ALASKA WORKERS' COMPENSATION BOARD

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

FLOYD D. CORNELISON, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No(s). 199609785
RAPPE EXCAVATING, INC., Employer, and TIG PREMIER INSURANCE CO., Insurer, Defendants.	)	AWCB Decision No. 13-0168 Filed with AWCB Anchorage, Alaska on December 26, 2013

Rappe Excavating, Inc.'s petitions to require use of a prescription drug card, and to terminate permanent total disability benefits, were heard in Anchorage, Alaska on December 3-4, 2013, a date selected on July 17, 2013. Attorney Michele M. Meshke represented Rappe Excavating, Inc. and its insurer TIG Premier Insurance Company (collectively, Employer). Attorney Richard L. Harren represented Floyd D. Cornelison (Employee). Employee appeared and testified. His previous deposition testimony is of record. Judy Cornelison, Forrest Cornelison, Jon Deisher, Scott Lyon and Jesse Cornelison appeared and testified in person for Employee. Judy Cornelison's previous deposition testimony is also of record. Kaylee Fischer testified telephonically for Employee. Leon Chandler, M.D. and Alison Jean McCarthy testified through deposition for Employee. Unopposed testimony through affidavit or other writing was provided by Judy Cornelison, Forrest Cornelison, Richard Fuller, Ph.D., Craig Haft and Alan Blanco. Alizon White and Michael Rush testified in person for Employer. Joel Seres, M.D., Bill McNabb, Dennis Johnson, Wayne Willott, Scott Coronado and Michael Rush testified through

deposition for Employer. The testimony provided by Charles Hewitt at the December 18, 2012 hearing was also considered. The record closed on December 9, 2013, when Employer's opposition to Employee's affidavits of attorney fees and costs was received.

ISSUES

Employer contends Employee has long paid for his prescription medications out-of-pocket and then sought reimbursement from the claims manager. Employer contends this process results in excess cost to the carrier because it must reimburse Employee his actual expense rather than the lower cost it obtains when an employee uses a prescription drug card. Employer further argues a prescription drug card reduces penalties assessed for employers' late reimbursement of prescription drug costs. Finally, Employer contends employees' use of a prescription drug card minimizes its overall administration costs. Employee does not object to using a prescription drug card. Because the parties agreed to address this matter by written stipulation, the issue of whether an employer can require an employee to use a prescription drug card will not be addressed here.

Employer contends Employee is no longer permanently and totally disabled, and it should be relieved from its obligation to pay Employee permanent total disability benefits. Employee contends he remains permanently totally disabled (PTD), and is entitled to continuing benefits under the Act.[1]

1. *Should Employer be relieved of its obligation to pay Employee permanent total disability benefits?*

Employee contends he hired an attorney, and as a result of his attorney's efforts he will succeed in defending against Employer's petition to terminate his disability benefits. Employee seeks an award of attorney fees for his current attorney, and for work performed by two previous attorneys, totaling $84,653.22. Employer contends Employee will not prevail and thus an award of attorney fees is not due. Alternatively, Employer contends the fees sought should be reduced.

2. *Is Employee entitled to an award of attorney fees and if so, in what amount?*

[1] Alaska Workers' Compensation Act, AS 23.30.001 *et seq*.

Employee contends he incurred expenses in successfully defending against Employer's petition to terminate his PTD benefits, and should be awarded costs totaling $66,463.60. Employer contends Employee will not prevail and thus an award of costs should not be made. Alternatively, Employer contends the costs sought are excessive and should be reduced.

3. Is Employee entitled to an award of costs, and if so, in what amount?

FINDINGS OF FACT

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

1) Employee sustained a low back injury on May 20, 1996. Employer accepted compensability, and paid medical and temporary total disability (TTD) benefits. Employee underwent a multiple level spinal fusion at L4-S1, and thereafter hardware removal. The surgeries were ultimately deemed unsuccessful. Leon Chandler, M.D., Employee's physician for chronic pain opined, "The patient has a failed back and will need oral narcotic therapy for the foreseeable future . . . I suspect that he will end up on oral narcotics for the rest of his life." (*Cornelison v. Rappe Excavating, Inc.*, AWCB Decision No. 01-0008 (January 11, 2001) (*Cornelison II*).
2) In 1997 and 1998, at Employer's request, Employee underwent physical capacities evaluations (PCE), specifically the "Key Functional Assessment" (KFA), at HealthSouth Rehabilitation Centers of Anchorage. The KFA tests and measures an individual's lifting height and weight limitations, activity capabilities, balance, gait, pushing and pulling capability, abilities to carry, kneel, crawl, negotiate stairs, sitting and standing tolerances, work surface height, grip and resistance strength, and heart rate. They are used to compare an individual's abilities with specific job demands. (KFA, HealthSouth Rehabilitation Centers, November 5, 1997; KFA, HealthSouth Rehabilitation Centers, June 18, 1998; Letter from A. Jean McCarthy to Tracy Conrad, Intracorp, November 5, 1997; McCarthy).
3) The Key Functional Assessment is an objective measurement of an individual's workday tolerance and workload level, and includes measures for determining the validity of the individual's effort during assessment. (Deisher, McCarthy).
4) On November 5, 1997, Employee was evaluated by A. Jean McCarthy, PT, Assessment Specialist, of HealthSouth. Ms. McCarthy concluded Employee's test performance was

valid (as opposed to "manipulated," "submaximal" or "insufficient"). She measured his workday tolerance at three to four hours, with sitting from one to two hours at 10 minute durations, standing from one to two hours at 10 minute durations, and walking, from two to three hours, frequent short distances. (KFA, HealthSouth Rehabilitation Centers, November 5, 1997).

5) On June 18, 1998, Employee was assessed by Joann Seethaler, LPT, Assessment Specialist, of HealthSouth. Ms. Seethaler concluded Employee's test performance was valid. She measured his workday tolerance at three to four hours, with sitting from one to two hours at 10 minute durations, standing from two to three hours at 10 minute durations, and walking, from two to four hours, frequent short distances. (KFA, HealthSouth Rehabilitation Centers, June 18, 1998). Ms. Seethaler noted:

> I did not observe the client to stand erect at all during the time he was here. He maintained a forward flexed posture at all times and was constantly on the move. His sitting and standing were both quite agitated even during the times which were recorded as continuous. He states that he is able to accomplish tasks at home if he has a waist high work surface (while standing) and a tall stool or chair to sit back on frequently. This would appear to be a necessary accommodation for any future employment situation. (Letter to Tracy Conrad, Intracorp, June 18, 1998).

6) Ms. Seethaler's description of Employee's posture, in a forward flexed posture at all times, unable to stand erect, unable to sit or stand for long periods of time, and constantly changing position, fits this panel's observations of Employee during over 30 hours of hearing time on December 18 and 20, 2012, February 26, 2013, December 3 and 4, 2013, and when Employee was unaware he was being observed by panel members on December 3 and 4, 2013. (Observation).

7) In October, 1999, at Employer's request, Employee was seen at Northwest Occupational Medicine Center (NOMC) for a "comprehensive pain evaluation" and a third PCE. After examining Employee, Joel Seres, M.D., a neurosurgeon and the director of NOMC, opined, "It is our feeling that the patient does have a legitimate source for his pain at this time. His pain is related to the remarkable scarring and sclerosis of musculature that has occurred in his lower back as the direct result of his surgical procedures." "This surgery has resulted in severe scarring in the lower back. The pulling of the normal musculature

above this area is probably the major source for his pain." (Comprehensive Pain Evaluation, Dr. Seres, October 13, 1999 at 15.*)*.

8) The "remarkable scarring" Dr. Seres observed in 1999 he described at deposition as a crisscross of vertical and horizontal scars over Employee's back. (Seres, October 4, 2013).

9) The PCE conducted at NOMC was performed by Dwight Anunciado, M.S.P.T., Physical Therapist Supervisor. Mr. Anunciado noted Employee's subjective complaints as cramping into his posterior legs and calves, pain into his lumbar region that extends across but is greatest in the right paraspinal region, pain symptoms so severe he has difficulty maintaining one position for any length of time, and he cannot enjoy recreational and hobby activities such as playing guitar. Mr. Anunciado reported Employee stating that laying in a flat position, staying out of cars, stretching and utilizing cold and heat packs lessens his pain. He noted that in a 24-hour period, Employee reported spending 10 to 14 hours laying down or sleeping, two to three hours sitting, and 11 hours standing and walking, noting these are total hours at each position and only tolerated for a short amount of time with frequent positional changes. (PCE, Northwest Occupational Medicine Center, October 14, 1999).

10) Employee's subjective complaints reported to Mr. Anunciado in 1999 are the same reports of pain, physical limitations, need for movement, and means of obtaining relief Employee has maintained throughout this litigation. (Cornelison; observation). They were corroborated by the credible testimony of Judy Cornelison, Forrest Cornelison, and Jesse Cornelison. Employee's complaints of loss of enjoyment from previous recreational activities and hobbies including playing guitar, fishing, and family gathings were similarly corroborated. (Judgment; Judy Cornelison, Forrest Cornelison, and Jesse Cornelison).

11) The 1999 PCE took six hours to complete. Mr. Anunciado reported that during those six hours, Employee demonstrated consistent full effort, inconsistencies were *de minimis*, while Employee seemed focused on his pain symptoms he "clearly demonstrated" numerous "clinical deficits," and the PCE was a valid assessment of Employee's abilities. Mr. Anunciado noted that during the testing period Employee required 13 breaks, totaling 77 minutes, during which Employee performed stretching activities and required ice in

the sitting, standing or supine positions. Mr. Anunciado concluded Employee suffered decreased lumbar range of motion, impaired tolerance to squatting, bending, crawling and twisting, poor physical stamina, and decreased tolerance to prolonged sitting, standing, or walking. He opined Employee demonstrated capacities in the "sedentary" work range, but that any employment must allow position changes every 15 to 30 minutes. (PCE, Northwest Occupational Medicine Center, October 14, 1999).

12) EME physician Dr. Seres, however, in conjunction with NOMC's associate director, Sharon M. Labs, Ph.D., a neuropsychologist, disagreed. Drs. Seres and Labs concluded Employee was not capable of working at that time. They recommended a four to six week multidisciplinary intensive program designed to address both the psychological and physical aspects of Employee's pain, including relaxation techniques, insight therapy regarding his pain and ways of treating it, documentation of regular stretching and exercises frequently during the day directed at postural mechanics. They felt his depression should be treated, and that he should be weaned from his narcotics "to see if perhaps there are not more appropriate ways of his coping once he is more clear mentally." It was their "feeling" that such a program stood a "good chance . . . to improve his function to the point where he could at least work at a sedentary job on a full-time basis." (Comprehensive Pain Evaluation, Northwest Occupational Medicine Center, October 13, 1999 at 16).

13) Beginning May 29, 2000 and continuing, Employer re-categorized Employee as permanently and totally disabled, and began paying PTD benefits. *Cornelison v. Rappe Excavating, Inc.*, AWCB Decision No. 01-0008 (January 11, 2001 (*Cornelison II*).

14) On January 11, 2001, Employee was found permanently and totally disabled, and PTD benefits from February 6, 1998 were awarded. *(Id.*).

15) On April 18, 2001, at Employer's request, Employee was again seen by Dr. Seres for physical examination and updated records review. Dr. Seres' recitation of Employee's then current complaints of low back pain radiating into his right leg, leg cramping, aggravated by activity, improved by lying down, icing and heat, and Dr. Seres' observations of Employee's posture as stiff and in a forward position, standing frequently, and hyperactivity, are consistent with Employee's reporting to and observations by Ms. McCarthy in 1997, Ms. Seethaler in 1998, Mr. Anunciado, Dr. Seres

in 1999, and Employee's consistent testimony throughout the current proceedings, initiated in 2009. (EME Report, Dr. Seres, April 18, 2001; observation).

16) From his examination of Employee in 2001, Dr. Seres opined Employee's back was "essentially unchanged in its appearance . . . [with] a significant amount of scarring and sclerosis of the paravertebral muscles in the low back . . . back is generally diffusely tender in the lower lumbar region . . . one particular area . . . is exquisitely sensitive. It is from this area that he states the radiation of pain extends into his lower extremities that causes him the most distress. This area is in the right paravertebral region approximately 2 inches below the end of his vertical lumbar incision. He is able to repeatedly document this location." Dr. Seres reported "marked splinting of the paravertebral muscles of the low back with significant relaxation when the patient is supine or prone." Dr. Seres reported his examination revealed "significant increase in stiffness in [Employee's] lower back," and absence entirely of any knee or ankle jerks during palpation. Although recording Employee's opinion his then current drug regimen has helped him better than any other he had been on in the past five years, Dr. Seres noted and took issue with the increase in Employee's prescribed narcotics since he last saw Employee in 1999. Dr. Seres maintained his opinion Employee should be in a detoxification program followed with treatment in a multidisciplinary pain management clinic. He acknowledged, however, there was a place for narcotic treatment, and while he would rather see the patient not use narcotics to deal with his pain, if it is used "it should be on a long-term narcotic basis and not on the p.r.n. (as needed) medication level that he is presently on." (EME Report, Dr. Seres, April 18, 2001).

17) On July 23, 2002, Employee was seen by Neil Pitzer, M.D. for a second independent medical evaluation (SIME) to address reasonable and necessary future medical care. Dr. Pitzer opined a trial catheter placement in advance of an intrathecal pump for pain medication delivery was reasonable if a psychological evaluation confirmed Employee's candidacy for this procedure. Dr. Pitzer opined consideration should be given to anticonvulsant medication for chronic pain management. He believed long-term use of appropriate narcotics might be reasonable, with methadone preferred over duragesic patches. He did not feel a multidisciplinary pain management program, or further

exercise therapy would be effective or indicated. (Dr. Pitzer, July 23, 2002; Medical Summary, October 14, 2002).

