ALASKA WORKERS' COMPENSATION BOARD

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

ANNIE L. MILLER, Employee, Claimant	FINAL DECISION AND ORDER
v.	AWCB Case No. 200606082
MUNICIPALITY OF ANCHORAGE, Self-Insured Employer,	AWCB Decision No. 13-0099
and	Filed with AWCB Anchorage, Alaska on August 20, 2013
STATE OF ALASKA, SECOND INJURY FUND, Defendants.	

The parties' joint oral petition to determine the amount of a Social Security offset and the amount of permanent partial impairment (PPI) benefits previously paid to Employee that Employer may recoup, and Annie L. Miller's June 11, 2012 claim for attorney fees, were heard in Anchorage Alaska by a two-member panel on June 20, 2013. Attorney Trena Heikes appeared and represented the Municipality of Anchorage (Employer). Attorney Michael Jensen appeared and represented Annie L. Miller (Employee). Assistant Attorneys General Toby Steinberger and Eugenia Sleeper appeared and represented the State of Alaska, Second Injury Fund (SIF). Law Henderson and Velma Thomas were called as witnesses and testified. The record closed at the conclusion of the hearing.

As preliminary matters, SIF's June 17, 2013 petition to quash subpoenas, and Employer's May 30, 2013 petition to set aside a stipulation were heard. The oral ruling on both matters are examined and memorialized below.

ISSUES

The first preliminary matter was the SIF's June 17, 2013 petition to quash subpoenas issued at Employer's request for Michael Monagle, Director of the Division of Workers' Compensation, and Velma Thomas, the Fund Administrator. SIF contended the subpoenas should be quashed because they provided inadequate notice, were intended to elicit inadmissible evidence, and, as to the subpoena for Mr. Monagle, would create an extreme hardship for the Division. Employer contended Mr. Monagle was a party to conversations with Employer's representatives, and his testimony was necessary. Employee did not take a position on the subpoenas. The subpoena for Ms. Thomas was upheld as she was present and available to testify. The subpoena for Mr. Monagle was orally quashed.

1. Was the decision to quash the subpoena issued for Director Monagle correct?

The second preliminary matter was Employer's May 30, 2012 petition to set aside the Stipulation and Order of Acceptance of PTD [permanent total disability] Claim approved by the board on May 29, 2013. Employer contended the stipulation should be set aside because it had been altered after being signed by Employer and because SIF had not signed the stipulation. Employee agreed the stipulation should be set aside because of the alterations. SIF contended the stipulation should not be set aside because the alterations did not affect the substance of the agreement and it was not a necessary party to the agreement. A decision on Employer's petition was deferred for deliberation.

2. Should the stipulation and order of acceptance of PTD be set aside?

The parties agreed that if the stipulation on PTD was set aside, determinations as to whether Employee was PTD and, if so, the date she became totally disabled were necessary before the remaining issues could be addressed.

3. *Is Employee permanently and totally disabled, and if so as of what date?*

Employer contends it is entitled to an offset against PTD benefits because Employee is receiving Social Security disability benefits. Employee concedes Employer is entitled to an offset, but disagrees with Employer's calculation of the amount of the offset.

4. *What is the correct amount of the Social Security offset?*

Employer contends that if Employee is PTD it is entitled to recoup previously paid PPI benefits. Employee acknowledges Employer may recoup the PPI benefits, but she disagrees with Employer as to the amount of PPI benefits she received.

5. *How much PPI may Employer recoup?*

Employee contends her attorney was successful in obtain benefits for her, and is entitled to a fee. Employer contends SIF should be liable for Employee's attorney fees, as it was SIF that resisted settlement and caused Employee to incur fees. Employer also contends that if it is liable for the attorney fees, Employee's fee request includes unreasonable items. SIF contends there is no statutory provision under which it may be ordered to pay attorney fees, and it was Employer who resisted Employee's claim.

6. *Is Employee entitled to attorney fees and costs, and if so, in what amount and who should pay?*

FINDINGS OF FACT

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

1. Employee began working for Employer on October 24, 1977. (Report of Injury, Case No. 198814686, August 1, 1988). While working for Employer she suffered seven back injuries before she retired in January 1989 and moved to Indiana. (Compromise and Release agreement, Case No. 198814686, (November 29, 1991).
2. Employee returned to Alaska, and on April 11, 2005, was again hired by Employer. In a pre-employment health questionnaire, Employee stated she had injured her back in 1998, while

working for an employer in Indiana. (Pre-Employment Health Questionnaire, April 11, 2005).

3. On April 20, 2006 Employee was injured when she fell on stairs while working for Employer. (Report of Injury, April 26, 2006).
4. On June 13, 2006, Employee began treating with Davis Peterson, M.D. for her work injury. (Dr. Peterson, Chart Note, June 13, 2006). Dr. Peterson saw Employee numerous times through 2013. (Medical Reports).
5. As a result of her injury, Employee underwent a three level lumbar fusion. She has continued to experience back problems, and has experienced other conditions that she attributes to the work injury or the surgery. (Claim, June 12, 2012).
6. Employer paid temporary total disability (TTD) and temporary partial disability (TPD) at various times prior to April 6, 2009. (Compensation Report, August 12, 2012). On April 9, 2009, Employee again became disabled, and Employer resumed TTD payments. (*Id*.).
7. On April 7, 2009, Dr. Peterson stated Employee was unable to return to gainful employment on a full time basis; he did not provide a termination date for the restriction. (Off Work and Return to Work Certification, April 7, 2009).
8. In an April 9, 2009, Physician's Report, Dr. Davis again stated Employee was unable to return to gainful employment. (Physician's Report, April 9, 2009).
9. On June 23, 2009, Employer filed notice of a possible claim against the SIF. (Notice of Possible Claim Against the Second Injury Fund, May 22, 2009).
10. On several occasions in 2009, 2010, and 2012, Employer conducted surveillance on Employee. As a result of the surveillance, Employer questioned the extent of Employee's disability, but Employer took no action at that time. (Henderson).
11. On August 13, 2009, Employee was seen by Timothy Borman, D.O., for an employer's medical evaluation (EME). Dr. Borman concluded employment was not the substantial cause of her disability or need for treatment. (Dr. Borman, EME Report, August 13, 2009).
12. On August 27, 2009, Employee was found eligible for reemployment benefits. (Reemployment eligibility letter, August 27, 2009).
13. On October 14, 2009, Employee was seen by Bradley Bergquist, M.D., for an employer's medical evaluation (EME). Dr. Bergquist opined Employee's conditions were caused by

degenerative changes to her spine and Employee was capable of sedentary work. (Dr. Bergquist, EME Report, October 14, 2009).

