ALASKA WORKERS' COMPENSATION BOARD

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

DOUG WILLIAMS, Employee, Claimant, v. ALASKA NATIVE INDUSTRIES COOPERATIVE, Employer, and EMPLOYERS INSURANCE CO. OF WAUSAU, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 202014668 AWCB Decision No. 21-0106 Filed with AWCB Anchorage, Alaska on November 19, 2021.

Employee Doug Williams' April 27, 2021 claim was heard on October 12, 2021, in Anchorage, Alaska, a date selected on July 15, 2021. A June 15, 2021 hearing request gave rise to this hearing. Attorney Elliot Dennis appeared and represented Employee. Attorney Rebecca Holdiman Miller appeared and represented Alaska Native Industries Cooperative and Employers Insurance Company of Wausau (collectively Employer). Employee, Marcus Bibbs, Steven Henderson, DC, and Lynne Sturman appeared and testified for Employee. Bill Mathews appeared and testified for Employer. The record remained open for additional filings and closed on October 20, 2021.

ISSUES

As a preliminary matter, Employer asked for a hearing continuance contending the September 24, 2021 deposition of Susanne Fix, M.D., and the August 26, 2021 deposition of its employer's

medical evaluator (EME) Scot Youngblood, M.D., showed new medical facts, and medical disputes between them warranted a second independent medical evaluation (SIME).

Employee conceded there were medical disputes, but contended Employer's untimely request waived its right to an SIME. He further contended there were already adequate medical opinions in the file, and the SIME process would unnecessarily delay his case resolution. Employee wanted the SIME request denied. An oral order denied Employer's continuance and SIME requests.

1) Was the oral order denying Employer's continuance and SIME requests correct?

As another preliminary matter, Employer requested a hearing continuance contending Employee had already asked to delay his reemployment denial appeal, untimely sought to add temporary partial disability (TPD) as a hearing issue and produced payroll records late. It contended all issues should be heard at the same time to ensure quick and efficient case resolution.

Employee contended he asked the reemployment issue to be held in abeyance because if he returns to work after surgery this issue would be moot. In addition, Employee contended this panel should address TPD because he produced his payroll records as soon as he obtained them. An oral order denied Employer's continuance request as the reemployment benefits claim was set for hearing, and a continuance would unnecessarily delay adjudication of other substantial issues.

2) Was the oral order denying Employer's hearing continuance request to resolve all issues at the same time correct; should this decision address TPD as a hearing issue; should this decision hold the reemployment denial appeal in abeyance?

Employee contends he sustained a compensable injury on November 18, 2020, while working for Employer, and is entitled to temporary total disability (TTD) benefits. Also, he contends he is entitled to TPD benefits from May 10, 2021, and continuing.

Employer contends the work injury is not the substantial cause of Employee's need for medical treatment, and his disability is due to progression of a preexisting condition. Employer contends this panel should not address TPD because it is not an issue for the October 12, 2021 hearing.

3) Is Employee entitled to TTD benefits?

Employee contends his permanent partial impairment (PPI) benefits claim is not ripe because he did not reach medical stability; however, once he is medically stable, he should be entitled to obtain a PPI rating and benefits, if his rating is greater than zero.

Employer contends the work injury is not the substantial cause of any permanent impairment Employee may have; any permanent impairment is due to progression of a preexisting condition.

4) Is Employee entitled to PPI benefits?

Employee contends he needs continuing medical care for his work injury. He seeks an order requiring Employer to pay for all medical benefits necessitated by his work injury.

Employer contends Employee is entitled to no additional medical care or related transportation costs based on its EME opinions, and his claim should be denied.

5) Is Employee entitled to medical and transportation costs?

Employee contends he is entitled to a late-payment penalty on benefits owed. In addition, he contends a penalty is owed because Employer's controversions were not filed in good faith.

Employer contends Employee is not entitled to penalties because he was not entitled to any benefits, and facts or law support its controversion notices.

6) Is Employee entitled to a penalty?

Employee contends Employer unfairly or frivolously controverted his benefits; he seeks an appropriate finding.

Employer contends it did not unfairly or frivolously controvert any benefits and paid Employee all benefits to which he is entitled.

7) Did Employer frivolously or unfairly controvert any benefits?

Employee contends he is entitled to interest on unpaid benefits. He also contends his attorney provided valuable services that will result in the award of benefits; consequently, he should be awarded attorney fees and costs.

Employer contends Employee is not entitled to interest, attorney fees or costs as it timely controverted his claims, and he is not entitled to any benefits in this case.

8) Is Employee entitled to interest, attorney fees and costs?

FINDINGS OF FACT

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

1) From January 14, 2005, to November 18, 2020, Employee worked for Employer re-packaging six to seven pallets of soda per day; each pallet had 81 cases, and each case had two 12-packs of soda. Employee manually banded three cases weighing 62 pounds and stacked them on pallets about 54 times a day. (Videoconference Deposition of Bill Mathews, August 20, 2021; Employee).

2) Since 2014, Dr. Henderson regularly treated Employee's back pain due to "moving and lifting most days." (Henderson report, September 4, 2014; Henderson).

3) On November 18, 2020, Employee saw Dr. Henderson and reported he "injured himself by lifting and twisted" at work. (Henderson report, November 18, 2020).

4) On November 20, 2020, Employee reported he injured his back on November 18, 2021, while working for Employer. (Report of Occupational Injury or Illness, November 20, 2020).

5) On December 21, 2020, Dr. Henderson diagnosed radiculopathy and ordered a magnetic resonance imaging (MRI) "at the L-spine to rule out disc problems." (Henderson report, December 21, 2020).