18) In the summer of 2007 and 2008, Employer retained Northern Investigative Associates (NIA) to conduct *sub rosa* video surveillance of Employee. Dennis Johnson is NIA's Chief Executive Officer. Johnson describes his business as "a defensive investigative firm specializing in Workers' Compensation, general liability, auto liability investigations." (Johnson deposition at 6). Surveillance was conducted over a period of no less than 88 hours over no fewer than 38 days between July 5, 2007 and September 18, 2008, by three undercover videographers employed by NIA: Michael Rush, Wayne Willott and Scott Coronado. Approximately 15 hours of video footage was reportedly collected during the surveillance period. Using the video footage and his investigators' dictated field notes, Johnson prepared three investigative reports. (Depositions of Michael Rush, Wayne Willott, Scott Coronado, Dennis Johnson; NIA Surveillance Reports, August 24, 2007, July 31, 2008 and October 20, 2008; *Cornelison v. Rappe, Excavating, Inc*., AWCB Decision No. 13-0060 (May 30, 2013) (*Cornelison V)* at Finding of Fact 31).

19) Employer first provided and Dr. Seres reviewed video surveillance from "various times between July 5, 2007 and August 16, 2007," and "a video . . . documenting the patient's activity from 7 a.m. through 3:30 p.m. on August 15, 2007." Employer also provided Dr. Seres with Johnson's surveillance report dated August 24, 2007. It then scheduled Employee for another employer-sponsored medical evaluation (EME) with Dr. Seres in Lake Oswego, Oregon on June 24, 2008. (Dr. Seres' EME report, June 24, 2008).

20) Dr. Seres' reviewed the July and August, 2007, footage, and the August 24, 2007 surveillance report prior to his June 24, 2008 evaluation of Employee. (Seres, October 4, 2013 deposition; Employer representation at hearing). Based on his viewing the surveillance video supplied, yet only referencing specific scenes from August 15, 2007, Dr. Seres made the following statements about Employee's appearance: (1) he "walks briskly without a limp;" (2) "there is never an indication of a limp;" (3) "there is nowhere in the video that the patient holds onto his back or indicated with any type of grimacing or other activity that would suggest a sudden acute pain developing at any time during this interval;" (4) "it is especially noteworthy that at no time did he demonstrate

discomfort when . . . resuming the standing position;" and (5) "He worked for many hours carrying things back and forth to his boat without any apparent physical distress." Dr. Seres concluded Employee's level of functioning depicted in the video is "remarkably greater" than he admitted or demonstrated to any health professional documented in his medical records. He opined Employee has "either developed remarkable tolerance to his use of opioids or else is diverting his drugs. The latter is strongly suspected . . ." (Dr. Seres' EME report, June 24, 2008 at 19, 21).

21) Further surveillance was conducted between June 20, 2008 and September 18, 2008. DVDs containing some portion of this surveillance footage, and two further surveillance reports, were provided to Dr. Seres for review. (Surveillance reports, July 31, 2008, October 20, 2008; Christi Niemann; Niemann letters to Seres).

22) On March 4, 2009, after viewing surveillance video taken on September 15-16, 2008, Dr. Seres concluded that he had never seen a more "remarkable discrepancy" between the severe disability Employee demonstrated when he was seen by Dr. Seres, and the "remarkably normal behavior" and "physical abilities" seen on the surveillance videos. Dr. Seres noted those parts of the DVDs he believed highlighted Employee's physical capabilities. At Employer's request, Dr. Seres reviewed job descriptions including Apartment House Manager, Hotel Clerk, and Operating Engineer. Dr. Seres opined Employee is capable of returning to work in any of the three jobs described "without restriction," and on "a full-time basis." (EME Report, Dr. Seres, March 4, 2009). He opined the information Employee provided during the June 24, 2008 evaluation was in "direct opposition" to the material documented in the DVD he viewed. Dr. Seres diagnosed an exaggerated pain syndrome, not supported by physical findings and invalidated by the surveillance study. He opined Employee was committing "Social Security Fraud," and as a physician he was expected to report it to the Social Security Administration, but would await instruction from defense counsel. Dr. Seres opined Employee has the ability to work on a full-time basis doing "fairly heavy" activities, including work as an operating engineer. (EME Report, March 4, 2009 at 4-5).

23) On April 16, 2009, Employer filed a petition to terminate Employee's PTD benefits. It amended its petition on September 6, 2012 and March 11, 2013, clarifying the petition was brought under 8 AAC 45.150(c), and was based on new evidence, namely, video

surveillance of Employee, and Dr. Seres' EME examination and reports. (Memorandum in support of Second Amended petition to Terminate Permanent and Total Disability Benefits, March 11 2013).

24) On May 13, 2013, in *Cornelison v. Rappe Excavating, Inc*., AWCB Decision No. 13-0060 (*Cornelison V*), Employer's petition to admit surveillance video taken in 2007 and 2008 was granted. The weight given the video surveillance and reports would be determined after a full hearing on the merits of Employer's underlying petition to terminate Employee's disability benefits. *Id.* at 37.

25) Describing NIAs protocol, Johnson explained his investigators are instructed to leave the surveillance camera running whenever a subject is in view. The investigator may be required to turn the camera off to move to another area for clearer observation, but the camera is never turned off to manipulate or edit out any material. He testified the camera embeds the date and time stamps into the ribbon of the video, and they cannot be altered in the filming or uploading process. He noted his investigators are instructed not to include audio recording of the surveilled subject, and any discernable on any of the footage is that of the investigator. (Johnson; *Cornelison V* at Finding of Fact 31).

26) One or more of NIA investigators Michael Rush, Wayne Willott and Scott Coronado testified they continue recording a claimant until the subject is no longer in view, or when visible, if the investigator is unable to obtain a clear line of sight, his view is obstructed, or he is attracting unwanted attention. (Rush, *Cornelison V* at 15-16; Willott, *Cornelison V* at Finding of Fact 15). Willott and Coronado testified they did not edit out any frames they shot. (*Cornelison V* at 15). Rush testified he never intentionally avoided capturing on film behavior that might indicate Employee was in pain, he filmed whenever Employee was in view, he had to stop filming several times to change the tape, use the restroom, adjust the windshield wipers, and to move back and forth between battery and plug-in camera operation. (*Cornelison V* at 15-16).

27) Johnson testified that following surveillance each investigator relinquished his dictated field notes to "Brenda" in NIA's office who is tasked with transcribing them. (Johnson; *Cornelison V*, Finding of Fact 35). The original field notes were discarded after transcription. (Johnson). The written transcription was never provided to the field investigators for review. (Rush).

28) Each investigator also relinquished the original film footage, contained on digital video cassettes or "DVC," to Johnson. Johnson transferred the DVC footage to DVD format using Final Cut Pro software to create a master original source DVD from which duplicates could be made. (Johnson). The original DVC footage, and the DVDs purportedly containing "every nanosecond" from the original cassettes, are maintained in NIA's vault. (*Id*.). Using a copy of the original source DVD, Johnson then edited and condensed the footage to remove long periods of inactivity he referred to as "dead space." From the transcription prepared by Brenda, and the DVDs he created, Johnston prepared three investigative reports, dated August 24, 2007, July 31, 2008 and October 20, 2008. (*Id*.). Johnson did not provide his reports to the investigators to review. (Rush).
29) Johnson then sent his reports, along with the condensed version of the original DVDs, to the client, claims manager Joanne Pride, with the adjusting firm Broadspire. (Johnson; Investigation reports August 24, 2007, July 31, 2008 and December 20, 2008; record).
30) The video surveillance conducted between July 5, 2007 and August 17, 2007 was conducted by either Michael Rush or Scott Coronado. Michael Rush obtained his training as a surveillance videographer after his 2006 hire by NIA. His training was "on the job" from Scott Coronado, whose training was also "on the job" from Dennis Johnson and Wayne Willott. (Rush; Coronado).
31) Rush was NIA's videographer on July 5, 2007, when Employee was observed and filmed driving his camper to a commercial recreational vehicle shop and unhooking it, and later directing a satellite dish technician on the roof of his house. Rush was also the videographer on August 15, 2007, purportedly the date Employee was observed and filmed at the Burkeshore Marina in Big Lake, Alaska. (Rush).
32) The parties dispute whether the video Dr. Seres viewed, labeled August 15, 2007, was in fact filmed on that date. Employee insists he was not on his boat on August 15, 2007, a day he clearly remembers because it was his birthday and he remembers the days' events. He contends the video footage was from a week or two later, but prior to Labor Day weekend. He asserts this is just one example of manipulation done by Johnson of the video footage obtained during Employer's surveillance in 2007-2008, manipulation which included changing the date or time from the original source metadata when copying to DVD, omitting exhibition of Employee's pain behaviors, increasing film

speed, and splicing. Employer contends the date and time stamps are correct on the August 15, 2007 video, and on all of the proffered surveillance video, and the footage was not manipulated in any way. (Parties' hearing briefs and arguments).

33) Regardless of the date the Burkeshore Marina footage was shot, there are striking discrepancies in the evidence generated by NIA and its agents purportedly on August 15, 2007, rendering unreliable not only this footage and the resulting surveillance report but, correspondingly, all of NIA's video footage and reports. Irregularities become apparent when comparing the video footage with Rush's purported "field notes" for August 15, 2007, contained in the August 24, 2007 investigative report, and Rush's sparse, though audible, dictation contained on the video footage. (Judgment, observation, facts of the case and inferences therefrom).

34) Johnson testified Brenda transcribed the investigators' dictated field notes, and he prepared the surveillance reports given to client. (Johnson). All of the reports are signed by "Dennis Johnson, President, Northern Investigative Associates," and are entirely his work product. (Johnson, observation, judgment). In each of the three surveillance reports there is a section titled "Field Notes" following a section titled "Summary of Events." The Summary in each report is two to three pages long, states the surveillance dates covered in the report, the times surveillance was conducted on each date, and a summary, by date, of what, if anything was observed. The Summary is just that, a Summary, what the evidence demonstrates is Johnson's summation of the video footage he viewed either during or after he transferred the original source DVC to DVD, or during the editing and condensing process, and presumably after reading the transcribed field notes. The reader would then expect the section labelled "Field Notes," in each report between 13 and 17 pages and containing a detailed description of the observations made during surveillance, to reflect the relevant portions of the field agents' transcribed dictation. During Rush's surveillance at the marina, however, he inadvertently failed to turn off the audio function on the camera, and his comments, unusually sparse given the detailed "Field Notes" for August 15, 2007, are audible. Listening to Rush during his filming at the marina, scant though they are, it is apparent the times and events reflected in the "Field Notes" portion of the surveillance report bear no relation to any field notes Rush may have dictated. Remarkably, none of Rush's audibly stated times or his

description of events even appear in the "Field Notes" section of the surveillance report. (Observation). The "Field Notes" in the August 24, 2007 report, and by reasonable inference all three of the surveillance reports, are not the videographer's dictated "Field Notes" at all, but Johnson's observations from his viewing some iteration of the surveillance footage. (Judgment, observation, facts of the case and inferences therefrom).

35) When the "Field Notes" in Johnson's August 24, 2007 report are compared with the observed footage, numerous mistakes or misrepresentations of the times and activities become apparent, lending credence to Employee's allegations the video footage was manipulated, and diminishing the veracity of both the video footage and the surveillance reports. The first discrepancy is apparent simply from the labels on the produced footage. NIA's condensed footage for August 15, 2007 is labeled as containing one hour 57 minutes of footage. The footage on the DVDs labeled "Original Footage," Northern Investigative Associates" "August 15, 2007," and purportedly containing on DVD what is depicted on the original source DVC, inexplicably contains only one hour 49 minutes two seconds of footage. The video surveillance for August 15, 2007 begins at 8:18 a.m. Johnson's report describes the activity seen as Employee "looking for some papers." He is not looking for some papers, but removing a cigarette from a pack. (Both condensed and original NIA footage, August 15, 2007). Johnson's report states Employee arrived at the Napa Auto Parts store at 8:31 a.m. On the condensed footage Employee is seen arriving at the Napa store at 8:35 a.m. On the original footage, Employee is arriving at 8:27 a.m. Johnson's surveillance report then states that at 8:31 "He exits his vehicle and enters the store," an impossibility if he arrived at 8:35 a.m. On both the original and condensed footage, although Employee is in full view and filming is proceeding apace from his arrival at Napa, there is a cut and Employee's exit from his vehicle is never shown. At 8:39 Johnson's report has Employee exiting the store, going to his car and grabbing something before re-entering the store. This is depicted on the original footage as occurring at 8:35. The report has Employee exiting the store and driving off at 8:42 and 8:45, respectively. On the condensed footage, however, Employee is seen exiting the store, getting into his truck and driving off at 8:39 a.m., never having re-entered the store. (Observation).

