ALASKA WORKERS' COMPENSATION BOARD

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

JOSEPH S. LOTT, Employee, Applicant, v. EXCEL GYMNASTICS, Employer, Uninsured, and THE ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201012662 AWCB Decision No. 13-0125 Filed with AWCB Anchorage, Alaska on October 9, 2013

Joseph Lott's (Employee) July 7, 2010 claim as amended was heard on August 29, 2013, in Anchorage, Alaska, a date selected on February 7, 2013. Attorney Rene Gonzales appeared and represented Employee, who appeared and testified. Attorney Burt Mason appeared and represented Excel Gymnastics (Employer). JoAnn Pride and Velma Thomas appeared and represented the Alaska Worker's Compensation Benefits Guaranty Fund (the fund). Robert Davila (Employer) appeared and Loretta Cole appeared by telephone; both testified on Employer's behalf. The record remained open until September 9, 2013, so Employer could file an objection to Employee's attorney's fee and cost affidavit. The record closed on September 9, 2013.

As preliminary matters, Employer objected to Employee's witness list because it did not comply with the regulations. Employer also objected to Employee's affidavit of attorney's fees and costs, because it was late. Employer's objection to the witness list was sustained but its objection to the tardy attorney's fee and cost affidavit was denied. Employee objected to Employer's rebuttal witness list because there is no procedure for filing such a list. Employee's objection to the rebuttal witness list was overruled. This decision examines the oral orders sustaining and denying Employee's and Employer's objections, and addresses Employee's claim on its merits.

ISSUE

As a preliminary matter, Employer contended Employee's witness list was not in accordance with the regulations. It contended Employee was not entitled to call witnesses because his witness list was nonconforming.

Employee conceded his witness list was not in accordance with the regulations but contended this was an oversight. He contended there were no surprise witnesses and in any event he only needed to call himself as a witness.

1) **Was the oral order allowing Employee to call only himself as a witness correct?**

As a second preliminary matter, Employer contended Employee's attorney's fee and cost affidavit was late. It contended under the regulations, Employee could only receive statutory minimum attorney's fees.

Employee conceded his attorney's fee and cost affidavit was late, but this was an oversight. However, he contended it was late because Employer changed its litigation strategy at the last minute, causing him to completely alter his approach.

2) **Was the oral order accepting Employee's late attorney's fee affidavit and allowing Employer 10 days to file an objection to it correct?**

Employee contended Employer should not be able to call a rebuttal witness. He contended there is no legal authority for a rebuttal witness list.

Employer contended it listed "rebuttal witnesses" on its original witness list. It contends it has a right to specifically name the rebuttal witness on a supplementary witness list.

3) Was the oral order allowing Employer to call a rebuttal witness correct?

Employee contends he is entitled to temporary total disability (TTD) from February 12, 2010 through January 11, 2011. He seeks an order awarding TTD.

Employer first contends Employee is not entitled to TTD for the first three days following his injury. It further contends Employee ceased working for it, not because of his injury, but because the parties could not come to terms on a new employment contract. Therefore, Employer contends it has already paid Employee the TTD owed.

4) Is Employee entitled to additional TTD?

Employee contends he was released to light duty work on May 4, 2010. Therefore, alternately, Employee contends he is entitled to temporary partial disability (TPD) from May 4, 2010 through January 11, 2011.

Employer contends Employee is not entitled to TPD because Employee ceased working for it, not because of his injury, but because the parties could not come to terms on a new employment contract. Therefore, Employer contends no TPD is owed.

5) Is Employee entitled to TPD?

Employee contends he is entitled to medical benefits for his work injury, including costs associated with a permanent partial impairment (PPI) rating evaluation. He also contends Employer should be ordered to reimburse the Veterans Administration (VA) for work-injury related services the VA paid on Employee's behalf.

Employer concedes Employee is entitled to medical benefits for his work injury. However, it contends it already sent Employee's attorney check for the VA. Employer further concedes Employee is entitled to a PPI rating and contends it has volunteered to pay for one.

6) Is Employee entitled to medical benefits?

Employee contends he is entitled to interest. He seeks an interest award on all benefits awarded in this decision.

Employer did not state a position on the interest issue. Its contentions are unknown.

7) Is Employee entitled to interest?

Employee contends he has succeeded in obtaining benefits. Therefore, he contends he is entitled to attorney's fees and costs.

Employer does not dispute Employee may be entitled to some attorney fees and costs. However, it contends it already paid Employee's attorney $3,000.00 and Employee's attorney is otherwise limited to statutory minimum attorney's fees because he failed to file a timely attorney's fee affidavit.

8) Is Employee entitled to attorney's fees?

FINDINGS OF FACT

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

1) Employee was a high school and collegiate gymnast. He became an "elite" gymnast and competed in his early 20s. He has been in the sport for about 28 years and has been designated a "pro coach" by USA Gymnastics, the sport's "governing" body (Employee).