6) On December 28, 2020, an MRI showed "[m]ultilevel degenerative changes worst at the L4-5 level where a small disk protrusion contacts multiple right transiting nerve roots." (Max Berry, M.D., report, December 28, 2020).

7) On February 1, 2021, Dr. Kropp saw Employee, reviewed the December 28, 2020 MRI, diagnosed lumbar disc displacement with radiculopathy, gave transforaminal epidural injection and performed a diagnostic epidurogram. (Kropp report, February, 1, 2021).

8) On March 4, 2021, Dr. Henderson predicted Employee (1) will have a PPI rating greater than zero as a result of his November 18, 2020 work injury and (2) will have the permanent physical capacities to perform the physical demands of his job as described in the Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles (SCODRDOT) for Machine Packager. (Henderson response, March 4, 2021).

9) On March 19, 2021, Dr. Youngblood saw Employee for an EME and diagnosed "(1) lumbar strain, without evidence of fracture, dislocation, internal derangement, radiculopathy, or myelopathy, related to the industrial injury of November 18, 2020, resolved and medically stable"; and "(2) subjective complaints in excess of objective findings, with nondematomal and nonanatomic sensory and pain complaints." "Chart Review" in his EME report shows two entries mentioning the MRI. However, he noted "[n]o imaging studies have been provided for review" and opined "[p]otential causes of [Employee's] claimed disability and claimed need for treatment would be [his] age, genetics, and the industrial injury of November 18, 2020," and "[t]he substantial cause (100%) of [Employee's] lumbar strain was the industrial injury of November 18, 2020," which "resolved and achieved medical stability three months after the industrial injury, on February 18, 2021." Dr. Youngblood stated, "[n]o pre-existing condition is identified as aggravated," and "[n]o additional medical treatment is deemed reasonable, necessary or recommended other than a self-directed home exercise program." He opined Employee was "cleared to return to full duty in the job held at the time of injury." (Youngblood report, March 19, 2021).

10) On April 10, 2021, rehabilitation specialist Jackie Doerner recommended Employee be found ineligible for reemployment benefits based on Dr. Henderson's March 4, 2021 prediction. (Eligibility Evaluation Report Addendum, April 13, 2021).

11) On April 16, 2021, Employer denied all benefits based on Dr. Youngblood's March 19, 2021 opinion. (Controversion Notice, April 16, 2021).

12) On April 16, 2021, Dr. Fix saw Employee, conducted a physical examination, reviewed the December 28, 2020 MRI, diagnosed an "L4/5 disc herniation," and recommended a partial discectomy due to failed conservative care. (Fix report, April 16, 2021).

13) On April 27, 2021, Dennis began representing Employee, who claimed TTD, PPI and reemployment benefits, medical and transportation costs, attorney fees and costs, a finding of unfair or frivolous controversion, interest and penalty. (Claim for Workers' Compensation Benefits; Entry of Appearance, April 27, 2021).

14) On May 4, 2021, the Reemployment Benefits Administrator Designee (RBAD) found Employee ineligible for reemployment benefits based on Doerner's April 10, 2021 report. (Agency file, May 4, 2021).

15) On May 6, 2021, Dr. Henderson released Employee to "part-time work with light duty" limiting his lifting to "10 lbs frequently and not over 20 lbs occasionally." (Henderson letter, May 6, 2021).

16) On May 13, 2021, Employee appealed the RBAD's May 4, 2021 decision. (Petition, May 13, 2021).

17) On May 20, 2021, Employer denied all claims based on Dr. Youngblood's March 19, 2021 opinion. (Controversion Notice, May 20, 2021).

18) On July 15, 2021, the parties agreed to a merits hearing on October 12, 2021, on TTD and PPI benefits, medical and transportation costs, attorney fees and costs, reemployment benefits, an unfair or frivolous controversion finding, interest and penalty issues. (Prehearing Conference Summary, July 15, 2021).

19) On August 26, 2021, Dr. Youngblood said he had "diagnosed [Employee] with a lumbar strain, and [he] did not think that there was any evidence of a fracture, dislocation, radiculopathy or myelopathy or internal derangement [. . .] related to the industrial injury of November 18, 2020," which was resolved. Dr. Youngblood said "[Employee's] complaints were not radicular in nature," physical tests showed he had no "radicular or dermatomal loss of sensation or altered sensation [. . .] or weakness," and "his reflexes were symmetric"; also, "the seated straight-leg raise and the supine straight-leg raise" showed normal results. Dr. Youngblood noted that there was no medical record between November 18, 2020, and December 16, 2020, showing any radicular symptoms; he opined Employee would have felt a radiculopathy immediately if there was a herniation pressing up against a nerve. He said, ". . . when you have a radiculopathy, it

should be consistent. You should know exactly where the pain is. It should be specific and reproducible. And it simply isn't [in] this case." Dr. Youngblood noted the December 28, 2020 MRI showed a "protrusion of a disc bulge," not a herniation, which is "where the disc material inside of the disc actually punctures through the annulus, which is the fibrous layer, and then escapes out into the spinal canal thus pushing onto the nerve or nerve roots more focally and more significantly." He said "typically, a disc protrusion or a disc bulge doesn't really cause a radiculopathy or nerve root compression where a disc herniation could do that more easily." Dr. Youngblood said that "[his] understanding of the consensus of the literature is that lifting occupations do not increase the risk of degenerative disc diseases of the lumbar spine." He said he did not request the adjuster to provide the December 28, 2020 MRI for his EME because "this is like a busy clinic, so [he's] trying to complete the exam, do the documentation and then move on. . . . it's kind of up to [the adjuster]" to provide it. (Remote Deposition of Scot A. Youngblood, M.D., August 26, 2021).

