

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

HUGH DUNCAN,)
)
Employee,)
Claimant,)
)
v.) FINAL DECISION AND ORDER
)
ASI SERVICES,) AWCB Case No. 202311936
)
Employer,) AWCB Decision No. 26-0015
and)
) Filed with AWCB Anchorage, Alaska
BERKSHIRE HATHAWAY) on February 19, 2026
HOMESTATE INSURANCE CO.,)
)
Insurer,)
Defendants.)
)

Hugh Duncan's (Employee) January 29, 2025 claim for benefits was heard on January 29, 2026, in Anchorage, Alaska, a date selected on December 4, 2025. An August 22, 2025 hearing request gave rise to this hearing. Attorney Adam Franklin appeared by Zoom and represented Employee, who appeared and testified. Attorney Krista Schwarting appeared and represented ASI Services and its insurer (Employer). The record remained open until February 2, 2026, for Employee's supplemental fee and cost affidavit and closed on that date.

ISSUES

Employee contends Employer must pay for medical care and treatment to control his diabetes to the level necessary to obtain his physician-recommended shoulder surgery.

Employer contends its medical evaluation (EME) physician found surgery unreasonable because Employee has uncontrolled diabetes and failed to reduce his A1c readings.

1)Should Employer be ordered to pay for Employee’s necessary work-related medical care including the recommended right-shoulder surgery?

Employee contends Employer owes him temporary total disability (TTD) benefits for the time during which he has not been able to get his physician-recommended shoulder surgery because Employer controverted his right to benefits. He seeks an order awarding TTD benefits.

Employer contends its EME found Employee medically stable. It argues that the medical stability finding precludes Employee from obtaining additional TTD benefits.

2)Is Employee entitled to TTD benefits?

Employee contends he is entitled to permanent partial impairment (PPI) benefits once he becomes medically stable following the recommended shoulder surgery.

Employer contends Employee has not provided a PPI rating higher than the rating its EME physician provided. It contends his PPI benefit claim must be denied absent a higher rating.

3)Should Employee’s PPI benefit request be denied without prejudice?

Employee contends the Rehabilitation Benefits Administrator’s designee’s (RBA-designee) decision finding him not eligible for reemployment benefits should be remanded to the RBA-designee based on new evidence.

Employer does not oppose a remand to the RBA-designee for review.

4)Shall the RBA-designee’s determination be remanded?

Employee contends he is entitled to attorney fees, costs and interest on all benefits awarded.

Employer agrees Employee's attorney is entitled to attorney fees and costs for obtaining a remand to the RBA-designee for further review. However, it argues Employee is entitled to no additional benefits, and is not entitled to any additional attorney fees and costs.

5) Is Employee entitled to attorney's fees, costs, and interest?

FINDINGS OF FACT

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

- 1) On August 26, 2023, Employee injured his right shoulder while working for Employer as a mechanic. (First Report of Injury, September 1, 2023). Employee is right-handed. (Jason Gray, MD, report, January 24, 2025).
- 2) On September 21, 2023, Dr Gray performed right-shoulder surgery on Employee to address his work injury. (Operative Report, September 21, 2023).
- 3) By November 29, 2023, Employee developed a right-shoulder infection, which required admission to the hospital and surgery the following day to remove loose anchors and to surgically manage his septic right shoulder. (Hospital reports, November 29-30, 2023).
- 4) Effective November 30, 2023, Dr. Gray removed Employee from work for approximately three months. (Work Status form, February 21, 2024).
- 5) On January 31, 2024, Dr. Gray completed a form letter from a vocational reemployment specialist assigned to evaluate Employee for reemployment benefits. He predicted Employee would not have physical capacities to work as a Diesel Mechanic, but would have capacities to work as a Small-Engine Mechanic. (Gray questionnaire, January 31, 2024).
- 6) On February 21, 2024, Dr. Gray saw Employee for his right shoulder and found dysfunction consistent with "pseudo-paralytic shoulder." He was not improving, and Dr. Gray stated Employee would continue to fail functional improvement without surgery. Dr. Gray opined Employee may require a reverse total shoulder arthroplasty. He continued Employee's off-work status. (Gray report, February 21, 2024).
- 7) On March 12, 2024, the RBA-designee found Employee not eligible for reemployment benefits based on Dr. Gray's opinions. (Letter, March 12, 2024).

8) On May 20, 2024, Dr. Gray opined, “Potentially if the patient can improve his Alc to 7 then further invasive treatment may be discussed, however at this time the patient is a poor surgical candidate with high Alc.” (Gray report, May 20, 2024).

9) On October 8, 2024, Dr. Gray answered the adjuster’s question, “If further treatment is necessary” what he would recommend. He stated, “possible reverse total shoulder” and agreed Employee had a high risk of recurrent infection. (Gray response, October 8, 2024).

10) On October 22, 2024, Employee said his status was the same; he “would like to discuss potentially moving forward with surgical options.” His A1c was down to 9.2. “Work status at this time is no release based on the patient’s shoulder dysfunction and the intense nature of the activities of his job.” (Eric Page, PA-C, report, October 22, 2024).

11) On November 23, 2024, EME Darren Thomas, MD, orthopedic surgeon, saw Employee and answered several questions from the adjuster, in relevant part as follows:

2. Please provide your diagnoses with respect to the work injury of 08/26/2023.

Right shoulder rotator cuff tendon tear with labral tear and biceps tendinitis, now with postoperative right shoulder infection status post-surgical debridement of the rotator cuff and removal of the implants. This is substantially caused by the August 26, 2023, work event.

3. Please identify all causes of Hugh Duncan’s disability, if any, and/or need for medical treatment following the 08/26/2023 injury, including home and work activities, accidents, genetics, age, hobbies, habits, other medical conditions, etc.

All causes of identified disability and need for medical treatment following the August 26, 2022, work event include the work event itself as well as the claimant’s insulin-dependent diabetes.

4. The Alaska Workers’ Compensation Act requires that a determination of “the substantial cause” must be made relative to the contribution of different causes. . . . In your opinion, which of the identified causes is “the substantial cause” of Hugh Duncan’s past disability or past need for treatment?

If the employment was not the substantial cause, what is the alternative cause?

The substantial cause relative to all contributing causes leading to his disability and need for treatment is the work injury in question. He reportedly sustained an acute eccentric straining injury to the right shoulder and underwent right shoulder rotator cuff tendon repair and biceps tenodesis and reported labral repair, which is

considered substantially caused by the work injury in question. The claimant then developed a postoperative infection of the right shoulder requiring surgical irrigation, debridement and suppression lifelong antibiotics. At this time, his current condition is considered compensable consequence of treatment rendered for the original condition substantially caused by the work injury in question. He does have insulin-dependent diabetes, and this certainly is considered a contributing factor to increase the risk of postoperative infection; however, the postoperative infection is inextricably intertwined with the original compensable surgery as such to support a compensable consequence of the original work event.

5. Is Hugh Duncan’s employment “the substantial cause” of any current and ongoing disability or need for treatment? . . .

Yes.

6. Did the 08/26/2023 injury aggravate, accelerate, or combine with a pre-existing condition to produce a temporary or permanent change in a pre-existing condition? . . .

No.

7. As you review the employee’s history since the time of accident, do you note any intervening factors which have affected the severity of the employee’s disability or need for treatment?

There is the intervening factor of his poorly controlled insulin-dependent diabetes. However, his postoperative surgical infection is considered directly related to the surgery performed as there do not appear to be any extenuating circumstances leading to the postoperative infection other than the surgery performed. Whereas, insulin-dependent diabetes certainly contribute to an increased risk of postoperative infection, he would not likely have developed an infection if he had not undergone a surgery. Thus, there is no intervening factors identified significantly contributing to his disability and/or need for treatment.

8. Has the work injury of 08/26/2023 resolved at this time, requiring no further need for care?

The work injury has not resolved as such to no longer require further treatments. He has a functional deficit about the right shoulder consistent with deficient rotator cuff. However, his rotator cuff deficiency, while it more likely than not will lead to rotator cuff arthropathy, is complicated by his underlying postoperative infection for which he has been treated with suppression lifelong antibiotics. This precludes a safe hygienic revision surgery, particularly in the form of any implant surgery. It is my opinion that further invasive treatment, while may be indicated for his condition in the absence of poorly-controlled insulin-dependent diabetes with chronically suppressed infection, the presence of poorly-controlled diabetes with a

chronically suppressed infection precludes safe arthroplasty surgery for the shoulder in my medical opinion.

9. What further medical treatment, if any, is recommended as a result of Hugh Duncan's injury of 08/26/2023? Please be specific as to modalities, frequency, dosage, and duration of recommended treatment.

In my opinion, no further formal invasive medical treatment is warranted for the right shoulder. Please see response to question eight for justification. In my opinion, his postoperative infection requiring lifelong suppression antibiotics occurring in the setting of insulin-dependent diabetes precludes safe and hygienic further invasive treatment. He may benefit from continued physical therapy treatments on a maintenance basis to relieve debilitating pain.

10. The Alaska Supreme Court has indicated that medical treatment is deemed medically reasonable and necessary for the first two years after a work injury unless there is evidence that the proposed treatment is 1) neither medically reasonable nor necessary for the process of recovery from the work injury, 2) unlikely to be effective or 3) is not within the realm of medically acceptable treatment options under the facts of the case.