36) Notably, at the Napa Auto Parts store and when he drives off, Employee is wearing a baseball cap and a white t-shirt. In the very next footage, also portrayed as August 15, 2007, Employee is wearing a safari hat and a green jacket, and is seen rolling up the back panel of the boat enclosure. The time displayed is 9:07 a.m., yet the surveillance report has Employee not even arriving to the marina until 9:10 a.m., much less aboard the boat, which later footage demonstrates is some distance from the parking area. (Observation). The report notes Employee is "inside a Bayliner Boat." Employee is not inside the boat at the time stated in the report, but outside. (Observation). Describing Employee shuttling objects from his truck to the boat the report states "The battery and toolbox are on a dolly." Only a battery is on the dolly. (Observation). "He walks toward the dock with the gas can in his right hand . . . He walks back to the gas can, picks it up and returns to the boat." He does not carry the gas can to the boat, he places the gas can on the dolly. (Observation). "The Claimant prepares to get onboard the boat. He opens up the boat cover." This chronology of events is contrary to the available video footage. The very first marina footage, at 9:07 a.m., depicts Employee opening the boat cover, well before any shuttling of items from the truck to the boat even begins. (Observation). The discrepancy suggests a manipulation of the times displayed on the video footage. Johnson's report then states that at 10:00 a.m. Employee added heat (sic, HEET®) de-icer to the fuel pump. According to the time on the DVD footage, this occurred at 9:22 a.m., not at 10:00 a.m. (Observation). At 10:04, the report has Employee exiting the boat, returning to his vehicle, obtaining a lighter, then returning to the boat, yet the DVD footage depicts this occurring at 9:29. (Observation).

37) In the 10:04 entry, Johnson opines "The Claimant shows no visible signs of pain or discomfort associated with his reported injury . . ." However, at 9:29 Employee is observed holding his back with his right hand. (Observation). At 9:30, while walking back to his truck, he is holding and patting his right leg with his right hand. (Observation). At 9:33 Employee's back brace is visible. (Observation). Despite Rush's testimony to the contrary, but consistent with Employee's testimony, Employee is observed sitting in the boat, removing from his pocket a small container similar to the pill container he displayed at the hearing, ingesting a portion of its contents, and then drinking from a thermos. At all times Employee is filmed walking he is in a forward

flexed posture, and is never seen able to stand erect. After periods of activity, a slight limp is noted in his step. (Observation). Judy Cornelison testified credibly that while Employee limps occasionally, it is not normally how he walks in any event. (Judy Cornelison Affidavit, October 14, 2010). There are too many discrepancies between the investigative reporting for August 15, 2007, and both the original and condensed film footage, to enumerate. Suffice it to say, they continue until the last entry of the report and the end of filming. Johnson's report states that at 12:30 p.m. "video is obtained of the Claimant returning to the boat slip after his test trip." On the original source DVD, this occurs at 12:13 p.m. Johnson later reports that at 1:20 p.m. "video is obtained of the Claimant trying to tie the boat down better…" This occurred on the original video at 1:07 p.m., with Employee leaving the area and driving off from the marina parking lot at 1:20, although Rush is heard reporting Employee's departure time as 1:22 p.m. Video for both of these report entries is entirely absent from some DVD copies used as exhibits at depositions, such as that introduced as an exhibit to Employer's deposition of Employee. (*Compare* NIA DVD "original source" DVD *with* Exhibit 19B, to Employer's deposition of Employee, December 6, 2010, and *with* Professional Legal Copy footage for August 15, 2007).

38) It is manifest that to accurately gather evidentiary video footage during surveillance operations, the videographer should switch the camera function menu to ensure the date and time stamp is permanently and visibly superimposed directly on the videotaped image at the time of recording. This should include the seconds, as well as the hour and minutes the recording is underway. This guarantees the time and date set by the camera operator at the time of recording is in fact the date and time the events portrayed appear, and have not been manipulated by either the videographer in the field or in the editing room. Similarly, reliable surveillance technique calls for no breaks in recording over a prolonged period of time, which requires the camera to continue running at all times while the subject is in view or in any proximity of the camera during the surveillance operation. While NIA's videographers and Johnson acknowledged this as standard operating procedure for obtaining reliable surveillance, the number of cuts and jumps in this surveillance, when Employee is in full view immediately before and after the cut,

demonstrate this protocol was not followed in this case. (Experience, judgment, observation, corroborated by Craig Haft).

39) Further failure to follow the stated protocol is again evident from audio contained on the surveillance footage captured by Michael Rush. When he was deposed, Rush believed the audio function on his camera had been disengaged per protocol. Prior to the hearing he learned he had failed to turn off the audio, and inadvertently recorded himself calling Employee a "bastard." While NIA admittedly holds itself out as a "defensive investigation firm specializing in workers' compensation," suggesting it is not impartial in the assignments it accepts, Rush's pejorative reference to his surveillance subject exemplifies videographer bias, casting doubt on the objectivity of his camera handling. The smile Mr. Rush displayed on the stand when he was asked and admitted to calling Employee a "bastard" belied any professionalism in Rush's training and performance. Indeed, Rush's testimony that his training as an investigator began with his hire by NIA in 2006, only the year before his surveilling Employee in 2007, was entirely "on the job" from another investigator, Coronado, whose training was also entirely "on the job" from NIA owner Johnson, reflects Rush's *de minimis* credentials for the job he was assigned, and the product he produced. (Experience, judgment, observations, facts of the case and inferences therefrom).

40) Bias against the surveillance subject, as well as misrepresentations to and disrespect for NIA's own client Joanne Pride, was exhibited by NIA investigator Wayne Willott, who also failed to turn off his camera's microphone when he called Ms. Pride on September 15, 2008, seeking authorization to continue surveilling Employee for another five consecutive days. Mr. Willott reported his progress to Ms. Pride:

> Here's the problem . . . every day he is busy 10 hours a day, and I mean, just, he is just, he is as active as any claimant that I can probably say I could just about ever get . . . Uh, he's put sewer and power lines and water lines in between his house and shed, he's done driveway work, he's done all sorts of work and working like a dog in his garage welding and painting and everything else. . .
>
> The problem is you know if you actually look at what I got, I'm almost embarrassed by it cause it's just, it's very spotty., and uh I could probably kill him in the report, but at the end of the day, when we go to go do testimony, you know, really some of the video . . . is a little bit hard to really show, yeah, yeah, it just becomes my testimony and he'll have an excuse or

> whatever you know, cumulatively, he's just, just trying to stay active to you know to fight the pain. . .
>
> You know it's not there, I mean I've, I've tried all different angles mentally, and I keep thinking he's going to take me to another location, where I could just cream him somewhere else possibly, or whatever . . .
>
> …[H]ere's what my gut instinct is . . . I wasn't getting what I was looking for so I was doing spot checks, I was doing drive bys, I was just kinda noting stuff, which by itself I knew wasn't going to make it, . . . What I believe we need to do right now is try to show these 8 to 10 hour days 5 days in a row. . .
>
> . . . [w]hen he walks around you know you can tell he has a little bit of a hunched over position . . . (Pause) Yeah . . . so my attitude is that you know probably where we're really going to end up on this is you know, that maybe it's a permanent partial and not a permanent total . . .
>
> [Y]ou know all summer I've actually been just ticked off because I knew it was there but I was afraid that I was going to burn it by pushing it too hard at the wrong moment. It just wasn't quite there to get, or it was going to stop, and now at this point it's kinda coming to us, so even though I didn't get it earlier it's now coming to us so like now's the time we have to just double up and go for it cause I think we're on the right track. . .it's just I could never document . . . (Transcript of Willot telephone call, September 15, 2008, Affidavit of Forrest Cornelison Certifying Transcript, June 11, 2013).

41) Up until his call to Ms. Pride on September 15, 2008, Willott had conducted surveillance over 23 days: June 20, 21, 23, July 4, 5, 6, 7, 8, 10, 11, 14, 15, 16, 17, August 22, 23, 24, 25, 26, 29, 30, and September 13 and 14, 2008. According to the "field notes" for these dates, contained in NIA's July 31, 2008 and October 20, 2008 investigative reports, during those 23 days, rather than observing Employee "busy 10 hours a day" "every day," as Willott told Ms. Pride, he observed Employee on only 11 of 23 days (June 23, July 5-8, 10, 14, 16, August 22-23, 29). On none of those 11 days did Willot observe for 10 hours. (Investigative Report, "Field notes," July 31, 2008, October 20, 2008). On three of those 11 days Willot's observations were simply of Employee walking or driving his truck between his house and his shop, which are across the street from one another. (June 23, July 5, July 8, 2008). On seven of the remaining eight days, Willot's only observations were of Employee welding for five minutes or less although he continued to surveil for two and half more hours (July 6, 2008); "carrying an undetermined item . . . possibly a one-gallon metal can," although he remained undercover for another five and a

half hours (July 7, 2008); carrying a bucket, then a step stool and ladder, and with his wife's help carrying a stand, after which she is seen loading a long board into a truck by herself (July 10, 2008); welding or grinding for 20 minutes, although Willot remained immediately on scene for another hour, and returned for a spot check and then another hour of surveillance (July 14, 2008); using a tape measure (August 22, 2008); and inside his garage with no activity observed (August 23, and 29 2008). On July 16, Willot observed Employee operating a backhoe for less than five minutes, but Johnson concluded in the "Field Notes" provided to Ms. Pride, "Claimant has dug a ditch between the residence and the shed . . . the ditch appears to be for wiring or plumbing between the house and the shed." The "Field Notes" for July 17, 2008 at 11:36 a.m. state "the ditch has been filled in from the house to the shed," although the "field notes" reflect no observation of wiring or plumbing pipe being laid by anyone in the remainder of his surveillance on July 16, or when Willot returned at 7:00 a.m. the following morning. Indeed, there is no evidence any wiring or plumbing pipe was laid by anyone at any time. Assuming there was a ditch which was filled in, there is no evidence it was filled in by Employee. (Observation). Although there is no evidence wiring, plumbing, sewer, water or power lines were laid in the ditch during the period between the ditch appearing on July 16, and its having been filled in by 7:00 a.m. the following morning, Willot told Ms. Pride: "he's put sewer and power lines and water lines in between his house and shed." (*Compare* Transcript of Willot call to Pride, *with* Investigative reports, July 31, 2008, October 20, 2008).

42) After obtaining Ms. Pride's authorization to continue working, Willott made another telephone call, by its content to a co-worker, but not Johnson, Coronado or Rush, reporting his success obtaining authorization for "all week surveillance" from "Mom, ha-ha it's Joanne." He also stated his dissatisfaction with the remuneration he was receiving from Johnson. (Transcription of Willot telephone call, September 15, 2008, Affidavit of Forrest Cornelison Certifying Transcript, June 11, 2013).

43) Willot is not a credible witness, and any field notes, video footage, and investigative reports based on Willot's work will be accorded no weight. (Judgment).

44) Johnson's surveillance reports repeatedly make such statements as "Claimant showing full range of motion," and "no visible signs of pain or discomfort associated with his

reported injury while involved in this activity." (*See* three Johnson surveillance reports). These statements in the report are contained in the section labeled "Field Notes." Neither Rush, Willot, or Coronado, from whom the field notes were purportedly derived, nor Johnson, who apparently wrote the field notes and whose opinions these statements most likely represent, are physiatrists, physicians, or physical therapists. Johnson's and the investigators' qualifications for rendering these opinions are dubious, and these opinions, and similar opinions appearing throughout all three surveillance reports, will be accorded no weight. (Judgment, observation; experience, facts of the case and inferences therefrom).

45) The surveillance video and reports are not an accurate depiction or rendition of events observed. (Judgment).

46) Observed discrepancies between video footage and surveillance reports, and considerable evidence NIA failed to follow procedures for obtaining reliable surveillance, render the video surveillance footage an unreliable source for accurately depicting the movements and behavior Employee displayed during the time frames presented on the DVDs. (Judgment).

47) The surveillance videos and reports are of little or no utility in the panel's determination whether Employer remains permanently and totally disabled. (Judgment).

48) At Employer's invitation and Employee's request, Alan Blanco appeared at NIA offices to duplicate NIA's original source DVC tapes onto DVD format. (Judy Cornelison; Johnson; Record; Alan Blanco, November 26, 2012; Alan Blanco, November 14, 2013; record). The DVDs he produced bear an "IMIG" label. (Employee's hearing Exhibit 2, admitted December 18, 20, 2012; observation).

49) Mr. Blanco states he was a production manager for IMIG Audio Video in Anchorage, Alaska. He has a degree in communications with an emphasis in Video Production from Southern Oregon University. He has worked with ABC affiliate KDRV editing news packages for reporters, and with NBC affiliate KOBI as a producer and editor. (Alan Blanco, November 14, 2013).

50) According to Mr. Blanco, the original source DVC tapes from NIA's surveillance contained metadata reflecting the dates and times the footage was recorded, but the dates and times were *not* permanently embedded or displayed when the tapes were viewed. He

described metadata as information which is captured during videotaping, but which can be displayed or not. Mr. Blanco noted that when the time from the source tape metadata was displayed, it was in hours and minutes only, not seconds. He opined that since the date and time did not display when the DVC tape was viewed, a new date or time could be programmed into the recording unit when the tapes were transferred to DVD, and a new date or time displayed and then captured on the DVD image. When Mr. Blanco transferred the source tapes to DVD, he recorded with hours, minutes and seconds displayed. (Blanco, November 14, 2013).

51) The August 15, 2007 video footage Dr. Seres examined was also examined by Craig Haft. Mr. Haft is a professional camera designer, engineer and operator, experienced in all aspects of production, technical direction, coordination and engineering of covert multi-camera productions. His credits include work with CBS 60 Minutes, CBS 48 hours, Anderson Cooper Live, Dateline NBC, ABC News 20/20, and PrimeTime Live ABC. He has a degree from Stony Brook University in Scene Design & Stage Lighting, and continuing education through training seminars in Data Handling, Red Camera, SONY F-950, SONY F-35, Panasonic HPX-3700, Apple Training, Final Cut Pro 7, and Avid. He owns and operates a SONY FS-100 HD video camera, Final Cut Pro 7 editing software, Porta-Jib Traveller, Portable Camera Jib, a modified "Tech Van," and Hidden Camera, BodyWear and Remote Control Camera Systems. He is not a professional witness, and has not testified in criminal or civil proceedings in the past ten years. (Craig Haft Resume).