2) Employee has known Robert Davila, Employer's owner, for 12 or 13 years; they were friends. He began working for Employer as a gymnastics instructor in September 2009. When he first negotiated for hire, Employee wanted $20.00 per hour. The parties agreed to $15.00 per hour, Employee was hired and his wages later increased to $17.00 per hour. Employee promised to remain with Employer to the end of a full, competitive gymnastics season but told Employer he wanted to renegotiate his employment contract following the season's end (*id.*).

3) While working for Employer, Employee typically taught homeschooled children ages from approximately 10 to 16, and the competitive boys' team. USA Gymnastics requires a "1 to 7" coach-to-student ratio. When Employee coached the competitive boys' team and the homeschooled children, there were approximately 10 students in the classes, which exceeded the industry ratio, in his view (*id.*).

4) On February 12, 2010, there were two assistant coaches on the gym floor. After Employee's gymnastics class was officially over, one student came back onto the mat and had some questions about a gymnastics maneuver. Employee moved the child off to the side on the mat and began demonstrating the proper technique for a back handspring. While so doing, Employee landed awkwardly, heard something "like a tree branch snapping" and tore his right Achilles tendon. He immediately hobbled over to where Robert Davila was sitting and told him what happened. Employee stayed at Employer's premises for about 45 minutes and iced his ankle. Employer's premises were not far from the Mat-Su Regional Hospital but Robert Davila eventually took Employee to the military hospital in Anchorage for treatment, because Employee is a Marine Corps veteran. During the drive to Anchorage, Employee and Robert Davila discussed where Employee should go for medical treatment. Robert Davila told Employee he was already "in trouble" because he did not have workers' compensation insurance. As a veteran, Employee told Employer he could go to the VA funded facility in Anchorage to get treatment (*id.*).

5) Employer did not dispute any of Employee's testimony set forth in factual finding four, above (Davila).

6) While the entire substance of Employee's and Employer's conversation in the car driving to the hospital is unknown, Employee agreed to forsake the closer "valley" hospital in favor of going to the VA hospital in Anchorage mainly because he could receive medical care there at a considerably reduced cost (Employee; experience, judgment and inferences drawn from all the above).

7) In a written statement, Employer's assistant coach Micah McKinnis said he was about 10 to 15 feet away from Employee when Employee was assisting the student by demonstrating a back handspring. While Micah watched, Employee performed a back handspring and upon his "rebound," Micah "heard a sharp cracking sound, which eventually was found to be a separated Achilles tendon." Micah averred "Robert Davila, several others, and I cursorily examined [Employee's] injury, and as it clearly warranted emergency treatment, Robert immediately drove him to the Fort Richardson hospital for treatment." Micah's statement also says the student was not currently on class time as his class had ended approximately one hour earlier (Accident Report, Micah McKinnis, December 20, 2010; Employer's Notice of Intent to Rely, December 21, 2010).

8) Employer developed Micah McKinnis' statement for litigation purposes, in part to support an inference Employee's injury did not arise out of and in the course of his employment with Employer

because the gymnastics class was "over" when the injury occurred (experience, judgment and inferences drawn from all the above).

9) Neither Employee nor Employer ever filed an injury report and Employee's failure is not excused because there is no satisfactory reason he could not have file one (record).

10) On February 12, 2010, Employee arrived at the Elmendorf Air Force Base hospital in a "Privately Owned Vehicle," which was Robert Davila's (Employee; Davila; Personal Data, Emergency Care & Treatment, February 12, 2010).

11) A physician's assistant completing the intake form recorded Employee's main complaint as "right achilles pain." Employee stated as the cause for his symptoms: "may have torn achilles -- heard loud pop [after] starting to run today at 1530." When asked whether this resulted from an "injury," Employee reported "no." Had he wanted to, Employee could have stated "how," "where," and "when" his work injury occurred, but did not. The intake form makes no mention of a work-related injury and no mention of how the accident occurred (Personal Data, Emergency Care & Treatment, February 12, 2010).

12) Neither Employee nor Employer mentioned this report at hearing or in their briefs and neither offered an explanation for why Employee would not have told the hospital staff he injured his Achilles tendon when he was demonstrating a back handspring for a student. The probable explanation for Employee's false reporting to his medical providers is that following the injury and during the car ride, Robert Davila advised him Employer had no workers' compensation insurance and convinced Employee to falsely report his history to his care providers to avoid causing Employer legal difficulties. This also explains why they decided to take Employee to the low-cost VA medical facility (experience, judgment and inferences drawn from all the above).

13) Employee intentionally and knowingly made a false or misleading statement and representation, related to a benefit, to his attending physician. He gave a false history about how he injured his Achilles tendon, to protect Employer because it had no workers' compensation insurance and to obtain medical care from the VA (experience, judgment and inferences drawn from all the above).

14) Robert Davila intentionally and knowingly assisted, abetted, solicited and conspired with Employee and encouraged him to make these false statements related to a benefit to protect Robert Davila because Employer knew it had no workers' compensation insurance (*id*.).

15) Neither Employee nor Robert Davila is credible (*id*.).