14. On November 24, 2009, Dr. Peterson again determined Employee was "unsuitable to work" and gave her a permanent off work form. (Dr. Peterson Chart Note, November 24, 2009).
15. On January 5, 2010, Dr. Peterson opined Employee would "probably never" be able to participate in retraining. (Dr. Peterson response to rehabilitation specialist letter, January 5, 2010.) As a result of Dr. Peterson's letter the Reemployment Benefits Administrator (RBA) suspended the development of a reemployment plan. (RBA letter to reemployment specialist, January 15, 2010).
16. On May 18, 2010, Employer controverted all benefits related to Employee's gall bladder and hernia conditions. (Controversion, May 18, 2010).
17. On June 23, 2010 Employee's application for PERS disability was approved. Her disability benefit was $2,585.67 per month, retroactive to April 2009. (Department of Administration award letter, June 23, 2010).
18. On September 1, 2010, Employee retired from her employment with Employer. As a result, her PERS disability payments ceased, and she began receiving regular retirement benefits. (Ms. Heikes letter to Mr. Jensen and Ms. Sleeper, January 2, 2013).
19. On October 26, 2010, Dr. Peterston stated Employee was medically stable, but still unemployable. (Dr. Peterson, Chart Note, October 26, 2010).
20. Dr. Peterson referred Employee to Michel Gevaert, M.D., for an impairment rating. On November 3, 2010, Dr. Gevaert concluded Employee had a 27 percent whole person impairment rating, of which 20 percent was due to prior injuries and 7 percent was attributed to the current injury. Dr. Gevaert stated "I do not believe that the patient is employable. She is unable to sit, stand, and walk for more than 20 minutes. In addition to the patient's bowel and bladder sphincteric dysfunction, I do not see how she can be gainfully employed." (Dr. Gevaert letter to Dr. Peterson, November 3, 2010).
21. On December 14, 2010, Employer issued a check to Employee for $12,390.00 for permanent partial impairment benefits. (Employer, Financial Summary, undated). This is the correct amount for a seven percent impairment. (Observation).
22. On December 31, 2010, after reviewing additional medical records, Dr. Gevaert revised his November 3, 2010 impairment rating. He now concluded Employee had 34 percent

impairment, with 14 percent attributed to the current injury. He stated Employee could perform sedentary work, as long as she was allowed to take frequent breaks and frequently allowed to change positions. (Dr. Gevaert letter to Dr. Peterson, December 31, 2010).

23. On February 7, 2011, the Social Security Administration found Employee eligible for Social Security disability benefits as of September 2009, entitling her to a monthly benefit of $1,126.20 which increased to $1,136.10 in January 2010. (Social Security Award Letter, February 7, 2011).
24. On June 23, 2011, Employer filed a compensation report showing in part that Employee was paid temporary total disability (TTD) benefits from November 8, 2010 through June 19, 2011, an undated lump-sum PPI payment of $12,390.00, and TTD payments from June 20, 2011 and ongoing. (Compensation Report, June 23, 2011).
25. On August 1, 2011, Lawrence Stinson, M.D., who provided pain management to Employee, reported Employee still had back and lower left extremity pain that had been fixed for a prolonged period of time and that Employee should be considered permanently disabled. (Dr. Stinson Report, August 1, 2011).
26. On May 31, 2012, Employee's attorney wrote a letter to the adjuster saying three doctors had found Employee to be PTD and requesting her benefits be reclassified as PTD benefits. Enclosed with the letter were five reports from Employee's doctors. (Letter, M. Jensen to M. Boshears, May 3, 2012).
27. On June 11, 2012, Employee filed a claim seeking PTD benefits from January 5, 2010 forward, a penalty, and attorney fees and costs. (Claim, June 11, 2012).
28. On June 19, 2012, Employer answered Employee's June 11, 2012 claim stating it lacked information to admit or deny Employee's PTD claim and stating TTD would continue while Employer investigated Employee's claim. (Answer, June 19, 2012).
29. On August 2, 2012, Employer, through counsel, sent Mr. Monagle a letter noting Employee was seeking PTD benefits for which Employer could seek reimbursement from SIF, and stating Employer "believes Ms. Miller has and continues to misrepresent her physical capacities in an effort to obtain benefits." Enclosed with the letters were the surveillance videos and portions of Employee's deposition that Employer believed were inconsistent with Employee's actions in the videos. (Letter, T. Heikes to M. Monagle, August 2, 2012).

30. On August 9, 2012, Employer filed another compensation report. This report does not show a lump-sum PPI payment, but shows periodic PPI payments from October 26, 2010 through October 14, 2011, in differing amounts. (Compensation Report, August 9, 2012).
31. On August 6, 2012, Dr. Gevaert signed an affidavit stating he had reviewed four job descriptions and Employee was capable of working in those jobs as well as her job with Employer. (Gevaert Affidavit, August 6, 2012).
32. On August 22, 2012 Bradley J. Bergquist, M.D., a neurosurgeon, reviewed records subsequent to his October 14, 2009 EME, as well as Employer's surveillance videos. Dr. Bergquist found the video to be "at striking odds" with the subjective evidence and concluded Employee's history was unreliable. He opined there was no basis for a spinal cord stimulator. (Bergquist EME Report, August 22, 2012).
33. On September 13, 2012, Employer and SIF stipulated that SIF should by joined as a party, that Employer had met the requirements for reimbursement by SIF, and that SIF would reimburse Employer for all disability compensation payments in excess of 104 weeks. (Stipulation to Join SIF as a Party, September 13, 2012).
34. On September 17, 2012, Employer controverted a spinal cord stimulator based on Dr. Bergquist's August 22, 2012 EME report. (Controversion, September 17, 2012).
35. On September 21, 2012, a physical capacities evaluation found Employee was incapable of sedentary work for an 8-hour day/40-hour week. (Advanced Physical Therapy, Physical Work Performance Evaluation, September 21, 2012).
36. On November 2, 2012, Employee filed an amended claim seeking PTD benefits from January 5, 2010, or alternatively TTD and PPI benefits, .041(k) stipend benefits, medical benefits for a spinal cord stimulator and related transportation costs, a compensation rate adjustment, interest, and attorney fees and costs. Employee also sought penalties because Employer took a Social Security offset without a board order, for an unfair or frivolous controversion, and for failure to include pension contributions when calculating Employee's compensation rate. Employee described her injuries as a back injury and a hernia. (Amended Claim, November 1, 2012).
37. On November 5, 2012, Employer filed a petition seeking an offset under AS 23.30.225(b) for the Social Security disability benefits Employee was receiving. (Petition, November 2, 2012).

