ALASKA WORKERS' COMPENSATION BOARD

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

RICHARD F. NELSON,	)	
	)	INTERLOCUTORY
Employee,	)	DECISION AND ORDER
Petitioner,	)	
	)	AWCB Case No. 201714848
v.	)	
	)	AWCB Decision No. 18-0079
STATE OF ALASKA,	)	
	)	Filed with AWCB Juneau, Alaska
Self Insured Employer,	)	On August 6, 2018
Respondent.	)	
	)	

Richard Nelson's (Employee) April 23, 2018 petition to quash State of Alaska's (Employer) controversion notice was heard on July 10, 2018 in Juneau, Alaska, a date selected on June 12, 2018. Attorney Robert Bredesen appeared and represented Employee, who appeared. Attorney Daniel N. Cadra appeared and represented Employer. There were no witnesses. The record closed at the hearing's conclusion on July 10, 2018.

ISSUE

Employee contends his claim arises from a mental injury caused by a physical work injury. Employee contends he sustained an injury to his head, stress, anxiety, and post-traumatic stress disorder (PTSD) caused by a physical assault at work on August 19, 2017. Employee contends a determination of whether his claim arose from a physical-mental injury or mental-mental injury is a question of law and must be made in order to rule on Employee's April 23, 2018 petition to quash Employer's controversion.

Employer contends Employee's claim arises from a mental injury caused by mental stress at work. Employer contends Employee suffered a mental injury after a job transfer and a disciplinary action. Employer contends a determination of whether Employee's claim arose from a physical-mental injury or mental-mental work injury is a question of fact and is not required to be made in order to rule on Employee's April 23, 2018 petition to quash Employer's controversion.

1) Did Employee's claim arise from physical-mental injury or mental-mental work injury?

Employee contends the presumption of compensability applies because his claim arose from a physical-mental injury. Employee contends the employer's medical evaluation (EME) opinions are not substantial evidence supporting Employer's controversion. Employee contends the EME reports failed to apply the presumption of compensability. Employee contends the EME physician opined the primary diagnosis was work related and Employee was not medically stable, criticized the treatment provided, recommended six months of additional treatment, and imposed ongoing work restrictions. Employee requests Employer's controversion be quashed and a benefits award.

Employer contends the presumption of compensability does not apply because Employee's claim arose from a mental-mental injury. Employer contends Employee must prove his claim by a preponderance of the evidence. Employer contends the EME opinions are substantial evidence supporting Employer's controversion. Employer requests Employee's petition be denied.

2) Are the EME reports substantial evidence supporting Employer's controversion?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On October 22, 2015, Employee saw Kassandra Burke, CMA, for a physical. Employee's anxiety was doing well. He was still taking 40 mg of citalopram daily for anxiety but planned "on weaning off sometime in the next few months." (Burke, Chart Note, October 22, 2015).

2) On August 19, 2017, Employee went to the emergency room for a head injury sustained during a physical assault while working as a Juvenile Justice Officer II (JJOII) at the Juneau Youth Center (JYC). He sustained a single moderate blow with a metal object but had no loss of consciousness, loss of vision, nausea, or vomiting. Employee reported a mild headache. Mild tenderness and swelling was noted in the right frontal head area. Employee's pupils were equal, round and reactive to light. Employee was diagnosed with a minor closed head injury with no loss of consciousness, memory loss, confusion, altered mental status, seizure, neurological deficit or coma. He was taken off work two days and instructed to take over the counter acetaminophen and Motrin. (Bartlett Hospital, Emergency Room Report, August 19, 2017).

3) On September 20, 2018, April Sapp, DNP conducted a "med review." Employee reported his anxiety medication was doing well and his testosterone injections were helping greatly. He informed Ms. Sapp of the August 19, 2017 physical assault. Under "Review of Symptoms," DNP Sapp noted "no headaches." (Sapp, Chart Notes, September 20, 2018).

4) On October 10, 2017, Employee went to the emergency room for moderate, squeezing central chest pain associated with shortness of breath occurring earlier that day for five minutes while anxious in a work meeting. He reported chest tightness while in a meeting at work, headaches and right eye and temple pain increasing in frequency since the work injury, severe episodes of anxiety increasing in frequency since the work injury, and reoccurrence dreams. Employee was diagnosed with episodic headache, anxiety reaction, essential hypertension, psychophysiological insomnia associated with medical condition (anxiety), and probable PTSD. Employee was given Ativan, referred to follow up with DNP Sapp, and recommended to follow up with a therapist and to consider prazosin at bedtime for insomnia. He was also instructed not to work for ten days. (Bartlett Emergency Room Report, October 10, 2017).

5) On October 10, 2017, a CT scan revealed Employee had no acute intracranial abnormalities. (CT Report, October 10, 2017).

6) On October 11, 2017, Employee reported having extreme anxiety at work, upset stomach, right eye and temple pain, poor sleep, and "an inability to function at work related to this anxiety/PTSD." Under "Review of Symptoms" DNP Sapp noted "no headaches." Employee moved to a different unit at work where there are "still metal chairs" and the residents are free to "move about." A video of the August 2017 assault was viewed in front of others so it could be evaluated and critiqued. DNP Sapp diagnosed Employee with insomnia and possible PTSD.

She prescribed prazosin and referred Employee to David B. Robinson, MD, MPH. She took Employee off work until November 6, 2017, due to severe anxiety, headache, and inability to focus secondary to a concussion. (Sapp, Chart Notes and Certification of Health Provider, October 11, 2017).