16) Employee's false or misleading statements and representations to his attending physicians did not result in Employee obtaining any workers' compensation benefits improperly. Robert Davila's efforts in knowingly assisting, abetting, soliciting, and conspiring with Employee to encourage him to make false statements to his physicians about how his injury occurred also did not result in Employee receiving any workers' compensation benefits inappropriately. If anything, Employee's false reports to his medical providers at Employer's encouragement unnecessarily delayed Employee's receipt of benefits to which he was entitled under the Act (*id*.).

17) Employee did not work between February 12, 2010 and February 18, 2010 (*id*.).

18) On February 16, 2010, Employee had surgery on his torn Achilles tendon (*id*.).

19) Employee produced no record from a medical provider stating he was ever removed from work either totally or partially because of his work injury (record).

20) On February 17, 2010, Employee spoke with Employer who wanted him to return to work immediately. Employee had inflammation in his ankle, which was in a cast, and he was using crutches and was on medication. He did not believe it was safe to participate actively with the students (Employee).

21) On February 18, 2010, Employee worked for Employer for three hours and tried "as best he could" to be a proxy coach. He had not been "medically cleared" to work but wanted to keep his promise to Employer to stick with the boys' competitive team through the season (*id*.).

22) After Employee returned to work following surgery, Employer provided no additional assistant coaches to help him. Depending upon the child's age and experience, in Employee's opinion, it is not possible to coach gymnastics while seated. Coaching is a big responsibility and the coach is responsible for his or her own safety as well as the students' safety. In Employee's view, nothing changed in terms of accommodations following his work injury (*id*.).

23) Employee confirmed Employer's timecards accurately showed he worked the following hours after his injury (*id*.):

Dates worked	Hours worked
February 18, 2010	3
February 19, 2010	5
February 21, 2010 through March 6, 2010	54
March 7, 2010 through March 20, 2010	24
March 21, 2010 through April 3, 2010	27
April 4, 2010 through April 17, 2010	0
April 18, 2010 through May 2, 2010	8

24) Employee also occasionally coached at Willow Elementary School for Employer, post-injury. When Employee worked off-site for Employer, Employer did not provide any additional assistance to accommodate Employee's injury, except for the last two weeks. When Employer finally provided an assistant at Willow Elementary School, the assistant was approximately 12 years old. Employee complained to Employer that this was an unacceptable arrangement and unsafe for him and for the students (*id*.).

25) In or around March 2010, sometime shortly after the state gymnastics meet was over, while still recovering from his injury Employee met with Employer to renegotiate his contract as agreed when he was hired. Employee said he had to have $25.00 per hour to remain a gymnastics coach for Employer. Because Employer did not have workers' compensation insurance when Employee was injured, Employee called around to find out what disability insurance would cost, got some quotes, and decided he wanted to be an independent contractor and take care of his own insurance needs. Employee figured $25.00 per hour would be adequate to compensate him and purchase insurance to protect against additional work injuries (*id*.).

26) On March 3, 2010, Employee reported to the military facility's orthopedic clinic. It was determined he was approximately two weeks post-surgery and was "doing well with no complaints." His "disposition" was "Released w/o Limitations" with instructions for follow-up as needed in six weeks or sooner if he had any difficulties (Chronological Record of Medical Care, March 2, 2010).

27) Post-surgery, Employee tried to coach at a safe distance from the students but a student accidentally kicked Employee in his right toe area, after the state championship meet, sometime near the end of March 2010, jamming his toes into his cast and causing painful swelling for several

days. At that point, Employee told Employer he needed time off to recover. Within a few days or a week, Employee took off, which he thinks was the last time he worked for Employer (Employee).

28) Employee's testimony on this point was vague and confusing (judgment, observations).

29) After his injury and surgery, Employee "spotted" many kids on the mat, while he was wearing a cast. However, he did not normally have to spot the competitive boys' team, because they were bigger and he had an assistant coach to help. His main focus was to assist the competitive boys' team to the end of their competitive season, as he had promised (Employee).

30) In Employee's view, he stopped working on or about May 2, 2010, because he "needed to heal" and because he had kept his commitment to Employer and stuck with the boys' competitive team through the end of the competitive season. When Employee says "a year," he refers to a competitive season, not a calendar year (*id*.).

31) On May 4, 2010, in response to Employee's concerns about his ability to return to work, Employee's attending physician released him to light duty with restrictions including no spotting, and activity as tolerated only, during his rehabilitation period (*id*.; chart note and Memorandum for Employer, May 4, 2010).

32) This release to restricted duty work was not preceded by a work restriction from any physician (observations; record).

33) Employee wanted to continue to work for Employer with certain conditions, including higher pay so he could obtain his own disability insurance because he did not trust Employer to maintain required insurance. Employee talked to Employer at least twice between May 4, 2010 and August 2010, about continuing to work agreements (Employee).

34) When Employee and Employer could not come to an agreement about his work contract, he called unemployment to obtain unemployment insurance benefits. Employee and Employer had not resolved the "reemployment negotiation" and it did not look like they were going to. Employee realized he was "not getting anywhere" and was not working so he needed to explore unemployment benefits. When he applied, Employee told unemployment he was physically able to work. At hearing, Employee reluctantly conceded he was probably physically able to work for Employer when he told unemployment he was able to work in general, though he believed working would have been a little bit more "hazardous" than he would have liked it, and he could have only done it to the best of "his ability." Employer never told him not to come back to work. Employee

does not think it was his decision to not return to work for Employer; rather, he believes he and Employer could not come to an agreement and that is why he never returned to work (*id*.).