52) Mr. Haft examined the NIA DVD labelled August 15, 2007, stating it's duration was one hour and 57 minutes, and compared it with the IMIG DVD for that date. The NIA and IMIG DVDs were identified and admitted into evidence in previous proceedings in this case. (Haft report, November 12, 2013; Employee's Hearing Exhibit 2, December 18, 20, 2012).

53) Comparing the NIA and IMIG copies of the original source DVC tape from August 15, 2007, Mr. Haft opined that but for the date and time stamps (NIA's with the hour and minute; IMIG's with the hour, minute and seconds), the two DVDs were identical. Mr. Haft made the following observations and rendered the following opinions:

a) At 9:42, an entire minute is missing although immediately before and after the missing minute, Employee is in full view (Haft report, November 12, 2013);

b) At 10:01 a.m., there is a distinct "jump cut edit" indicating 14 seconds are missing. Mr. Haft opined this is due to either the camera operator stopping and starting the video tape within the camera, or because an editor "cut out" 14 seconds with a non-linear editing system such as "Final Cut Pro." Notably, Employee is in full view both immediately before and after this time omission (*Id.*). NIA's Johnson used Final Cut Pro software to edit the DVC tapes. (Johnson);

c) At 10:08 a.m., a minute timed at only 23 seconds, Employee is seen in full view, sitting in the boat. Although Employee is in full view, the video then jumps to 10:09, which is just 13 seconds in duration, where Employee is still seen, now apparently bent over in the boat (Haft report);

d) At 10:49, a minute of only 40 seconds duration, Employee is in full view when there is a jump in the video, but the time 10:49 remains displayed. According to Haft, on IMIG's DVD, where seconds are displayed, the cut occurs at 10:49:07 and jumps to 10:49:27 (*Id.*);

e) At 10:54, Employee is in full view when the filming jumps twice, to 10:55, which is three seconds long, and then to 10:56 (*Id.*);

f) At 10:56:54 on the IMIG DVD, Employee is in full view leaning down when, without showing how he gets up, the video jumps to 10:59:52. Then 10:59 is just seven seconds long during which Employee is in full view when the video jumps to 11:00, where Employee is still in full view (*Id.*; underscore in original);

g) At 11:01, 11:01:10 on the IMIG DVD, Employee is seen sitting inside the boat in a front seat drinking from a thermos, then standing up, left hand going into his left pocket, then to his mouth and ingesting something. (*Id.*). These latter actions were observed at hearing, when Employee was seen retrieving a pill container from his left pocket with his left hand, and ingesting pills. This appears to be what is occurring between 11:01:26 and 11:01:45. (Observation).

h) At 11:02:03 on the IMIG DVD, Employee is visible sitting down, 4 seconds go by, then, without showing how Employee gets up, the video jumps to 11:05:09,

when Employee is seen standing inside the boat (Haft report; underscore in original);

i) At 11:06, a 16-second minute on the NIA DVD, Employee is seen inside the boat, bending or squatting down out of full view when at 11:06:16, before showing how Employee gets up, the video jumps to 11:07:25, when Employee is seen standing inside the boat (*Id.*; underscore in original);

j) At 11:07, Employee is seen bending at the rear of the boat when, without showing how he gets up, at 11:07:34 on the IMIG DVD, the video jumps to 11:07:40 and then at 11:07:43, it jumps to 11:16:41 (*Id.*; underscore in original);

k) The minute displayed as 11:16 on the NIA DVD is 11 seconds long. Employee is still visible when the video jumps to 11:17, which is just 17 seconds long (*Id.*);

l) At 11:21, four seconds are missing during which Employee is walking behind a houseboat and still visible (*Id.*);

m) At 11:22, Employee is in full view squatting, but without showing him getting up, the video jumps to 11:24, with 11:23 skipped entirely, when Employee is then seen outside the boat. On the IMIG DVD, this jump occurs at 11:22:42/43 over to 11:24:57. 11:24 is just two seconds long (*Id.*);

n) At 11:25, just 50 seconds long, while Employee is in full view, the video jumps from 11:25:33 to 11:25:37 (*Id.*);

o) The time displayed as 11:26 is of only 25 seconds duration. Observable from the IMIG DVD, a time stamp jump takes place at 11:26:19 over to 11:26:42, then at 11:26:57 it jumps to 11:27:14. 11:27 is then only 33 seconds long. Employee is in full view at all times. Haft opined that can zooming in or out does not explain these three jumps in time (*Id.*).

p) At 11:31, just 41 seconds long, Employee is in full view when the video jumps from 11:31:38 to 11:31:58 (*Id.*);

q) At 11:32, just 33 seconds long, the video jumps from 11:32:33 when Employee is in view and partially down, to 11:33:09, without showing Employee getting up (*Id.*);

r) At 11:34, a minute displayed for slightly more than one second, with Employee in full view bending down inside the rear of the boat, without showing how he gets up, the video jumps to 11:35:30, when he is seen standing inside the boat (*Id*.);

s) At 11:35, a minute is displayed as only 29 seconds in duration. (*Id*.)

54) Mr. Haft's observations between 9:42 a.m. and 11:35 a.m. on the video footage labeled August 15, 2007, corroborates the board panel's observations from viewing the same video footage. (Observation).

55) In the one hour 57 minutes of the NIA DVD labeled August 15, 2007, there are over sixty time-breaks, either cuts or edits, in the DVD, in many of which Employee is in full view and within the camera's proximity. (Observation, corroborated by Haft).

56) Johnson's and the investigators' suggestion that portions of video are absent while a subject is in full view only when the investigator is trying to avoid detection, to change batteries, or to change position, does not adequately explain the number of jump cuts in the viewed video footage. (Johnson; Rush; Willot; Coronado; observation; judgment).

57) This number of cuts, jumps or edits, in less than two hours, when Employee is in full view and proximity of the camera, diminishes the credibility of NIA's representative and agents, who testified they kept the camera rolling whenever possible when Employee was in view, and contributes to the unreliability of the footage as a depiction of Employee's movements and behavior during the time presented. (Experience, judgment, observation, facts of the case and inferences therefrom, corroborated by Haft.).

58) The missing footage could have been accomplished by the field investigator stopping his recording; or by stopping the recording, rewinding what was shot, and recording over the undesired footage; or by the editor eliminating unwelcome footage in the cutting room. (Experience, judgment, corroborated by Haft).

59) Because both NIA and IMIG copied the original source surveillance footage from the camera's DVC tapes onto DVDs, and since each was able to display and burn the time onto the DVDs differently (NIA showing hours and minutes only, and IMIG showing hours, minutes and seconds) it is reasonable to conclude the date and time were not permanently embedded and displayed on the original cassette tapes, as Johnson testified, but appeared only in the tapes' metadata, as stated by Blanco. (Experience, judgment,

observation, facts of the case and inferences therefrom, corroborated by Haft, corroborated by Blanco).

60) The panel's observations on viewing the video footage labeled August 15, 2007, also contrasts with Dr. Seres' June 24, 2008 observations and, accordingly, his opinions based on those observations. Contrary to Dr. Seres' assertion "there is never an indication of a limp," Employee is seen with a slight limp after periods of activity. Dr. Seres' statements "there is nowhere in the video that the patient holds onto his back . . . or indicated . . . pain developing," and "he worked many hours without any apparent physical distress," are also inaccurate. At 9:29 Employee is observed holding his back with his right hand. At 9:30, while walking back to his truck, he is holding and patting his right leg with his right hand. At 9:33 Employee's back brace is visible. At 11:01 Employee is seen removing his pill container from his pocket, and taking his medication. Unpersuasive is Dr. Seres' observation, one he termed "especially noteworthy," that Employee never demonstrated discomfort when resuming the standing position. What is noteworthy are the number of cuts in the August 15, 2007 video footage when Employee is in full view, sitting or bent down, and then after a jump cut shown standing, without capturing his efforts to rise. (Seres report, June 24, 2008; observation; judgment).

61) Concerns about the video footage's reliability are not ameliorated by the testimony of Charles Hewitt, who while credible, did note some minor discrepancies between the original source tapes and the original source DVD, but more importantly, was not asked and did not render an opinion on the ramifications of an absent time display on the source DVC, on jump cuts in the footage when Employee remained in full view, the substance and quality of the videography and the affect deficiencies in the videotaping had on the reliability of the movement and behaviors depicted in the videotape. (Hewitt; observation, judgment).

62) Since according to the testimony of NIA's agents, all of the video footage and surveillance reports were generated in the same manner, it is reasonable to infer, without watching all 15 hours of video surveillance and comparing it to the recitation of dates and times in the surveillance reports, that those videos and reports are as similarly flawed as the August 15, 2007 surveillance footage and report. (Judgment, observation, facts of the case and inferences therefrom).

63) Although the weight of Dr. Seres' opinions is diminished by the faulty video surveillance and discrepant reportage upon which he relied, inconsistencies in his own reporting contribute to the panel's decision to accord no weight to his opinions. On page 1 of Dr. Seres' June 24, 2008 report, for example, he refers to the examinee as Floyd Cornelison. On each of 23 succeeding pages he identifies the examinee as "Jack Calabria." (EME Report, Dr. Seres, June 24, 2008). On page 2 of the report, Dr. Seres opines Employee's "severe cramping in both lower extremities that will awaken him from a sound sleep" are "not a sign of nerve root irritation or scarring," and Employer "does not have radicular pain radiation." On page 3, however, Dr. Seres notes Employee's episodic, jolting pain "will radiate from his back into his foot," and opines it "might be related to nerve root scarring." (*Id*.). On page 19, Dr. Seres states he based his opinions on video he viewed documenting Employee's activity from 7:00 a.m. through 3:30 p.m. on August 15, 2007. In no version of the videos produced and filed does any of the recording for August 15, 2007 begin before 8:18 a.m. (Observation). The investigative report confirms video recording only began at 8:18 a.m. on that date. (Observation). NIA's own footage and surveillance report reflects all filming ceased at least an hour prior to 3:30 p.m. as Dr. Seres' reported. (Observation).

64) Inconsistencies continue through Dr. Seres' October 4, 2013 deposition testimony Replying to questioning concerning his 2008 reported suspicion Employee was diverting his prescribed drugs from their legal usage, Dr. Seres' described his 2008 report as "merely indicat[ing] that [drug diversion] was a possibility." His report, however, while opining Employee has either developed a tolerance to or is diverting his drugs, states unequivocally "The latter is strongly suspected . . . Again, I strongly recommend that the patient be investigated for drug diversion." In his March 4, 2009 report, Dr. Seres, unambiguously opined, "I believe that the surveillance studies demonstrate Social Security Fraud . . . that I am expected to report . . . to the Social Security Administration. I will delay that report until I hear from you. Please let me know whether or not you are dealing with this issue." At his deposition Dr. Seres tried to minimize his unmistakable accusation of Employee's wrongdoing, calling his reporting simply a belief that "what I saw [in the video] doesn't fit his clinical picture." (Judgment; observation; *Compare* Seres' reports *with* Seres Deposition, October 4, 2013, at 93-96).

65) There is no evidence Employee ever diverted to others any of the medications prescribed for his back pain. (Record).

66) There is no evidence Employee committed fraud in an effort to obtain benefits under either the Alaska Workers' Compensation Act or the Social Security Act. (Record; Deisher; judgment, observation, experience, facts of the case and inferences therefrom).

67) There are further deficiencies in and discrepancies between Dr. Seres' reports and his deposition testimony. Consistent with his reports, Dr. Seres first admitted at deposition his opinion Employee could return to work "full time" doing "fairly heavy work" was based on the video footage reflecting Employee "capable of doing these things without restriction or without taking breaks or without observing pain behavior." When pointed out to him the video surveillance he viewed and represented in his reports as full days of heavy work were instead snippets in time, where eight and one half hours was condensed down to less than two hours, Dr. Seres retreated, opining that because Employee was seen in the video working "episodically . . . it seemed to me that that could be – that he could do it on a full-time – he didn't seem worried about it." Dr. Seres provided no explanation, however, how the episodic physical activity he saw Employee perform on the video footage proved an ability to perform full time in the workplace. As another example, Dr. Seres failed to elucidate how the "remarkable scarring" and "sclerosis of musculature," which in 1999 he opined rendered Employee totally disabled and unable to return to work, had reversed itself between then and his 2008 and 2009 reporting. For these reasons too, Dr. Seres' opinion Employee can return to work full time doing "fairly heavy work," and his opinions Employee could return to work as an apartment house manager, hotel clerk and operating engineer, will be accorded no weight. (Judgment; observation; *Compare* Seres' reports *with* Seres Deposition, October 4, 2013, at 93-96).

68) Dr. Seres' reports are noteworthy, however, for the fact that Employee's June 24, 2008 report to Dr. Seres of symptoms, pain levels, and physical limitations are remarkably consistent with his long term reporting to his treating providers, including Dr. Chandler and other providers, with his testimony before the Board at this and a prior hearing, and in his deposition testimony. (Observation).

69) The most objective and persuasive evidence of Employee's physical capabilities came from A. Jean McCarthy, PT. (Judgment).