38. On November 5, 2012, Employer also filed a controversion notice dated October 31, 2012. Employer denied all indemnity benefits based on Dr. Gevaert's August 6, 2012 affidavit and Dr. Bergquist's August 22, 2012 EME report. (Controversion, October 31, 2012).
39. At some point, SIF informed Employer it did not wish to join with Employer in defending Employee's claim. (Henderson; Henderson Affidavit, May 29, 2013).
40. On November 8, 2012, Employer's attorney wrote a letter to Employee's attorney:

> This will confirm our conversation yesterday regarding MOA's decision to align its position in this matter with its exposure. As you know, all future compensation benefits are the responsibility of the State of Alaska, Second Injury Fund. Thus, it makes no sense for MOA to defend against Ms. Miller's claim for PTD. I will be filing an Answer to the Amended Workers' Compensation Claim before leaving on Tuesday which will further clarify our position, to wit: MOA takes no position one way or the other regarding Ms. Miller's claim for any benefits under the Act. It does, however, deny liability for penalties raised in your Amended WCC (they appear groundless in any event). MOA is willing to pay your reasonable costs and attorney's fees through today once the matter has been concluded. I honestly do not know as of this writing what SIF is going to do. If they concede her claim, we will stipulate to your fees. If they contest it, I think we have to wait to pay until the matter is concluded. Please forward your affidavit of fees and costs through the present.
>
> In light of the above, MOA is lifting the October 31, 2012 Controversion Notice and will commence payment of stipend benefits retroactively to the date they were terminated. I am sure you would concede a Social Security Offset is due and I will forward the calculations when I return. If SIF concedes PTD, we will, of course, convert all .041(k) to PTD and reimburse employee accordingly. I have instructed Carl Warren & Company to commence stipend retroactively to the last date of payment.
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> As for any other controversions, it is up to SIF to instruct whether to lift or continue to deny the spinal cord stimulator and PTD. Thus, any further costs or fees incurred by you are the responsibility of the SIF as effective November 8, 2012 MOA takes no position with respect to any issues in this case aside from your attorney fees incurred to date. MOA will pay as directed by SIF and then obtain reimbursement from the fund in accordance with AS 23.30.205.

41. On November 13, 2012, Employer answered Employee's amended claim, admitting Employee injured her back in the course and scope of her employment, but denying the hernia was work-related. Employer denied liability for disability or medical benefits, stating SIF was responsible for those benefits. Employer admitted liability for attorney fees and costs through November 8, 2012. (Answer to Amended Claim, November 13, 2012).

42. On November 13, 2012, SIF and Employer stipulated that Employer had met its obligation for SIF reimbursement as of February 7, 2010, and was entitled to reimbursement of disability benefits paid since that date. (Stipulation for SIF Reimbursement, November 13, 2012).
43. At a prehearing conference on December 11, 2012, Employer stated it was withdrawing its controversions and accepting Employee's PTD claim. There is no discussion of Employer withdrawing its November 2, 2012 Petition for and offset, and the board designee noted that the issues of a compensation rate adjustment, penalty, interest, unfair controversion, and attorney fees and costs were unresolved. A hearing was set to address those issues. (Prehearing Conference Summary, December 11, 2012). The only compensation rate adjustment issue was Employer's November 2, 2012 Petition for a Social Security offset. (Observation).
44. On December 20, 2012, Employer's attorney wrote to the board designee stating Employer had only withdrawn the September 20, 2012 controversion of a spinal cord stimulator and controversions of other medical benefits were not withdrawn. The letter does not mention Employer's November 2, 2012 petition for Social Security offset. (Letter, T. Heikes to H. Pullen, December 20, 2012).
45. On January 14, 2013, a decision and order addressing a discovery dispute in the case was issued. (*Miller v. Municipality of Anchorage*, AWCB Decision No. 13-0006 (January 14, 2013).
46. On February 28, 2013, Employer's attorney drafted a letter to the other parties analyzing potential modifications to Employee's compensation rate. Relevant to the issues here, are the analyses of the Social Security offset and the deduction for previously paid PPI benefits. Employer's attorney concluded that even if Employee's compensation rate was increased under AS 23.30.220(a)(10) when she became PTD, the compensation rate would not change, because under AS 23.30.225(b) calculation of the offset is based on Employee's average weekly wage "at the time of injury." Employer's attorney stated a total of $24,783.11 in PPI benefits had been paid, and adjusted for inflation Employer was entitled to recover $26,103.15. (Letter, T. Heikes to M. Jensen and E. Sleeper, February 28, 2013).
47. On April 12, 2013, Employer filed another compensation report. This report indicates Employee was paid TTD from September 1, 2010 through October 25, 2010, an undated

lump sum PPI payment of $12,390.00, and periodic PPI payments from October 26, 2010 through February10, 2011. (Compensation Report, April 12, 2013).

48. On May 23, 2013, Employer filed a Stipulation and Order of Acceptance of PTD Claim. The stipulation and proposed order included a number of deletions and handwritten interlineations and notations. Although the stipulation included a signature line for SIF, the signature line had been crossed out and the effect of several of the interlineations and deletions was to eliminate SIF as a party to the agreement. The stipulation, as modified, was approved by the board on May 29, 2013. (Stipulation, May 29, 2013). At hearing, the parties explained the modifications to the agreement. The agreement was drafted by Employee's attorney, signed by Employee and her attorney, and sent to Employer without any modifications. Employer's attorney made some modifications to the agreement, Employer and its attorney signed the agreement, and sent it to SIF. SIF's attorney made further modifications to the agreement, but as the agreement did not reflect SIF's position, SIF declined to sign the agreement. SIF returned the modified, but unsigned agreement to Employer. (Hearing representations).
49. On May 24, 2013, Employee and Employer filed a stipulation for attorney fees and costs agreeing Employee's attorney should be paid $28,706.00 in fees and costs for services provided through November 8, 2012. The stipulation states it does not affect employee's claim to statutory minimum fees which may be due on PTD and medical benefits. (Stipulation for Attorney's Fees and Costs, May 23, 2013).
50. At Employer's request, subpoenas to appear and testify at the June 20, 2013 hearing were issued for Mr. Monagle and Ms. Thomas on June 12, 2013. (Subpoenas, June 12, 2013).
51. Despite the fact the May 23, 2013 stipulation was set aside, the parties agreed at hearing that Employee's gross weekly wage and PTD rate stated in paragraph 4 and all of paragraph 5 were correct:

> 4. The parties hereby stipulate that the employee's gross weekly wage is $1,283.64. This results in a PTD rate of $839.69 per week. It is agreed that this rate becomes effective April 1, 2011. . . .
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> 5. For the period April 1, 2009 to August 31, 2010, the employee's compensation rate after offset for PERS disability is $409.61 per week. For the period September 1, 2010 until April 1, 2011 the employee's compensation rate after the SSDI offset equals $722.86 per week. This is based on the SSDI initial award of $1,126.20 per month. Any overpayment made as a result of these

compensation rates will be collected from continuing PTD compensation benefits 20% per weekly benefit payment. (Hearing representations).