7) On October 16, 2017, Employee filed an Employee Report of Occupational Injury or Illness (ROI) stating that on August 19, 2017, a resident at the Johnson Youth Center (JYC), Detention Unit, picked up a metal chair and struck Employee over the head while he was working for Employer as a JJOII. The resident chased Employee and continued to throw chairs at Employee and another staff member. Employee described the nature of the injury as head trauma. Employee attached a "Johnson Youth Center Letter of Commendation" dated August 28, 2017 and signed by a "Juvenile Justice Unit Supervisor" which stated:

> I am writing this letter to recognize [Employee]'s outstanding performance and professionalism demonstrated during the swing shift on 08/19/2017. Your response during this extreme stressful situation of being assaulted multiple times, and regain control of the assault resident without retaliation.
>
> During the high stress situation, [Employee] demonstrated the ability to maintain professional composure, regain safety of the facility through placing handcuffs on his assailant, and ensuring the rest of the residents were secured. Once all was secure, [Employee] was able to tend to his own injuries and eventually get assistance to the hospital.

(Employee ROI, October 16, 2017; Letter of Commendation, August 28, 2017).

8) On October 16, 2017, Employer filed an Employer ROI and stated the date Employer first knew of the injury was August 19, 2017. It listed the part of the body affected as "multiple head injury," the nature of the injury/illness as "concussion," and the cause of the injury/illness as "person in act of a crime." (Employer ROI, October 16, 2017).

9) On October 24, 2017, Employee reported a lot of dreams of the incident and notable irritation at kids while at work. Employee stated the resident that struck him with the metal chair "looked like he wanted me dead" so he could escape the facility. Employee complained of stomach aches, super-orbital and temple head pain, eye pain, and poor sleep. Employee still had bad dreams and recently yelled in his sleep. Employee experienced a panic attack while at the grocery store two days ago and had to leave the store; 0.5 mg of prazosin helped. Employee's transfer from the detention unit to the treatment unit at the JYC caused him immediate anxiety. Employee told Dr. Robinson that "detention is safer" because residents in the treatment unit have

"a lot of freedom." Employee was also "stressed out in disciplinary atmosphere" at work. In the end of September, Employee was "called in" by the treatment unit leader with concerns about Employee letting residents "call him names." Employee was told he needed a union representative for an informal inquiry because he was "not firm enough" with residents. Dr. Robinson diagnosed Employee with PTSD with panic disorder and noted a history of general anxiety disorder treated with citalopram which "helped dwelling." He recommended neuropsychological testing, stopping prazosin, and starting lorazepam with 1.0 to 2.0 mg at bedtime and 0.5 mg per panic attack. (Robinson, Chart Note, October 24, 2017).

10) On November 6, 2017, Employee reported he continues to have anxiety and PTSD that "he cannot even talk to work at this time without experiencing severe anxiety." DNP Sapp restricted Employee from working for one month. (Sapp, Chart Notes and Letter, November 6, 2017).

11) On November 7, 2017, Employee reported continuing super-orbital and temporal pain and stress. When he recounted the assault, Employee stated he feared for his life. Upon his return to work, Employee experienced some horrible days and Dr. Robinson noted Employee was exposed to risk in his job with "kids screaming, yelling, chaos." Employee reported taking 0.5 lorazepam helps with panic at the grocery store. Employee's wife told Employee he was talking in his sleep and Employee avoids driving by work. Dr. Robinson assessed Employee with continuing panic, agoraphobia, and PTSD and increased Employee's lorazepam dosage to 3.0 to 5.0 mg at bedtime. (Robinson, Chart Notes, November 7, 2017).

12) On November 21, 2017, Employee stated his anxiety worsened by the day until he could not work. Dr. Robinson noted Employee experienced a better result taking 3.0 to 4.0 mg of lorazepam at bedtime. (Robinson, Chart Notes, November 21, 2017).

13) On December 19, 2017, Dr. Robinson found Employee's symptoms had improved with more time away from the JYC. Employee was feeling better but he was still hyper-vigilant at the store and experiencing anxiety and anger while driving. Employee expressed extreme reluctance to return to JYC. Dr. Robinson noted Employee was more active, less isolated, and less numb but still experienced disorganized sleep and excessive napping. He recommended Employee desensitize himself at stores and while driving and continue on the 3.0 to 5.0 mg lorazepam. (Robinson, Chart Note, December 19, 2017).

14) On January 5, 2018, DNP Sapp restricted Employee to four hours of administrative work per month with no interactions with residents for the next two month for PTSD, head injury,

Generalized Anxiety Disorder (GAD) and panic. (Sapp, Certification of Health Care Provider, January 5, 2018).

15) On January 12, 2018, Dr. Robinson filled out an Americans with Disabilities Act (ADA) Accommodation Request with Employee. He stated Employee has PTSD which may be long-term or permanent. Dr. Robinson indicated the PTSD substantially limits Employee's major life activities including sleeping, concentrating, thinking, working, an "events or situations which resemble the index trauma (physical assault by resident)." Dr. Robinson stated the "core clinical features of PTSD impede adjustment and function in any environment with similar threat level, crowding or unpredictable individuals." When asked for suggestions regarding possible workplace accommodations that would allow Employee to perform the functions of the job, Dr. Robinson stated it would be unfeasible and inappropriate for Employee to return to work in his position at the time of the work injury for the foreseeable future. (Robinson, ADA Accommodation Request, January 12, 2018).

16) On January 30, 2018, Employee reported depression, sleep disturbances and anxiety. DNP Sapp assessed Employee with GAD, panic disorder, depressive disorder, PTSD and chronic PTSD. Employee requested release to work to start a new job in an office with the State of Alaska. DNP Sapp released Employee to full duty with regular hours. (Sapp, Chart Notes, January 30, 2018).