70) Ms. McCarthy has been a practicing physical therapist for over 40 years. She holds a post-graduate degree in physical therapy, and has been trained in performing Key Functional Assessments (KFA). At Employer's request, Ms. McCarthy conducted the KFA on November 5, 1997. At the request of vocational rehabilitation counselor Jon Deisher, she conducted another KFA of Employee on August 15, 2010. She determined that although Employee exhibited exaggerated pain behavior, the KFA measurements objectively demonstrated his efforts were valid. She concluded Employee had a workday tolerance of two to three hours, with sitting from one to two hours of 10-15 minute durations, standing from one to two hours with 15 minute durations, and walking two to three hours, frequent short distances, and could not work an eight hour day doing even sedentary work. She acknowledged there was consistency between the 2010 KFA's work tolerance measures and the KFAs and PCEs conducted in 1997, 1998, and 1999, noting, however, Employee's strength has decreased slightly over the 13-year period between the first and last evaluations. (McCarthy deposition; McCarthy Report, August 15, 2010).

71) Based on the KFA's objective measurements, Ms. McCarthy specifically disapproved Employee returning to work as an operating engineer, finding him unable to meet its strength and kneeling requirements. She disapproved "Deliverer, Outside," (DOT Code 230.663-010) because its 50 pound lifting requirement exceeded Employee's abilities, and "Receptionist" (DOT Code 237.367-038) given Employee's inability to sit. She noted that while Employee met the physical requirements listed for telephone solicitor, sales clerk, and general clerk, he could perform these jobs for only two to three hours per day, and only if his sitting, standing and walking tolerances were accommodated by an employer. Ms. McCarthy maintained her opinions despite viewing the surveillance video footage. (McCarthy deposition; McCarthy Report, August 15, 2010; McCarthy "Not Approved" DOT Code 859.683-Q10; DOT Codes 186.167-018, 238.367-038, "Approved" only with accommodations, August 17, 2010).

72) At the parties' request, Richard D. Fuller, Ph.D., Clinical Neuropsychologist, evaluated Employee over a period of two days, and provided cogent evidence. He observed Employee walked stooped forward, leaning to the left, with a mild limp. Employee could only sit for up to 15 minutes before standing for 10 to 15 minutes. He brought pillows on which he sat and leaned to the left to minimize his pain. The panel noted Employee

brought pillows to the hearing and used them in a similar manner. To Dr. Fuller's office he also brought a microwaveable heating pad he warmed up in the microwave oven. Dr. Fuller interviewed Employee and administered a battery of psychological tests. Test results were found a valid reflection of Employee's current level of functioning. They revealed Employee's learning and memory are in the deficient or low-average range. He has attention and concentration difficulties. Comparing test results with similar testing done in October 1999, Dr. Fuller found increased psychological distress suggesting an increased degree of depression, tension, worry and nervousness, more difficulty coping with stressors, and increased feelings of inadequacy and inferiority. Dr. Fuller opined Employee's test results were those commonly found in chronic pain patients. He opined his test performance showed he was putting forth good effort, and was validly expressing concerns about his symptoms, not exaggerating them. Dr. Fuller diagnosed chronic pain due to medical condition, adjustment disorder with anxiety and depression, history of attention-deficit/hyperactivity disorder, chronic low back pain due to failed back surgery, sleep disturbance, significant psychosocial stressors, including financial difficulties, and coping with a chronic condition. Dr. Fuller recommended antidepressant medication, as well as individual psychotherapy to help him learn to manage the increased psychological difficulties he is experiencing. If Employee were to return to the work force, Dr. Fuller explained, he would need various accommodations, including added exposure and practice in learning new information, prompts and cues to remind him to perform various tasks, and frequent breaks, including the ability to change positions every 15 to 20 minutes to help manage his chronic pain. (Fuller Report, August 18, 2010; observation).

73) The most thorough and persuasive examination of Employee's vocational potential was performed by Jon Deisher. Mr. Deisher holds a masters degree, has been a vocational rehabilitation counselor since 1978, and a certified vocational rehabilitation counselor since 1981. He was the Director of the Alaska Division of Vocational Rehabilitation from 1978 to 1986, and the Rehabilitation Benefits Administrator for the Alaska Division of Workers' Compensation from 1986 to 1988. He has been in private practice as a vocational rehabilitation counselor since 1988. (Deisher).

74) To render an opinion on Employee's employability, Mr. Deisher interviewed Employee and his wife, and obtained a current physical capacities evaluation from Ms. McCarthy.

He compared the results of Ms. McCarthy's PCE with three others conducted over the previous 13 years, noting all were determined valid measures of Employee's abilities and the results obtained from all PCEs were consistent. He read Ms. McCarthy's deposition. Mr. Deisher examined the SCODDOT[2] Job Analysis descriptions and physical requirements for a number of suggested occupations and compared those requirements to Employee's physical abilities obtained from the current PCE. He provided the PCE to Employee's treating physician Dr. Chandler, and requested and obtained Dr. Chandler's opinion on Employee's ability to perform those jobs. He read Dr. Chandler's deposition. Mr. Deisher reviewed Dr. Seres' June 24, 2008 and March 4, 2009 reports, and his two deposition transcripts. He viewed the DVDs produced by NIA. He read Dr. Fuller's neuropsychological evaluation report. Mr. Deisher was also present for and considered the hearing testimony of Alizon White, a vocational rehabilitation specialist retained by Employer, who opined Employee had the physical capacity to perform as a delivery driver, receptionist and autobody parts shop customer service representative, and these jobs existed in either the Anchorage or Mat-Su Valley labor markets. (Deisher; Deisher report, August 25, 2010; Deisher report, November 13, 2013).

75) In response to several questions posed by Mr. Deisher concerning Employee's vocational potential, Dr. Chandler opined Ms. McCarthy's PCE was generally consistent with Employee's current medical condition, although Dr. Chandler opined Employee's workday tolerance was 2-3 hours every *other* day, not consecutive days. It was his opinion Employee could reasonably be expected to have "good days" and "bad days" in which his ability to perform physically would vary significantly. He agreed Employee's chronic pain and pain medications limit his physical and mental capabilities. Dr. Chandler opined Employee's functional capacity, pain and pain medications limit his ability to safely and competently operate a commercial vehicle. Dr. Chandler disagreed with Dr. Seres, and opined Employee does not have the physical capacity to perform as an apartment house manager, hotel clerk or operating engineer, and is not capable of performing the activities required of those vocations in the competitive marketplace eight

[2] The United States Department of Labor's *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles, revised.*

hours per day, five days per week. (Chandler responses to Deisher letter, August 18, 2010).

76) Mr. Deisher opined, and the panel concurs, the opinions reflected in Dr. Chandler's responses to Mr. Deisher's written inquiry are more considered responses, more objective, and more reliable than any contained in his deposition testimony in response to being shown selected portions of the flawed NIA surveillance videos. (Deisher; Deisher report, August 25, 2010; experience, observation, judgment).

77) Mr. Deisher opined that Dr. Seres' conclusion Employee could work full time doing "fairly heavy work," or as a heavy equipment operator was biased by the condensed and edited video surveillance and surveillance report provided, failed to consider the objective measurements a current PCE would have provided, and is unreliable for these reasons. The panel concurs that these reasons contribute to its decision to give little if any weight to Dr. Seres' opinions. (Deisher; Deisher report, August 25, 2010; judgment).

78) Mr. Deisher opined, and the panel concurs, Ms. White's vocational evaluation was inadequate, her job descriptions generic, her labor market survey deficient and her opinions, based on the erroneous assumption Employee has the physical ability to work 40 hours per week, misplaced. (Deisher; Deisher report, August 25, 2010; judgment).

79) Ms. White was unpersuasive in her testimony Employee was capable of working as a "Courier" and a "Receptionist/Customer Service." Ms. White did not specify which DOT Codes she was using when she concluded Employee could physically perform these jobs. She based her opinion Employee could perform the duties of courier or receptionist on those stated by Dr. Chandler in his deposition testimony, which the panel has dismissed as unreliable, and on Employee's prior work history and experience driving. She did not consider the most current, objective, PCE results, upon which the panel relies. Her opinion openings exist in these occupations which Employee could fill was based on telephone calls she placed the day before and the morning of hearing to "LabCorp" and "Anchorage Messenger Service" for advertised "courier" jobs, and to "Hall's Autobody," "Jewel Lake Bowl," and "Microcom," for "receptionist" jobs. (White).

80) The job with Anchorage Messenger Service (AMS) required an ability to lift 50 pounds, with perhaps a 40 pound accommodation, was full time and involved driving between

Anchorage and the Valley. Ms. White failed to indicate the frequency at which either 40 or 50 pounds would require lifting, an important consideration according to SCODRDOT. (Experience). The LabCorp job required delivering medical specimens between Anchorage and the Valley, and lifting up to 20 pounds. The lifting requirements for both jobs exceed Employee's lifting capacity. The 2010 PCE measured Employee's ability to engage in frequent bilateral lifting at between 6.0 and 12.6 pounds, and occasional bilateral lifting at between 25.8 to 28.0 pounds. (White; 2010 McCarthy PCE, KFA at 2). Both courier jobs require a good driving record, reliability, and possibly a physical examination. Ms. White conceded both jobs required multiple commutes between Anchorage and the Valley daily, and would involve 10-11 hours of driving daily. Ms. McCarthy measured Employee's ability to sit, and found him unable to do so for more than 15 to 30 minutes without having to get up and change positions. Ms. McCarthy and Dr. Chandler opined Employee cannot work consecutive days. Employee, Mrs. Cornelison, Forrest Cornelison and Jesse Cornelison were persuasive in their testimony that Employee is unable to drive to and from the Valley without stopping at least once, and is unable to do so on consistent and consecutive days, an obvious requirement for either of the two full-time messenger jobs Ms. White recommended. (Judgment, observation, experience, facts of the case; Deisher). Ms. White did not ask either AMS or LabCorp whether they would hire drivers who required, as does Employee, 690 mg. of opioid medicine daily to function, or whether clean drug tests were administered or required as part of either a pre- or post-hire physical examination. Her testimony that Employee's narcotic drug regimen would not bar his employment with either courier job since neither required a commercial driving license was unpersuasive. Mr. Deisher opined, and common sense dictates that an employer is unlikely to hire as a full-time driver an individual requiring 690 mg of opioid medication to function. Employee cannot physically perform either of the courier or messenger jobs White suggested. (Judgment).

81) Convincing, objective measurement through the KFA establishes Employee cannot work full time in even a sedentary job. (McCarthy 2010 PCE, KFA; Deisher; judgment, experience, observation, facts of the case and inferences therefrom).

82) At least two of the three receptionist positions Ms. White suggested, at Hall's Autobody in the Valley, and Jewel Lake Bowl in Anchorage, were also full-time jobs, and thus exceed Employee's workday tolerance. (Judgment). The customer service representative job at Microcom, in Palmer apparently offered full-time and part-time positions, but Ms. White defined part-time as 20 hours per week. This too exceeds Employee's workday tolerance of 2-3 hours daily. (McCarthy 2010 PCE). Ms. White acknowledged she did not consider how Employee's appearance, now a 57 year old man,[3] bent forward at the waist, would affect his employability as a receptionist or customer service person when competing with a younger, non-disabled job applicant, but conceded that without further training Employee would need to be "selective" in the jobs he pursues. She acknowledged she did not know with certainty whether an employer could ask a prospective employee about their use of controlled substances, but believed they could only ask whether there was any reason an employee could not perform the job sought. After admitting she failed to ask these employers whether drug testing was required from prospective employees, her response that if it was required she believed the help wanted ads would have said so, was unconvincing. (White; judgment, observation, experience).

83) More persuasive was Mr. Deisher's opinion Employee suffers considerable competitive disadvantage in the labor market due to his limited physical capacity, a workday tolerance of no more than three hours, his appearance bent over at the waist, and an inability to produce a clean urine sample given his prescription narcotic usage, rendering him unemployable. (Deisher; judgment, observation, experience).

84) Jesse Cornelison (Jesse) is the older of the Cornelisons' two sons. He is 34 years old, married, with two children. Jesse is a heavy equipment operator running a gravel crusher for road construction. He testified that before he was injured Employee hauled the 800 square foot house Employee and his wife live in today from Anchorage to his property in Wasilla. Employee remembers his brother Forrest's birth in the home 29 years ago. Employee hauled another building, a cabin, which sits as a rental property on Employee's Wasilla land. Jesse testified that before Employee became disabled, he could operate all types of heavy equipment. Following the example set by his own father, Employee put Jesse to work when he was young, according to Jesse, at age five, washing dishes in a

[3] Who to some appears to be in his 70s. (Kaylee Fischer).

road camp. (Employee; Jesse). Jesse remembers Employee telling him he was proud of him when he worked alongside his father for fifteen hours one day when he was 10 or 11. By 13 or 14 Jesse was operating Employee's backhoe. Jesse was credible in his assessment that while there is no piece of heavy equipment he cannot operate, Employee was a better equipment operator before he was disabled than Jesse is today. Based on his own experience as a hard-working man, Jesse believes his father worked harder and accomplished more before he was disabled than Jesse believes he is on track to accomplish. As a heavy equipment operator in his prime, Jesse was convincing Employee could not compete for work in the current economy given his disability. Jesse was truthful in his assessment that the backhoe Employee is seen operating in the video surveillance is on rubber tires, not tracks, and Employee is operating it on a smooth gravel topped area, one of the least jarring areas to run equipment. (Jesse; judgment). Jesse testified credibly Employee has good and bad days, making him unreliable as an employee for any employer. Jesse corroborated other testimony that Employee's condition deteriorates as the day progresses, giving as convincing examples Employee having to leave family Christmas parties early, not accompanying family members to Mat Su Miners games after a Father's Day barbecue, no longer playing the guitar, and his inability over the years to lift his grandchildren. He corroborated Employee's testimony that he has to take his back brace periodically given the discomfort it causes over time. He testified persuasively Employee taught him that the worst a man could be is a liar or a thief, and was convincing in his opinion his father is an honest man, who made Jesse the man he is today. (Jesse Cornelison, judgment).