20) On August 27, 2021, Dr. Kropp said the December 28, 2020 MRI showed an abnormality at L4-5 disc, and there was a nerve injury related to that abnormality. He said "the disc at 4-5 was contacting the right nerve root on the right," which "will develop symptoms in that dermatome"; if the contact continues, the nerve will lose conductivity and develop some nerve damage if left untreated. Dr. Kropp said Employee's numbness tracing down to his anterior thigh, which is where L4-5 nerve goes, supported his February 1, 2021 "lumbar disc displacement with radiculopathy" diagnosis. He explained some doctors would argue a condition should not be called "radiculopathy" until there is a documented weakness in the leg; if it is just a nerve inflammation, it should be called "radiculitis." Dr. Kropp explained:

> The "-opathy" means that there's actually documented disease, say like on an EMG, or something like that, or he is weak, he can't walk. Radiculitis means he has all those symptoms, but he hasn't developed nerve damage yet. So there's a continuum; you start with radiculitis and you progress on to radiculopathy . . . Most textbook authors are going to say he can't walk on that leg. And so
> Dr. Youngblood, of course, is going to argue that if I say that he has a radiculopathy, he's going to say, well, then demonstrate to me -- demonstrate to me his inability or his loss of strength. So "radiculopathy" has kind of been a catchphrase here. And again, it's a spectrum, so I'm going to say [Employee's] somewhere on that spectrum . . . .

(Deposition of Larry Kropp, M.D., October 4, 2021).

21) On September 24, 2021, Dr. Fix opined Employee's work is the substantial cause of his need for medical treatment and disability because "he has a disk herniation with impingement and radiculopathy that does not allow him to kind of do normal activities. It's interfered with even just self-care and what he does at home. He also stated he hasn't been able to sleep because of it. But the onset at least fits with his description of the [November 18, 2020] injury." She said the December 28, 2020 MRI findings and his complaints are consistent; the MRI showed "a disk herniation that contacts the traversing nerve roots, and the L5 root runs across that disk space before it exits the spine, as well as the sciatic." Dr. Fix also said sensory and motor exams confirmed radiculopathy in the L5 distribution and explained that radiculopathy begins "when the disk shifts to contact the nerve root," and it "may start with back pain when the disk protrudes," "comes through the annulus," and contacts the nerve roots. Then "it triggers a chemical reaction which triggers then as pain." This process may not be an immediate process; "[s]ometimes the disk herniates and people – their back hurts, and the back is the predominant complaint. And once the disk shifts, there is a ligament that runs down the posterior aspect of the spine, and if that ligament is stretched, it causes intense back pain. If the disk slips through the ligament, the back pain improves and then the leg pain starts. So the description the patient gives me tells me when the piece of disk shifted towards the nerve when the leg symptoms began." Dr. Fix opined Employee needs surgery to relieve pressure from his L-5 nerve root; surgery should be the last resort but because "[Employee's] almost coming up on a year with the problem, the fact that he still has it would suggest that he's not one of those fortunate ones that will resolve it without an intervention." Further, Dr. Fix said "it would not be surprising if the leg pain started a few weeks later" after back injury. Based on her 30 years of practice, she opined that workers engaged in heavy physical activity are at increased risk of back injuries. Dr. Fix opined Employee is not medically stable and "would not be able to do heavy manual labor, given his current condition." She said Employee would have a PPI rating greater than zero once the recommended surgery is done. (Videoconference Deposition of Susanne E. Fix, M.D., October 4, 2021).

22) On September 28, 2021, Employer asked for an SIME. (Petition, September 28, 2021). It did not file a completed SIME form. (Agency file).

23) On September 29, 2021, Employee asked to hold the RBAD denial appeal in abeyance until after his back surgery. (Petition, September 29, 2021).

24) On October 6, 2021, Employee sought to amend his April 27, 2021 claim to add TPD benefits as an issue for the October 12, 2021 hearing. (Petition, October 6, 2021).

25) At hearing on October 12, 2021, Dr. Henderson opined Employee's work is the substantial cause of his need for medical treatment and disability, and he is not medically stable and needs back surgery. Dr. Henderson has treated Employee's back pain since 2014 but Employee began showing radiculopathy symptoms after the November 18, 2020 work injury. Dr. Henderson also said Employee's actual job duties with Employer differed from the SCODRDOT description for Machine Packager; had he known such he would have not predicted Employee will have the permanent physical capacities to perform the physical demands of his job as Machine Packager. (Henderson).

26) From 2014 to November 18, 2020, Employee also worked part-time as a janitor for Bibbs Services, LLC (Bibbs). He did not work for Bibbs in December 2020, January, February, March or April 2021. But in May 2021, Employee returned to work part-time for Bibbs after providing Dr. Henderson's May 6, 2021 light release; Bibbs modified his job duties according to it. (Bibbs).

27) On October 15, 2021, Employee asked for $51,073.39 in attorney fees and $17,468.25 in costs, totaling $68,541.64. Dennis bills at $395 per hour for attorney services and $175 per hour for paralegal services. (Summary of Fees and Costs Incurred by Employee's Attorney).