35) Had the injury never happened, Employee's employment contract renegotiation with Employer would have probably happened around the same time anyway. Employee was committed to long-term employment, loved gymnastics, and wanted to help Employer's business succeed. If Employer had offered Employee $20.00 per hour and had workers' compensation insurance, Employee would have returned to work for Employer. Employee conceded he and Employer were not able to come to a meeting of the minds regarding contract renegotiations, had a "falling out," and these factors had "a lot to do" with him not returning to work for Employer (*id*.).

36) In Employee's view, the end of the competitive season was the termination point for the original employment contract between him and Employer (*id*.).

37) Following his work injury, in or about June 2010, Employee performed work as a residential contractor and earned approximately $350.00. He also did a paint job in August 2010 earning about $580.00. Each job lasted approximately one week (*id*.).

38) When it became apparent Employee was not going to return to work for Employer, and Employer was not providing any workers' compensation benefits voluntarily, Employee decided to pursue a workers' compensation claim (experience, judgment and inferences drawn from all the above).

39) On September 7, 2010, Employee through counsel filed a workers' compensation claim against Employer for TTD from February 12, 2010 through "present"; permanent partial impairment (PPI); medical costs; transportation costs; a reemployment eligibility evaluation; a compensation rate adjustment; interest; and attorney fees and costs (Workers' Compensation Claim, September 1, 2010).

40) On September 23, 2010, Employer through counsel filed an answer to Employee's claim. It denied Employee was its "employee" at the time of injury and said the injury occurred when Employee was not working for or on Employer's behalf. The answer denied Employee was entitled to TTD or vocational reemployment benefits because he returned to work and was offered continued employment which he refused. Employer admitted an injury occurred on February 12, 2010, on Employer's premises (Answer, September 21, 2010).

41) On September 24, 2010, Employer through counsel denied all benefits claiming Employee was not an employee at the time of injury was off-duty and performing personal gymnastics when

the injury occurred. Employer specifically denied TTD and vocational reemployment benefits because Employee returned to the work he was doing at the time of injury and was allegedly offered light duty work which he refused (Controversion Notice, September 21, 2010).

42) Employer did not timely controvert Employee's right to benefits. It had actual knowledge of his work-related injury on February 12, 2010, but did not file a Controversion Notice until September 24, 2010 (*id*.; record).

43) On December 27, 2010, Employer filed documents including a written statement from Micah McKinnis, in anticipation of defending against Employee's claim (Notice of Intent to Rely, December 21, 2010).

44) On February 14, 2011, Employer was notified Employee had applied for unemployment insurance. Employer dutifully completed a statement stating Employee last worked for Employer on April 3, 2010. His wages were $17.00 per hour for three hours a day, three days a week. His job was "coach," Employee did not give notice before quitting and quit before the intended last day of work because Employee "wanted a pay raise to $25/hour, which was not accepted, then he quit." Employer said this discussion with Employee concerning his pay raise occurred over the phone on approximately August 15, 2010. Notably, Employer told unemployment Employee "injured himself during his off-duty time." Employer averred accommodations were made to help Employee coach so he would not have to perform physical tasks. Employer said Employee took leave to recuperate then demanded a pay raise. Employer stated the accommodations were standard in the industry and Employee could have coached from a sitting or "relaxed position" and had to perform no physical exertion. In short, Employer told unemployment Employee was given several opportunities to work without physical exertion and turned them down while on leave (Voluntary Leaving Statement-Employer, February 16, 2011).

45) When asked about this unemployment issue at hearing, Robert Davila testified he never told unemployment Employee quit. When confronted with the above-mentioned form, Robert Davila conceded he told unemployment in writing Employee quit, but this was not inconsistent with his prior testimony, as his testimony had to do with a telephone conversation and not a written document (Davila).

46) On March 1, 2011, unemployment advised Employee he was not entitled to unemployment insurance benefits because his last day working for Employer was April 3, 2010, and Employer reported he quit his job on August 15, 2010, when his request for a pay increase and a status change

from "employee" to "independent contractor" was turned down (Notice of Non-Monetary Determination, March 1, 2011).

47) On March 25, 2011, Employee's physician stated Employee was medically stable and released to return to work without medical restrictions effective January 1, 2011 (Employee).

48) Employee was medically stable effective January 1, 2011 (Employee; judgment and inferences drawn from all the above).

49) On September 8, 2011, the parties appeared at a prehearing conference and agreed to a January 24, 2012 hearing. The issues included those raised in Employee's claim and his "employee" status at the time of his injury (Prehearing Conference Summary, September 8, 2011).