85) Forrest Cornelison (Forrest) is the younger of the Cornelison's two sons. He is 29 years old. He graduated from Texas A & M University with a Bachelor of Science degree in Marine Transportation, and was employed in his field within six months of graduation. He serves aboard the MV Siswa as a Ship's Captain Mate, hauling everything needed for servicing oil rigs between the Gulf of Mexico, through the Panama Canal, to Alaska. Forrest testified persuasively about his observations of his father's work and work ethic, and the changes his disability has brought. He explained that the "shop" across from the Cornelison's home was salvaged from an old school in the early 90s, when he was nine or 10 years old. The plan was to build in a two-story apartment, where Mr. and Mrs.

Cornelison would live, with the shop adjacent. Since Employee was doing the work with help from his sons, the "shop" has not progressed since Employee's injury. It lacks internal framing, sheetrock, plumbing or insulation. When Forrest was in high school he operated Employee's backhoe and with instruction from Employee put in a septic system, but the shop is not connected to it. Before his injury, Employee taught Forrest mechanics, carpentry and guitar, vocations and avocations Employee pursued and enjoyed before his injury but can no longer perform. Forrest also corroborated testimony from Employee, Mrs. Cornelison and Jesse, that Employee cannot sit in vehicles for long periods of time, and as the day progresses, his pain increases and his mood darkens. (Forrest Cornelison).

86) Jesse and his brother Forrest's testimony that Employee was a hard-working man before his work injury, and their opinions he would be working a full time job now if he was physically able, were persuasive. (Jesse; judgment).

87) Judy Cornelison continued her employment as a cook with the Mat-Sue Valley School District after Employee's injury, and is the family breadwinner. (Judy Cornelison; Employee). She testified credibly Employee has no computer skills. Corroborating Employee's and the couple's son's testimony, she testified persuasively Employee cannot work full time because his back pain requires him to lie down for varying periods every day. She conceded he could maybe work two to three hours per day every other day, but an Employer would need to know Employee might have to leave early. Mrs. Cornelison's explanation for Employee being on the roof: to show the satellite installation technician the location of the old satellite dish holes rather than have him drill additional holes in a newly re-shingled roof, is convincing. She held the ladder while Employee descended from the roof. (Judy Cornelison). The "field notes" for this event reflect investigator Rush observed Mr. Cornelison's descending the ladder, yet no footage of the descent itself has been produced, suggesting selective filming or editing of events on that day. (August 24, 2007 investigative report; observation, judgment).

88) Scott Lyon and Kaylee Fischer provided corroborating and convincing lay testimony of Employee's disabilities. (Judgment).

89) Mr. Lyons is the sales manager of North Coast Electric. He has been Employee's neighbor for eight years. The Lyons and Cornelisons are neighbors who share a driveway, and are not close friends. Mr. Lyon sees Employee on his property, and talks

to him perhaps once or twice a month. He described Employee as "pretty crippled up," and 'hunched over," and "can't straighten up." Mr. Lyon was credible in his assertion he often sees Employee when Employee is unaware he is observed, and Employee's appearance and gait are no different from when he knows he is seen. Mr. Lyons saw Employee once try to mow his lawn but was unable to finish. He sees him using a cane or stick to get around. He has helped Employee lift and move objects over the weight of a full gallon of gas. In the past he saw Employee use a 4-wheeler between his house and shop across the street, but not for a few years. He has not seen Employee use his boat after one or two times it was used years ago. (Lyons; judgment)

90) Kaylee Fischer was returning to Alaska from a business trip to Minnesota in May 2012. She was seated with a co-worker in the rear of the plane, near the bathrooms, during this five to six hour flight. She observed Employee having to get up from his seat and walk every 20 to 40 minutes. They were strangers. She described him as frail, uncomfortable, and in obvious pain. On arrival in Anchorage Ms. Fischer was met by her husband, who was standing with a co-worker, with whom Judy Cornelison was talking. Ms. Fischer later asked her husband's co-worker what was wrong with Employee, and was told he has a chronic back problem. She was "shocked" when she learned he was in his 50s, having herself estimated from Employee's appearance that he was in his 70s. Ms. Fischer had not seen Employee before nor after this encounter. They remain strangers. (Fischer; judgment).

91) The evidence elicited through Bill McNabb's deposition testimony added nothing to either party's position. That neither party mentioned this evidence in their briefs or oral argument demonstrates its lack of probative value. (Judgment).

92) Employee's counsel filed an Affidavit of Attorney Fees before hearing, enumerating 186.25 hours of attorney time at $325.00 per hour. He verbally supplemented his affidavit at the close of the second hearing day and by supplemental affidavit, enumerating another 27.5 hours, for a total of 213.75 hours. For his efforts, counsel seeks an award of attorney fees totaling $69,468.75. Employer objects to entries related to a civil lawsuit Employee has filed against NIA, Dr. Seres and others (0.6 hour on June 20, 2013), time spent researching a retired copier's copy count (1.0 hour on December 1, 2013), time spent discussing a fee contract (1.4 hours on June 3, 5, 2013), and the

ambiguous nature of an entry reading "take work home for periods of insomnia." Employer did not object to Mr. Harren's hourly rate of $325.00, or the number of hours expended other than for the entries noted. (Affidavit of Attorney Fees and Costs, Richard L. Harren; Supplemental Affidavit of Fees and Costs; Employer's Opposition to Affidavit of Fees and Costs). Mr. Harren has been practicing law in Alaska for over 30 years. (Alaska Bar Association Attorney Directory).

93) Employee further seeks an award of fees for 27.3 hours of attorney time expended by Nancy Driscoll Stroup between November 2009 and January 2010, at the hourly rate of $300.00, for the sum of $8,190.00. According to Mr. Harren, Ms. Stroup withdrew from Employee's representation due to its nature, intensity and her level of experience. While her services are delineated by the initials "NDS" on a combined listing of services provided by Mr. Harren and paralegal assistants in Mr. Harren's office in Wasilla, Alaska, it is noted that during this period and to date Ms. Stroup was and is the "owner" of "Law Office of Nancy Driscoll Stroup" in Palmer, Alaska. Ms. Stroup has not filed an Affidavit of Attorney Fees. Her level of experience is unknown. (*Id.*, Alaska Directory of Attorneys, Spring 2008, Fall 2009, Spring and Fall 2011; Alaska Bar Association Member Directory; record).

94) Employee also submitted an invoice he received from Principe Law Office issued on March 3, 2012. These were for services rendered and costs incurred by Dennis Principe, Esq. between December 19, 2011 and March 1, 2012, at an hourly billing rate of $400.00, and totaling $15,931.97. Mr. Harren's affidavit indicates Mr. Principe practiced law in the same building as Mr. Harren, and took over Employee's representation when non-attorney representative Randi Olson, previously representing Employee, was no longer able to assist. Nothing is known of Mr. Principe, who the affidavit indicates has withdrawn from the practice of law in Alaska, other than Mr. Harren's opinion Ms. Olson was a more capable advocate than Mr. Principe. Mr. Principe has not filed an Affidavit of Attorney Fees. His level of experience is unknown. Employer objects to Mr. Principe's fees, suggesting they appear related to the civil lawsuit and are not compensable under the Act. Mr. Principe entered an appearance in this proceeding on January 11, 2012, and withdrew on May 12, 2012, after having filed a stipulation to continue, and a petition to dismiss Employer's petition to terminate benefits, *de minimis*

efforts overall. The vast majority of entries on Mr. Principe's invoice involve contacts related to Employee's civil action. (Affidavit of Fees and Costs, Richard L. Harren; Employer's Objection to Affidavit of Fees and Costs; judgment; record).

95) Separate affidavits of time expended were filed by legal assistants Roxie Miller, Randi Olson and Anuhea Reimann-Giegerl. (Record).

96) Ms. Miller's affidavit itemizes 24.95 hours of paralegal time expended while employed by and under Mr. Harren's supervision. Entries from June 3, 5, October 31, November 5, 6, 7, 13, 14, and 19, 2013, and totaling 11.35 of those hours, are clerical in nature. Reimbursement at $150.00 per hour is sought for Ms. Miller's efforts. Employer did not object to Ms. Miller's hourly rate. (Affidavit of Roxie Miller; judgment; Affidavit of Richard L. Harren). An award for 13.6 hours of paralegal time at $150.00 per hour, for a total of $2,040.00, will be made for Ms. Miller's time. (Observation; judgment).

97) Ms. Reimann-Giegerl's affidavit enumerates 24.95 hours of paralegal time spent while employed by and under Mr. Harren's supervision. Entries from June 24, July 9, 15, August 2, September 27, October 4, November 15, November 22, November 25, and November 27, and totaling 8.75 hours, are clerical in nature. Reimbursement at $150.00 per hour is sought for Mr. Reimann-Giergerl's efforts. While Employer does not object to Ms. Reimann-Giergerl's hourly rate, it objects to Ms. Reimann-Giergerl's fees entirely as her affidavit was accompanied initially by a printout of her services in an unrelated matter. Ms. Reimann-Giergl corrected this oversight by filing and serving the correct entries by 10:00 a.m. on December 5, 2013. Employer's opposition was not due until December 9, 2013. Employer had ample time to review Ms. Reimann-Giergerl's entries. (Affidavits of Anuhea Reimann-Giergerl; judgment; Employer's Opposition to Affidavits of Fees and Costs). An award for 16.2 hours of paralegal time at $150.00 per hour, for a total of $2,430.00, will be made for Ms. Reimann-Giegerl's time. (Observation; judgment).

98) Ms. Olson's affidavit enumerates 190.5 hours of paralegal time expended while employed by and under Mr. Harren's supervision between September, 2009 and December, 2010. The hourly fee sought for Ms. Olson's services is $180.00. Ms. Olson's affidavit excludes the periods during which Employee was without counsel and she appeared as his non-attorney representative. Employer objects to Ms. Olson's time

"as being excessive and not reasonable." This is interpreted as unnecessarily excessive time spent by Ms. Olson on the items delineated. (Affidavit of Randi Olson; Affidavit of Richard L. Harren; Employer's Opposition to Affidavit of Fees and Costs; observation; judgment).

99) The first six entries on Ms. Olson's affidavit, totaling 12.5 hours, describe the services performed as "File assembly and review; assist client in protecting in [sic] procedural rights and facilitate client's acquisition of attorney." This description suggests these efforts were employed prior to Mr. Harren's acceptance of Employee's case. According to Mr. Harren's affidavit, Ms. Olson is a personal friend of Employee and his wife. (*Id*.). She appeared at various times as Employee's non-attorney representative. Because these services were not performed under Mr. Harren's supervision, the hours listed for the period September 21, 2009 and October 26, 2009 will be disallowed. (Observation; judgment).

100) Comparing the next nine entries on Ms. Olson's affidavit, totaling 36 hours, with Mr. Harren's initial affidavit containing in chronological order mixed entries from Harren, Stroup, Olson, Miller and Reimann-Giergerl, suggests Ms. Olson was not performing services under Mr. Harren's supervision as the affidavit states, but under Ms. Stroup's, from whom no affidavit was filed and little is known. Because these services were not provided under Mr. Harren's supervision, these hours will be disallowed. (Observation; judgment).

101) Ms. Olson's duplication of Mr. Harren's efforts appears to have occurred when both she and Mr. Harren attended the depositions of Dennis Johnson (11.5 hours), and Employee (10.4). (Affidavits of Randi Olson, Richard L. Harren; observation). These hours will be disallowed. (Judgment).

102) An entry of 2.5 hours on June 17, 2010, where Ms. Olson lists a telephone call with the Clerk of Court in Barrow, Alaska, is unrelated to this case and will be disallowed. (Observation; judgment).

103) Between February 13, 2010 and April 6, 2010, on ten separate dates, Ms. Olson lists having spent at total of 37 hours reviewing NIA materials in preparation for Dennis Johnson's deposition. There is no question but that Ms. Olson's efforts assisted Mr. Harren in preparing for Mr. Johnson's deposition, thereby reducing to 6.5 the hours Mr.

Harren was required to expend preparing for the deposition. However, 37 hours is excessive, particularly considering the enormous efforts the record demonstrates Judy Cornelison spent analyzing and organizing the NIA materials herself. A more reasonable assessment of the time necessary for these efforts, assuming all 15 hours of NIA video surveillance were examined by Ms. Olson, along with Dr. Seres' reports and the three surveillance reports, would be 20 hours. Seventeen hours will be disallowed for these entries (*Id.*; judgment).

104) Although this panel recognizes Ms. Olson assisted Employee when he was without counsel, and no doubt provided Mr. Harren valuable assistance when employed as his legal assistant, what was also apparent at two hearings where Ms. Olson appeared with Mrs. Cornelison as joint non-attorney representatives, is that Ms. Olson's organizational skills are wanting. These observations, as well as the panel's experience, corroborate Employer's assessment the time Ms. Olson spent on various tasks was greater than reasonably necessary. In addition to Ms. Olson's review of the NIA materials in advance of the Johnson depositions, other examples of excessive time spent, or entries which are too vague to assess, include January 14, 24, February 3, 21, and April 15, 2010 through June 30, 2010, where 36 hours was spent doing "file management," "research, " "file review" and "prepare office memo." Accordingly, the panel finds it reasonable to reduce the remainder of Ms. Olson's time by half. According to Mr. Harren's credible representation, Ms. Olson is a law school graduate, though not admitted to the bar. Employer has not opposed the $180.00 per hour rate requested for Ms. Olson's services. As a law school graduate, Ms. Olson's services are appropriately compensated at a rate greater than the $150.00 per hour sought for the other two paralegal assistants in Mr. Harren's office. (Observation, judgment). An additional forty-five hours will be deducted for these entries reflecting excessive time spent, leaving a total of 55.6 hours payable at $180.00 per hour for Ms. Olson's time, or the sum of $10,008.00.