28) On October 15, 2021, Dennis addressed the required factors supporting his request for reasonable fees from Alaska Rules of Professional Conduct 1.1(a). He filed a fee affidavit; in pertinent part it states:

> 6) The time and labor expended in this matter has been considerable as is delineated in my timesheets and as the Board has observed. A vigorous prosecution of this case has been necessary because employer and its IME physician has vigorously asserted the employer's defenses, that Mr. Williams is not disabled by a work injury, that he is medically stable, that he needs no further medical treatment and that he can return to the job of the injury without limitations. Depositions of two treating physicians, the IME physician, the employer and the employee were taken in this case. At hearing, employee's counsel elicited testimony from attending physician Dr. Henderson, part-time employer Marcus Bibbs, employee's mother, Lynne Sturman and the employee. Each witness had to be prepared. Factually this is a relatively straightforward case, but due to the aggressive defense asserted by the employer it has not been the simplest case to prosecute. Challenges in the case include Mr. Williams' cognitive limitations as testified to by Ms. Sturman.

> 7) Acceptance of this case has precluded acceptance of other legal work. The quantity of time expended on this case has precluded the acceptance of work for other clients.
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> 8) My hourly rate is $395 per hour. For an attorney with my experience, it is believed this is a customary and usual rate, if not on the low side. This hourly rate has been awarded to me multiple times for litigation before the Board.
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> 9) The amount of time I have expended is delineated in my timesheets. Also, the amount of costs I have advanced to prosecute this case is set forth in my timesheets. I do not know the result which will be obtained, but I have worked hard to maximize the possibility of recovery for my client.
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> 10) There have been specific time limits applicable to this case by virtue of it being a workers' compensation case which I have taken to hearing for resolution. Without proceeding to hearing, there would have been no prompt resolution of this matter.
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> 11) I have not had a long professional relationship with this client, only representing him in this workers' compensation matter.
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> 12) I have handled injury cases for most of my 45 year career as an attorney. For the last 10 years I have predominantly handled workers' compensation cases. I believe I am relatively skilled in representing my clients. I trust the Board knows whether I have a good reputation or not.
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> 13) The fee in this matter is contingent. If I am not successful before the Board, then I will not receive payment for my services nor will I receive reimbursement for the considerable costs which I have expended in this matter. . . . (Supplemental Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees, and Costs, October 15, 2021).

29) On October 19, 2021, Employer opposed the amount of fees and costs based on (1) hourly attorney fees; (2) administrative time; (3) time billed for not litigated issues; and (4) excessive time spent on tasks. (Employer's Opposition to Affidavit for Attorney Fees, October 19, 2021).

30) On October 20, 2021, Dennis agreed to reduce his fees as follows: 0.7 hour entry for June 16, 2021, 0.2 hours for September 3, 2021, and 0.3 hours for September 8, 2021, totaling $474 for 1.2 attorney hours. (Employee's Reply to Employer's Opposition to Affidavit for Attorney's Fees).

31) Dennis' hourly rate for attorney and paralegal services are reasonable and the board has awarded fees and costs at these rates to him in other cases. They are commensurate with rates

awarded other workers' compensation claimant attorneys and paralegals practicing in this area. (Experience, judgment and observations).

PRINCIPLES OF LAW

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

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has a right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
> . . . .

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp*., AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under AS 23.30.095(k). The AWCAC confirmed "[t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer." *Id*. *Bah* further stated when deciding whether to order an SIME, the board considers the following questions, though the statute does not require it:

> (1) Is there a medical dispute between Employee's physician and an EME?
> (2) Is the dispute significant?
> (3) Will an SIME physician's opinion assist the board in resolving the disputes?

Maher v. Doyon Associated, LLC, AWCB decision No. 17-0087 (July 27, 2017) declined to order an SIME in a case with medical disputes. It determined "medical personnel with the relevant expertise" had already reviewed and analyzed the injured worker's test results. *Id.* at 11. *Maher* concluded:

> Although an SIME *may* be ordered when there is a medical dispute, the existence of a medical dispute alone does not *require* an SIME. (Citations omitted). Wide discretion exists when deciding on whether to order an SIME. (Citations omitted).

O'Connell v. Chevron Corp., AWCB Decision No. 15-0108 (August 28, 2015), declined to order an SIME when it found "sufficient evidence" already in the record. *Id*. at 11. *Gonzalez v. Ocean Beauty Seafoods, LLC*, AWCB Decision No. 21-0013 (February 22, 2021) did not order an SIME where it found significant disputes but found "an additional medical opinion would not aid the fact-finders in resolving the disputes" and "an SIME would unnecessarily delay this case." *Id*. at 5. *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Decision No. 20-0085 (September 24, 2020) declined to order an SIME because physicians had already addressed the issue and "another SIME would unnecessarily delay this case and unduly burden Employer with a unreasonable cost." *Id*. at 4. *LaBlanc v. AK Inga's Galley*, LLC, AWCB Decision No. 19-0106 (October 11, 2019), found a significant medical dispute over treatment but declined to order an SIME "because there is sufficient evidence to make a determination regarding Employee's claim for medical treatment." *Id*. at 5.

> **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. . . .

Benefits sought by an injured worker are presumed compensable. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption applies to any claim for compensation under the workers' compensation statute. *Id*. The presumption involves a three-step analysis. To attach the

presumption, an employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Credibility is not examined at the first step. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

Once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc*., 973 P.2d 603 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence.

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000).

In *Bockness v. Brown Jug, Inc.*, 980 P.2d. 445, (Alaska, 1999), the Supreme Court held by providing that employers are responsible only for providing medical care and services "which the nature of the injury or the process of recovery requires," the Act indicates the board's proper function includes determining whether the care paid for by employers is reasonable and necessary.

