Alaska,* AWCB Decision No. 13-0154 (November 26, 2013)(R. Vollmer, dissenting, noting had the case been found compensable, fees would have been awarded at $350.00 per hour); *Beeman v. Weaver Brothers, Inc.,* AWCB Decision No. 13-101 (August 28, 2013); *Shastitko v. MTI,* AWCB Decision No. 13-027 (March 19, 2013). Based on Employee's counsel's efforts and success in this case, their years of experience, the contingent nature of workers' compensation cases, and recent awards to them and to attorneys similarly situated, an hourly rate of $350.00 for attorney time spent is reasonable here. Claimant's fee award will reflect this reduced rate. Claimant is entitled to an award of attorney's fees of $12,040.00 and paralegal fees of $2,562.00, for a total actual fee award of $14,602.00 under AS 23.30.145(b). Claimant is also entitled to mandatory statutory minimum attorney fees under AS 23.30.145(a) when and if the statutory minimum amount based on the payment of past and future benefits exceeds the attorney fee awarded under AS § 145(b). *See, Porteleki.*

CONCLUSIONS OF LAW

1) The oral order denying Employer's December 8, 2014 petition to continue the February 5, 2015 hearing was correct.

2) Claimant is entitled to death benefits calculated per AS 23.30.215.

3) Claimant is not entitled to a penalty under AS 23.30.155(e).

4) Claimant is entitled to an award of attorney's fees.

ORDER

1) Employer's December 8, 2014 petition to continue the February 5, 2015 hearing is denied.

2) Claimant's September 16, 2014 claim for death benefits is granted.

3) Employer shall pay to Claimant death benefits in accordance with AS 23.30.215. Jurisdiction is reserved to resolve any calculation disputes.

4) Claimant's September 16, 2014 claim for penalty under AS 23.30.155(e) is denied.

5) Employer shall pay $14,602.00 in actual attorney's fees. Employer shall pay statutory minimum attorney's fees under AS 23.30.145(a) on ongoing benefits payments when and if the statutory minimum amount on past and future benefits exceeds the attorney fee awarded under §145(b).

Dated in Fairbanks, Alaska on March 17, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/__________________________________
Amanda K. Eklund,
Designated Chair

/s/__________________________________
Ron Nalikak, Member

/s/__________________________________
Lake Williams, Member

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

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the board and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of the ESTATE OF MARK GARWOOD, Claimant v. BLACK GOLD EXPRESS and the INSURANCE CO. OF THE STATE OF PENNSYLVANIA, Employer/insurer; Case No. 201415369; dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, and served upon the parties on March 17, 2015.

/s/____________________________________
Darren Lawson
Office Assistant II