105) Attached to counsel's Affidavit of Costs and Supplemental Affidavit of Costs are four separate itemized invoices for expenses incurred by his office on Employee's behalf. The expenses listed are for physician, vocational rehab specialist and other witness fees and reports, depositions copies, travel costs to attend depositions, long distance telephone calls, copies, postage and mileage fees. Employer does not object substantively to the

entries on these invoices in amounts totaling $5,499.80, $1,518.75, $3,839.14 and $2,291.50, respectively. However, Employer objects to reimbursing Mr. Harren for invoices Employee has already reimbursed him. Employee appears to have paid counsel for the first two invoices for $5,499.80 and $1,518.75. (*See* checks payable to counsel from Employee in these amounts attached to Affidavit of Costs). It is unclear whether Employee has reimbursed counsel for the third invoice, dated November 7, 2013, for $3,839.14, as this sum appears on Judy Cornelison's list of out of pocket costs, yet no copy of the check has been produced. There is no evidence, and it is unlikely Employee has either received or paid an invoice for the fourth and final cost itemization for which an award is sought, totaling $2,291.50. (Affidavit of Attorney Fees and Costs, with attachments, including checks payable from Employee to counsel for $5,499.80 and $1,518.75; Supplemental Affidavit of Attorney Fees and Costs, with attachments; Objection to Affidavits of Fees and Costs).

106) Employer further objects to reimbursing for copies identified on the Supplemental Affidavit of Fees and Costs totaling $525.00, as this sum is a rough estimation, not based on any maintained copy count. According to the Supplemental Affidavit, this amount is for copies charged at $0.15 per copy. (Supplemental Affidavit of Fees and Costs; Opposition to Affidavits of Fees and Costs).

107) Employee provided a detailed six-page itemization of his own out-of-pocket costs totaling $22,397.10, incurred from June 20, 2008 through November 22, 2013, primarily when Employee was either unrepresented, or when Mrs. Cornelison was acting as his non-attorney representative. This bill of costs includes three of four cost invoices from Mr. Harren: $5,499.80, $1,518.75 and $3,839.14, totaling $10,857.69. (Judy Cornelison Affidavit and Bill of Costs; Employer Opposition to Affidavit of Fees and Costs; observation).

108) Employer objects to paying for days Mrs. Cornelison took off work for either litigation purposes, or accompanying Employee to the doctor, and using annual leave. These amounts total $3,128.00. Employer further objects to entries itemized as "Misc[cellaneous]" as too vague. These items total $226.84. (*Id.*). Employer objects to a mileage cost of $49.40 associated with Employee's filing a petition for review in the Alaska Supreme Court. Employer objects to paying for numerous costs Mrs. Cornelison

lists for office equipment and supplies, including a stopwatch, VHS tapes, a television, a DVD player, and a printer/fax, contending the Act does not require reimbursement for setting up a home office or for equipment available for use beyond this case. These durable home office supplies total $562.98.

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, 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, 533-34 (Alaska 1987).

An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (2009).

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;

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

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

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

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;

. . .

The presumption of compensability is "applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). An injured worker is afforded the presumption that all the benefits he seeks are compensable. *Id.* The presumption of compensability applies as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991). The presumption is continuing, and applies to a finding of total disability. An employee found totally disabled presumptively remains totally disabled unless and until the employer introduces 'substantial evidence' to the contrary. *Meek* at 1280; *Bailey v. Litwin Corp.*, 713 P.2d 249, 254 (Alaska 1986).

Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978).

> **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.

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g., Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005). The board has sole discretion to determine weight accorded to medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087, at 11 (August 25, 2008).

Less weight may be given to a physician who appears to be advocating for a party. *Geister v. Kid's Corps*, AWCB Decision No. 08-0258 at 30 (December 29, 2008). *See also Wolfe v. State*, AWCB Decision No. 12-0213 (December 19, 2012); *Dickman v. Providence Washington*

Insurance Group, AWCB Case No. 87-0015 (January 21, 1987); *Hill v. Municipality of Anchorage*, AWCB Decision No. 86-0136 at 13, n. 1 (June 7, 1986).

While lay testimony does not always have probative value in complex medical cases, at times lay testimony is "highly relevant," especially when "it tends to support or contradict the assumptions as to the facts of the claimant's history on which expert witnesses rely." *Smith v. University of Alaska, Fairbank*s, 172 P.3d 782, 789 (Alaska 2007). The Board must make finding about the lay testimony where it is relevant to the issues in dispute. *Pietro v. Unocal Corp.*, 233 P.3rd 604, 615 (Alaska 2010).

The Board has long held surveillance videotapes and related reports may be relevant to an employee's physical capacities, and thus within the scope of discoverable evidence. *Rockstad v. Chugach Eareckson Support Services*, AWCB Decision No. 08-0028 (February 22, 2008).

Addressing the admissibility of surveillance videos in *Geister v. Kid's Corps, Inc.*, AWCAC Decision No. 45 (June 6, 2007), the Commission likened surveillance videotapes to a witness' observations. In the case of surveillance videos, the observations would be those of the videographer. Because videotapes are subject to manipulation, however, which can render the recording an inaccurate representation of a declarant's conduct, the recording witness must lay a foundation for admission of the video. *Geister* at 21.

Determining the weight to be accorded admissible evidence lies entirely within the Board's province. Accordingly, the Board determines the probative value of videotape recordings in a proceeding, not doctors. *Aikens v. Browning Timer of Alaska*, AWCB Decision No. 95-0310 (November 13, 1995).

The Board's record should be open to all evidence "relative" to a claim. In other words, to all evidence relevant or necessary to resolve the claim. The evidence is then winnowed in the adversarial process of cross-examination and weighing in a hearing before the Board. *Rockstad v. Chugach Eareckson Support Services*, AWCB Decision No. 08-0028 (February 22, 2008) citing AS 23.30.135(a), AS 23.30.155(h).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in condition . . . the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases or decreases the compensation, or award compensation…
>
> (b) A new order does not affect compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and payment made earlier in excess of the decreased rate shall be deducted from the unpaid compensation, in the manner the board determines.

A "change in condition" for purposes of modification under AS 23.30.130, necessarily implies a change from something previously existing. It must refer to a change from the condition at the time of the award from which modification is sought. *Fischback & Moore of Alaska, Inc*. v. *Lynn*, 453 P.2d 478 (Alaska 1969).

The plain language of AS 23.30.130(a) "expressly authorizes the Board to modify its own earlier orders." *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158, 163 (Alaska 1996). In the case of a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easeley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). Section 23.30.130 confers continuing jurisdiction over workers' compensation matters. *Id*.

> **AS 23.30.135. Procedure before the board**. In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

Relevant evidence is admissible. Evidence is relevant if it has any tendency to make a question at issue in the case more or less likely. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999) at 6, 8.

The Board is required to make findings about issues that are both contested and material. *Bolieu v. Our Lady of Compassion Care Center*, 983 P.2d 1270, 1275 (Alaska 1999). Findings are adequate when at a minimum they show that the Board considered each issue of significance, demonstrate the basis for the Board's decision, and are sufficiently detailed. *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 953 (Alaska 2005).

> **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.

> **AS 23.30.180. Permanent total disability**. (a) In case of total disability adjudged to be permanent, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . . Permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
>
> (1) area of residence;
> (2) area of last employment;
> (3) the state of residence; and
> (4) the State of Alaska.
>
> (b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not by itself, constitute permanent total disability.

"Total disability" does not necessarily mean a state of abject helplessness. It means the inability because of injuries to perform services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *J.B. Warrnack v. Roan*, 418 P.2d 986 (Alaska 1966).

Alaska has adopted the "odd-lot" doctrine for defining permanent total disability, which holds that "total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market" (footnote omitted). *Leigh v. Seekins Ford*, 136 P.3d 214 (Alaska 2006).

The term "odd lot" was addressed in *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978), and cited favorably Justice William Cardozo's opinion in *Jordan v. Decorative Co.*, 230 N.Y.S. 522, 130 N.E. 634-635-36 (1921): "He is the 'odd lot' man, the 'nondescript in the labor market.' Work if

he gets it, is likely to be casual and intermittent. . . . Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and halt." *Hewing* at 187.

The burden of proving the availability of work is on the employer in odd-lot cases. *Sulkowsky v. Morrison-Knudsen*, 919 P.2d 158, 168-169. (Alaska 1996).

To avoid paying permanent total disability benefits, an employer must show that there is regularly and continuously available work in the area suited to the employee's capabilities, *i.e.*, that he is not an odd-lot worker. *Carlson v. Doyon-Universal Ogden Services*, 995 P.2d 224, 228 (Alaska 2000). *See also Sulkowsky* at 168-169.

In determining whether regular and continuous work is available and "suited to [the employee's] capabilities," the Board must consider the factors identified by the Court in *Hewing.* These "include not only the extent of the injury, but also age, education, employment available in the area for persons with the capabilities in question, and intentions as to employment in the future." *Id.* at 185. Applying the factors outlined in *Hewing*, *Roan* and *Sulkosky*, the Board must determine whether the employee has the physical abilities and vocational skills necessary to work in jobs that are regularly and continuously available. *Id.*

Where there exists an initial board determination an employee is permanently and totally disabled, the employee is "entitled to a presumption of continuing "odd lot" status until substantial evidence is introduced to the contrary, i.e., evidence that jobs actually were available to persons with capabilities similar to the employee's." *Sulkowsky* at 169, fn 8.

> **8 AAC 45.120. Evidence**.
> (a) Witnesses at a hearing shall testify under oath or affirmation. The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . . .
>
> (b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.
> (c) Each party has the following rights at hearing:

(1) to call and examine witnesses;

(2) to introduce exhibits;

(3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;

(4) to impeach any witness regardless of which party first called the witness to testify; and;

(5) to rebut contrary evidence.

. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds. . . .

(f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

(g) A request for cross-examination filed under (f) of this section must (1) specifically identify the document by date and author, and generally describe the type of document; and (2) state a specific reason why cross-examination is being requested.

. . .

(j) Subsections (f) – (i) apply only to objections based on hearsay, and do not limit the parties' right to object to the introduction of document on other grounds.

…

8 AAC 45.150. Rehearings and modifications of board orders. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds sated in AS 23.30.130.

(b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the ate of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

. . .

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

(f) In reviewing a petition for rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

8 AAC 45.180. Costs and attorney's fees. . . .

. . .

(b) A fee under AS 23.30.145 will only be awarded to an attorney licensed to practice law in this state or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

(c) Except as otherwise provided in this subsection, an attorney fee may not been collected from an applicant without board approval. A request for approval of a fee be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed. . . .

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work

> performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
>
> (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

(e) Fee contracts are not enforceable unless approved by the board. The board will not approve attorney's fees in advance in excess of the statutory minimum under AS 23.30.145.

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. . . .

> (1) costs incurred in making a witness available for cross-examination;
>
> (2) court reporter fees and costs of obtaining deposition transcripts;
>
> (3) costs of obtaining medical reports;
>
> (4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;
>
> (5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;
>
> (6) costs for telephonic participation in a hearing;
>
> (7) costs incurred in securing the services and testimony, if necessary, of vocational rehabilitation experts;

(8) costs incurred in obtaining the in-person testimony of physicians at a scheduled hearing;

(9) expert witness fees, if the board finds the expert's testimony to be relevant to the claim;

(10) long-distance telephone calls, if the board finds the call to be relevant to the claim;

(11) the costs of a licensed investigator, if the board finds the investigator's services to be relevant and necessary;

(12) reasonable costs incurred in serving subpoenas issued by the board, if the board finds the subpoenas to be necessary;

(13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;

(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk

(A) is employed by an attorney licensed in this or another state;

(B) performed the work under the supervision of a licensed attorney;

(C) performed work that is not clerical in nature;

(D) files an affidavit itemizing the services performed and the time spent in performing each service; and

(E) does not duplicate work for which an attorney's fee was awarded;

(15) duplication fees at 10 cents per page, unless justification warranting awarding a higher fee is presented;

(16) government sales taxes on legal services;

(17) other costs as determined by the board (emphasis added).

(g) Costs incurred in attending depositions not necessitated by a Smallwood objection may be awarded only where the board finds that attendance at the deposition was reasonable.

. . .

ANALYSIS

1. Should Employer be relieved of its obligation to pay Employee permanent total disability benefits?

Cornelison II concluded Employee was permanently and totally disabled as a result of his work injury. Accordingly, the presumption of continuing disability adheres to Employee's status and entitlement to benefits. *Sulkowsky; Bailey*. To succeed on its petition to terminate Employee's PTD benefits, Employer must prove there is regularly and continuously available work in the area suited to Employee's capabilities, *i.e.,* that he is not an odd-lot worker. *Carlson*.

Employer relies on the video surveillance conducted in 2007 and 2008, the investigative reports prepared by Dennis Johnson, and the opinions of Dr. Seres and Alizon White. The panel has found the video surveillance, the investigative reports and the opinions of Dr. Seres based on those reports and video footage: that Employee can work full time in "fairly heavy" employment, and as an apartment manager, hotel clerk and sales clerk, unreliable. (Findings of Fact 33-47, 54-58, 61). Dr. Seres' opinions are further diminished by discrepancies within and between his two reports and his deposition testimony. (Findings of Fact 59, 62-63, 66). The panel finds more reliable, and places greater weight on its own observations of the video surveillance, the lay witness testimony, and the professional opinions of Ms. McCarthy and Jon Deisher.