With regard to the reverse total shoulder arthroplasty recommended by Dr. Gray:

- a. Is the treatment reasonably effective and necessary for the process of recovery? Please explain.**
- b. Is the treatment an acceptable medical option under the particular facts of this case? Please explain.**

Please explain and provide the basis for your opinion for each form of treatment you do not believe constitutes reasonable and necessary care.

In my opinion, the reverse total shoulder arthroplasty recommended by Dr. Gray is not considered medically reasonable, although it is considered an acceptable treatment option. It is considered medically reasonable for the process of recovery for the underlying pathology in the absence of insulin-dependent diabetes with postoperative infection requiring suppression antibiotics. It is not considered acceptable given the facts of the case of his insulin-dependent diabetes and postoperative infection with lifelong suppressive antibiotics. If the claimant were to undergo a reverse total shoulder arthroplasty, there would be enormous certainty that he would develop a postoperative shoulder arthroplasty infection requiring resection arthroplasty and thus, worsen his disability. Thus, it is my opinion that the reverse total shoulder arthroplasty treatment is not indicated in this case from a do no harm perspective as well as from a perspective of not worsening his disability or worsen his functional deficits.

11. For each condition you have diagnosed, please indicate whether the condition is medically stable. . . .

For the identified conditions, and based off the above reasoning of lack of medically reasonable hygienic invasive treatment, the worker is considered medically stable from the effects of the work injury, and he reached medical stability as of the date of this examination, November 23, 2024.

. . . .

16. Will Hugh Duncan have any physical restriction as a result of the 08/26/2023 industrial injury? If so, please clearly delineate those restrictions.

Yes. Mr. Duncan has work restrictions substantially caused by the work injury of August 26, 2023, in the form of no lifting, pulling, pushing, or carrying greater than 20 pounds with his right upper extremity, and no lifting overhead with right upper extremity.

17. Is Hugh Duncan able to perform the usual and customary employment as a Mechanic?

No.

18. If not, do you anticipate that Hugh Duncan will have the physical capacities to return to work as a Mechanic in the future? If so, when do you anticipate that the injured worker will be able to work at this position?

No.

19. Is Hugh Duncan able to return to gainful employment? If so, please indicate your opinion as to whether Hugh Duncan is physically capable of performing the following types of work:

. . . .

In my opinion, Mr. Duncan is able to return to gainful employment with the above recommended work restrictions but would require significant work modifications and likely requiring sedentary type job. (Thomas report, November 23, 2024; bold in original).

12) Dr. Thomas' findings were "acute." He provided a seven percent whole-person (PPI rating. (Thomas report, November 23, 2024).

13) According to Employee's agency file, December 14, 2024 was the last date Employer paid Employee TTD benefits. However, Employer's Controversion Notice suggests it may have paid Employee TTD benefits through only November 23, 2024, or it may have overpaid him. The exact

date of last payment cannot be ascertained by looking at data in the agency file. (Agency file: Payments tab, accessed February 10, 2026; observations).

14) On December 19, 2024, Employer paid Employee \$19,110 in PPI benefits. (Agency file: Payments tab, accessed February 10, 2026).

15) On January 10, 2025, Employer denied Employee's right to TTD and temporary partial disability (TPD) benefits, and payment for a reverse total shoulder arthroplasty. It relied on Dr. Thomas' November 23, 2024 medical stability date. Dr. Thomas also stated Employee needed no further formal invasive medical treatment for his right shoulder. Employer stated, "Reverse total shoulder arthroplasty is not considered medically reasonable and not considered acceptable given the facts of his insulin-dependent diabetes and post-operative infection with lifelong suppressive antibiotics." (Controversion Notice, January 10, 2025).

16) On January 27, 2025, Dr. Gray released Employee to light-duty work with no lifting over five pounds with his right upper-extremity above shoulder-level, and no activity at or above shoulder-level. If these conditions could not be met, Employee was to remain off-work. (Work Status, January 27, 2025).

17) There is no evidence that Employer offered Employee work within these limitations. Employee testified at hearing that he has not looked for work, or worked, since Dr. Gray's release because his right upper extremity was not functional. (Agency file; record).

18) On January 29, 2025, Employee claimed TTD, permanent total disability (PTD), PPI and medical benefits and transportation costs, a penalty for late-paid compensation, interest, attorney fees and costs. (Claim for Workers' Compensation Benefits, January 29, 2025).

19) On February 27, 2025, Dr. Gray wrote:

I agree with Dr. Thomas' opinion that patient has extremely high risk of postoperative infection primarily given his poorly controlled insulin-dependent diabetes.

However, given patient's shoulder dysfunction [it] is not unreasonable, if patient can maintain appropriate diabetic control for a prolonged pre-op window, to proceed with reverse total shoulder arthroplasty in light of a prior infection. This assumes Infectious Disease involvement and likely lifelong antibiotic suppressants. This is [sic] already been discussed in depth with patient's Infectious Disease physician, Dr. Megan Clancy. (Gray letter, February 27, 2025).

Dr. Gray released Employee to light-duty work, limited to five pounds in his right upper-extremity below shoulder level and no activity above that level. (Work Status, February 27, 2025).

20) On February 28, 2025, Employer denied Employee's claim for TTD, TPD or PTD benefits after November 23, 2024; PPI benefits over seven percent of the whole-person; any further invasive medical treatment; and reemployment benefits. It based these denials primarily on Dr. Thomas' EME report. (Controversion Notice, February 28, 2025).

21) On March 25, 2025, Employer filed and served a Medical Summary to which it attached Dr. Gray's May 20, 2024 Patient Visit Note, which stated, "Potentially if the patient can improve his Alc to 7 then further invasive treatment may be discussed, however at this time the patient is a poor surgical candidate with high Alc." Northern Adjusters' June 18, 2024 "received" stamp appears on Dr. Gray's May 20, 2024 report. (Medical Summary, March 25, 2025).

22) On July 29, 2025, Dr. Gray responded to a question from Employee's attorney and stated he predicted Employee would not have permanent physical capacities to perform physical demands of Small-Engine Mechanic, as described on a Dictionary of Occupational Titles form. (Gray questionnaire response, July 29, 2025).

23) On August 21, 2025, *Duncan v. ASI Services*, AWCB Dec. No. 25-0053 (August 21, 2025) (*Duncan I*) denied Employee's petition for a second independent medical evaluation (SIME). *Duncan I* found there was adequate medical evidence in the agency file to decide the case, and it was more doubtful an SIME would assist the factfinders, but it would increase costs and reduce speed and efficiency. (*Duncan I*).

24) On September 29, 2025, Dr. Gray testified he is an orthopedic surgeon with a fellowship specialty in the upper extremity. He has practiced medicine in Alaska since 2018, and his practice is about 60 percent shoulder surgeries. Dr. Gray performs about 200 shoulder surgeries a year. (Zoom Videoconference Deposition of Dr. Jason Gray, September 29, 2025).

25) Dr. Gray testified about Dr. Clancy's involvement in Employee's case:

A. Yeah. So -- and the caveat here is this has been after multiple conversations with Dr. Clancy as well to determine, you know, what is the risk of him developing another infection if we put more foreign hardware in there. You know, are we far enough out, and have we done enough testing to ensure that things are cleared?

But effectively after, you know, the last conversation with Dr. Clancy saying, "Okay. It's reasonable to consider this as long as he's educated that he's still high-risk for potential complications," the plan was to potentially talk about doing

something called a reverse shoulder replacement, and that is basically a joint replacement where we alter the anatomy to allow for the shoulder to function without having a good rotator cuff, which he no longer has. (Zoom Videoconference Deposition of Dr. Jason Gray, September 29, 2025).

26) Dr. Gray testified Employee has two options: First, do nothing and he “lives with this dysfunction as he has.” Second, he has a shoulder replacement. Dr. Gray formed these opinions in consultation with Dr. Clancy. He understands Employee will go into this surgery with a “higher risk tolerance because of his history of prior infection.” Although his shoulder will not be normal, Employee will have substantial improvement in his current status, “assuming it does not get infected.” In Dr. Gray’s opinion, the infection risk is a “reasonable risk.” Dr. Gray stated:

Chronically elevated blood glucose levels have been attributed to an increased risk of not only for soft tissue healing, but also definitely increased risk of infection. . . . I have operated on patients with elevated blood glucose levels in the past for high tears without complication.

And so basically what I told him is, “If we’re going to do any other surgery in the future, we need to get this blood glucose to within a reasonable level, so close to or under 7, ideally.” (Zoom Videoconference Deposition of Dr. Jason Gray, September 29, 2025).

27) Addressing his previous prediction about Employee’s ability to work as a Small Engine Mechanic, Dr. Gray explained:

Q. Okay. So it’s kind of like you had given the protocol earlier, and that was optimistically -- I won’t say optimistically -- hoping that he would just be following that protocol?

A. Correct, assuming he went on to successful healing without having all this infection, I would anticipate he should be able to get back to that. You know, again, that’s the whole point of continued reevaluation, is if they are not progressing accordingly, then we kind of make updated statements as to their functional capacity.

Q. Got you. So, I mean, I sent you that same job description a few months ago. I think that it was maybe over the summer, and you had made a different conclusion or prediction at that time.

A. I would hope I did.

Q. Okay. And that's because of, I'm assuming, [Employee] had actually -- what his actual conditions and abilities were at this point; correct?

A. Correct.

Q. Okay. And so between the two I suppose there was a change in circumstances; right? It went from a prediction to an actual observation of what had happened?