52. Based upon the parties' agreement, Employee's compensation as calculated based on the date of injury does not fairly reflect her earnings during her disability. Her gross weekly earnings during here disability is $1283.64 based on parties' stipulation. (Hearing representations, Observation, Judgment).
53. On June 13, 2013, Employee filed an affidavit of attorney fees and costs, and at hearing filed a supplemental affidavit. The fees and costs are for the period after November 8, 2012. The affidavits detail fees of $36,322.00 and costs for $1,775.61. (Attorney Fee Affidavits, June 13, 2013 and June 20, 2013). In addition, Employee sought attorney fees for her attorney's participation in the hearing, an additional 5.75 hours not reflected in the fee affidavits. At her attorney's hourly rate of $385.00, that is an additional $2,213.75 in fees for total fees of $38,535.75.
54. Employer did not object to Employee's attorney's hourly rate of $385.00 per hour, but did object to several entries in the June 13, 2013 affidavit. Employer's objections fall in three general categories: first, instances in which Employee's attorney and his paralegal both billed for reviewing documents; second, instances in which the time spent was alleged to be unnecessary; and third, impermissible costs, in particular copying costs of $798.40, transportation, and courier fees. (Objection to fees and costs, Exhibit L to Employer's hearing brief).
55. At hearing, Employee's attorney explained that the bulk of the copying costs were the cost of copying computer disks. (Hearing representation).
56. In December 2010, the Consumer Price Index, All Urban Consumers (CPI-U) was 218.056. For June 2013, the most recent month available, it was 233.504. (*Consumer Price Index, All Urban Consumers - (CPI-U) U.S. city average, at* ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (August 14, 2013)).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
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> . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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

> **AS 23.30.010. Coverage.**
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> (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
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> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
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> . . . .
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> (k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the

> employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability or permanent partial impairment benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability or permanent partial impairment benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155 (j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.
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> **AS 23.30.120 Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter; . . . .
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> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Carter,* 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

Application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury

and the employment. *See, e.g., Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). Medical evidence may be needed to attach the presumption of compensability in a complex medical case. *Burgess Constr. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). However, an employee "need not present substantial evidence that his or her employment was a substantial cause of his disability." *Fox v. Alascom, Inc.*, 718 P.2d 977, 984 (Alaska 1986) "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

If the employee establishes the preliminary link, then "if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the [need for medical treatment], etc., the presumption is rebutted." *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011) at 7. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fireman's Fund Am. Ins. Companies v. Gomes*, 544 P.2d 1013, 1015 (Alaska 1976). The determination of whether evidence rises to the level of substantial is a legal question. *Id*. Because the employer's evidence is considered by itself and not weighed at this step, credibility is not examined at this point. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

If the presumption is raised and not rebutted, the claimant need produce no further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Runstrom* at 8.

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

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

The board's authority to award attorney fees is purely statutory. *M-B Contracting Co. v. Davis*, 399 P.2d 433 (Alaska (1965). In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which section of the statute attorney's fees may be awarded in workers' compensation cases. A controversion (actual or in fact) is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id*. at 152-153.

In *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009), the commission stated "AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. A fee award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the board to consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." *Id*.

In determining a reasonable fee under AS 23.30.145(b), the board is required to consider the contingent nature of the work for an employee in workers' compensation cases, the nature, length and complexity of the services performed, the resistance of the employer or carrier, and the benefits resulting from the services performed, *Wise Mech. Contractors v, Bignell*, 718 P.2d 971, 973, 975 (Alaska 1986).

When an employee is entitled to fees under both AS 23.30.145(a) and (b), the board has awarded actual fees under subsection (b) and statutory fees under (a), if and when the statutory fees exceed the actual fees. *Porteleki v. Uresco Construction Materials, Inc.*, AWCB Decision No. 09-0210 (December 30, 2009); *Wolf v. Wolf Dental Services*, AWCB Decision No. 10-0126 (July 22, 2010).

> **AS 23.30.155. Payment of compensation**. . . .
> . . .
> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.
>
> **AS 23.30.180. Permanent total disability.**
>
> (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. If a permanent partial disability award has been made before a permanent total disability determination, permanent total disability benefits must be reduced by the amount of the permanent partial disability award, adjusted for inflation, in a manner determined by the board. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
>
> (1) area of residence;
>
> (2) area of last employment;
>
> (3) the state of residence; and
>
> (4) the State of Alaska.
>
> (b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not, by itself, constitute permanent total disability.
>
> **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.

AS 23.30.205. Injury combined with preexisting impairment.
(a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.

(b) If the subsequent injury of the employee results in the death of the employee and it is determined that the death would not have occurred except for the preexisting permanent physical impairment, the employer or the insurance carrier shall in the first instance pay the compensation prescribed by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payable in excess of 104 weeks.

(c) In order to qualify under this section for reimbursement from the second injury fund, the employer must establish by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was retained in employment after the employer acquired that knowledge.

(d) The second injury fund may not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party or in relation to which the director was not notified at least three weeks before the award or adjudication that the fund might be subject to liability for the injury or death.

(e) An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier has knowledge of the injury or death.

(f) In this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. A condition may not be considered a "permanent physical impairment" unless

(1) it is one of the following conditions:
. . . .
(Z) ruptured intervertebral disk,

> (2) it would support a rating of disability of 200 weeks or more if evaluated according to standards applied in compensation claims.

Under the original 1959 Act, SIF was also liable for vocational training costs, including a stipend paid directly to employees. In 1968 the section was amended to remove that provision. Ch. 178 SLA 1968. In *Providence Washington Insurance Co. v. Busby*, 721 P.2d 1151 (Alaska 1986), an employer appealed a board decision that ordered SIF to reimburse disability benefits, but not medical expenses or attorney fees. The court affirmed the board, holding SIF was "a limited reimbursement scheme for disability payments *only*." *Busby*, at 1152 (emphasis original).

> **AS 23.30.220. Determination of spendable weekly wage.**
> (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
> . . . .
>
> (10) if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of the employee's gross weekly earnings under (1) - (7) of this subsection does not fairly reflect the employee's earnings during the period of disability, the board shall determine gross weekly earnings by considering the nature of the employee's work, work history, and resulting disability, but compensation calculated under this paragraph may not exceed the employee's gross weekly earnings at the time of injury.

The object of AS 23.30.220 is to arrive at a fair approximation of an employee's probable future earning capacity during the period of disability. *Deuser v. State of Alaska*, 697 P.2d 647, 649 (Alaska 1985). The term "gross weekly earnings" used in AS 23.30.220 has the same meaning as "average weekly earnings" in AS 23.30.225(b). *Underwater Construction, Inc. v. Shirley*, 884 P.2d 150, 151 (Alaska 1994).

> **AS 23.30.224. Coordination of benefits.**
> (a) Notwithstanding other provisions of this chapter, an employer's liability for payment of weekly compensation under AS 23.30.180 or 23.30.185 to an employee eligible for a disability benefit under AS 14.25.130 , AS 39.35.400, or 39.35.410 may not exceed the lesser of
>
> (1) the difference between the disability benefit payable to the employee under AS 14.25.130 , AS 39.35.400, or 39.35.410, converted to a weekly

basis, and 100 percent of the employee's spendable weekly wage as calculated under AS 23.30.220 ; or

(2) the maximum compensation rate calculated under AS 23.30.175 .

(b) An employer's liability for payment of compensation under AS 23.30.041(k) to an employee eligible for a disability benefit payable under AS 14.25.130, AS 39.35.400 , or 39.35.410 may not exceed the lesser of

(1) the difference between the disability benefit payable to the employee under AS 14.25.130 , AS 39.35.400 , or 39.35.410, converted to a weekly basis, and 80 percent of the employee's spendable weekly wage as calculated under AS 23.30.220; or

(2) 105 percent of the average weekly wage calculated under AS 23.30.175(d).