17) On February 2, 2018, Dr. Robinson stated Employee was making good progress. Employee expressed concerns about problems retraining in his new job working for the Office of Children's Services (OCS) and that he is not an office/computer person. Dr. Robinson recommended Employee continue with 3.5 mg of lorazepam at bedtime. (Robinson, Chart Note, February 2, 2018).

18) On February 14, 2018 Employee reported increasing anxiety as he felt "way over [his] head" at his new job and he has been taking one or two pills after he arrives home from work. Employee complained of memory difficulties and wondered if it was due to the PTSD. The Monday prior, Employee had a headache in his eye and temple and he almost cried, which he never does. Employee's wife complained of Employee losing his train of thought more than usual. Employee was afraid to get lost in Anchorage for the upcoming EMEs. Dr. Robinson recommended ruling out "depression secondary to anxiety and memory deficits" and that

Employee's wife accompany him to the EME appointments to avoid complications of PTSD. (Robinson, Chart Note, February 14, 2018; Robinson, Prescription Form, February 14, 2018).

19) On February 16, 2018, DNP Sapp restricted Employee from working until March 12, 2018 for PTSD. (Sapp, Progress Report, February 16, 2018).

20) On February 28, 2018, Employee reported sharp pain at times behind his right eye when he is anxious and increased anxiety for upcoming appointments and assessments. DNP Sapp restricted Employee from work stating, "[h]e is able to work four hours only March 1, 2018, then no work until re-evaluation in March 2018." (Sapp, Chart Notes, February 28, 2018; Progress Report, February 28, 2018).

21) On March 1, 2018, Employee reported to Dr. Robinson that he was worrying about everything at night and having nightmares about the incident which is compromising his sleep. He often used lorazepam for errands and at work. Dr. Robinson stated Employee was having ongoing nightmares, his intrusive recollections had returned, and he was possibly cognitively compromised. He opined Employee was not medically stable and recommended Employee continue with the lorazepam. (Robinson, Chart Note, March 1, 2018).

22) On March 3, 2018, Robert E. Montenegro, MD, Ph.D., a psychiatrist, evaluated Employee for an EME. Under "History of Present Illness," Dr. Montenegro noted Employee told him he was written up a few days before the October 10, 2017 panic attack "for not being able to maintain discipline in the unit" at the JYC. Dr. Montenegro diagnosed Employee with a primary "other specified trauma and stress-related disorder, adjustment-like disorder with prolonged duration of more than six months without prolonged duration of stressor" . . . "related to his work related injury dated 08/19/2017" and a secondary pre-existing GAD which was temporarily aggravated "due to his work related injury dated 08/19/2017." When asked "to set forth [his] objective findings supporting each diagnoses", he stated:

> [Employee] meets the criteria for other specified trauma and stress related disorder, adjustment-like disorder with prolonged duration of more than six months without prolonged duration of stressor for the following reasons:
>
> [Employee] has developed a clear emotional symptom (anxiety and intermittent partial depression) that occurred within the three months following his work-related injury.
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> The symptoms are clinically significant as evidenced by marked distress that is out of proportion to the intensity of the stressor (severe panic attacks that subside

> when in a preferred environment and re-emerge when in an [sp] dis-preferred environment – working at a desk without any physical imminent threat, although with the experience of feeling overwhelmed with anxiety due to perceived inability to meeting work demands).
>
> The above significant stress had led to significant impairment in his occupational functioning.
>
> The stress-related disturbance does not meet criteria for post-traumatic stress disorder, as presented by the provided documentation and interview, given the lack of consistency across time and settings. More specifically, the fact that the examinee's perceived "PTSD symptoms" are not apparent during times of him experiencing improved or good mood, or being removed from stressful environments including being at home, engaging in pleasurable activities contrasted with a resurgence of anxiety, avoidance, and other post-traumatic stress disorder-like symptoms including intrusive thoughts, is inconsistent with typical post-traumatic stress disorder.
>
> Likewise, once the stressor (not having to return to a specific work setting) was temporarily terminated, the symptoms did not persist at the same intensity or frequency, making the above diagnosis an appropriate diagnosis compared to post-traumatic stress disorder.

Employer asked Dr. Montenegro to, "Please state whether the diagnosed condition is a mental-mental condition (work stress causing a mental condition)" for each condition he diagnosed. Dr. Montenegro replied, "This diagnosis is considered a mental-mental condition (work stress causing a mental condition). As explained above, when the work stress is removed, the above complaints dissipate, per examinee's explanation." For the conditions he diagnosed, Dr. Montenegro stated Employee would benefit from "continued psychiatric treatment consisting of both cognitive-based therapy with exposure therapy for anxiety and depression," with weekly sessions for 25-weeks and continuing psychiatric medication management for Employee's preexisting GAD. Dr. Montenegro opined, "The current treatment that [Employee] has received for his work-related injury has lacked the cognitive behavioral therapy and exposure therapy" he recommends. Dr. Montenegro did not believe the August 19, 2017 work-related injury caused a permanent aggravation of Employee's GAD, but may have caused a temporary aggravation. He opined the temporary aggravation has returned to pre-injury status given Employee's "numerous reports of positive overall emotional and social as well as occupational functioning when in a preferred setting." Dr. Montenegro offered the following regarding "the substantial cause" of the treatment he recommended:

> [Employee]'s work stress on August 19, 2017, was on a more probable than not basis, the substantial cause of the treatment recommended . . . . [Employee]'s work stress following his August 19, 2017 work-related injury does not remain the substantial cause for the treatment and psychiatric evaluation or diagnostics. That is, although [Employee] experienced a traumatic event that could be perceived as life-threatening (although the examinee never reported to feel that his life was in jeopardy during the work-related injury), his current presentation is most consistent with the above diagnosis of other specified trauma and stress-related disorder, complicated by the aggravation of his previous diagnosis of generalized anxiety disorder.