50) On October 17, 2011, Employer filed an amended answer averring Employee was not an "employee" at time of injury and was not entitled to workers' compensation benefits. As affirmative defenses, Employer contended Employee was not working when injured and was not required to be on Employer's premises. Demonstrating or exhibiting his skill "to co-workers" was not part of Employee's job and did not further Employer's business. Employer further alleged Employee knowingly made "false and/or misleading statements and representations regarding the facts related to [sic] injury and its ability to work either at his normal job and/or light-duty employment offered by Employer." Employer further alleged Employee violated AS 23.30.250 and requested findings Employee violated the statute and was civilly liable to Employer for costs and fees incurred in defending this claim. Lastly, Employer wanted a determination if Employee was "guilty of theft by deception" (Amended Answer, October 13, 2011).

51) On November 15, 2011, the parties attended another prehearing conference. This time, they agreed the sole issue for hearing would be whether Employee was an "employee" at the time of his accident (Prehearing Conference Summary, November 15, 2011).

52) On January 10, 2012, the hearing was continued because Employer's attorney was ill and could not attend (*Lott v. Excel Gymnastics*, AWCB Decision No. 12-0008, January 11, 2012).

53) On February 7, 2013, the parties appeared at another prehearing conference. The issues for hearing remained as before, including Employer's contention Employee was not an "employee" working at the time of his injury and therefore not covered under the Act. The parties selected August 29, 2013 for their hearing and a witness list deadline was set (Prehearing Conference Summary, February 7, 2013).

54) On August 20, 2013, Employer filed a witness list. Among other things, Employer listed: "Rebuttal witnesses as necessary" (Employer's Witness List, August 20, 2013).

55) On August 21, 2013, Employee filed his witness list listing six witnesses by name, but provided no addresses, telephone numbers or the nature and substance of the witnesses' expected testimony (Employee's Witness List, August 20, 2013).

56) On August 22, 2013, Employer filed its second amended answer denying Employee was working at the time of his injury but conceding the board would find he was acting on Employer's behalf and would be found entitled to benefits under the Act. Employer admitted Employee was entitled to five days TTD less the first three days, and PPI when rated. Employer calculated Employee's compensation rate at $102.02 per week. Employer maintained its objection to Employee receiving vocational reemployment benefits because he returned to work doing his job at the time of injury. As amended affirmative defenses, Employer averred Employee refused appropriate work thus making him not entitled to any disability or reemployment benefits. Employer conceded it had paid $779.01 to the VA and $3,000.00 in attorney's fees to Employee's counsel (Seconds (sic) Amended Answer, August 23, 2013).

57) There is no evidence Employer paid any statutory interest on the TTD paid to Employee for the VA reimbursement (record).

58) Employer paid Employee his regular wages for February 12, 2010 (Robert Davila).

59) Employer has already paid Employee TTD for February 16, 2010 and February 17, 2010 (*id*.).

60) Employee did not dispute this evidence (Employee).

61) Employee did not dispute Employer's TTD compensation rate calculation (*id*.).

62) Employee's counsel has not deposited or cashed any of the three checks Employer sent to Employee's counsel as described above, fearing Employer might argue "accord and satisfaction" (Employee's hearing statements).

63) In his August 20, 2013 hearing brief, Employee argued he was entitled to disability benefits because coaching gymnastics is a "hands-on activity" and cannot be accomplished safely from the seated position (Employee's Trial Brief, August 20, 2013).

64) On August 27, 2013, in response to Employee's hearing brief arguments, Employer filed a rebuttal witness list listing Loretta Cole as a witness. This supplemental witness list provided Loretta Cole's address and phone number, and a brief description of her testimony and stated her

testimony was necessary to rebut Employee's anticipated testimony about coaching safety gleaned from his recently received hearing brief (Employer's Rebuttal Witness List, August 26, 2013).

65) At hearing on August 29, 2013, Employee filed his affidavit of attorney's fees and costs, totaling 32.16 hours billed at $275.00 per hour for a preliminary total of $8,844.00 in legal fees (Affidavit of Rene J. Gonzales, August 28, 2013).

66) Employee's attorney's fee affidavit was late (observations).

67) Employee's counsel averred his fee affidavit was late by "oversight" because Employer at the last minute withdrew its defenses, accepted the claim and this required Employee's counsel to re-think his hearing strategy, which he implied resulted in the oversight and late-filed attorney's fee affidavit (Employee's counsel's statements at hearing).

68) Employer's last minute withdrawal of its defenses and resultant need for Employee's counsel to reassess his hearing strategy is good cause to modify the fee affidavit filing requirement (experience, judgment and inferences from all the above).

69) At hearing on August 29, 2013, Employee clarified he was seeking TTD from February 12, 2010 through January 1, 2011, and alternately, TPD from May, 4 2010 through January 11, 2011 (Employee's hearing statements).

70) At hearing on August 29, 2013, Employer objected to Employee's witness list because it did not state the nature and substance of the witnesses' expected testimony. It also failed to list their phone numbers and addresses. An oral order sustained Employer's objection to the witness list. Employer also objected to the attorney's fee affidavit as untimely. An oral order overruled the objection and left the hearing record open for 10 days for Employer to file a written objection to Employee's attorney's fee affidavit (record).

71) Employee's witness list was not in compliance with the law (observations).