(c) Notwithstanding other provisions of this chapter, the liability of an employer for payment of compensation for an injury or illness under AS 23.30.180 or 23.30.185 to an employee who is covered by a union or group retirement system to which the employer makes contributions under a collective bargaining agreement or by membership in a welfare or pension plan or trust may not exceed the lesser of

(1) the difference between 100 percent of the employee's spendable weekly wage and an amount equal to the disability benefit, disability pension, or medical retirement benefit that the employee is eligible to receive as a result of the injury or illness, as calculated on a weekly basis, under the retirement system or welfare or pension plan or trust; or

(2) the maximum compensation rate calculated under AS 23.30.175 .

(d) If the union or group retirement system, pension plan, or trust referred to in (c) of this section provides by its terms that its benefits are precluded or reduced if benefits are awarded under this chapter, the limitation provided in (c)(1) of this section is not applicable to the extent of the amount precluded or reduced.

(e) Notwithstanding other provisions of this chapter, the liability of an employer for payment of compensation for an injury or illness under AS 23.30.041 (k) to an employee who is covered by a union or group retirement system to which the employer makes contributions under a collective bargaining agreement or by membership in a welfare or pension plan or trust may not exceed the lesser of

(1) the difference between 100 percent of the employee's spendable weekly wage and an amount equal to the disability benefit, disability pension, or medical retirement benefit that the employee is eligible to receive as a result of the injury or illness, calculated on a weekly basis, under the retirement system or welfare or pension plan or trust; or

(2) 105 percent of the average weekly wage calculated under AS 23.30.175(d).

(f) If the union or group retirement system, pension plan, or trust referred to in (e) of this section provides by its terms that its benefits are precluded or reduced if benefits are awarded under this chapter, the limitation provided in (e)(1) of this section is not applicable to the extent of the amount precluded or reduced.

(g) If the employee receives a lump sum distribution of disability benefits, disability pension, or medical retirement benefits, the combined workers' compensation and weekly disability or medical retirement benefit specified in this section shall be calculated by assuming that the employee received weekly disability or medical retirement payments under the applicable plan from the date of eligibility for the disability benefit or medical retirement until the total of the weekly payments equals the amount of the lump sum, exclusive of that portion of the lump sum specifically set aside under the applicable plan for retraining expenses, medical and transportation expenses, and attorney fees or other legal costs.

AS 23.30.225. Social security and pension or profit sharing plan offsets.
(a) When periodic retirement or survivors' benefits are payable under 42 U.S.C. 401 - 433 (Title II, Social Security Act), the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.

(b) When it is determined that, in accordance with 42 U.S.C. 401 - 433, periodic disability benefits are payable to an employee or the employee's dependents for an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 - 433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury.

(c) If employer contributions to a qualified pension or profit sharing plan have been included in the determination of gross earnings and the employee is receiving pension or profit sharing payments, weekly compensation benefits payable under this chapter shall be reduced by the amount paid or payable to the injured worker under the plan for any week or weeks during which compensation benefits are also payable. The amount of the reduction may not in any week exceed the increase in weekly compensation benefits brought about by the inclusion of employer contributions to a qualified pension or profit sharing plan in the determination of gross earnings.

8 AAC 45.052. Medical summary

. . . .

(d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board.

8 AAC 45.050. Pleadings

. . . .

(f) Stipulations.

(1) If a claim or petition has been filed and the parties agree that there is no dispute as to any material fact and agree to the dismissal of the claim or petition, or to the dismissal of a party, a stipulation of facts signed by all parties may be filed, consenting to the immediate filing of an order based upon the stipulation of facts.

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.

(4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.

8 AAC 45.180. Costs and attorney's fees

. . . .

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

(1) costs incurred in making a witness available for cross-examination;

(2) court reporter fees and costs of obtaining deposition transcripts;

(3) costs of obtaining medical reports;

(4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;

(5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;

(6) costs for telephonic participation in a hearing;

(7) costs incurred in securing the services and testimony, if necessary, of vocational rehabilitation experts;

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

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

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

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

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

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

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

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

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

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

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

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

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

(16) government sales taxes on legal services;

(17) other costs as determined by the board.

The board has recognized that when an attorney and a paralegal work on the same project or issue at the same time they may both review a file and bill for their services at different hourly rates. "Such practice saves time and money, as the paralegal bills at a substantially lower rate than the attorney, who without the paralegal's assistance would likely spend more time researching or reviewing the file at a higher hourly rate." *Hanson v. Municipality of Anchorage*, AWCB Decision No. 12-00031 (February 21, 2012) at 45. Similarly, the board has allowed courier and mileage charges listed in the cost bill when reasonable. *Mullen v. Municipality of Anchorage*, AWCB Decision No. 10-0172 (October 14, 2010) at 15.

ANALYSIS

1. Was the decision to quash the subpoena issued for Director Monagle correct?

While AS 23.30.005(h) authorizes the issuance of subpoenas, neither the Act nor the regulations specifically address quashing a subpoena. In such cases, the rules in civil cases can provide guidance. Alaska Rule of Civil Procedure 45 addresses voiding or quashing subpoenas for the production of documents or attendance at a deposition, but the rule does not specifically address quashing a subpoena to appear at a hearing. The federal rules, however, provide more guidance. Under Federal Rule of Civil Procedure 45(c)(3) a court is required to quash a subpoena that fails to allow a person a reasonable time to comply. Public officials, such as Director Monagle, are often required to participate in a variety of public functions that cannot be rescheduled on short notice. However, disregarding the fact Mr. Monagle is a public official, a subpoena issued only seven days does not allow a person reasonable time to comply. The decision to quash the subpoena to Mr. Monagle was correct.

2. Should the stipulation and order of acceptance of PTD be set aside?

Both Employee and Employer, the parties who signed the stipulation, agree the stipulation and order should be set aside. Only SIF, which did not sign the stipulation, contends the agreement should not be set aside.

All parties agree that interlineations and additions were made to the agreement and the proposed order after the stipulation was signed by Employee and Employer. It is unclear why Employer filed the stipulation if it did not agree with those revisions, but the agreement and the proposed order as filed do not reflect the agreement between Employer and Employee. Because the order was based on a stipulation that does not reflect the parties' agreement, and because the parties at hearing orally stipulated to significant provisions of the stipulation, it will be set aside and the order rescinded.

3. Is Employee permanently and totally disabled, and, if so, as of what date?

All parties agreed that if the stipulation was set aside a determination as to whether Employee is PTD, and the date of the disability must be determined. At hearing, Employee, as might be expected, argued she was PTD. Employer conceded Employee was PTD, and stated it had conceded that fact in November 2012. SIF stated it did not contest Employer's determination that Employee was PTD. The parties' oral stipulation will be adopted.

Employee claimed she became PTD on January 5, 2010, when Dr. Peterson determined she was unable to participate in vocational rehabilitation. Employer was "unclear" as to the date Employee became PTD. In the compensation report it filed on April 12, 2013, it reclassified Employee's disability payments after February 11, 2011 as PTD benefits. Because Employer does not agree with the January 5, 2010 date proposed by Employee, there is a factual dispute, and the presumption analysis applies.