With regard to treatment for which Employee's "work stress" was the substantial cause, Dr. Montenegro stated, "[Employee] has not obtained all the medical treatment necessary for his work-related work stress sequelae. As discussed above, [Employee] would benefit from cognitive behavioral therapy specific to anxiety with exposure therapy." Dr. Montenengro opined Employee most likely experienced severe generalized anxiety "given his dis-preferred work environment (as well as job demands that he did not prefer – working in an office). At this moment, I do not believe that [Employee] meets criteria for disability nor that [Employee]'s work stress was the substantial cause of any disability." For the medical conditions Dr. Montenegro determined Employee's work injury of 08/19/17 was the substantial cause, Dr. Montenegro said:

> Employee has not reached medical stability. Given that [Employee] has not received the proper psychological therapeutic modality of cognitive behavioral therapy with exposure therapy to assist with his adjustment disorder and aggravation of his pre-existing [GAD] which may be informing his ongoing adjustment disorder.

Dr. Montenegro opined for each medically stable condition, Employee has no permanent impairment "from a psychiatric perspective." Employer asked Dr. Montenegro to state whether Employee's work for the State of Alaska is the "predominant cause" for each diagnosed "mental-mental condition" Dr. Montenegro diagnosed. Dr. Montenegro answered,

> [Employee]'s other specified trauma and stress-related disorder with adjustment-like disorder with prolonged duration of more than six months without prolonged duration of stressor, as well as aggravation of his pre-existing [GAD], during his work for the State of Alaska, are on a more probable than not basis, the predominant cause of the diagnosed mental-mental condition.

When asked to identify the "actual events" that caused Employee's diagnosed conditions, Dr. Montenegro replied, "Not applicable." Dr. Montenegro considered each "actual event" and

whether each was "extraordinary and unusual" in comparison to pressures and tensions experienced by other JJOII in a comparable work environment and said:

> There is no extraordinary or unusual circumstance in comparison to pressures and tensions experienced by other [JJOIIs] in a comparable work environment that would explain [Employee]'s reactivity. That is, it appears that [Employee] responds with difficulties in managing his anxiety secondary to his frustrations of dis-preferred work environments (office work) or in which he legitimately feels unsafe, as well as to work settings in which he feels frustrated at being placed in a position where his skills do not match the work demands.

Dr. Montenegro stated, "[Employee]'s mental-mental injury most likely resulted secondary to a disciplinary action, job transfer, and his perceived inability to meet his new job requirements." He also stated "[Employee]'s work for the State of Alaska appears to be the predominant cause of the above diagnosis, any medical treatment provided to date" and any medical treatment he recommended. He opined Employee's primary diagnosis was not medically stable and expected it to reach medical stability after the treatment he recommended. Dr. Montenegro opined Employee's preexisting GAD was medically stable. He stated Employee will benefit from continued exposure to work environments where there is low to no potential of physical harm or assault by inmates, temporarily, during 20 to 25 weeks of cognitive behavioral therapy with exposure therapy. (Montenegro EME Report, March 3, 2018).

23) On March 6, and 7, 2018, Paul L. Craig, Ph. D., a board certified clinical neuropsychologist, evaluated Employee for an EME. After administering 24 tests to assess Employee's neuropsychological functioning, Dr. Craig opined Employee did not suffer a traumatic brain injury or concussion as a result of the work injury. He explained the "acute medical records do not support a diagnoses of traumatic brain injury or concussion." Dr. Craig determined Employee has some longstanding neurocognitive limitations, including a full scale IQ of 79, which do not warrant a diagnosis of an acquired neurocognitive disorder. He noted the extent and pattern of Employee's limitations point toward longstanding limitations that have been present throughout his adulthood rather than pointing toward an acquired neurological disorder. Dr. Craig opined there is no reason to suspect a decline from a previously higher level of mental ability and noted some of Employee's average verbal abilities have allowed him to compensate for his other measureable limitations. Dr. Craig stated Employee "appears to be misinterpreting some of his symptoms of anxiety and depression as indicators of concussion and/or traumatic brain injury" and opined psychological, neuropsychological, or medical treatment is not needed

for any neuropsychological condition. He opined the evaluation at the emergency room after the assault and after the panic attack were reasonable and necessary. While Dr. Craig stated "being assaulted at work is an emotional stressor and would warrant at least some counseling to cope with the emotional consequences of being assaulted," he referred whether the August 19, 2017 assault was an extraordinary and unusual work stressor to "a vocational expert" knowledgeable about Employee's specific job. Dr. Craig referred any psychiatric opinion regarding the relationship between Employee's psychiatric symptoms and the August 19, 2017 assault and any treatment recommendations to a psychiatrist. (Craig EME Report, March 6 and 7, 2018).

24) On March 12, 2018, Employee reported fearing being fired for difficulty learning his computer desk job at OCS to Dr. Robinson. He also stated he "can't do high tech, fast paced spreadsheet tasks." A predominate concern for Employee was the economic impact of losing his job. He complained of right orbital pain occasionally with cognitive demands and slightly blurry vision. Dr. Robinson recommended ruling out a cognitive deficit secondary to a traumatic brain injury (TBI) and noted Dr. Craig's report was pending for neurological testing. (Robinson, Chart Note, March 12, 2018).