The video footage from Burkeshore Marina in Big Lake depicts Employee bent forward and using a hand truck to move single rather than multiple items when he has multiple items to transport. He is observed wearing a back brace the entire time he is working on the boat, and an adjustment he makes to the brace is visible. While on the boat Employee is also seen taking a small container out of his left pocket, which Employee and Mrs. Cornelison testified persuasively was his pain medication. This was the container Employee displayed at hearing as his pill container, which he was observed removing from his left pocket with his left hand as he was in the surveillance footage. The panel finds the marina video demonstrates Employee's restricted physical abilities and reflects pain behavior.

While other video footage depicts Employee briefly instructing a satellite technician on the roof of his home, and operating a backhoe on his property, the panel is persuaded these snippets of video, out of the 88 hours of surveillance conducted over two years by three videographers, are not of a man with the physical ability to return to the workforce, but a disabled man doing what

he can, when he can, in an effort to be of use to his family. Mrs. Cornelison's explanation for Employee being on the roof: to show the satellite installation technician the location of the old satellite dish holes rather than have him drill additional holes in a newly re-shingled roof, when the technician was unable to locate them from Employee's efforts to direct him from the ground, is credible, and not inconsistent with the panel's viewing of the footage, limited though it was. Considering Mrs. Cornelison's testimony she held the ladder while Employee descended from the roof, and the investigator's report reflecting he watched Employee come down the ladder, the absence of footage of his descent is another of numerous examples of what appears to have been selective filming or editing.

The testimony from Jesse Cornelison, a heavy equipment operator himself, that Employee's use of a backhoe with large rubber tires, on flat graveled land, would be smooth and not jarring to an injured back, and his observation his father is no longer capable of operating heavy equipment in an employment setting, is more persuasive than Dr. Seres' conclusion from the backhoe footage that Employee can work full time, at "fairly heavy" work, and as an operating engineer.

Cogent testimony depicting Employee's physical disabilities was provided by lay witnesses Scott Lyons and Kaylee Fischer. Neither of these witnesses had anything to gain from their testimony. Ms. Fischer was no more than a stranger on a plane. Although neighbors, Lyons and Employee are not close friends. Both Fischer and Lyons observed Employee's extremely frail, hunched over and disabled in appearance at times Employee would believe he was unobserved. Mr. Lyons has had an opportunity to observe Employee over the course of eight years, and his opinion Employee has been "pretty crippled up" the whole time is an accurate description of the panel's observations of Employee during over 30 hours of hearing over the past couple of years.

The most professional and persuasive evidence of Employee's physical capacity is that of Ms. McCarthy, who conducted a PCE demonstrating Employee's efforts were valid, and obtained results consistent with the three previous PCEs performed at Employer's request over the past 13 years. The PCE Ms. McCarthy administered is an objective measure of Employee's workday tolerance and workload level. She measured his workday tolerance at two to three hours, with sitting from one to two hours at 10 minute durations, standing from one to two hours at 10

minute durations, and walking, from two to three hours, frequent short distances. She disapproved "Deliverer, Outside," (DOT Code 230.663-010) because its 50 pound lifting requirement exceeded Employee's abilities, and "Receptionist" (DOT Code 237.367-038), given Employee's inability to sit. She noted that while Employee met the physical requirements listed for telephone solicitor, sales clerk, and general clerk, he could perform these jobs for only two to three hours per day, and only if his sitting, standing and walking tolerances were accommodated. Her opinion of Employee's limited physical capacity for performance in the workplace did not change after she viewed the video surveillance.

At hearing even Employer appeared to have abandoned Dr. Seres' suggestion Employee could perform "fairly heavy" work. Alizon White, Employer's the vocational specialist, recommended only two forms of employment for Employee: as a messenger/deliverer, or as a receptionist, and listed current openings in the Anchorage and Mat-Su Valley for these positions. Ms. White's opinions, however, failed to consider the results of any of the four consistent PCEs conducted over the past 13 years, and were based primarily on her review of Dr. Chandler's deposition testimony. Since much of Dr. Chandler's deposition testimony was elicited when he was asked to view portions of unreliable video footage, the opinions he proffered in response to Ms. McCarthy's PCE results, that Employee could return to the workplace for two to three hours per day every other day, are more reliable and more consistent with the totality of the evidence.

The evidence does not support Ms. White's opinion Employee could perform any of the two messenger or three receptionist jobs she located. Four of the five jobs are full-time jobs, presumably between 35 and 40 hours per week. While one of the employers offered a part-time position, which White opined was 20 hours per week, the weight of evidence demonstrates Employee's workday tolerance is no more than 2-3 hours daily, perhaps every other day, totaling no more than 15 hours per week maximum. The delivery jobs required 10-11 hours of driving daily between Anchorage and the Valley. Since the evidence Employee cannot sit for more than 15-20 minutes without having to change positions was unrefuted, Ms. White's suggestion Employee could perform these jobs was unpersuasive. While it seems likely an employer seeking drivers would consider it important to know whether a prospective employee was taking 690 mg. of opioid medication daily to function, Ms. White chose not to make these inquiries of

the employers she contacted. None of the jobs Ms. White advocated Employee could perform are consistent with Employee's objective physical abilities and workday tolerance.

The most persuasive testimony concerning Employee's ability to obtain employment suited to his physical capacities was from vocational rehabilitation specialist Jon Deisher. Mr. Deisher was the most credentialed, experienced and qualified professional to render an opinion, and conducted the most thorough evaluation of all persons asked to opine on Mr. Cornelison's employment potential. The panel concurs with Mr. Deisher that Employee suffers so considerable a competitive disadvantage in the labor market: a workday tolerance of no more than three hours, limited physical capacity, appearance bent over at the waist, and an inability to produce a clean urine sample given his prescription narcotic usage, that he is unemployable.

While Employee is able to function at some level during portions of most days, and to perform activities his household requires when his pain allows, permanent total disability does not require a worker be reduced to a state of abject helplessness. Employee's physical disability is such he remains unable to return to any recognized branch of the labor market. He is, quintessentially, "the 'odd lot' man, the 'nondescript in the labor market.' Work if he gets it, is likely to be casual and intermittent. . . . Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and halt." (Justice Cardozo, *Jordan v. Decorative Co.*, citation omitted). Employer has failed to demonstrate there is regularly and continuously available work in the area suited to Employee's capabilities. Employee remains permanently totally disabled. Employer's petition to terminate Employee's PTD benefits will be denied.

2. Is Employee entitled to an award of attorney fees and if so, in what amount?

When an employer resists payment of compensation and the employee hires an attorney who succeeds on the employee's behalf, the employee is entitled to attorney's fees. In making fee awards, the nature, length and complexity of the professional services performed on the injured worker's behalf are considered, as well as the benefits resulting from those services. An attorney's fee and cost award must reflect the workers' compensation proceedings' contingent nature, and fully but reasonably compensate attorneys for services performed on issues for which

the injured worker prevails. The experience and skills exercised on an injured worker's behalf are taken into account to compensate their attorneys accordingly.

Here, Employer resisted its duty to pay awarded PTD benefits through its petition to terminate Employee's continuing entitlement to those benefits. Employee retained counsel who successfully defended against Employer's petition. Counsel obtained a valuable benefit for Employee, namely continuation of his PTD status and entitlement to benefits. Employer does not object to counsel's hourly fee of $325.00, and that fee is considered reasonable considering Mr. Harren's years of litigation experience. Although his practical experience with workers' compensation matters is limited, Mr. Harren's representation of Employee, particularly his selection and persuasive examination of witnesses, and the quality of his hearing brief, reflected a deeper understanding of the field than his effective years of workers' compensation experience would indicate, and were of great assistance to the board. With the exception of three hours spent addressing a fee agreement, Employee's civil lawsuit and efforts to recover a copy count from a discarded copy machine, Employer did not object to the time listed in counsel's attorney fee affidavit. Employer's objections to the three hours indicated are well-taken. Three hours will be deducted from counsel's request for fees, and 210.75 hours will be awarded at $325.00 per hour, for a total fee award for Mr. Harren's efforts totaling $68,493.75.

Employee seeks a further award of attorney fees for services provided by Nancy Driscoll Stroup, Esq. and Dennis Principe, Esq. The law requires an attorney seeking an award of fees to file an Affidavit of Attorney Fees. Neither Ms. Stroup nor Mr. Principe have filed the required affidavit seeking or justifying an award of fees. The file reflects a *de minimis* amount of work performed by Ms. Stroup, about whom little is known, and who abandoned Employee early on in these proceedings. The invoice filed in an effort to justify an award to Mr. Principe appears related primarily to the civil lawsuit Employee filed against some of the actors in this proceeding, for which this body has no jurisdiction. Those efforts, if successful, would be compensable under Alaska Civil Rule 82 should Employee prevail on his complaint in that arena. No fees will be awarded for Ms. Stroup or Mr. Principe's efforts.

3. Is Employee entitled to an award of costs, and if so, in what amount?

Upon filing a conforming affidavit, a claimant who prevails in an action before the board is entitled to an award of costs. 8 AAC 45.180. With guidance from 8 AAC 45.180(f), costs are awarded at the board's discretion. Apart from Mr. Harren's cost bill, discussed below, Employee has sought direct cost reimbursement to himself totaling $22,397.10. Citing controlling law, Employer has objected to numerous costs as non-compensable. Employer's objections are well-taken. The monetary value of the annual leave Mrs. Cornelison chose to take while acting as Employee's non-attorney representative is non-compensable under the Act. Indeed, as annual leave, Mrs. Cornelison received the $3,128.00 value placed on the time she elected to take off from work. This sum will be disallowed. Durable office equipment, particularly where it is available for the Employee's use in a related civil action, for ordinary home office uses, and in the case of the television and DVD here, for pleasure, is non-compensable. The sum of $562.98 for durable office equipment will be disallowed. To be reimbursed, costs must be an identifiable expense under subsection (f). Costs labeled "miscellaneous" are not sufficiently identifiable for reimbursement. "Miscellaneous" costs totaling $226.84 are not awardable. Only costs incurred before the Board may be awarded. Accordingly, Employee's request for his mileage expense totaling $49.40, for filing a Petition for Review with the Alaska Supreme Court, may not be ordered. Duplicative costs are also disallowed. Because three cost invoices totaling $10,857.69 are listed on Employee's cost bill and appear among the costs listed by Mr. Harren, to avoid any duplication, all costs incurred initially by the Law Office of Richard L. Harren will not be considered for direct reimbursement to Employee. Accordingly, from Employee's request for direct reimbursement of $22,397.10, the sum of $14,824.91 will be deducted, leaving a direct cost award to Employee of $7,572.19.

Paralegal services are a recognized cost awardable with a conforming affidavit under 8 AAC 45.180(f)(14). Paralegal costs may not be awarded unless the services were performed under the supervision of a licensed attorney, are not clerical in nature, do not duplicate work for which an attorney fee was awarded, and are itemized, with the time spent performing each service identified. As with any award under the Act, the services provided and time expended must be reasonable. Employee, through counsel, seeks an award of paralegal costs for services provided by three legal assistants totaling $41,775.00. Eliminating items which were clerical in nature, were not performed under Mr. Harren's supervision, duplicated work for which an attorney fee was awarded, or

consumed an unreasonably excessive amount of time, as more fully enumerated in Findings of Fact 95-103, the award of paralegal costs will be reduced to $14,478.00.

Other than for paralegal services, the other costs for which counsel seeks reimbursement are for the professional services of rehabilitation consultants, for deposition witness, transcription and copy costs, travel expenses for the purpose of deposing Employer's EME physician, and *de minimis* mileage costs. These costs total $13,149.19. Employer's objection to $525.00 in estimated copy costs from years ago when a copy count was not kept is well-taken. In addition, counsel's estimate is erroneously based on a rate of .15 per page when the regulation allows only $.10. This copy cost will be disallowed. Employer does not object to the remainder of itemized costs other than objecting to counsel recovering costs he has already recovered from Employee directly. Deducting the disallowed $525.00 in copy costs, an award of costs totaling $12,624.19 will be awarded, with counsel reimbursing Employee for costs previously paid.

CONCLUSIONS OF LAW

1. Employee remains permanently and totally disabled. Employer will not be relieved of its obligation to pay Employee PTD benefits.
2. Employee is entitled to an award of attorney fees totaling $68,493.75.
3. Employee is entitled to an award of costs, including the cost for paralegal services, totaling $34,674.38, with payment made as ordered below.

ORDER

1. Employer's petition to terminate Employee's award of PTD benefits, as amended, is denied and dismissed.
2. Employer shall pay The Law Office of Richard L. Harren attorney fees totaling $68,493.75.
3. Employer shall pay The Law Office of Richard L. Harren litigation costs totaling $27,102.19. From this sum, Mr. Harren shall reimburse Employee for costs previously reimbursed by Employee.
4. Employer shall reimburse Employee directly out of pocket costs totaling $7,572.19.

Dated at Anchorage, Alaska this 26 day of December, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Linda M. Cerro
Designated Chairperson

Patricia Vollendorf, Member

Amy Steele, Member

If compensation is payable under the 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 Workers' Compensation Appeals Commission.

If compensation is awarded, but not paid within 30 days of this decision, the person to whom the compensation is payable may, within one year after the default of payment, request from the board a supplementary order of default.

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the Board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the Board are parties to an appeal. 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 because the Board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation 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. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

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 that the foregoing is a full, true and correct copy of the Decision and Order in the matter of FLOYD D. CORNELISON employee / applicant; v. RAPPE EXCAVATING, INC., employer; TIG PREMIER INSURANCE CO., insurer / defendants; Case No. 199609785; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, this 26th day of December, 2013.

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Anna Subeldia, Office Assistant I