To raise the presumption, Employee need only present "some," or "minimal," relevant evidence. In determining whether the presumption is met, credibility is not considered nor is the evidence weighed against competing evidence. Employee raised the presumption that January 5, 2010 is the correct date through Dr. Peterson's November 24, 2009 "permanent" off work slip, as well as his January 5, 2010 statement she would "probably never" be able to participate in retraining.

To rebut the presumption, Employer was required to present substantial evidence demonstrating that Employee became PTD on a date other than January 5, 2010. Employer did so through Dr.

Gevaert's December 31, 2010 opinion that Employee was capable of sedentary work as well as his August 6, 2012 affidavit that Employee could perform several jobs, in effect, opinions that Employee was not PTD after January 5, 2010.

Because Employer rebutted the presumption, it dropped out, and Employee was required to prove, by a preponderance of the evidence, that she was PTD as of January 5, 2010. She did so. Dr. Peterson began treating Employee on June 13, 2006, and saw her numerous times before and after January 5, 2010. As a result, his opinions are given great weight. Dr. Peterson's November 24, 2009 "permanent" off work slip, and his January 5, 2010 statement that Employee would "probably never" be able to participate in retraining are significant evidence Employee was PTD as of January 5, 2010.

Dr. Gevaert significantly changed his opinions on Employee's ability to work. On November 3, 2010, after determining Employee was 27 percent impaired, he stated "I do not believe that the patient is employable. She is unable to sit, stand, and walk for more than 20 minutes. In addition to the patient's bowel and bladder sphincteric dysfunction, I do not see how she can be gainfully employed." Less than two months later, on December 31, 2010, he concluded Employee was 34 percent impaired, but could work at sedentary jobs. On its face, a greater impairment is inconsistent with an improved ability to work, and Dr. Gevaert did not explain why he changed his opinion. A medical provider may, and often should, change their opinions when new evidence becomes available. However, when the reason for the change is not apparent and no explanation for the change is given, the opinion may be given less weight. For that reason, Dr. Gevaert's opinions are given less weight. Similarly, his August 6, 2010 statement that Employee could return to various jobs she had previously held does not include any explanation for his change in position, and it is, likewise, given less weight.

Dr. Borman's August 2009 and Dr. Bergquist's October 2009 EME reports are not probative as to whether Employee later became PTD in January 2010. In his August 22, 2012 EME Report, Dr. Bergquist states Employee's history is unreliable based on his review of the surveillance videos, and he concludes there is no basis for a spinal cord stimulator, but he does not address Employee's ability to work.

On the basis of all the medical records, Employee has proven by a preponderance of the evidence she was PTD by January 5, 2010.

4. What is the correct amount of the Social Security offset?

Employer initially raised the issue of a Social Security offset in its November 2, 2012 Petition. At hearing Employer's attorney stated Employer had withdrawn all petitions on November 8, 2012, but that is not reflected in the prehearing conference summary. Normally, the withdrawal of the petition would render the issue moot. Nevertheless, at hearing the parties agreed the offset was an issue for hearing.

Once an employee has been found to be PTD he or she may be entitled to a compensation rate adjustment under AS 23.30.220(a)(10) if the calculation of gross weekly earnings for the period of temporary disability does not fairly reflect the employee's earnings during the period of permanent disability. Here, Employer and Employee agreed Employee would be entitled to such an adjustment, but disagreed on the date the new compensation rate should be effective. At hearing, they agreed the new rate should be effective April 1, 2011, as was stated in paragraph 4 of the stipulation that was set aside. They also agreed that her gross weekly wage prior to April 1, 2011 was $1,126.20, as was stated in paragraph 5 of the stipulation. This would also be her average weekly wage at the time of her injury. They agreed that as of April 1, 2011, her gross weekly wage was $1,283.64, as was stated in paragraph 4 of the stipulation. Based on those wages, they agree Employee's compensation rate was $722.86 per week before April 1, 2011 and $839.69 per week thereafter, as was stated in paragraphs 4 and 5 of the stipulation.

Having agreed on the compensation rate adjustment under AS 23.30.220(a)(10) and its effective date, the parties disagree on the effect of that adjustment on Employer's SSDI offset. Employer contends that AS 23.30.225(b) is explicit: the offset must be based on Employee's average weekly wage "at the time of injury," and any subsequent adjustment to Employee's gross weekly earnings under AS 23.30.220(a)(10) is disregarded.

Both Employee and Employer agree that prior to April 1, 2011, the offset under AS 23.30.225(b) is calculated as follows:

A.	Average Weekly Wage at Time of Injury	$1,228.44
B.	Adjusted Average Weekly Wage under AS 23.30.220(a)(10)	N/A
C.	Agreed Weekly Compensation Rate	$805.04
D.	Agreed Weekly SSDI Benefit	$259.89
E.	Workers Compensation plus SSDI (C + D)	$1,064.93
F.	80% of Average Weekly Wage at Time of Injury (A x .8)	$982.75
G.	Offset (E – F)	$82.18
H.	PTD Rate (C – G)	$722.86

After April 1, 2011, Employer contends the offset should be calculated as follows:

A.	Average Weekly Wage at Time of Injury	$1,228.44
B.	Adjusted Average Weekly Wage under AS 23.30.220(a)(10)	$1,283.64
C.	Agreed Weekly Compensation Rate	$839.69
D.	Agreed Weekly SSDI Benefit	$259.89
E.	Workers Compensation plus SSDI (C + D)	$1,099.58
F.	**80% of Average Weekly Wage at Time of Injury (A x .8)**	$982.75
G.	Offset (E – F)	$116.83
H.	PTD Rate (C – G)	$722.86

Employee contends the offset after April 1, 2011 should be calculated as follows.

A.	Average Weekly Wage at Time of Injury	$1,228.44
B.	Adjusted Average Weekly Wage under AS 23.30.220(a)(10)	$1,283.64
C.	Agreed Weekly Compensation Rate	$839.69
D.	Agreed Weekly SSDI Benefit	$259.89
E.	Workers Compensation plus SSDI (C + D)	$1,099.58
F.	**80% of Adjusted Average Weekly Wage (B x .8)**	$1,026.91
G.	Offset (E – F)	$72.67
H.	PTD Rate (C – G)	$767.02

The crux of the issue is whether a gross weekly wage adjusted under AS 23.30.220(a)(10) becomes the "average weekly wage at the time of injury" under AS 23.30.225(b). It must. In *Underwater Construction*, the Supreme Court held "gross weekly earnings" used in AS 23.30.220 has the same meaning as "average weekly earnings" in AS 23.30.225(b). While the court did not specifically say "average weekly wages at the time of injury," the term "average weekly wages" only appears as part of "average weekly wages at the time of injury" in AS 23.30.225(b). The Supreme Court cannot have meant it in any other context. Further, as the Supreme Court stated in *Deuser*, the object of AS 23.30.220(a)(10) is to arrive at a fair

approximation of an employee's probable future earning capacity during the period of disability. In effect, an employee whose wages at the time of injury do not accurately reflect lost earnings during a disability may be entitled to an increase in compensation – a benefit to the employee. Employer's proposed interpretation would not do that. Under Employer's interpretation, the employee's compensation would remain the same and the employer's Social Security offset increases. Nothing suggests that was the legislature's intent. Employee's gross weekly wage as adjusted under AS 23.30.220(a)(10) is her average weekly wage at the time of injury under AS 23.30.225(b). Beginning April 1, 2011, Employer is entitled to an offset of $72.67 per week against Employee's weekly PTD benefits of $839.69.