25) On March 12, 2018, Dr. Robinson responded to a letter from Employer's claim adjuster. He indicated he predicted Employee will have incurred a permanent impairment greater than zero due to the effects of the work injury. Dr. Robinson predicted Employee will not have permanent psychological capacities equal to the psychological demands of the job description for Correction Officer, Correctional-Treatment Specialist, and Police Officer. (Robinson Response, March 12, 2018).

26) On March 22, 2018, Employee reported sleep disturbances, anxiety and agitation but no depression. DNP Sapp restricted Employee to work four hours per day at his own pace. (Sapp, Chart Note and Physician's Report, March 22, 2018).

27) On March 29, 2018, Employee complained of exhaustion by one p.m. at his new job and right eye pain with high cognitive demand. Dr. Robinson reviewed Dr. Montenegro's EME report and Employee objected to Dr. Montenegro's findings. Dr. Robinson recommended Employee continue with 3.5 mg of lorazepam at bedtime. (Robinson, Chart Note, March 29, 2018).

28) On April 2, 2018, Employee informed Dr. Robinson he worked from home today and reported feeling very tired and overwhelmed with right eye pain and memory strain, frustration

and tension. Dr. Robinson recommended Employee continue with daily four hour shifts at work. (Robinson, Chart Note, April 2, 2018).

29) On April 12, 2018, Employer denied temporary total disability (TTD), temporary partial disability (TPD) beyond March 3, 2018, permanent partial impairment (PPI) based on evidence received to date, and medical psychiatric treatment beyond March 3, 3018. The reason specific benefits were controverted included the following explanation:

> The Employer relies on the panel Independent Medical Examinations completed on 03/03/2018 by Dr. Roberto E. Montenegro, MD Psychiatry and on 03/06 and 03/07/2018 by Paul L Craig, Ph.D Neuropsychology. Both Dr. Montenegro and Dr. Craig opined that there are no objective findings that [Employee]'s employment with the State of Alaska continues to be the substantial cause of his need for disability, work restrictions, and medical treatment. Dr. Montenegro opines that from a psychiatric perspective the work injury has returned to his preinjury status given his numerous reports of positive overall emotional and social as well as occupational functioning when in a preferred setting.
>
> Dr. Paul L Craig, Neuropsychology has opined that there is no objective medical evidence that [Employee] suffered from a traumatic brain injury, concussion, neurocognitive or neuropsychological damage occurring from the assault.
>
> Worker's Compensation AS 23.30.185 provides that TTD/TPD benefits may not be paid for any period of disability occurring after the date of return to work or medical stability whichever occurs first. In this case [Employee] has been found able to return to work without restrictions relative to the industrial injury on 03/03/2018 by the Independent medical examiners Dr. Montenegro and Dr. Craig. Neither Examiner identifies any PPI (Permanent partial impairment) related to the work incident or injury. (Controversion Notice, April 12, 2018).

30) On April 16, 2018, Employee claimed TPD, PPI, medical costs and unfair or frivolous controvert for an August 19, 2017 date of injury. He described the nature of the injury as "assaulted with a commercial metal chair by surprise while performing my duties at Johnson Youth Center." (Claim, April 16, 2018).

31) On April 23, 2018, Employee claimed TTD, TPD, PPI, attorney fees and costs, transportation costs, medical costs and interest for an August 19, 2017 date of injury. He described the nature of the injury as "Employee was assaulted, sustaining head injuries and PTSD." (Claim, April 23, 2018).

32) On April 23, 2018, Employee requested a ruling on whether Employer's April 12, 2018 controversion is supported by substantial evidence, and if not, an award of benefits. (Petition, April 23, 2018).

33) On June 20, 2018, Employee filed a notice of intent to rely with four pages of medical bills paid out-of-pocket by Employee for appointments with Dr. Robinson on March 29, April 2, April 20, and May 21, 2018 totaling $1,420. (Notice of Intent to Rely, June 20, 2018).

34) Employee contended whether Employee's claim arose out of a physical-mental injury or a mental-mental injury is a question of law and not a question of fact. Employee contended a determination must be made on whether Employee's claim arose out of a physical-mental injury or mental-mental injury to rule on Employee's April 23, 2018 petition. (Employee).

35) Employer contended whether Employee's claim arose out of a physical-mental injury or a mental-mental injury is a question of law. Employer contended a determination of whether Employee is claiming a physical-mental injury or mental-mental injury is not required to be made to rule on Employee's April 23, 2018 petition. Employer contended the July 10, 2018 hearing is not a merits hearing and contends a decision should not authorize medical treatment. (Employer).

36) It is undisputed that a JYC resident physically assaulted Employee at work on August 19, 2017. It is also undisputed that after the August 19, 2017 physical assault, Employer transferred Employee from the detention unit to the treatment unit at the JYC, Employer made a disciplinary inquiry of Employee's work at JYC, and that Employee started a new office position at OCS. (Record).

37) Neither Employee nor Employer filed a report of occupational injury for mental injuries caused by a work stress event, including a job transfer, disciplinary action, and Employee's perceived inability to meet work responsibilities. (Record).

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).

> **AS 23.30.010. Coverage.**
> (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120 (a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
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> (b) Compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer.
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> **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
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> (1) the claim comes within the provisions of this chapter . . . .
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> (c) The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress.