> **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 credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.135. Procedure before the board**. (a) 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 by 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. . . .
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> **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. . . . 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. . . .

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. *Bignell* required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id*. at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id*. at 973, 975. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), held "attorney's fees in workers' compensation cases should be fully compensatory and reasonable," so injured workers have "competent counsel available to them." Nonetheless, when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed. *Rusch & Dockter v. SEARHC*, 453 P.3d 784, 803 (Alaska 2019), held an award of attorney fees will only be reversed if it is "manifestly unreasonable" and explained "[a] determination of reasonableness requires consideration and application of various factors that may involve factual determinations, but the reasonableness of the final award is not in itself a factual finding." *Rusch & Dockter*. It held the board must

consider all of the following eight non-exclusive factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining the reasonableness of a fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director. . . .
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> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
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> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due.
> . . . .

> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment.
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> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

AS 23.30.155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). To avoid a penalty, a controversion must be filed in good faith. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352 (Alaska 1992). For it to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the board would find the claimant not entitled to benefits. *Id*.

Land and Marine Rental Co. v. Rawls, 686 P.2d 1187 (Alaska 1984), held a workers' compensation award, or any part thereof, shall accrue lawful interest from the date it should have been paid. Interest and penalty are mandatory.

> **8 AAC 45.065. Prehearings**. . . .
> . . . .
>
> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issue for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.
>
> **8 AAC 45.070. Hearings**. . . .
> . . . .
>
> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary . . . governs the issues and the course of the hearing.

8 AAC 45.082. Medical treatment.

. . . .

(d) Medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and a completed report in accordance with 8 AAC 45.086(a). Unless the employer controverts the prescription charges or transportation expenses, an employer shall reimburse an employee's prescription charges or transportation expenses for medical treatment no later than 30 days after the employer received the medical provider's completed report in accordance with 8 AAC 45.086(a), a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and an itemization of the prescription numbers or an itemization of the dates of travel, destination, and transportation expenses for each date of travel. If the employer controverts (1) a medical bill or if the medical bill is not paid in full as billed, the employer shall notify the employee and medical provider in writing the reasons for not paying all or a part of the bill or the reason for delay in payment no later than 30 days after receipt of the bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and completed report in accordance with 8 AAC 45.086(a); (2) a prescription or transportation expense reimbursement request in full, the employer shall notify the employee in writing the reason for not paying all or a part of the request or the reason for delay within the time allowed in this section in which to make payment; if the employer makes a partial payment, the employer shall also itemize in writing the prescription or transportation expense requests not paid.

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include (1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment; (2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and (3) ambulance service or other special means of transportation if substantiated by competent medical evidence or by agreement of the parties.

(c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.

> (d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or more have accumulated, or upon completion of medical care, whichever occurs first.
>
> (e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.
>
> **8 AAC 45.092. Second independent medical evaluation**. . . .
> . . . .
>
> (g) If there exists a medical dispute under AS 23.30.095(k),
> . . . .
>
> (2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;
>
> (A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and
>
> (B) copies of the medical records reflecting the dispute; or
>
> (3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation. . . .

In *Egemo v. Egemo Const. Co.*, 998 P.2d 434, 441 (Alaska 2000), an injured worker claimed disability benefits for future surgery when he was not yet disabled. *Egemo* held the board was wrong to dismiss a prematurely filed a claim and said:

> In our view, when a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice that it may be refiled when it becomes timely. (Footnote omitted).

ANALYSIS

1) Was the oral order denying Employer's hearing continuance and SIME requests correct?

As a preliminary matter, Employer asked for a hearing continuance contending the deposition of Dr. Fix, and EME Dr. Youngblood showed new medical facts, and medical disputes between them warranted an SIME. Employee conceded there were medical disputes, but contended Employer's untimely request waived its right to an SIME, and there were already adequate medical opinions in the file, and the SIME process would unnecessarily delay his case resolution. An oral order denied Employer's continuance and SIME requests.

Employer did not file a completed SIME form as required by 8 AAC 45.092(g)(2)(A). Even if it had filed the form, the main question was whether an SIME would help the factfinders resolve this case. Though the medical disputes are significant, there are already considerable medical opinions on the relevant issues. *O'Connell*; *LaBlanc*. *Bah* provides guidance for ordering an SIME; however, its list is not exhaustive and does not delineate everything that can be taken into account. An SIME is discretionary. *Dwight*; *Maher*; 8 AAC 45.092(g)(3). As Employer controverted all benefits, including medical care, and considering all *Bah* factors, another physician's opinion on the relevant issues would have not assisted the factfinders in resolving this case because there is already enough medical evidence. *Gonzales*. An SIME, which could take many months to accomplish, would have unnecessarily delayed case resolution contrary to the legislative mandate. AS 23.30.001(1); *Gonzales*; *Hernandez*. Further, given the considerable medical evidence already in the file, an SIME order would have been an unreasonable cost for Employer, notwithstanding its willingness to incur that cost. *Hernandez*; *O'Connell*; *LaBlanc*. Proceeding without an SIME assisted in more efficiently ascertaining the rights of all parties. AS 23.30.001(1); AS 23.30.135(a). Thus, the oral order denying Employer's continuance and SIME requests was correct.

2) Was the oral order denying Employer's hearing continuance request to resolve all issues at the same time correct; should this decision address TPD as a hearing issue; should this decision hold the reemployment denial appeal in abeyance?

As another preliminary matter, Employer asked for a hearing continuance contending Employee sought to delay his reemployment denial appeal, untimely asked to add TPD benefits as a hearing issue and produced payroll records late. It contended all issues should be heard at the same time at a later date ensure quick and efficient resolution of the case.