72) Robert Davila is also certified by USA Gymnastics and has been involved in gymnastics for 17 years. There are several types of gymnastics coaching techniques including the "command" and "progressive" styles and the "hands-on" method. Most coaches use all methods, meld them together and "go in and out" of them as necessary (Davila).

73) Employee was not required to spot students after his injury, according to Employer. He had an assistant to do all the heavy lifting and spotting, and was not required to have any hands-on activity post-injury while working for Employer. Employee's Employment contract was initially three hours a day, three days per week, at $15.00 an hour, which was later raised to $17.00 per hour.

Sometime after May 4, 2010, Employer had a discussion with Employee about why he was no longer coming to work. Employer asked Employee how long he was going to be out and Employee said he would only be out until the summer. When summer came, Employer asked Employee if he was "good to go," Employee said "yes." About a week later, Employer called him back and Employee changed his mind and said he needed "more time off." Employer canceled programs and reorganized its schedule to accommodate Employee's absence (*id.*).

74) Employer only recalled talking to Employee once about renegotiating his contract sometime after April 2010, on the phone. This conversation occurred toward the end of summer 2010. Employee told Employer he wanted $25.00 per hour and independent contractor status. Employer told Employee this was too much money. Employer had called around to find out how much other gyms paid their top gymnastic instructors. It learned top gyms in Anchorage, for example, paid its best gymnastics instructor only $22.00 per hour. Employer determined it simply could not afford to pay Employee $25.00 an hour (*id.*).

75) Toward the end of summer 2010, someone from unemployment called Employer and asked if Employee was still working for Employer. Employer advised he was not, and when repeatedly "pressed" by unemployment to state whether Employee "quit," Employer advised unemployment Employee did not quit but simply had "not returned to work." Employer also told unemployment it offered Employee work but he did not return to work (*id.*).

76) Employer was aware of no reason why Employee could not have returned to work for Employer after April 2010. Employer offered Employee the opportunity to sit down, to use an assistant coach, and to utilize available accommodations around him. Robert Davila had coached this way successfully in the past (*id.*).

77) On cross-examination, Robert Davila conceded he checked the "yes" box on an unemployment questionnaire and stated Employee had in fact quit because: "Wanted a pay raise $25/hour, which was not accepted, then he quit" (*id.*; Voluntary Leaving Statement-Employer, February 16, 2011).

78) Prior to the injury, Employer had an assistant with Employee at all times to comply with USA Gymnastics' protocols. After the injury, Employer did not provide any additional assistance to Employee. However, Employer argued the ratio between students and instructors was correct both before and after the injury. The assistant at Willow Elementary School was a 12 year old student, with several years' gymnastics experience. The assistant does not need to be licensed or certified by

USA Gymnastics; he or she only needs to be supervised by a certified coach. Employee's injury happened about halfway through the six week class at Willow Elementary, so the assistant came on after the injury. Robert Davila spoke with Loretta Cole after the injury and before the end of the summer to determine whether he could offer Employee accommodated employment. He learned Ms. Cole had injured herself and had successfully been a gymnastics coach (*id*.).

79) Had Employee returned to work on May 5, 2010, Employer would have reemployed him (*id*.).

80) Employer did not recall the same agreement to renegotiate with Employee that Employee recalled. It recalled Employee wanting to become a part-owner of the business and Employer told Employee he was not interested in that arrangement because Robert Davila was going to pass the business onto his daughter when he retired (*id*.).

81) Loretta Cole has been a gymnast since 1972, a collegiate level gymnastic who owned a gymnastics business since 1980 and has coached since 1974. She too is certified by USA Gymnastics and is a certified gymnastics official. She owns Gymnastics, Inc., in Fairbanks, Alaska. Loretta Cole tore both Achilles tendons while she was coaching around 20 years ago. She tore her tendons on a Friday, had surgery the following Monday, and two weeks later returned to teaching full-time physical education classes at a high school and coaching her gymnastics club. Ms. Cole was in a wheelchair for approximately eight weeks post-surgery after which she wore braces on her legs until the middle of May the following year. She was not required to spot her students and recruited another coach for this purpose when necessary. She did not have to assist students perform movements. Similarly, she coached from a chair and did not have to demonstrate techniques. She simply used her voice and had an assistant coach perform demonstrations as required. A week prior to hearing, Robert Davila called and asked what she had done when she tore her Achilles tendons. He found out through word-of-mouth that Loretta Cole had been injured and had continued to work. Loretta Cole and Robert Davila did not know each other when she injured her Achilles tendons (Cole).

82) Loretta Cole asked her doctor how soon she could return to work and was advised she could use her "common sense" so long as she was not on narcotic medication. She obtained the medical return to work release required by her employer to return to work at her public school job. She would not have returned to work without her doctor's clearance. Loretta Cole would not use a 12-year-old to physically spot children the same size or older, as an assistant coach. On occasion, she

would park her wheelchair and crawl on her hands and knees because her wheelchair did not always go where she needed to be in the gym. She would use voice commands to tell the students to stop until she could get to them (*id*.).

83) Loretta Cole uses students as young as six years old to help set the gym up, move mats, and straighten things up after class; doing so is the industry standard (*id*.).