A. Correct.

Q. Okay. And I think this is kind of obvious, but the hope is that with additional treatment that he will be seeing some strength, range of movement, et cetera, and regain function, potentially return to work, and have lower pain; right?

A. Correct.

Dr. Gray opined the surgery would certainly assist Employee's participation in retraining for reemployment, if his functional impairment is secondary to pain, which Employee reported was his main problem. Dr. Gray said Employee's pain should improve post-surgery. (Zoom Videoconference Deposition of Dr. Jason Gray, September 29, 2025).

28) On cross-examination, Dr. Gray testified that as long as Employee's hemoglobin A1c stayed elevated, his risk for infection post-surgery was high. Employee was concerned about cost, which was why he specifically wanted to hold off on moving forward with the recommended surgery. (Zoom Videoconference Deposition of Dr. Jason Gray, September 29, 2025).

29) On January 22, 2026, in his hearing brief Employee argued that Employer improperly controverted his rights to benefits, and he requested an order requiring Employer to pay for his shoulder surgery as "reasonable and compensable medical treatment." He also sought an order remanding the RBA-designee's ineligibility decision for reconsideration, after Dr. Gray changed his opinion upon which the RBA-designee had relied in denying him eligibility. (Employee Hearing Brief Regarding Controverted Medical Treatment and Modification of Reemployment Benefits Eligibility Decision, January 6, 2026).

30) Employee further argued he was entitled to reasonable medical treatment recommended for his work injury. He relied on the *Hibdon* decision and noted that Dr. Gray had recommended the reverse shoulder arthroplasty in February 2024, well within two years of Employee's work injury. Employee noted that Employer's only objection to the surgery was based on Dr. Thomas' opinion, which was that the shoulder surgery was not reasonable based on the infection risk. Moreover,

Employee argued that unlike Dr. Thomas, Dr. Gray consulted with an infectious disease specialist (Dr. Clancy) whom he said stated the surgery was reasonable and the infection risk could be minimized. (Employee Hearing Brief Regarding Controverted Medical Treatment and Modification of Reemployment Benefits Eligibility Decision, January 6, 2026).

31) Employee contended a remand to the RBA-designee was warranted because Dr. Gray made his prediction before Employee's second surgery. Dr. Gray's opinion changed when Employee's situation worsened. (Employee Hearing Brief Regarding Controverted Medical Treatment and Modification of Reemployment Benefits Eligibility Decision, January 6, 2026).

32) Employee also argued he was entitled to TTD benefits for the time Employer improperly denied him medical treatment and impeded his ability to obtain benefits. Employer controverted his benefits before he could obtain the recommended medical care. Alternately, Employee argued he should have received "stipend" benefits while in the reemployment process. Since Employer never offered him an alternative job within his physical capacity, Employee argued he is presumed disabled and entitled to disability benefits until Employer produced substantial evidence to the contrary. (Employee Hearing Brief Regarding Controverted Medical Treatment and Modification of Reemployment Benefits Eligibility Decision, January 6, 2026).

33) Employee sought full, reasonable attorney fees and costs as well as *Wozniak* attorney fees on future benefits Employer must pay to him, or on his behalf. (Employee Hearing Brief Regarding Controverted Medical Treatment and Modification of Reemployment Benefits Eligibility Decision, January 6, 2026).

34) On January 6, 2026, Franklin filed and served his attorney fee affidavit. In it he recited his incrementally increasing hourly rate, which was \$490 per hour in March 2024, \$500 per hour in December 2024, and which is now \$515 per hour in 2025 and 2026. Franklin works alone and has resolved over 40 workers' compensation claims in 2024 and 2025. He currently represents approximately 35 injured workers and has a broad civil and criminal practice. Franklin earns \$350 per hour in family law, contracts and criminal defense cases. Those cases are guaranteed with a payment retainer. Franklin turns down family and criminal law defense cases because he has commitments to his current workers' compensation clients. He funds all expenses associated with these claims. Franklin would not be motivated to accept workers' compensation clients unless there was a significantly higher fee award than in cases where his payment is on a retainer. He previously worked as an assistant attorney general handling workers' compensation cases. From

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January 28, 2025 through January 5, 2026, Franklin’s attorney fees and costs for all work performed in this case through that date totaled \$14,269.70. Of the amounts incurred, the following related solely to the denied SIME:

Date	Topic	Time Spent
July 17, 2025	Draft SIME petition	.6
July 28, 2025	Review SIME hearing notice	.1
August 6, 2025	Receive and review answer to SIME petition	.1
August 6, 2025	Draft SIME brief	2.38
August 7, 2025	Finalize SIME brief	.2
August 12, 2025	Review ER SIME brief	.2
August 22, 2025	Review SIME D&O	.3
Total SIME-related attorney fees		3.88

Attorney fees related to the SIME issue from this affidavit total \$1,998.20 (3.88 X \$515 per hour = \$1,998.20). Non-SIME-related attorney fees from this affidavit total \$12,271.50 (\$14,269.70 - \$1,998.20 = **\$12,271.50**). (Attorney Fee Affidavit of Adam R. Franklin, January 6, 2026).

35) On January 22, 2026, Franklin filed his first supplemental attorney fee affidavit. This affidavit covered the period from January 10, 2026 through January 20, 2026. The additional attorney time spent was .5 hours equaling **\$257.50** (.5 hours X \$515 per hour = \$257.50). (Attorney Fee Affidavit of Adam R. Franklin, January 22, 2026).

36) On January 23, 2026, Employer argued that once Dr. Thomas declared Employee was medically stable on November 23, 2024, and opined surgery was not “medically reasonable or necessary,” Employee was no longer entitled to TTD benefits. Employer agreed Employee attached the presumption of compensability for TTD and medical benefits through Dr. Gray’s opinions. It acknowledged Dr. Gray recommended a shoulder replacement. However, Employer contended Dr. Gray acknowledged that Employee did not actively monitor his diabetes and he had a significant risk of another post-surgical infection. Thus, Dr. Gray said Employee would need to have his blood sugar levels under good control for several months before surgery, “and that has not happened yet.” Employer reasoned that as a consequence Employee was not a surgical candidate because he “failed to take the necessary steps to ensure the best result.” (Employer’s Hearing Brief, January 22, 2026).

37) On the claim for PPI benefits, Employer argued that Employee had not presented a PPI rating higher than the rating Dr. Thomas assessed, and which Employer already paid. Therefore, his PPI benefit claim should be denied. (Employer’s Hearing Brief, January 22, 2026).

38) Regarding the request for a remand to the RBA-designee, Employer acknowledged that Drs. Gray and Thomas both admitted Employee has permanent physical restrictions, “and that a remand is appropriate.” (Employer’s Hearing Brief, January 22, 2026).

39) As for interest, attorney fees and costs, Employer contended since in its view Employee is entitled to no additional benefits, his interest, attorney fee and cost claim should be denied. However, it agreed Franklin is entitled to “some attorney fees” for obtaining a remand to the RBA-designee. (Employer’s Hearing Brief, January 22, 2026).

40) At hearing on January 29, 2026, the parties discussed Employee’s request for a remand to the RBA-designee, based on new evidence. Employer acknowledged, “There is new evidence. I think it would be foolish of me as the employer’s representative not to acknowledge there’s new evidence.” Thus, the parties agreed on the record for an eligibility remand to the RBA-designee, eliminating that issue previously set for hearing. Further, Employee stated he had not submitted a transportation log for related costs, also removing that issue. (Record).

41) Employee argued consistent with his brief He acknowledged that he had received payment for Dr. Thomas’ PPI rating. Since Employee needed additional surgery it was not clear that the PPI rating would remain the same. Employee admitted that if he were entitled to “stipend,” Employer would be entitled to a credit for previously paid PPI benefits. (Record).

42) Employer argued consistent with its brief. It asserted the 45-day presumption of medical stability as a defense. (Record).

43) Employee testified he worked for Employer as an equipment operator and mechanic. At work, he regularly exerted over 100 pounds pressure while “turning wrenches.” Employee’s work included lifting extremely heavy objects repetitively. Prior to his work injury with Employer, Employee was physically capable of performing all his job duties. He no longer can do so. Employee had “very limited” work as a small engine mechanic, and has never been trained for it. Even then, small engine work requires constant upper extremity use, like pulling cords on lawnmowers and lifting small equipment up onto a bench. He is right-handed and his injury was to his right shoulder. (Record).

44) As for his diabetes, about five months before the hearing, Employee obtained Medicaid coverage and had his medications adjusted. His A1c numbers were “coming down rapidly.” He did not get on his new medications sooner because he was uninsured and was using “cheap

medicine from Walmart.” Employee could not afford to purchase medications that would reduce his A1c. He still wants to pursue the surgery that Dr. Gray recommended. (Record).

45) On cross-examination, Employee testified he had not worked since the day before his first right-shoulder surgery. He has not applied for or looked for other work because he had not “been released.” When asked if it had always been his position that he wanted the surgery recommended by Dr. Gray, Employee said “we talked about it,” but Dr. Gray said he had to get his diabetes under control first. Employee never stated that he did not want to get the surgery. He and Dr. Gray had never talked about “no” because Dr. Gray still said it was the best option. Employee was not qualified for Medicaid until a few months ago because he had too much “money in the bank” from cashing in a retirement fund. He was diagnosed with diabetes in 2002. Employee had been taking less-effective Walmart medications for his diabetes. He had diabetes well before his work injury and had difficulty controlling it before the injury. He added, “I have always been a yo-yo when it comes to that,” meaning controlling his diabetes, because on many occasions when he would go on a service call to an island or to villages he could not eat properly. (Record).