To determine whether the presumption of compensability applies, work-related mental injuries are divided into three different categories: mental stimulus that causes a physical injury, or "mental physical" cases; physical injury that causes a mental disorder, or "physical-mental" cases; and mental stimulus that causes a mental disorder, or "mental-mental" cases. *Kelly v. State of Alaska, Dept. of Corrections*, 218 P.3d 291, 298 (Alaska 2009). Where a work-related

physical injury results in a mental disorder, such as depression, the presumption is applied. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, footnote 36 (Alaska 2007) (citing *Williams v. Abood*, 53 P.3d 134 (Alaska 2002)). However, where work-related stress results in a mental injury, such as posttraumatic stress disorder, a claimant is required to prove each element of the test for mental injury by a preponderance of the evidence, without the benefit of the presumption of compensability. *Kelly* at 297 (discussing the former AS 23.30.395(17)).

Once an employee attaches the presumption of compensability, by establishing a preliminary link between the claim and his employment, the employer must rebut it with "substantial" evidence that either, (1) something other than work was the substantial cause of the disability or need for medical treatment, or (2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc*., 372 P.3d 904, 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. *Miller* at 1055. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Veco v. Wolfer*, 693 P.2d 865, 869- 870. If an employer fails to rebut the raised presumption, the injured worker is entitled to benefits based solely on the raised but unrebutted presumption. *Williams v. State of Alaska, Department of Revenue*, 938 P.2d 1065 (Alaska 1997).

In *Kelly*, the Supreme Court addressed a case in which a prison guard, Kelly, filed a claim for job-related stress after being threatened with serious injury or death by an inmate who had been convicted of murder and was armed with a weapon. Kelly's stress was not compensable as it would not be unusual or extraordinary for correctional officers to be threatened by inmates. On appeal, the Court found he claimed a mental-mental injury because it was based on stress from the threat and he never alleged a physical injury. The Court noted a worker's perception that he feels stress is by itself inadequate to establish "extraordinary and unusual" stress. *Id.* at 300.

The Court reversed, explaining while other guards had been threatened, it was often by intoxicated inmates or inmates behind bars. When Kelly was threatened, he was alone, unarmed, locked in a module with an armed inmate who threatened to stab him in the eyes and then stab him to death.

In *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012), the Supreme Court addressed a case in which a healthcare worker, Runstrom, filed a claim for time loss benefits for mental injuries after being sprayed in the eye with fluids from an HIV-positive patient. Employee's four tests for HIV reactivity were all negative. The Court affirmed the Board, holding the claim was for a physical-mental injury and that Runstrom had not proved her claim by a preponderance of the evidence.

In *Harp v. ARCO Alaska Inc.*, 831 P.2d 352, 358-59 (Alaska 1992), a physical-physical injury case, the Supreme Court found the employer lacked sufficient evidence for controverting the employee's benefits based in part upon the employee's treating physician's statement that, he was "at a loss to understand what [was] going on and why she had recurrent symptoms." An employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the board would find that the claimant is not entitled to benefits. *Id*. at 358. Evidence in Employer's possession "at the time of controversion" is the relevant evidence reviewed to determine its adequacy. *Id.* When an employer relies on responsible medical opinion or conflicting medical testimony, the employer has sufficient evidence for controverting the employee's benefits. *Stafford v. Westchester Fire. Inc., Co. of New York*, 526 P.2d 37, 42 (Alaska 1974).

In *ARCTEC Alaska v. Traugott*, AWCAC Decision No. 249 (June 6, 2018), the Alaska Workers' Appeals Commission (commission) held the SIME physician opinion was not substantial evidence because the board asked the SIME physician misleading questions misstating the law under AS 23.30.010(a). The commission reversed the board's decision that work with the employer was the substantial cause of the need for medical treatment and held the worker's injury was not compensable.

> Final judgment: a court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment. Black's Law Dictionary, (Tenth Ed. 2014) at 971.
>
> Interlocutory judgment: an intermediate judgment that determines a preliminary or subordinate point or plea but does not finally decide the case. A judgment or order given on a provisional or accessory claim or contention is generally interlocutory. *Id.*
>
> Issue of fact: a point supported by one party's evidence and controverted by another's. Black's Law Dictionary, (Tenth Ed. 2014) at 959.
>
> Issue of law: a point on which the evidence is undisputed, the outcome depending on the court's interpretation of the law. *Id.*
>
> Question of fact: 1. An issue that has not been predetermined and authoritatively answered by the law. 2. An issue that does not involve what the law is on a given point. 3. A disputed issue to be resolved by the jury in a jury trial or by the judge in a bench trial. 4. An issue capable of being answered by way of demonstration, as opposed to a question of unverifiable opinion. See *issue of fact*. Black's Law Dictionary, (Tenth Ed. 2014) at 1442.
>
> Question of law: 1. An issue to be decided by the judge, concerning the application or interpretation of the law. 2. A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion. 3. An issue about what the law is on a particular point; an issue in which the parties argue about, and the court must decide what the true rule of law is. See *issue of law*. 4. An issue that, although it may turn on a factual point, is reserved for the court and excluded from the jury; an issue that is exclusively within the province of the judge and not the jury. *Id.*

ANALYSIS

1) Did Employee's claim arise from a physical-mental injury or mental-mental work injury?

Employee contends his claim arises from a mental injury caused by a physical work injury. Employer contends Employee's claim arises from a mental injury caused by work stress. Work-related mental injuries are classified into three groups, physical-mental, mental-mental, and mental-physical injuries. *Kelly*. The presumption of compensability applies to a physical-mental injury and does not apply to a mental-mental injury. AS 23.30.120; AS 23.30.010; *Kelly*; *Theoni*. Mental-mental injuries requires an employee to prove all elements of his claim by a

preponderance of the evidence. *Id*. The distinction between the mental injury groups is important when determining whether an employer's controversion is supported by sufficient evidence because the presumption of compensability shifts the burden of production to the employer once an employee makes a preliminary link, generally making it easier for an employee to prove and more difficult for an employer to controvert a physical-mental injury. Therefore, this decision must resolve whether Employee's claim arose out of a physical-mental or mental-mental injury before determining whether Employer has substantial evidence supporting its controversion. The key to analyzing Employee's claim is to look at the underlying cause of his disability. *Runstrom*.