5. How much PPI may Employer recoup?

At hearing, Employer declined to take a position on the issue stating it was SIF's obligation as SIF was responsible for Employee's disability benefits. However, in its February 28, 2013 letter to Employee and SIF, Employer stated it had paid $24,783.11 in PPI benefits, and adjusting for inflation, was entitled to recoup $26,103.15. In its brief, SIF states Employee received more than $24,000.00 in PPI benefits. Both Employer and SIF are mistaken.

On December 14, 2010, Employer paid Employee $12,390.00 based on Dr. Gevaert's November 3, 2010 determination Employee had suffered an additional 7 percent impairment as a result of this injury. On December 31, 2010, Dr. Gevaert revised his opinion to state Employee had actually suffered an additional 14 percent impairment as a result of this injury. Employee was never paid for the additional 7 percent impairment. The June 23, 2011 compensation report, the first compensation report filed after Employee received a PPI rating, shows Employee was paid TTD from November 8, 2010 and ongoing with an undated PPI lump-sum payment of $12,390.00. The next compensation report, dated August 9, 2012, shows Employee was paid periodic PPI payments from October 26, 2010 through October 14, 2011, totaling $24,783.11. The report does not show the lump-sum payment. The April 12, 2013 compensation report again shows an undated lump-sum as well as periodic PPI payments from October 26, 2010 through February 10, 2011. At hearing, Employer stated the August 2012 and April 2013 compensation reports were revisions to reflect the reclassification of TTD payments Employee received to periodic PPI payments. Without deciding whether those reclassifications were appropriate,

given the above finding that Employee was PTD as of January 10, 2010, all disability payments since that time must now be reclassified as PTD payments. Only the December 14, 2010 lump-sum PPI payment of $12,390.00 remains.

Under AS 23.30.180, PTD benefits must be reduced by previously paid PPI "adjusted for inflation." The consumer price index in December 2010, when the PPI was paid, was 218.056. In June 2013, the most recent month available, it was 233.504, a 7.08 percent increase. Increasing the $12,390.00 PPI payment by 7.08 percent yields $13,267.21, which is the amount by which Employer may reduce Employee's PTD benefits by withholding up to 20 percent of each unpaid installment of compensation that becomes due.

6. Is Employee entitled to attorney fees and costs, and if so, in what amount and who should pay?

An employee may be entitled to attorney fees under AS 23.30.145 if the responsible party controverted or resisted payment of compensation. As Employer and SIF both contend the other should be liable for any attorney fees awarded, it is first necessary to determine whether either or both may be liable for attorney fees.

SIF contends it is not directly liable to an employee for any benefits; its only obligation is to reimburse an employer for qualifying benefits. Employer contends SIF resisted payment of benefits through its refusal to acknowledge its liability for benefits or to stipulate to an order awarding Employee PTD benefits. It relies on *Mumby v. State, Supplemental Fund*, Unpub. Op. S-4990, S. 5070 1994 WL 16459424 (Alaska 1994), *SIF v. Arctic Bowl*, 928 P.2d 590 (Alaska 1996), and *Kennecott Greens Creek Mining v. SIF*, AWCAC Decision No. 80 (June 9, 2008) and *J.B. Warrack v. Roan*, 418 P.2d 986 (Alaska 1966). None of those cases are relevant. *Mumby* involved the Supplemental Fund created by former AS 23.30.172, a fund with an entirely different purpose and obligations than the SIF. It has no bearing on whether the SIF may be ordered to pay an employee's attorney fees. While SIF was ordered to pay fees in *Arctic Bowl*, the award was under AS 23.30.145(c), which applies only to court proceedings, and does not authorize the board to assess fees. *Kennicott Greens* involved a dispute between SIF and an employer; the commission held there was no statutory authority under which the board could

order SIF to pay employer's attorney fees. *Roan* involved a 1961 injury; at that time, AS 23.30.205 authorized SIF to pay some benefits directly to an employee. That provision was amended in 1968, and the case is no longer relevant.

The Supreme Court has held the board's authority to award attorney fees derives solely from AS 23.30.145. *Davis*. Under that section, the board may only order an employer or carrier to pay attorney fees, and the SIF is neither an employer nor a carrier. Further, AS 23.30.205, which creates SIF, clearly states "the employer or the insurance carrier shall in the first instance pay all awards of compensation." In *Busby*, an employer argued the board should have ordered SIF to reimburse medical expenses and attorney fees as well as disability benefits. The Supreme Court held the fund was a limited reimbursement scheme for disability payments only. Attorney fees are not disability payments. SIF is not liable for attorney fees.

Employee contends she should be awarded her actual attorney fees as an advance on statutory fees under AS 23.30.145(a), and the May 23, 2013 stipulation expressly preserved Employees' right to do so. Under *Porteleki* and *Wolf*, when an employee is entitled to fees under both AS 23.30.145(a) and (b) the board may order both actual fees and statutory fees, if and when the statutory fees exceed the actual fees.

Because the parties' stipulation resolves actual fees through November 8, 2012, the question under AS 23.145(b) becomes whether Employer resisted payment of compensation or other benefits after November 8, 2012. Clearly, it did. Even in its November 8, 2012 letter, Employer does not accept Employee's PTD claim; it contends SIF is liable: Employer states "all future benefits are the responsibility of SIF," "it makes no sense for MOA to defend," and "MOA takes no position" on Employee's "claims for any benefits under the Act." It agreed to "commence payment of stipend benefits" and "if SIF concedes PTD, we will of course convert all .041(k) benefits to PTD."

In its November 13, 2012 answer to Employee's amended claim it denies it is liable for any PTD benefits. Finally, on December 5, 2012, after being informed SIF had never objected to PTD

benefits, Employer informed Employee's attorney it was reclassifying benefits as PTD benefits, but it was still asserting offsets for Social Security and previously paid PPI.

Apparently forgetting it had previously reclassified TTD payments as PPI in the August 9, 2012 compensation report, in its February 28, 2013 letter Employer erroneously asserted it was entitled to recover over $24,000.00 in PPI benefits rather than the $12,390.00 it had actually paid. By asserting it was entitled to recover more that it was entitled to, Employer resisted payment of compensation. At hearing, Employer's attorney stated Employer had withdrawn its petition at the December 11, 2012 prehearing conference. The prehearing conference summary does not reflect that, and although Employer asked that the summary be revised, it did not include the withdrawal of its petition for social security offset in that request.

Although the interplay between AS 23.30.220(a)(10) and AS 23.30.225(b) appears to be an issue of first impression, in its February 28, 2013 letter, Employer asserted a position in which it, rather than Employee, was the beneficiary of the compensation increase under AS 23.30.220(a)(10). Employer again resisted payment of compensation.