84) USA Gymnastics does not set "rules"; they make "recommendations." The recommendations are not "hard and fast rules." In the past 20 years, USA Gymnastics has increased its recommendations as new and different types of equipment and training techniques became available. When Loretta Cole was crawling around on the floor after getting out of her wheelchair, after she was injured 20-some years ago, this satisfied her safety duties under USA Gymnastics' recommendations, because she always made sure an assistant coach was available. In her business, Loretta Cole would allow an injured gymnastic instructor to return to work in a wheelchair or crutches so long as that person's safety was observed and the coach had a doctor's release (*id*.).

85) Loretta Cole is credible (experience, judgment, observations and inferences drawn from all the above).

86) Employee's attending physician does not perform PPI ratings. Employee does not have adequate funds to pay for a PPI rating on his own (Employee).

87) Notwithstanding Employer's prior fraud allegations against Employee, at hearing, the parties stipulated Excel Gymnastics was an "employer" and Employee was its "employee" at the time of his February 12, 2010 injury (parties' hearing stipulation).

88) At hearing, the parties also stipulated Employee's injury arose out of and in the course of his employment with Employer (*id*.).

89) At hearing, Employer stipulated Employee was entitled to a PPI rating by his physician and was entitled to PPI benefits if rated (Employer's hearing stipulation).

90) In Employee's closing argument, he conceded through counsel he made a "personal decision" to discontinue working for Employer after his injury because in his view, he could not safely protect himself and his students (Employee's closing argument).

91) In Employer's closing argument, it requested the money for the VA it had previously sent to Employee's attorney in trust be paid immediately to the VA to resolve the bill (Employer's closing argument).

92) On September 3, 2013, Employee filed an amended affidavit of attorney's fees listing 32.16 hours at $275.00 per hour, totaling $8,844.00 in fees for representing Employee. His first entry on August 15, 2010 for his initial consultation with Employee, stated: "Davila had requested that Joe not file WC claim." Employee's counsel's affidavit itemizes and describes: reviewing medical records; preparing a claim; consulting with Employee and answering his questions; responding to Employer's discovery requests; preparing and serving discovery requests; dealing with Employer's failure to respond to discovery requests; reviewing sworn statements from witnesses; reviewing amended answers including allegations of fraud and theft by deception; developing evidence to defeat these allegations; and generally performing duties normally reasonably associated with prosecuting a workers' compensation case (Affidavit of Rene J. Gonzales, September 3, 2013; experience, judgment and inferences drawn from the above).

93) Post-hearing, Employee's counsel requested 4.5 hours for attending the August 29, 2013 hearing, for a total of 36.66 hours and $10,081.50 in requested fees (Petition for AWCB to Take Notice of Hearing Time, September 3, 2013).

94) Employee's counsel's fee rate is reasonable when compared to other claimants' counsel in the area with similar or more experience handling workers' compensation claims (experience, judgment, observations).

95) Employee's fees are contingent and were incurred or unnecessarily increased in large measure because Employer raised fraud and theft by deception issues against Employee, which he and his attorney had to address (*id*.).

96) Employer ultimately dropped its allegations of fraud and theft by deception against Employee, in part because of Employee's counsel's assistance (*id*.).

97) Employer did not file a post-hearing objection to Employee's attorney's fees (record).

PRINCIPLES OF LAW

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

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or

> the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . 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.
>
> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. . . .
>
> **AS 23.30.100. Notice of injury or death.** (a) Notice of an injury . . . in respect to which compensation is payable . . . shall be given within 30 days after the date of such injury . . . to the board and to the employer.
>
> (b) The notice must be in writing. . . .
> . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
> . . .
>
> (2) if the board excuses the failure opn the ground that for some satisfactory reason notice could not be given; . . . .
>
> **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. . . .
>
> (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(b), Employee does not enjoy the benefit of the presumption if he did not file a report of injury.

Egemo v. Egemo Construction Co., 998 P.2d 434, 441 (Alaska 2000) held filing a claim prematurely "does not justify dismissal" of the claim, as the employer was not prejudiced or inconvenienced. *Id*. In summary, *Egemo* stated claims which are not ripe may be held in abeyance.

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **AS 23.30.145. Attorney Fees**. . . .
> . . .
>
> (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.

Subsection 145(b) requires Employer to pay reasonable attorney's fees when Employer delays or "otherwise resists" payment of compensation and Employee's attorney successfully prosecutes his claim. *Harnish Group, Inc.*, 160 P.3d 149 (Alaska 2007). Attorney's fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990). Fees for time spent on *de minimis* issues will not be reduced if Employee prevails on the primary issues at hearing. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 at 14-16 (May 11, 2011).

> **AS 23.30.150. Commencement of compensation.** Compensation may not be allowed for the first three days of the disability, except the benefits provided for in AS 23.30.095; if, however, the injury results in disability of more than 28 days, compensation shall be allowed from the date of the disability.
>
> **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.

AS 23.30.200. Temporary partial disability. (a) In case of temporary partial disability resulting in decreased of earning capacity to compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of 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;
. . .