The relevant facts for this issue are largely undisputed. The parties do not dispute Employee was physically assaulted at work on August 19, 2017 and afterwards Employee was transferred from the detention unit to the treatment unit at the JYC, Employer took a disciplinary action against Employee when he worked at JYC, and Employee started a new position at OCS. Therefore, the issue is primarily an issue of law. *Black's*.

Employer and Employee both filed October 16, 2017 injury reports describing a physical assault on Employee by a resident of the JYC on August 19, 2017. Neither Employee nor Employer filed an injury report for a work stress event. Employee's April 16, 2018 and April 23, 2018 claims described the nature of injury as a physical assault which occurred at work on August 19, 2017. In *Runstrom*, the Alaska Supreme Court held the employee's claim arose from a physical-mental injury when the employee was splashed in the eye with fluids from an HIV infected patient. In *Kelly*, the Court held the employee's claim arose from mental-mental injury when the employee was threatened with an assault by an inmate but was not physically assaulted. Employee's injury is more similar to *Runstrom* than to *Kelly* because a resident of the JYC struck Employee with a chair. Employee's claim arose from a physical-mental injury. *Rogers & Babler*; AS 23.30.010; AS 23.30.120; *Kelly*; *Runstrom*.

2) Are the EME reports substantial evidence supporting Employer's controversion?

An employer has sufficient evidence to support a controversion if the board would find the employee is not entitled to benefits if the employee does not introduce evidence in opposition to

the controversion. *Harp*. As stated previously, the distinction between the mental injury groups is important when determining whether an employer's controversion is supported by substantial evidence because the presumption applies to a physical-mental injury. AS 23.30.120; AS 23.30.010; *Kelly*; *Theoni*. For a physical-mental injury, to rebut the presumption of compensability Employer must provide "substantial evidence" that either something other than work was the substantial cause of the disability or need for treatment or that work could not have caused the disability or need for medical treatment. *Huit*; *Harp*.

Employer controverted TTD, TPD, PPI, and medical treatment based upon the opinions of Drs. Montenegro and Craig. Employee contends Dr. Montenegro's EME report is not sufficient evidence upon which a reasonable mind would rely to support Employer's controversion. Employer's contends Dr. Montenegro's EME report is substantial evidence because he diagnosed Employee with a mental-mental injury which most likely resulted secondary to a disciplinary action, job transfer, and Employee's perceived inability to meet his new job requirements at OCS.

Dr. Montenegro opined Employee's primary diagnosis, other specified trauma and stress-related disorder, adjustment-like disorder, was work related and found Employee was not medically stable, criticized the treatment provided to Employee, recommended six months of additional psychological treatment, and imposed ongoing work restrictions. Dr. Montenegro's EME report is confusing and inconsistent and will not be relied upon. *Rogers & Babler*; *Miller*. Dr. Montenegro diagnosed Employee with "other specified trauma and stress related disorder" and temporary aggravation of Employee's preexisting GAD and related both diagnoses to the August 19, 2017 work injury on a more probable than not basis. Dr. Montenegro noted Employee's symptoms first occurred in the three months following the August 19, 2017 work injury and did not persist in the same intensity and frequency while in "dis-preferred" settings, leading him to conclude Employee does not have PTSD. Next, Dr. Montenegro stated Employee's diagnosis is a mental-mental condition because Employee's "complaints dissipate" when the work stress is removed. Dr. Montenegro subsequently opined Employee's "work stress" on August 19, 2017 was on a more probable than not basis, the substantial cause of his treatment recommendations, cognitive behavioral therapy and exposure therapy, for other specified trauma, stress-related

adjustment-like disorder, and pre-existing GAD, and for Employee's August 19, 2017 "occupational injury." He also opined Employee's "work-stress following his August 19, 2017 work injury does not remain the substantial cause for the treatment."

Basically, Dr. Montenegro opined Employee's August 19, 2017 work stress injury is the substantial cause of his need for treatment, not the work stress events following Employee's August 19, 2017 injury. The claimed August 19, 2017 work injury was a physical injury. The work stress events occurred after the August 19, 2017 work injury. Dr. Mongenegro's confusing and inconsistent opinions stem from Employer's failure to explain the distinction between the mental injury groups in its questions to Dr. Montenegro. *Traugott*. Additionally, Employer's questions initially described Employee's 19, 2017 physical injury as an "occupational injury" and as a "work stress."

Employer contends Dr. Montenegro's opinion Employee's "mental-mental injury most likely resulted secondary to a disciplinary action, job transfer and his perceived inability to meet his new job requirements" supports the "work stress events" after the August 19, 2017 injury are the substantial cause of Employee's disability and need for medical treatment. However, this contention ignores Dr. Montenegro relating Employee's need for treatment to the August 19, 2017 physical work injury.

When Employer asked Dr. Montenegro whether Employee's "work for the State of Alaska" is the predominant cause of the conditions he diagnosed, Dr. Montenegro opined Employee's diagnoses, other specified trauma and stress-related disorder with adjustment-like disorder and aggravation of Employee's pre-existing GAD, "during his work for the State of Alaska" are "the predominant cause of his mental-mental condition." Dr. Montenegro's opinion does not make any sense because it states Employee's diagnosis are the predominant cause of his mental-mental injury. The August 19, 2017 work injury is a physical-mental injury, not a mental-mental injury and Dr. Montenegro opined Employee's August 19, 2017 work stress injury is the substantial cause of his need for treatment, not the work stress events following Employee's August 19, 2017 injury.