TPD was not identified as a hearing issue on the July 15, 2021 Prehearing Conference Summary. Prior to a scheduled hearing, the parties must ensure that the controlling prehearing conference summary for a hearing includes all issues they intend to have heard at the scheduled hearing. Unless modified, the prehearing conference summary will "limit the issues" at hearing and "governs the issues and the course of the hearing." 8 AAC 45.065(c). This requirement helps avoid misunderstandings and allows all parties to properly prepare their evidence and arguments. Once the parties are at the hearing, absent "unusual and extenuating circumstances," that have not been shown to exist in this case, the prehearing conference summary still "governs the issues and the course of the hearing." 8 AAC 45.070(g).

Dennis began representing Employee on April 27, 2021; Employee disclosed he worked part-time at his August 26, 2021 deposition. Thus, Dennis should have known about Employee's part-time work and had sufficient time to address it; he did not do so. Employee did not show unusual and extenuating circumstances to circumvent the prehearing conference summary which limited the hearing issues. As Employer objected, this decision cannot address TPD benefits because it was not properly raised as a hearing issue; Employer is entitled to sufficient time to respond to this issue. AS 23.30.001(4); 8 AAC 45.065(c); 8 AAC 45.070(g).

It is undisputed Employee was initially found ineligible for reemployment benefits, and he subsequently appealed the RBAD's decision. However, Employee asked this appeal to be held in abeyance because (1) he intends to return to work with Employer after surgery and (2) he does not want to give up the prospects of reemployment benefits in case he is not able to do so. Reemployment specialist Doerner relied on Dr. Henderson's March 4, 2021 prediction that Employee (1) will have a PPI rating greater than zero as a result of his November 18, 2020 work injury and (2) have the permanent physical capacities to perform the physical demands of his job as described in the SCODRDOT for Machine Packager. If this decision rules in Employee's favor on the medical care and causation issues, Employee will not yet be medically stable. Employee, in that event, will not have been rated yet any possible PPI; thus, the reemployment issue is not ripe. Thus, the RBAD's reemployment denial appeal will be held in abeyance. AS 23.30.135(a); 8 AAC 45.525(f); *Egemo*. In the event Employee obtains a future PPI rating for a

body part or function injured in his work injury with Employer, he retains his right to revisit the reemployment issue, and Employer retains all its defenses.

3) Is Employee entitled to TTD benefits?

Employee contends he sustained a compensable injury while working for Employer and is entitled to TTD benefits from November 18, 2020, to May 9, 2021. Employer contends the work injury is not the substantial cause of Employee's need for medical treatment, and his disability is due to the progression of a preexisting condition.

There is conflicting medical evidence addressing compensability, which raises factual questions to which the presumption analysis applies. AS 23.30.120(a)(1); *Meek*. Without regard to weight or credibility, Employee raised the presumption on his TTD claim with medical opinions from Drs. Henderson, Kropp and Fix. *Tolbert*; *Wolfer*. Each physician provided a medical opinion stating Employee sustained a work injury and was disabled by it. Disregarding weight or credibility, Employer rebutted the presumption with Dr. Youngblood's opinion stating Employee's November 18, 2020 work injury was not the substantial cause of his need for medical treatment or disability. *Kramer*; *Tolbert*. Therefore, Employee must prove his TTD claim by a preponderance of the evidence. *Saxton*; *Steffey*.

It is undisputed Employee had preexisting back conditions, and Dr. Henderson has treated them since 2014. Employee continuously worked for Employer from January 14, 2005, through November 18, 2020, and Dr. Henderson's September 4, 2014 chart note states Employee reported back pain due to "moving and lifting most days." However, whether Employee started having work-related back conditions since 2014 is not the focal point of this case. The main question is whether Employee developed radiculopathy due to the November 18, 2020 work injury.

Dr. Henderson said he treated Employee for more than seven years but Employee began showing radiculopathy symptoms after the November 18, 2020 work injury, and the December 28, 2020 MRI confirmed it. He opined Employee's work is the substantial cause of his need for medical treatment and disability, he is not medically stable and needs back surgery.

Dr. Kropp saw Employee, reviewed the December 28, 2020 MRI, and said the MRI showed an abnormality at L4-5 disc, and there was a nerve injury related to that abnormality. Dr. Kropp said Employee's numbness tracing down to his anterior thigh, which is where L4-5 nerve goes, supported his "lumbar disc displacement with radiculopathy" diagnosis. He said some doctors like Dr. Youngblood would argue that radiculopathy must demonstrate inability or loss of strength. By contrast, Dr. Kropp opined "radiculopathy" is a "spectrum," of nerve inflammation and nerve damage, and Employee is "somewhere on that spectrum."

Dr. Fix, a neurosurgeon who practiced for more than 30 years, saw Employee, conducted physical examinations, reviewed the December 28, 2020 MRI, diagnosed an "L4/5 disc herniation," and recommended a partial discectomy. She opined Employee's work is the substantial cause of his need for medical treatment and disability because "he has a disk herniation with impingement and radiculopathy that does not allow him to kind of do normal activities." Dr. Fix said the December 28, 2020 MRI findings and Employee's complaints were consistent; sensory and motor exams confirmed radiculopathy in the L5 distribution and explained that radiculopathy may not be an immediate process. Contrary to Dr. Youngblood's opinion, Dr. Fix said "it would not be surprising if the leg pain started a few weeks later" after back injury. She explained, "[s]ometimes the disk herniates and people – their back hurts, and the back is the predominant complaint. And once the disk shifts, there is a ligament that runs down the posterior aspect of the spine, and if that ligament is stretched, it causes intense back pain. If the disk slips through the ligament, the back pain improves and then the leg pain starts. So the description the patient gives me tells me when the piece of disk shifted towards the nerve when the leg symptoms began." Dr. Fix opined Employee needs surgery to relieve pressure from his L-5 nerve root because all conservative care failed, is not medically stable and "would not be able to do heavy manual labor, given his current condition." She said Employee could have a PPI rating greater than zero once the recommended surgery is done.