46) When asked if there was anything his doctors recommended that he do to get his diabetes under control that he had not done, Employee testified he was doing “really good” with it and he was “doing everything that they got me doing.” His new medications made a “significant drop” in his A1c. Employee’s understanding is that in a few more months, his A1c level should be down to seven or below. His doctors made “a little” change to his diet and he cut down on desserts. He made dietary changes in 2002 when he was first diagnosed with diabetes. Employee understood that his physicians had a “7.5” A1c target before he could have surgery. His last A1c rating was “10,” and the one before that was “13.” Insulin is expensive, and the only thing that would stop him from staying on his regimen was “finances.” Employee has a general practitioner, a pharmacist and a dietitian that help him with his diabetes. So far as Employee knows, his primary care provider has not been sending his records to Dr. Gray, although some have been sent to Dr. Clancy. (Record).

47) In his closing argument, Employee cited *Hibdon* and contended it is not Employer’s place to dictate what medical treatment he should have for his injury. He argued Employer had no basis to controvert his case based on the EME report. The Board should require Employer to withdraw it. He also questioned why Employer, if it agreed to a remand to the RBA-designee, did not agree to it months ago, and resume his benefits. This is another reason why Employee argued he is

entitled to past benefits, be they TTD or “stipend” benefits, since he should have been reentered into the reemployment process sooner. (Record).

48) The panel asked Employee to explain where he fit within the disability benefit “scheme” should the Board agree with Dr. Gray that he is not medically stable, but also agree that he was not yet a surgical candidate because his diabetes was not well controlled. Employee argued he was still totally disabled because there was no work he could do at this time because of his work injury. In other words, notwithstanding the fact that he could not currently receive surgery, he remained disabled. In response to Employer’s argument that he was not mitigating his damages by controlling his diabetes, Employee said he has been doing the best he could. He could not afford the necessary medication until he got onto Medicaid. Employer’s controversion prohibited him from getting that necessary treatment. (Record).

49) Employee raised the question “whether or not the employer or . . . workers’ compensation benefits should have covered the diabetic medications to get him to the level of surgery.” He argued that if Employer really cared about returning him to the work force it could have provided the necessary medical treatment to prepare him for surgery. Employee contended there was no evidence that he failed to cooperate in his duty to prepare himself for surgery. When asked if Employer should be required to pay for medical treatment to get Employee’s diabetes under control so he could have the surgery, he argued it should for purposes of obtaining the surgery. Employee conceded his diabetes was not part of his work injury. (Record).

50) As for the PPI benefit claim, Employee stated he raised the issue to preserve it as part of the case, but right now he did not know what his eventual PPI rating would be until he got the surgery. He agreed his PPI claim was “premature.” (Record).

51) Employee had not sent any bills to Employer for medications, relying on his misunderstanding that once Employer controverted the claim, it was no longer necessary to make specific demands for medical payments. (Record).

52) Regarding attorney fees, Employee argued that even if the only thing he won in this decision was a remand to the RBA-designee, he should be entitled to all his attorney fees. Franklin took a “holistic” view on representation and said he cannot divvy up his attorney fees by issue. The Alaska Supreme Court wants claimant lawyers to be fairly compensated so there are competent counsel available to represent injured workers. Franklin’s efforts on various issues “cannot be distinguished.” Employee sought *Wozniak* fees on continuing benefits. (Record).

53) In its closing argument, Employer contended it had never “dictated” Employee’s medical care. Rather, both the attending and EME physicians stated the surgery was neither reasonable nor medically appropriate under this cases’ circumstances. Employee admitted his diabetes had been poorly controlled for over 20 years. However, Employer admitted, “We [took] Mr. Duncan as we [found] him.” He had diabetes before the injury and required medication. Employee’s diabetes was still not well-controlled. Employer argued that Employee had not mitigated his damages nor had he tried to find work within his physical capabilities. (Record).

54) Employer had no objection to Franklin filing a supplemental fee affidavit. However, it said the panel must consider the benefits awarded and denied in finding a reasonable attorney fee. As Employee lost on the SIME issue, he should not be compensated for that. (Record).

55) The panel asked Employer what it contended Employee was doing or not doing to mitigate his diabetes. It argued that Employee had always been non-compliant with his diabetes control. Employer further contended that going into a significant surgery, Employee had an obligation to get himself into the “best shape possible.” In Employer’s view, it should not be responsible to provide medical care and treatment or medication to reduce Employee’s A1c down to the necessary level to enable him to have surgery for the work injury because diabetes was clearly a preexisting condition. Moreover, it argued that there was no evidence that Employee’s diabetes was worsened by the work injury. Employer argued it was Employee’s responsibility to obtain treatment and monitor his diabetes. It analogized Employee’s situation to a surgical candidate who needed to lose weight before having surgery. (Record).

56) On February 2, 2026, Franklin filed his last supplemental attorney fee and cost affidavit. This affidavit covered from January 21, 2026 through February 2, 2026. The additional attorney time incurred totaled 5.9 hours, with fees totaling \$3,038.50 (5.9 hours X \$515 per hour = **\$3,038.50**). (Supplemental Attorney Fee Affidavit of Adam R. Franklin, February 2, 2026).

57) On February 3, 2026, Employer responded to Franklin’s February 2, 2026 fee affidavit. It did not object to the fees but requested documentation regarding invoices for Dr. Gray’s deposition and transcript. (Response to Supplemental Fee Affidavit, February 3, 2026).

58) Post-surgical improvement may be objectively measured through strength testing and other medical evaluation methods. (Experience; observations).

PRINCIPLES OF LAW

The Board may base its decision on testimony, evidence, 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). “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.” *Egemo v. Egemo Const. Co.*, 998 P.2d 434, 441 (Alaska 2000).

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 . . . the need for medical treatment of an employee if the disability . . . 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 the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

It is a fundamental principle in workers’ compensation law that an employer “must take” the injured employee “as he finds him.” *Wilson v. Erickson*, 411 P.2d 998, 1000 (Alaska 1970). *Morrison v. Alaska Interstate Constr., Inc.*, 440 P.3d 224, 233-34 (Alaska 2019) stated:

The statutory language does not require the Board to look at the type of injury in identifying the substantial cause of the need for medical treatment. Alaska Statute 23.30.010(a) requires the Board to “evaluate the relative contribution of different causes of the . . . the need for medical treatment.” That subsection then provides, “Compensation or benefits under this chapter are payable for . . . medical treatment if, in relation to other causes, the employment is the substantial cause of the . . . need for medical treatment.” When read together, these sentences do not reflect an instruction to consider the type of *injury* when evaluating compensability; instead, they require the Board to look at the *causes* of the injury or symptoms to determine whether “the employment” was a cause important enough to bear legal responsibility for the medical treatment needed for the injury.

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. . . .

Municipality of Anchorage, v. Carter, 818 P.2d 661, 664-66 (Alaska 1991) held “process of recovery” language in §.095(a) allows the Board to authorize continuing care even beyond two years after date of injury where evidence establishes such care promotes an employee’s recovery. *Carter* held the statute grants the Board discretion to award such “indicated” care “as the process of recovery may require.” *Philip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727, 731-33 (Alaska 1999) set the Board’s limits when reviewing recommended medical care made within two years post-injury:

Under Alaska’s Workers’ Compensation Act, an employer shall furnish an employee injured at work any medical treatment “which the nature of the injury or process of recovery requires” within the first two years of the injury. The medical treatment must be reasonable and necessitated by the work-related injury. Thus, when the Board reviews an injured employee’s claim for medical treatment made within two years of an injury that is undisputably work-related, its review is limited to whether the treatment sought is reasonable and necessary.

. . . .

. . . However, where the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable. If the employee makes this showing, the employer is faced with a heavy burden -- the employer must demonstrate to the Board that the treatment is neither reasonable and necessary, nor within the realm of acceptable medical options under the particular facts. It is not the Board’s function to choose between reasonable, yet competing, medically acceptable treatments. Rather, the Board must determine whether the actual treatment sought by the injured employee is reasonable.

. . . .

. . . Choices between reasonable medical options and the risks entailed should be left to the patient and his or her physician. The superior court correctly stated that the Board should not have overridden the consensus reached in the physician-patient decision-making process. We therefore hold that Hibdon proved her claim by a preponderance of the evidence. . . .

Jespersen v. Tri-City Air, 547 P.3d 1042 (Alaska 2024) affirmed the Board’s denial of treatment for diabetes, as a precursor for recommended surgery, because the primary medical claim was for lumbar surgery allegedly caused from a plane crash 31 years earlier. Based on weight the Board gave to other physicians’ opinions, *Jespersen* decided the claimant had not met his burden of proof, and concluded the 1985 injury “was neither a factual cause nor a legal cause” of the medical care he received for his spine since 2016. *Jespersen* denied the claim for precursor diabetes-related treatment because he had “not prevailed on his primary claim.” In other words, since the claimant’s lower-back surgical problem was not work-related, *Jespersen* denied treatment to control his diabetes as a precursor to the employee getting the surgery.

Harding v. Placid Oil Co., AWCB Dec. No. 90-0245 (October 9, 1990) addressed a case where a worker slipped and fell at work and suffered a herniated disc. He underwent surgery. Subsequently, a doctor reviewed the employee’s studies, examined him and concluded the claimant had a deteriorating condition and referred him to an orthopedic surgeon. The surgeon examined the employee and, while taking a presurgical history, noted the claimant had significant hypertension and acute sinusitis that the doctor believed was related to dental abscesses in his upper jaw. The doctor concluded “that these conditions needed to be corrected before surgery and referred him to an internist and a dentist.”