Employer resisted payment of benefits after November 8, 2012, and Employee was successful in her quest for an order finding her PTD, and both the Social Security offset and PPI recovery issues were decided in her favor. She is entitled to costs, including reasonable attorney fees under AS 23.30.145(b).

Employer does not contest either Employee's attorney's hourly rate or his paralegal's rate, but alleges some instances of "double billing" in which the attorney and his paralegal billed for reviewing the same documents. In each of the instances cited by Employer, the paralegal billed a very short time; the longest was .3 hours, and that included other work as well. In *Hanson v. Municipality of Anchorage*, AWCB Decision No. 12-00031 (February 21, 2012) at 45, the board stated:

> It is not uncommon for an attorney and a paralegal to work on the same project or issue at the same time. In essence, such practice results in two people concurrently reviewing a file or performing legal research, though gleaning different information, and billing for their services at different hourly

> rates. Such practice saves time and money, as the paralegal bills at a substantially lower rate than the attorney, who without the paralegal's assistance would likely spend more time researching or reviewing the file at a higher hourly rate.

Here, the alleged "double billing" is exactly the type of review approved of in *Hanson*. Employee's attorney fee will not be reduced for the "double billing."

Employer also contends Employee's attorney and paralegal expended unnecessary efforts after Employer had lifted its controversions on November 8, 2012. Employer points to six affidavits of service of medical bills. Five of those affidavits were signed by legal assistants in Employee's attorney's office, and the sixth is not in the board's file. However, in none of those instances did Employee's attorney or his paralegal bill for preparing the affidavits of service.

Employer also contends Employee's attorney's correspondence after November 8, 2012 regarding medical bills was unnecessary because the controversions had been withdrawn. While those letters are not in the Board's file, it is far from clear the work was unnecessary. In its November 13, 2012 answer to Employee's amended claim, Employer denied it was responsible for medical benefits as well as Employee's PTD claim. At the December 11, 2012 prehearing conference, Employer stated it had accepted Employee's PTD claim, and the prehearing conference summary states Employer withdrew all controversions, but on December 20, 2011 Employer's attorney wrote to the designated chair stating Employer had only withdrawn its September 20, 2012 controversion of a spinal cord stimulator, not the controversions of other medical conditions. Given Employer's lack of clarity on medical benefits, Employee's attorney's work regarding medical bills was not unnecessary.

Employer further contends Employee's attorney's efforts to secure Employer's compliance with the January 14, 2013 interlocutory decision and order were unnecessary, given Employer's concession that Employee was PTD. If Employer believed circumstances had changed such that compliance with the board order was unnecessary, the proper procedure would have been to request modification of the order, not to ignore the order. Employee's attorney's efforts to secure compliance with a board order were not unnecessary.

Finally, Employer contends Employee cannot recover mileage and messenger costs or excessive copying costs. Employee's attorney explained at hearing that the bulk of the copying costs were to reproduce computer disks. The board has previously approved both mileage and courier costs under 8 AAC 45.180(f)(17). *Mullen v. Municipality of Anchorage*, AWCB Decision No. 10-0172 (October 14, 2010) at 15. The regulation on costs, 8 AAC 45.180(f), does not specifically address the cost to duplicate digital media; digital media are common in litigation today, and reproduction costs will be allowed as "other costs" under 8 AAC 45.180(f)(17).

In reviewing Employee's attorney's fee affidavits, experience, judgment, observations and inferences drawn from all of the above show his services appear reasonably commensurate with the actual work performed given the nature, length, and complexity of the services performed, and the actual and potential benefits resulting to Employee from the services. The attorney's and his paralegal's hourly rates are not unlike or inconsistent with those seen in other cases with similarly experienced legal representatives. The fees are reasonable given the test set forth in 8 AAC 45.180, Alaska Supreme Court case law, and the present results for Employee as discussed in this decision. Accordingly, Employee's attorney will be awarded fees of $38,535.75 under AS 23.30.145(b) and costs of $1,775.61.

When an employee is entitled to fees under both AS 23.30.145(a) and (b), the board has awarded actual fees subsection (b), and statutory fees under (a) if and when the statutory fees exceed the actual fees. *Porteleki*; *Wolf*. As noted above, the employer controverted the employee's claim. AS 23.30.145(a) provides the minimum fees we are to award in the successful prosecution of an employee's controverted claim. Accordingly, the employer shall pay the employee statutory minimum attorney fees under AS 23.30.145(a) when, and if, the statutory minimum amount based on the payment of past and future medical, indemnity, and all other benefits related to the employee's injury, exceeds $67,241.75, which is the sum of the $38,535.75 fee awarded here and the fee of $28,706.00 in the parties' May 23, 2013 stipulation.

CONCLUSIONS OF LAW

1. The decision to quash the subpoena issued for Director Monagle was correct.
2. The stipulation and order of acceptance of PTD will be set aside.

3. Employee was permanently and totally disabled as of January 5, 2010.

4. The correct amount of the Social Security offset is $72.67 per week against Employee's weekly PTD benefits of $839.69.

5. Employer may recoup PPI benefits of $13,267.21 by withholding up to 20 percent out of each unpaid installment of compensation due.

6. Under AS 23.30.145(b), Employee is entitled to actual attorney fees and paralegal fees of $38,535.75 and costs of $1,775.61. Under AS 23.30.145(a), Employee is entitled to statutory fees, if and when such fees exceed $67,241.75. Employee's attorney fees and costs shall be paid by Employer.

ORDER

1. The Stipulation and Order of Acceptance of PTD filed May 23, 2013, and the May 29, 2013 Statement and Order of the Board are vacated.

2. Employee was permanently and totally disabled as of January 5, 2010.

3. Employee's weekly compensation rate for PTD is $839.69, against which Employer is entitled to an offset of $72.67 for the Social Security disability benefits Employee is receiving.

4. Employer may recover PPI benefits of $13,267.21 from PTD payments to Employee. Pursuant to AS 23.30.155(j), Employer may withhold up to 20 percent of each PTD payment until the PPI benefits have been recovered.

5. Employer shall pay Employee actual attorney fees and paralegal fees totaling $38,535.75 and costs of $1775.61.

6. Employer shall pay Employee statutory fees under AS 23.30.145(a), if and when statutory fees under AS 23.30.145(a) based on the payment of past and future medical, indemnity, and all other benefits exceed $67,241.75.

Dated at Anchorage, Alaska on August 20, 2012.

ALASKA WORKERS' COMPENSATION BOARD

____
Ronald P. Ringel, Designated Chair

____
Patricia Vollendorf, 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.

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the Board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the Board are parties to an appeal. If a request for reconsideration of this final decision is timely filed with the Board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied because the Board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of ANNIE L. MILLER, employee/claimant, v. MUNICIPALITY OF ANCHORAGE, employer, and STATE OF ALASKA, SECOND INJURY FUND, defendants; Case No. 200606082; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties this 20th day of August, 2013.

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Kimberly Weaver, Clerk