By contrast, EME Dr. Youngblood saw Employee and diagnosed "(1) lumbar strain, without evidence of fracture, dislocation, internal derangement, radiculopathy, or myelopathy, related to the industrial injury of November 18, 2020, resolved and medically stable"; and "(2) subjective

complaints in excess of objective findings, with nondematomal and nonanatomic sensory and pain complaints." He did not review any "imaging studies" giving these diagnoses and opined "[p]otential causes of [Employee's] claimed disability and claimed need for treatment would be [his] age, genetics, and the industrial injury of November 18, 2020," and "[t]he substantial cause (100%) of [Employee's] lumbar strain was the industrial injury of November 18, 2020," which "resolved and achieved medical stability three months after the industrial injury, on February 18, 2021." Dr. Youngblood stated, "[n]o pre-existing condition is identified as aggravated," and "[n]o additional medical treatment is deemed reasonable, necessary or recommended other than a self-directed home exercise program." He opined Employee was "cleared to return to full duty in the job held at the time of injury." In his deposition, Dr. Youngblood said physical tests showed he had no "radicular or dermatomal loss of sensation or altered sensation [. . .] or weakness," and "his reflexes were symmetric"; also, physical tests showed normal results. Dr. Youngblood noted that there was no medical record between November 18, 2020, and December 16, 2020, showing any radicular symptoms and opined Employee would have felt a radiculopathy immediately if there was a herniation pressing up against a nerve. Dr. Youngblood said the December 28, 2020 MRI, which was not reviewed during his EME, showed a "protrusion of a disc bulge," which "doesn't really cause a radiculopathy or nerve root compression where a disc herniation could do that more easily." Dr. Youngblood said that "[his] understanding of the consensus of the literature is that lifting occupations do not increase the risk of degenerative disc diseases of the lumbar spine." He did not explain why other physicians' opinions should not be given greater weight.

Drs. Henderson, Kropp and Fix's opinions are given the greatest weight. These doctors physically examined Employee, reviewed the MRI, and considered his complaints before giving radiculopathy diagnosis. They agreed Employee's work is the substantial cause of his need for medical treatment and disability; he is not medically stable and needs back surgery. On the other hand, Dr. Youngblood deliberately chose not to review the MRI before rendering his March 19, 2021 opinion. "Chart Review" in his report shows two entries mentioning the MRI; yet he chose not to look for it because "this is like a busy clinic, so [he's] trying to complete the exam, do the documentation and then move on. . . . it's kind of up to [the adjuster]" to provide it. MRIs are essential in determining musculoskeletal issues. *Rogers & Babler*. The level of Dr.

Youngblood's commitment to provide an accurate medical opinion is questionable; his opinion is given no weight. AS 23.30.122; *Smith*.

There is no evidence showing Employee worked from November 18, 2020, through May 5, 2021. On May 6, 2021, Dr. Henderson released Employee to "part-time work with light duty." On May 10, 2021, he returned to work for Bibbs as a part-time janitor. Therefore, based on Drs. Henderson, Kropp and Fix's opinions, Employee is entitled to TTD benefits from November 18, 2020, through May 5, 2021.

4) Is Employee entitled to PPI benefits?

Drs. Henderson, Kropp and Fix recommended back surgery; thus, Employee's PPI benefits claim is not ripe because he did not reach medical stability. *Egemo*. However, once he is medically stable, he is entitled to obtain a PPI rating, and PPI benefits if the rating is greater than zero. In that event, Employee can file an appropriate claim and revisit this issue if Employer, who reserves its defenses, controverts any future PPI rating.

5) Is Employee entitled to medical and transportation costs?

This decision establishes Employee sustained a compensable injury; thus, under AS 23.30.095(a), Employer must provide medical treatment "which the nature of the injury or the process of recovery requires." In *Bockness,* the Supreme Court explained that meant "reasonable and necessary" medical care. Therefore, Employee is entitled to all reasonable and necessary medical care related to this compensable injury, paid pursuant to the Alaska Medical Fee Schedule, to the extent Employee properly files and serves appropriate medical records and billing statements. AS 23.30.095(a); 8 AAC 45.082(d). Employee is also entitled to medical transportation expenses for the work injury to the extent he provides appropriate documentation. 8 AAC 45.084.

6) Is Employee entitled to a penalty?

Penalties are imposed when employers fail to pay compensation when due. AS 23.30.155(e); *Haile*. Also, to avoid a penalty, a controversion must be filed in good faith. AS 23.30.155(a);

(d); *Harp*. In examining a controversion and the evidence on which it was based in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion, the panel must decide if the controversion is a "good faith" controversion. For a controversion to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the claimant would not be entitled to benefits. *Harp*.