The internist prescribed medication to control hypertension. A dentist performed dental surgery, incurring a significant medical bill. Thereafter, the orthopedic surgeon performed the lumbar surgery. The injured worker in *Harding* filed a claim for bills related to the hypertension and dental treatments. The employer denied responsibility for any non-employment-related medical treatment. *Harding* stated, “The primary issue to be resolved is whether the medical expenses incurred in this case for the treatment of nonemployment related conditions necessitated by the treatment of employment related injury are compensable.”

At hearing, the claimant in *Harding* argued that §.095 required an employer to pay for all medical treatment “necessary or useful to bring an employee to the maximum level of recovery from injuries sustained in his employment.” He cited numerous Alaska Supreme Court decisions illustrating expansive coverage under §.095: for example, a preexisting disease did not disqualify

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an employee from compensation if the employment aggravated, accelerated or combined with that condition to produce the disability; if the work injury caused a delayed diagnosis of an underlying non-employment condition, the employee was entitled to benefits for the underlying condition; and if a prior compensable work injury was a substantial factor in a subsequent nonindustrial injury, the nonindustrial injury is compensable.

The *Harding* claimant also cited *Arrowhead Press v. Industrial Commission of Arizona*, 653 P.2d 371 (Ariz. App. 1982) (non-employment-related bronchitis treatment, necessary to place the employee in a condition to undergo surgery, was compensable); *Braewood Convalescent Hospital v. Workers' Compensation Appeals Board*, 666 P.2d 14 (Cal.1983) (an injured worker, chronically overweight since childhood, was entitled to reimbursement for a weight-loss program at a clinic required to cure or relieve the effects of his work injury); and *Williams v. Gates, McDonald & Co.*, 709 P.2d 712 (Oregon 1985) (consequences of an operation, required as a preliminary procedure to an operation necessitated by work-related injury, are compensable).

The employer in *Harding* contended that since the claimant “allowed his dental and hypertension issues to deteriorate to the point where medical treatment was needed to correct them before work-related surgery could be performed, he failed to mitigate his damages and his claim should be barred.” It cited *Phillips Petroleum Co. v. Alaska Industrial Board*, 17 Alaska 658 (D. Alaska 1958) (the injured worker must do everything humanly possible to restore himself to his normal strength so as to minimize his damages). The employer also cited three Board decisions affirming that injured workers had the responsibility to mitigate their damages. *Harding* decided:

After giving serious consideration to positions taken by the parties, we are more persuaded by the employee’s arguments and the reasoning set forth in the cases he cites from other jurisdictions. First, AS 23.30.095(a) requires that an employer pay such treatment that the “nature of the injury or the process of recovery requires” and in this case the nature of the injury and the process of recovery required that the treatment for *Harding*’s dental and hypertension be completed before the work-related surgery could be done. We conclude that there was a direct correlation between the two conditions. Next, we conclude, on the bases of the Alaska Supreme Court [cases] cited, that the court has rejected strict requirements of causation in connection with an employer’s obligation to pay workers’ compensation benefits and this should be given serious consideration. Finally, we agree with the courts in Arizona, California and Oregon that have held, in essence,

that non-work-related medical treatment, which is reasonably necessary, a precondition or a prelude to required work-related surgery, the employer is liable for it [sic]. Accordingly, we conclude that the employer in this case is liable for the dental and hypertension treatment here at issue.

Harding rejected the employer's arguments and, in regard to mitigating his losses, noted that the worker was "not able to work after his injury and could not afford medical insurance." Therefore, it was reasonable for him to not seek medical attention. *Harding* added:

We would also point out that if we were to adopt the employer's way of thinking, the result would be self-defeating. We foresee the situation where certain medical treatment to be provided by the employer could restore an employee to the work force but, because the employee cannot afford non-work-related treatment needed before the work-related treatment can be undertaken, the employee cannot be healed and remains a financial burden to the employer indefinitely.

Harding required the employer to pay medical costs for the injured worker's hypertension and dental treatment until he was able to undergo the recommended surgery.

In *Copelin v. Carr-Gottstein Foods Co.*, AWCB Dec. No. 94-0282 (November 4, 1994) the injured worker developed a rash that prevented his scheduled surgeries. Based on his orthopedic surgeon's reports, the rash required treatment before his surgery could occur. *Copelin* found the "time the employee waited for treatment of his rash exceeded 45 days." It also found that "technically," the employee had no objective medical improvement during that time. The employer in *Copelin* had terminated the employee's benefits based on its conclusion that the employee had become medically stable based on the 45-day presumption. The employer admitted it knew the employee's scheduled surgeries were postponed due to the rash that required treatment before his operation. *Copelin* found that admission "clear and convincing evidence rebutting the presumption of medical stability." It awarded the worker disability benefits during that period.

Deford v. CH2M Hill Energy LTD, AWCB Dec. No. 12-0101 (June 14, 2012) denied an injured worker's claim for diabetes treatment for lack of evidence. The worker had claimed the work-related back injury had "aggravated" his diabetes but provided no evidence.

Jordan v. Florida Indus. Commission, 183 So.2d 529 (Fla. 1966) stated:

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We hold that this is not a situation where there was an aggravation of a pre-existing injury, nor is it a situation where an occupational disease is aggravated by any other disease or infirmity not in itself compensable, but that this is a case where the existence of a non-disabling pre-existing condition retarded and prevented recovery from the compensable injury. . . .

We are of the opinion that this is a case where the process of recovery is retarded by a pre-existing deformity, and that the provisions of Sec. 440.13(1) are applicable. This section requires that ‘The employer shall furnish to the employee such remedial treatment, care and attendance under the direction and supervision of a qualified physician or surgeon, or other recognized practitioner, nurse or hospital, and for such period, as the nature of the injury or the process of recovery may require, including medicines, crutches, artificial members, and other apparatus.’ We hold that the employer should bear the cost of returning the employee to an employable status when it is shown, as here, that his present status of unemployability was produced directly by the injury on the job, and which status did not exist prior to such injury. . . .

Florida applied the above reasoning in *Urban v. Morris Drywall Sray*, 595 So.2d 60 (Fla.1991):

Moreover, a claimant may be awarded treatment for a preexisting medical condition which is not directly related to a compensable injury if that condition interferes with or retards recovery from the compensable injury. In the present case, there is record evidence to suggest the necessity of treating claimant’s diabetic condition in order to render effective treatment of claimant’s compensable injuries. If such is the case, we hold that claimant is entitled to that treatment of his diabetic condition necessary for effective treatment of his compensable injuries. It will, however, be necessary for the JCC to make specific findings as to whether such diabetes treatment was indeed a necessary adjunct to the treatment of claimant’s compensable injuries. If such is the case, claimant is entitled to compensation for his diabetes treatment . . . for the period in which stabilization of the diabetes was necessary to assist claimant in attaining maximum recovery from his compensable injuries. . . .

Forni v. Pathfinder Mines, 834 P.2d 688, 694 (Wyoming 1992) stated:

. . . The medical testimony explicitly supports Forni’s view that the treatments afforded for his . . . diabetes were necessary, and ancillary, to his back surgery. They properly are to be paid as a part of the expenses of his back injury. Diabetes was a preexistent condition unrelated to the back injury, but Forni’s insulin intake level had to be in a proper and delicate balance for a changed dietary regimen and activity level brought about by the surgery together with its associated hospital stay and recuperation period. . . . The treatments for diabetes . . . necessary to perform the surgery and of a different type and different regimen than those required by Forni’s normal life routine, are compensable as part of the expenses of his back injury.

AS 23.30.120. Presumptions. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

- (1) the claim comes within the provisions of this chapter;

Benefits sought by an injured worker are presumptively compensable and the presumption applies to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). To attach the presumption, and without regard to credibility, an injured worker must establish a “preliminary link” between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603 (Alaska 1999). Once the presumption attaches, and without regard to credibility, an employer must rebut the raised presumption with “substantial evidence.” *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). “Substantial evidence” is relevant evidence a reasonable mind might accept as adequate to support a conclusion, considering the whole record. If the employer’s evidence rebuts the presumption, it drops out and the employee must prove his claim by a preponderance of the evidence. *Miller v. ITT Arctic Services*, 577 P.2d 1044 (Alaska 1978). This means the employee must “induce a belief” in the fact-finders’ minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn, and credibility is considered. *Huit*.

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 has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. The Board’s credibility findings are “binding for any review of the Board’s factual findings.” *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The Board has sole discretion to determine weight accorded to medical testimony and reports. When doctors’ opinions disagree, the Board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Dec. No. 087 (August 25, 2008).

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 . . . and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer . . . otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered. . . .

Wise Mechanical Contractors v. Bignell, 718 P.2d 971 (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. *Childs v. Copper Valley Elec. Ass’n*, 860 P.2d 1184 (Alaska 1993) held that when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed. *State of Alaska v. Wozniak*, 491 P.3d 1081 (Alaska 2021) affirmed a Board decision that awarded the successful claimant a lump-sum attorney fee for past work on the claim and statutory minimum fees on continuing benefits. *Wozniak* held that the Board may fashion a fee award as it sees fit as long as the award is not manifestly unreasonable. *Rusch v. Southeast Alaska Regional Health Consortium*, 517 P.3d 1157, 1162 (Alaska 2022) compared attorney fee awards and stated, “Claimants’ attorneys must prevail ‘on a significant issue on appeal’ to be awarded fees for an appeal; in contrast Board-awarded fees depend on success on the claim itself.”