When asked to identify the "actual stress" events that caused Employee's diagnosis, Dr. Montenegro stated, "Not applicable" without any further explanation. An answer to this inquiry goes to the heart of Employer's defense in this matter. Employer contends job transfers and a disciplinary action are the substantial cause of Employee's disability and need for treatment, not the August 19, 2017 work injury.

In responding to Employer's inquiry about whether all medical treatment been completed for which Employee's "work stress" was the substantial cause, Dr. Montenegro stated Employee did not obtain all of the medical treatment for his "work-related work stress sequelae" and would benefit from the cognitive behavioral treatment Dr. Montenegro recommended for Employee's August 19, 2017 "occupational injury." For each medical condition Dr. Montenegro opined the August 19, 2017 work injury was the substantial cause, Dr. Montenegro stated Employee had not reached medical stability for the "other specified trauma and stress related disorder" or the aggravation of his pre-existing GAD because Employee did not receive the cognitive behavioral therapy he recommended. This is the same treatment Dr. Montenegro recommended for Employee's "work-related stress sequelae" and for an "occupational injury" on August 19, 2017. It is unclear whether Dr. Montenegro is opining Employee's need for treatment is caused by the August 19, 2017 work injury or the following work stress events, which he could not identify. *Rogers & Babler*.

Employer also asked whether Employee's "work stress" was the substantial cause of any disability from August 19, 2017 to the present. Dr. Montenegro responded Employee did not meet the criteria for disability at that time and that the "work stress" was not the substantial cause of any disability. Employer's questions failed to ask Dr. Montenegro to address whether the August 19, 2017 work injury was the substantial cause of any disability and Dr. Montenegro's response failed to address whether the August 19, 2017 work injury caused any disability. Employee was assaulted on August 19, 2017 and an assault can produce unusual stress. However, Employee's injury is not automatically reclassified into a "mental-mental" claim without an analysis of the underlying cause of Employee's disability or need for medical treatment. *Runstrom*. The August 19, 2017 work injury is a physical-mental injury, not a

mental-mental injury. Dr. Montenegro's opinions do not address the underlying cause of Employee's disability or need for medical treatment. *Id*.

Therefore, due to the inconsistent and confusing opinions, Dr. Montenegro's report is not evidence a reasonable mind might accept as adequate to support the conclusion Employee's disability and need for psychological treatment was not work related. *Miller*; *Harp*. Furthermore, Dr. Montenegro's report never opined the work stress events occurring after the August 19, 2017 work injury were the substantial cause of Employee's disability and need for psychological treatment or that the August 19, 2017 physical work injury could not have caused Employee's disability and need for psychological treatment. *Huit*. Without addressing issues of credibility and evidentiary weight, Dr. Montenegro's report is not substantial evidence supporting Employer's controversion of disability benefits and psychological treatment for Employee's physical-mental injury. *Rogers & Babler*; *Huit*; *Harp*; *Miller*; *Norcon*.

Dr. Craig's report unequivocally concluded that the August 19, 2017 work injury could not have caused Employee's disability and need for medical treatment for a traumatic brain injury. He conclusively found Employee suffered no traumatic brain injury as a result of the August 19, 2017 work injury based upon his review of the medical record and Employee's test results. Dr. Craig's report is substantial evidence supporting Employer's controversion of disability benefits, medical treatment, and PPI for a traumatic brain injury. *Rogers & Babler*; *Huit*; *Harp*; *Miller*.

Because Dr. Montenegro's report is not substantial evidence supporting Employer's controversion of psychological treatment and Dr. Craig's report is substantial evidence supporting Employer's controversion of disability benefits, PPI and medical treatment for a traumatic brain injury, Employee's April 23, 2018 petition will be granted in part and denied in part. Employer's controversion will be quashed for psychological treatment and will not be quashed for disability benefits, PPI, or medical benefits for a traumatic brain injury.

Employee seeks an award of benefits, including disability and past and continuing medical costs. Employee contends he is entitled to benefits based solely on the raised but unrebutted presumption based upon *Williams*. However, this decision is not a final judgment on the merits

of Employee's claim. *Black's*. It makes no finding as to whether Employee's August 19, 2017 work injury is the substantial cause of any disability and need for treatment, whether specific medical treatment is reasonable and necessary, whether Employee was medically stable, or whether Employee is entitled to payment of unpaid medical bills.

CONCLUSIONS OF LAW

1) Employee's claim arose from a physical-mental injury.

2) Dr. Montengro's EME report is not substantial evidence supporting Employer's controversion of disability benefits and psychiatric treatment and Dr. Craig's EME report is substantial evidence supporting Employer's controversion of disability benefits, medical treatment, and PPI.

ORDERS

1) Employee's April 23, 2018 petition is granted in part and denied in part.

2) Employer's controversion is quashed for psychological medical treatment.

3) The parties are directed to attempt to resolve any remaining issues. If unresolved issues remain, any party may seek relief on an existing claim or a new claim or petition.

4) Jurisdiction is retained to decide any remaining disputes, which will be heard in a subsequent hearing upon due notice.

Dated in Juneau, Alaska on August 6, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Charles Collins, Member

/s/
Bradley Austin, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of RICHARD F. NELSON, employee / claimant; v. STATE OF ALASKA, employer; STATE OF ALASKA, insurer / defendants; Case No. 201714848; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 6, 2018.

/s/
Dani Byers, Technician