On April 16, 2021, Employer controverted all benefits based on Dr. Youngblood's March 19, 2021 report, which this decision gives no weight because he opined primarily based on the physical examination he conducted. However, at the time the controversion was filed, Dr. Youngblood's report taken in isolation was sufficient evidence to controvert all benefits. *Harp*. In other words, Employee would not be entitled to any benefits if the panel decided based on Dr. Youngblood's report or any other evidence Employer possessed on March 19, 2021. *Harp*. Therefore, Employer's April 16, 2021 Controversion Notice was filed in good faith, and Employee is not entitled to a penalty on unpaid benefits. AS 23.30.155(e); *Harp*.

7) Did Employer frivolously or unfairly controvert any benefits?

Because this decision finds Employer's July 20, 2020 controversion was in good faith, Employee's request for a finding of unfair or frivolous controversion will be denied. AS 23.30.155(o); *Harp*.

8) Is Employee entitled to interest, attorney fees and costs?

Interest is mandatory. AS 23.30.155(p). Employee is entitled to accrued interest on unpaid benefits. AS 23.30.155(p); 8 AAC 45.142(a); *Rawls*. Employer is directed to calculate interest in accordance with the Act and regulations.

Employee requests attorney fees and costs. AS 23.30.145(a); 8 AAC 45.180. Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(a); *Childs*. This is a complex case with voluminous medical records. *Rogers & Babler*. Employee prevails on his TTD

benefit, medical and transportation costs, and interest claims; he will obtain a PPI rating once he is medically stable, which may result in PPI benefits if the rating is greater than zero. *Bignell*. His reemployment benefits claim is held in abeyance. Employer controverted Employee's claim, which allows an award of actual attorney fees under AS 23.30.145(a). Employee has to complied with 8 AAC 45.180(b), which requires an attorney requesting fees in excess of statutory fees to file an affidavit "itemizing the hours expended as well as the extent and character of the work performed." He seeks $51,073.39 in attorney fees and $17,468.25 in costs, totaling $68,541.64.

Dennis addressed the required factors supporting his request for reasonable fees from Alaska Rule of Professional Conduct 1.1(a). *Rusch & Dockter*. Employer objects to Dennis' fees on several grounds. It first contends his hourly rate should be $350. Dennis requests $395 per hour for attorney services and $175 per hour for paralegal costs. These are rates Dennis has received in prior decisions. *Rogers & Babler*. They are reasonable given his experience and rates charged by comparable attorneys who practice in this area. *Id*.

Dennis agreed to reduce his fees as follows: 0.7 hour entry for June 16, 2021, 0.2 hours for September 3, 2021, and 0.3 hours for September 8, 2021, totaling $474 for 1.2 attorney hours. Further, because this decision held the RBAD denial appeal in abeyance; fees and costs related to reemployment issues will be reduced, subject to being revisited later when this issue becomes ripe. Dennis billed $7,821 for 19.8 attorney hours and $245 for 1.4 paralegal hours, totaling $8,066, for reemployment issues. Thus, Dennis' attorney fee and costs request will be reduced by $8,540 ($474 + $7,821 = $8,066).

Lastly, Employer contends Dennis spent excessive time on several tasks. For instance, it contends "the attorney fees billed for Dr. Youngblood's deposition preparation total 12.9 hours, a task that should not take more than two hours." It is unclear how Employer came up with these figures since it did not provide any evidence supporting such. Employer's additional objections are similarly arguments, not evidence, and do not present a legal basis for reducing an attorney fee or cost award. Employee will be awarded $42,778.39 ($51,073.39 - $474 - $7,821 = $42,778.39) in attorney fees and $17,223.25 ($17,468.25 - $245 = $17,223.25) in costs for a total

of $60,001.64 ($42,778.39 + $17,223.25 = $60,001.64), which are fully compensatory and reasonable attorney fees and reasonable costs. *Bignell*.

CONCLUSIONS OF LAW

1) The oral order denying Employer's hearing continuance and SIME requests was correct.
2) The oral order denying Employer's hearing continuance request to resolve all issues at the same time was correct; this decision will not address TPD as a hearing issue; this decision will hold the reemployment denial appeal in abeyance.
3) Employee is entitled to TTD benefits.
4) Employee is not entitled to PPI benefits.
5) Employee is entitled to medical and transportation costs.
6) Employee is not entitled to a penalty.
7) Employer did not frivolously or unfairly controvert any benefits.
8) Employee is entitled to interest, attorney fees and costs.

ORDER

1) Employer's oral request to continue hearing is denied.
2) Employer's request for an SIME is denied.
3) Employee's request to add TPD benefits as a hearing issue is denied.
4) Employee's RBAD denial appeal is held in abeyance.
5) Employer shall pay TTD benefits from November 18, 2020, through May 5, 2021.
6) Employee's PPI benefits claim is not ripe; once he is medically stable, he is entitled to obtain a PPI rating, and PPI benefits if the rating is greater than zero. In that event, Employee can file an appropriate claim and revisit this issue if Employer, who reserves its defenses, controverts any future PPI rating.
7) Employer shall pay for all reasonable and necessary medical care related to Employee's November 18, 2020 work injury in accordance with the Act and the Alaska Medical Fee Schedule.
8) Employee's request for a penalty is denied.
9) Employee's request for a finding of frivolous or unfair controversion is denied.
10) Employer shall pay accrued interest on all unpaid benefits.

11) Employer shall pay Dennis $42,778.39 in attorney fees and $17,223.25 in costs, for a total of $60,001.64.

Dated in Anchorage, Alaska on November 19, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Bronson Frye, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord 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 Final Decision and Order in the matter of Doug Williams, employee / claimant v. Alaska Native Industries Cooperative, employer; Employers Insurance Co. of Wausau, insurer / defendants; Case No. 202014668; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on November 19, 2021.

/s/
Kimberly Weaver, Office Assistant