AS 23.30.155. Payment of compensation. . . .

(p) An employer shall pay interest on compensation that is not paid when due. . . .

AS 23.30.185. Compensation for temporary total disability. In case of disability total in character but temporary in quality, 80 percent of the injured employee’s spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

Thoeni v. Consumer Electronic Services, 151 P.3d 1249, 1255-56 (Alaska 2007) addressed §.395(28)'s 45-day rebuttable presumption. In *Thoeni*, a medical stability finding was based on physicians' predictions that "proved incorrect." By the time the Board determined medical stability, it knew that the physicians' predictions were incorrect, and that another physician recommended surgery. Given this evidence, *Thoeni* reversed the medical stability finding, because the predictions were not "substantial evidence" upon which the Board could rely to conclude the claimant had reached medical stability.

AS 23.30.395. Definitions. In this chapter

....

(16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

....

(28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence; . . .

Municipality of Anchorage v. Leigh, 823 P.2d 1241, 1246 (Alaska 1992) set forth how an injured worker can rebut the §.395(28) 45-day presumption:

This evidence is easily obtained by examining the treating physician. That is, the treating physician should have no difficulty offering an opinion on whether or not further objectively measurable improvement is expected. The 45 day provision merely signals when that proof is necessary. The alleged difficulty in proving the nonexistence of medical stability, simply fades when viewed in light of the proof actually required.

ANALYSIS

1) Should Employer be ordered to pay for Employee's reasonable and necessary work-related medical care including the recommended right-shoulder surgery?

The Alaska Workers' Compensation Act (Act) in §.095(a) is clear regarding Employer's obligation to provide Employee with medical treatment. Employer "shall furnish" medical treatment "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. . . .” *Hibdon* clarified the discretion a hearing panel has during the two-year post-injury period -- review is “limited.” If Employee’s physician recommended treatment within two years from his injury date, and Employee claimed it, this panel may review Employee’s claim for medical care “only to determine whether the treatment” he sought in his claim “was reasonable and necessary.” *Id.*

That the litigation process may result in the treatment occurring outside the two-year window is irrelevant. *Hibdon* further stated that if an injured worker received conflicting medical advice, he may present credible, competent evidence from his attending physician stating the treatment sought is “reasonably effective and necessary for the process of recovery.” If corroborated by other medical experts, and if the treatment falls within the realm of medically accepted options, “it is generally considered reasonable.”

Employee claims medical treatment from Employer. This includes treatment for his diabetes to reduce his hemoglobin A1c levels to a level amenable to surgery, and the right-shoulder replacement that Dr. Gray recommended. Employee does not claim that the work injury caused his diabetes or even aggravated it. Thus, his claim is distinguished from *Deford*, where the worker claimed his work injury aggravated his preexisting diabetes, but presented no evidence to support that claim. Likewise, there is no dispute over causation for Employee’s right-shoulder injury or need to treat it, distinguishing this case from *Jespersen*, where the underlying injury was found not-work-related and the worker’s claim for precursor diabetes treatment became irrelevant. By contrast, Employee claims that controlling his diabetes to a surgical level is a reasonable medical treatment that Employer is required to provide, along with the surgery.

The statutory presumption under §120(a)(1) applies to any claim for compensation under the Act including medical care. *Meek*. In its brief, Employer agreed Employee had raised the presumption. *Tolbert; Huit*. The burden shifted to Employer to rebut the raised presumption with “substantial evidence” to the contrary. *Huit*. “Substantial evidence” is relevant evidence a reasonable mind might accept as adequate to support a conclusion, considering the whole record. *Miller*. Without regard to credibility, Employer rebutted the raised presumption with Dr. Thomas’ opinion that the

recommended shoulder replacement surgery was not reasonable. He added it “is not considered acceptable given the facts of the case of his insulin-dependent diabetes and post-operative infection with lifelong suppressive antibiotics.” In addition, Dr. Thomas opined the treatment was not reasonable “in this case” from a “do no harm perspective” because he believed it would worsen Employee’s functional deficits. *Huit*. Employer shifted the burden back to Employee who must prove his claim for medical benefits by a preponderance of the evidence. *Saxton*.

It is undisputed that Employee injured his right shoulder on August 26, 2023, while working for Employer. It is undisputed that Dr. Gray performed right-shoulder surgery on Employee to address his work injury, and that by November 29, 2023, Employee developed a right-shoulder infection and abscess. It is further undisputed that Dr. Gray removed all shoulder hardware he had implanted previously, to address the infection. EME Dr. Thomas agreed the work injury with Employer was “the substantial cause” of all the above. Drs. Gray and Thomas agreed that Employee’s preexisting diabetes is a compounding factor in his treatment, because it heightens his risk for infection. All agreed his diabetes was not well-controlled. EME Dr. Thomas expressly stated, “The work injury has not resolved as such to no longer require further treatments.” He admitted surgery “may be indicated for his condition. . . .” Dr. Thomas stated the shoulder replacement surgery Dr. Gray recommended is generally “considered an acceptable treatment option,” albeit not in this case in his view given Employee’s diabetes and previous infection history.

The remaining disputes are two-fold. First, must Employer pay for medical treatment to prepare Employee for surgery and for recovery, and second, must Employer pay for the surgery?

a) Medical treatment to prepare Employee for surgery and recovery

The law is clear. Under §.095(a) Employer must furnish Employee’s medical treatment “for the period” which the “nature of the injury” or the “process of recovery requires.” It is undisputed that a medical condition precedent for Employee getting the right-shoulder surgery is reducing Employee’s A1c level to at least “7.” Employer argues that since Employee has not done this, he is not a “surgical candidate.” Employee contends that Employer should be responsible to furnish medical treatment to prepare him for the surgery. His position has merit.

Employer at hearing admitted that it “[took] Mr. Duncan as we [found] him.” That precept is well-settled law in Alaska since at least 1970. *Wilson*. Employer “found him” as a person with preexisting diabetes that was not well-controlled. The only evidence adduced at hearing about this was Employee’s credible testimony that he changed his diet when he was first diagnosed with diabetes 20 years ago, and cut-out desserts. He further testified that he was doing everything his physicians told him to do. AS 23.30.122; *Smith*. Employee said his “Walmart” medications he had been taking pre- and post-injury were not effective. But since he has been on Medicaid he now has better medications, which are improving his hemoglobin A1c levels.

The treatment he seeks from Employer is “for the period” necessary to better control his diabetes to the extent he can obtain the recommended surgery and recover from it. The “nature of the injury” at this point includes a shoulder that needs surgery in the context of poorly controlled diabetes, which prevents Employee from having surgery. The “process of recovery” includes preliminary treatment reducing his A1c level enough to obtain the surgery, have the surgery and recover from the surgery. Employer disavows responsibility for both the diabetes treatment and, because Employee has not achieved the required A1c level, the surgery.

This is primarily a legal question. Employee does not claim the work injury caused his diabetes. This is not a “causation” case. Likewise, he does not claim it “aggravated, accelerated or combined with” his preexisting diabetes to cause the need for right-shoulder treatment. Rather, Employee claims that his undisputed work-related shoulder injury cannot be properly treated unless his diabetes is under control and his hemoglobin A1c is reduced to at least “7.” The panel found no Alaska Supreme Court case addressing this issue. There is agency support for Employee’s position and ample support from other jurisdictions with similar medical statutes.

This case is similar to *Harding*, where the injured worker suffered a herniated disk, underwent surgery, and needed additional surgery for his condition. A surgeon noted the claimant had hypertension and sinusitis caused by dental abscesses. The surgeon concluded these conditions had to be corrected before surgery and referred him to an internist and a dentist. *Harding* addressed bills related to those specialized, but non-work-related treatments. It determined that §.095(a) required the employer to pay for all medical treatment “necessary or useful” to bring the claimant

to the maximal recovery level from the work injuries. It cited cases from other jurisdictions, including: *Arrowhead Press*, which held non-employment-related bronchitis treatment was compensable to prepare the claimant for surgery; *Braewood Convalescent Hospital*, which held a chronically overweight injured worker was entitled to reimbursement for a weight-loss program at a clinic to assist in his recovery from the work injury; and *Williams*, which held that even consequences from an operation for a non-work-related condition that was required as a preliminary procedure to an operation necessitated by the work-injury, were compensable.

The employer in *Harding* raised the same defenses that Employer raised in the instant case. It blamed the employee for allowing his hypertension and dental hygiene to deteriorate to the point where medical treatment was needed to correct these problems before he could have work-related surgery. The employer claimed the employee “failed to mitigate” his damages. *Harding* rejected these defenses and cited §.095(a) as support for its decision requiring the employer to pay to correct the non-work-related problems so the injured worker could have his work-related surgery. Like Employee here, the claimant in *Harding* was not able to work after his injury and could not afford medical insurance. Therefore, he was not able to obtain necessary treatment. *Harding* further noted that the employer’s position was “self-defeating,” because medical treatment from the employer could restore the injured worker to work, but by denying the care, the claimant could remain a financial burden to the employer indefinitely.

Applying *Harding* to the instant matter compels a similar result. There is no evidence in the agency file stating that Employee has failed to do, or failed to stop doing, something to reduce his A1c level during the period in question. That “period” is the time it will take from his second surgery for Employee to reduce his A1c to an appropriate surgical level, obtain the surgery and recover from it. By contrast, Employee credibly testified he is doing everything his doctors told him to do. AS 23.30.122; *Smith*. In fact, he said since he obtained Medicaid coverage his current medication regimen has decreased his A1c level considerably and quickly.

Another agency decision, *Copelin* required an employer to treat an injured worker’s rash before the claimant could have surgery. The rash was not-work-related, but the need for surgery was. The employer in *Copelin* knew the rash prevented the treatment but nevertheless controverted and

argued the 45-day medical stability rule to defeat the worker's claim for TTD benefits. *Copelin* rejected that defense and ruled in the employee's favor.

That Employee's diabetes had not been well-controlled for 20 years pre-injury could mean he was not following his physician's advice. Or it could mean his primary care providers (Employee testified he does not have an endocrinologist) were not properly treating him. The only evidence in the record was Employee's credible testimony that he has been doing everything his doctors told him to do. AS 23.30.122; *Smith*. There is no evidence supporting Employer's argument that Employee is failing to mitigate his damages by not trying to lower his A1c level.

Employer's other contention is that it should not be required to get Employee's diabetes under control because it was a preexisting condition that was not affected by the work injury. It likens Employee's situation to a person who needs to lose weight prior to having surgery. But Employee, having had diabetes for roughly 20 years, was able to work notwithstanding his diabetes. Once he was injured at work, Employee's diabetes adversely affected his right-shoulder surgery, which contributed to his infection according to EME Dr. Thomas. There is little difference between the injured worker's dilemma in *Harding* and Employee's situation. "Fault" for the underlying condition that must be treated as a precursor to work-related treatment, does not affect Employee's right under §.095(a) to have Employer pay for non-work-related treatment "for the period which the nature of the injury or the process of recovery requires." Moreover, contrary to Employer's "weight-loss" argument, jurisdictions that have addressed the issue, have required employers to provide weight-loss treatment to obese injured workers who need to lose weight before surgery. *Braewood Convalescent Hospital*. Employer cited no law to the contrary.

Some jurisdictions have addressed this same issue. *Jordan* spoke to Employee's situation -- there was no aggravation of a preexisting condition. Rather, in *Jordan* a non-disabling preexisting condition "retarded and prevented recovery from the compensable injury." Citing its medical care statute, which sounds much like Alaska's, *Jordan* noted, "the employer shall furnish to the employee such remedial treatment, care and attendance . . . for such period, as the nature of the injury or the process of recovery may require. . . ." *Jordan* required the employer to pay medical

costs to return the claimant to work where the “unemployability was produced directly by the injury on the job, and which status did not exist prior to such injury. . . .”

In *Urban*, the claimant’s diabetes had to be treated before he could have “effective treatment” of his compensable injuries. *Urban* held that notwithstanding any possible, minor work aggravation, the claimant was still “entitled to that treatment of his diabetic condition necessary for effective treatment of his compensable injuries.” However, the judge had to make specific findings as to whether “such diabetes treatment was indeed a necessary adjunct” to treat the work injuries. If so, the claimant was entitled to compensation for his diabetes treatment “for the period in which stabilization of the diabetes was necessary to assist claimant in attaining maximum recovery from his compensable injuries.” This is precisely Employee’s situation.

Forni found treatment for an injured worker’s non-work-related diabetes was “necessary, and ancillary, to his back surgery.” Diabetes was a preexisting condition but the claimant’s “insulin intake level had to be in a proper and delicate balance for a changed dietary regimen and activity level brought about by the surgery together with its associated hospital stay and recuperation period.” *Forni* required the employer to pay for a “different type and different regimen” than required by the claimant’s “normal life routine” as a compensable part of his back injury.

Notwithstanding his 20-year-history of poorly-controlled diabetes, Employee did not need right-shoulder surgery before his injury with Employer. Now he does. Employee was able to work full-time without regard to his poorly controlled diabetes. Now he cannot. As Dr. Thomas stated, had Employee not had the work injury, he would not have had the surgery. Had he not had the surgery, he would not have had the infection. Had Employee not had the infection he would not have needed the second surgery. Had he not had the second surgery Employee would not need a third work-related surgery. That third surgery cannot happen without Employee reducing his A1c level. Treating Employee’s diabetes is a “necessary adjunct” to his recovery. *Urban*. Employee’s right-shoulder injury and need to treat his diabetes pre-surgery thus “arose out of an in the course of” Employee’s injury. There is a direct causal “link” between his injury and his need to better control his diabetes for surgery and recovery. AS 23.30.010(a). The work injury was a “cause important enough to bear legal responsibility for the medical treatment needed for the injury.” *Morrison*.

Given the “nature of the injury,” the “period” for which Employer needs to pay to treat Employee’s diabetes is the time it takes to reduce his A1c level so he can have surgery, and recover.

Employee testified that his A1c is dropping. It may be that his current medication regimen is working better than his previous protocol. Or perhaps his current physicians are better managing his diabetes. It may also be that there are other diabetes medications or treatments that could more quickly reduce his A1c levels, so that he can obtain surgery more quickly. In any event, as EME Dr. Thomas stated, “The substantial cause relative to all contributing causes leading to his disability and need for treatment is the work injury in question.” Care that promotes recovery from a work injury is “indicated” care. *Carter*. Therefore, Employee’s request for an order requiring Employer to pay for his diabetes treatment from immediately after his second surgery, for long enough to reduce his A1c level so he can obtain surgery and recover from it, will be granted.

Since Employee was already taking “routine” diabetes medicine pre-injury, Employer will only have to pay for the “different type and different regimen” he has been on since obtaining Medicaid coverage. *Forni*. Employer need not pay for the same kind of medicine and appointments that Employee had pre-injury, as he would have paid for them himself. Its current requirement to pay for diabetes treatment will end when Employee has recovered from his surgery. Employee will be directed to obtain his relevant medical records and file and serve them on medical summaries.

b) Reasonableness of the recommended treatment

This decision determined that Employer must pay for medical care to lower Employee’s A1c level to that which will enable right-shoulder surgery and recovery. August 26, 2023 was Employee’s injury date. Corroborated medical treatment for a work injury, recommended within two years of the injury date, limits review of Employee’s claim for treatment to see only if “the treatment sought is reasonable and necessary.” *Hibdon*.

(i) Treatment to address diabetes and A1c level

On May 20, 2024, Dr. Gray opined that if Employee could improve his hemoglobin A1c score to “7” he would be a surgical candidate. Both Dr. Gray and Employee want to move forward with the surgery. Employer was aware of Dr. Gray’s opinion by at least June 2024, as reflected by its

adjuster's date-stamp on Dr. Gray's report. It was surprising that Dr. Thomas opined Employee needed no further treatment to address his work-related shoulder injury. Nowhere in Dr. Thomas' report did he suggest or recommend that Employee or Employer do anything about Employee's poorly-controlled diabetes. He used Employee's preexisting, poorly-controlled diabetes and infection history as reasons to object to the shoulder replacement surgery, but he never mentioned doing anything to bring Employee's diabetes under control to at least address the diabetes portion of his objection. Thus, Dr. Thomas' opinion is given lesser weight and credibility. AS 23.30.122; *Smith; Moore*. Dr. Gray's reports and testimony state Employee's diabetes must be well-controlled so he can obtain the surgery. This recommendation came within two years of Employee's August 26, 2023 work injury. Dr. Gray's opinions are given greater weight and credibility. AS 23.30.122; *Smith; Moore*. The analysis from (1)(a), above, is incorporated here by reference. Treatment to address Employee's A1c level is reasonable and necessary. *Moore*.

(ii) Treatment to address the right shoulder

After Employee's second surgery on November 30, 2023, Dr. Gray discussed with him on several occasions performing a shoulder replacement. These visits included February 21, 2024, May 20, 2024, and October 8, 2024. Even using a later date, October 22, 2024, when Employee said his status was the same and he wanted to "discuss potentially moving forward with surgical options," Dr. Gray's right-shoulder arthroplasty recommendation and Employee's desire to move forward with it clearly came within two years of August 26, 2023. Employer, by at least November 23, 2024, considered Dr. Gray's above-referenced notes a recommendation for the shoulder arthroplasty because it asked EME Dr. Thomas to comment on the "reverse total shoulder arthroplasty recommended by Dr. Gray." Employee's attending surgeon had recommended the right-shoulder arthroplasty, and Employee claimed it, well within two years of Employee's injury date. The primary reason the right-shoulder arthroplasty did not occur at that time was Dr. Thomas' opinions and Employer's controverson relying on them.

Dr. Gray relied on consultations with Dr. Clancy who he said stated the infection risk can be managed. Dr. Thomas conceded the right-shoulder arthroplasty was indicated but for the diabetes and infection, which the credible evidence shows can be controlled. AS 23.30.122; *Smith; Moore*.

Employer will be required to pay for Employee's third right-shoulder surgery under §.095(a) once Dr. Gray clears him. *Hibdon*. The parties shall also deal with any Medicaid lien.

2)Is Employee entitled to TTD benefits?

a) Disability

Employee seeks TTD benefits under §.185. "Disability" under §.395(16) means incapacity because of injury to earn wages Employee was receiving at the time of injury in any employment. It is undisputed that Employee has not worked since the day before his first surgery. He remains "disabled." Likewise, there is no evidence Employer offered him a lighter-duty job. Employer has not defended on grounds that Employee is not "disabled." Thus, the §.120(a)(1) presumption analysis need not be applied at this point to the "disability" issue.

b) Medical stability

Employee is entitled to TTD benefits during the work-related "continuance of the disability," until he reaches "medical stability. "Medical stability" under §.395(28) means the date after which further objectively measurable improvement from the effects of the compensable injury are not reasonably expected to result from additional medical care or treatment, notwithstanding any possible need for care or improvement or deterioration resulting from time passing. "Medical stability" is presumed in the absence of objectively measurable improvement for 45 days, but this presumption may be rebutted by "clear and convincing evidence." *Id.*

Employee relied on Dr. Gray who stated the recommended surgery would certainly assist Employee in participating in retraining because it would at least reduce his pain. Employer relied on Dr. Thomas' opinion finding Employee was medically stable effective November 23, 2024. He reasoned that "lack of medically reasonable hygienic invasive treatment" rendered Employee medically stable. This creates a factual dispute regarding "medical stability" to which the presumption analysis applies. *Meek*. Without regard to credibility, Employee raised the presumption with Dr. Gray's testimony, summarized above. *Tolbert*. Without regard to credibility, Employer rebutted the raised presumption with Dr. Thomas' opinions, above. *Huit*.

This shifted the burden back to Employee who must prove his claim that he is not medically stable by a preponderance of the evidence. *Saxton*.

Dr. Thomas never opined about Employee reducing his A1c level to at least address that part of his objection to the recommended surgery. He never even mentioned that obvious, partial solution. For that reason, his opinion is given less weight. AS 23.30.122; *Smith; Moore*. Moreover, there is no evidence that Dr. Thomas is an infectious disease specialist. For that additional reason, his opinion about infection risks associated with Employee's recommended surgery is given less weight. *Id.* By contrast, Dr. Gray opined that he can safely operate on Employee once he gets his A1c level down to "7," based on his consultations with Dr. Clancy whom he said stated infection risk can be ameliorated through appropriate antibiotic treatment. *Id.* Dr. Gray's opinion is logical, based on consultations with an infectious disease specialist, and is given greater weight and credibility. *Id.*

Pain relief from the proposed right shoulder surgery can result in objectively measurable improvement if it improves Employee's pain as Dr. Gray predicted. Improvement can be demonstrated objectively through strength measurements post-surgery. AS 23.30.395(28); *Rogers & Babler*. Employer raised §.185's 45-day rebuttable presumption as a defense. The 45-day argument is overcome by Dr. Gray's opinions. *Thoeni; Leigh; Copelin*. Dr. Gray has recommended additional surgery for Employee for years. *Hibdon* limits this panel to determine if the surgery is reasonable and necessary. Dr. Gray recommended surgery, which he in consultation with Dr. Clancy, said is reasonable to undertake once Employee reduces his A1c level to "7," and suppressive antibiotics are used. Thus, Employee is not "medically stable." Because Employee has not been medically stable since Dr. Gray recommended additional surgery, and he has remained disabled, and this decision requires Employer to pay for treatment to reduce his A1c level, Employee's claim for TTD benefits will be granted and Employer will be ordered to pay these benefits retroactively and continuing until Employee reaches medical stability.

The last date through which Employer paid Employee TTD benefits is difficult to pinpoint from the agency file. It appears to be December 14, 2024. However, Employer did not controvert Employee's right to TTD benefits until January 10, 2025. In any event, Employer will be ordered

to pay Employee TTD benefits from the day after the last date it paid him TTD benefits, whatever that date may be, to the present and continuing until he reaches medical stability post-surgery. According to the agency file Employer paid Employee a lump-sum PPI benefit on December 19, 2024. Since the instant decision found Employee not yet medically stable, Employer is entitled to take a TTD benefit credit against \$19,110 already paid in PPI benefits.

3)Should Employee’s PPI benefit request be denied without prejudice?

Given the instant decision, which awards Employee medical benefits, including surgery, his PPI benefit claim is premature. Neither the parties nor this panel know if Employee will have a higher or lower PPI rating post-surgery than the rating for which Employer paid him, until the surgery is complete and a new rating is provided. The previously paid PPI is credited against owed TTD benefits. Thus, Employee’s PPI benefit claim will be denied without prejudice. *Egemo*.

4)Shall the RBA-designee’s determination be remanded?

At hearing, the parties stipulated to a remand to the RBA-designee so she could reconsider Employee’s eligibility for reemployment benefits. They based this agreement on Dr. Gray’s changed opinion, which he gave after the RBA-designee rendered her decision. Employee’s request for a remand to the RBA-designee will be granted.

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

Employee also claims attorney fees, costs and interest. AS 23.30.145; AS 23.30.155(p). Employer did not have specific objections to Employee’s attorney fees regarding time-spent or hourly-rate. However, it objected to attorney fees related to Employee’s unsuccessful request for an SIME. Employer’s position on attorney fees related to the SIME issue has merit.

Attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. *Bignell*. However, when an employee does not prevail on all issues, attorney fees should be based on the issues on which he prevailed. *Childs*. Unlike the situation where an injured worker appeals and prevails on a “significant issue on appeal” and gets full reasonable fees, an injured worker at a hearing must

prevail on the “claim” itself.” *Rusch*. Employee did not prevail on his PPI benefit claim, which has been denied without prejudice. He also did not prevail on his prior request for an SIME. Employee prevailed on all other claims that he scheduled for hearing.

A party prevailing on an SIME request is routinely awarded attorney fees because an SIME provides a benefit to the injured worker. Here, Employee requested an SIME but did not prevail on it as one was not necessary. *Duncan I*. Consequently, Employee’s total attorney fee and cost request will be reduced by 3.88 hours, the time his attorney spent working on the SIME issue. Employee’s request for a lump-sum attorney fee and cost award will be granted. Employer will be ordered to pay Employee’s attorney \$15,567.50 in full, reasonable attorney fees and costs for past work on this case (\$14,269.70 from Franklin’s original affidavit - \$1,998.20 for SIME work = \$12,271.50 + \$257.50 from Franklin’s first supplemental fee affidavit = \$12,529 + \$3,038.50 from his second supplemental fee affidavit = \$15,567.50).

As for particular cost items, Employee will be directed to provide Employer receipts for payments made for Dr. Gray’s deposition. He shall do so within 10 days from this decision’s date.

In addition to legal fees for past work done in this case, Employee also requested ongoing statutory minimum attorney fees on all benefits payable to Employee or on his behalf resulting from this decision and order. Pursuant to *Wozniak*, Employee’s request will be granted. Employer will be directed to pay Employee’s attorney statutory minimum attorney fees on the value of all medical and TTD benefit payments resulting from this decision, and reemployment benefits to which he may be entitled from the date of this decision and order and continuing, until Employee reaches medical stability, recovers from his third surgery and ends the reemployment process.

Lastly, Employee requested interest under §.155(p). As interest is statutory, Employer will be directed to pay to Employee statutory interest on all past TTD benefits.

CONCLUSIONS OF LAW

1) Employer will be ordered to pay for Employee’s reasonable and necessary work-related medical care including the recommended right-shoulder surgery.

- 2) Employee is entitled to TTD benefits.
- 3) Employee's PPI rating request will be denied without prejudice.
- 4) The RBA-designee's determination shall be remanded.
- 5) Employee is entitled to attorney fees, costs, and interest.

ORDER

- 1) Employee's January 29, 2025 claim is granted in part and denied in part.
- 2) Employee's claim for medical treatment for diabetes control to bring his A1c down to a surgically acceptable level and through recovery from surgery is granted. Employer shall pay to providers on Employee's behalf retroactively and continuing until he recovers from his third surgery, for all treatments that differ from Employee's pre-injury routine diabetes treatments, including his current diabetes treatment regimen that are reducing his A1c level.
- 3) Employee is ordered to obtain from his medical providers relevant medical records charting his diabetes treatment and file and serve them on medical summaries. He shall also obtain, file and serve relevant, itemized billing statements. The parties are also ordered to obtain and resolve the Medicaid lien in this case, if any.
- 4) Employee's claim for TTD benefits is granted. Employer is ordered to pay Employee TTD benefits beginning the day after it last paid him TTD benefits and continuing until he reaches medical stability following his third surgery. Employer is entitled to take an offset against the TTD benefits owed in accordance with this decision, for PPI benefits previously paid.
- 5) Employee's request for PPI benefits is denied without prejudice.
- 6) The RBA-designee's determination is remanded for consideration of new evidence.
- 7) Employee's interest claim is granted. Employer is ordered to pay interest on all past benefits awarded, in accordance with the Act and regulations.
- 8) Employee's claim for attorney fees and costs is granted. Employer is ordered to pay Employee's attorney \$15,567.50 for his legal fees and costs for services rendered through this decision's date.
- 9) Employer is also ordered to pay to Employee's attorney 10 percent statutory minimum attorney fees on the value of all medical care resulting from this decision and order, on ongoing TTD benefits until Employee reaches medical stability, and on any reemployment benefits to which he may be entitled.

Dated in Anchorage, Alaska on February 19, 2026.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/
William Soule, Designated Chair

_____/s/
Randy Beltz, Member

_____/s/
Brian Zematis, 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 Hugh Duncan, employee / claimant v. ASI Services, employer; Berkshire Hathaway Homestate Insurance Co., insurer / defendants; Case No. 202311936; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on February 19, 2026.

_____/s/_____
Rochelle Comer, Workers' Compensation Officer