(27) '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;

8 AAC 45.112. Witness list. A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. If a witness list is required under 8 AAC 45.065, the witness list must be filed with the board and served upon all parties at least five working days before the hearing. If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing, except that the board will admit and consider

(1) the testimony of a party, and

> (2) deposition testimony completed, though not necessarily transcribed, before the time for filing a witness list.

> **8 AAC 45.142. Interest.** (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.
>
> (b) The employer shall pay the interest
> . . .
>
> (1) on late-paid time-loss compensation to the employee. . . .
> . . .
> (3) on late-paid medical benefits to
>
> (C) to the provider if the medical benefits of not paid.

Interest awards recognize the time value of money, and they give "a necessary incentive to employers to release . . . money due." *Moretz v. O'Neill Investigations,* 783 P.2d 764, 765-66 (Alaska 1989). The court consistently directs interest awards to injured workers for the time value of money. *Childs v. Copper Valley Electric Assn.,* 860 P.2d 1184, 1191 (Alaska 1993).

> **8 AAC 45.180. Costs and attorney's fees**.
> . . .
>
> (d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.
>
> (1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed. . . . Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
>
> (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature,

> length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.
>
> **8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

1) Was the oral order allowing Employee to call only himself as a witnesses correct?

Parties have a right to know at least five working days in advance who will be testifying at hearing, and the subject matter and substance of the witnesses' expected testimony. 8 AAC 45.112. Addresses and phone numbers for witnesses not protected by the attorney-client privilege are important so opposing parties can contact these witnesses if they desire to see what they may be saying at hearing. The witness list filing requirements are intended in part to prevent trial by surprise, and unfair prejudice to the opposing party. At the February 7, 2013 prehearing conference, the designee required witness lists and set a filing deadline. Employee's witness list failed to list the required addresses, telephone numbers, and brief descriptions of the subject and substance of his witnesses' testimony. Employee's witness list was not in accordance with the applicable regulation. Employer objected. Accordingly, only Employee as a party was properly allowed to testify on Employee's behalf. Therefore, the oral order sustaining Employer's objection was correct.

2) Was the oral order accepting Employee's late attorney's fee affidavit and allowing Employer 10 days to file an objection to it correct?

Employee concededly did not file his attorney's fee affidavit in a timely manner. The law required Employee to file his fee affidavit at least three working days prior to the hearing. 8 AAC 45.180. This regulation is intended to give Employer an opportunity to review the attorney's fees, and file an objection. However, unlike the situation with the nonconforming witness list, Employer was not prejudiced and its due process rights were protected when given an opportunity after the hearing to object to Employee's attorney's fee affidavit. Modifying the procedural requirement for filing Employee's attorney's fee affidavit under these circumstances was justified to avoid manifest

injustice. AS 23.30.195. Unlike the prejudice caused by the non-conforming witness list, Employee's tardy attorney's fee affidavit did not affect or prejudice Employer's case preparation or presentation. As Employer was given ample opportunity to file a post-hearing objection to Employee's attorney's fees, its due process rights were adequately protected and the oral order overruling Employer's objection was correct.

3) Was the oral order allowing Employer to call a rebuttal witness correct?

Employer's initial witness list included "rebuttal witnesses as necessary." This is standard language in most witness lists. It is intended to allow a party to call a rebuttal witness if and when an opposing party's witnesses provide testimony which may have been unexpected. Typically, a party does not know of unexpected witness testimony until the witness testifies. On August 26, 2013, Employer filed a "rebuttal" witness list including witness Cole's name, address, and phone number with a brief description of the substance and subject of her expected testimony. 8 AAC 45.112. Employer listed this rebuttal witness after having read Employee's hearing brief. Employee had several days to contact this witness and speak with her if desired. Employer called witness Cole after learning from Employee's brief that he expected to testify it is against USA Gymnastics' regulations for a gymnast instructor to work under his perceived limitations, and is unsafe. At hearing, Employee objected to Employer calling Loretta Cole as a rebuttal witness.

From the brief description given in the rebuttal witness list, Employee could anticipate Loretta Cole would testify a person can safely coach gymnastics with an Achilles tendon injury. He had adequate opportunity to prepare his testimony contrary to this position, and had already done so to some degree given his hearing brief arguments. Employee's brief argued he was entitled to disability benefits because coaching gymnastics is a "hands-on activity" and cannot be accomplished safely from the seated position. Consequently, witness Cole's testimony was not a surprise, Employee was not unfairly prejudiced by this witness testifying at hearing and the oral order overruling his objection to witness Cole's testimony was correct.

4) Is Employee entitled to TTD?

Employee seeks TTD from February 12, 2010, through January 1, 2011. It is undisputed Employer paid Employee wages for February 12, 2010, the day he was injured. Therefore, as a legal matter,

he is not entitled to TTD for that day because he was not "disabled." If Employee's TTD spans less than 28 total days, by law he is not entitled to TTD for February 13, 14, 15, 2010, the first three days following his injury. AS 23.30.150. It is also undisputed Employer already paid Employee TTD for February 16, 2010, and February 17, 2010. Therefore, the law prohibits him from receiving TTD for those dates as well, as he has already received these benefits.

As can be seen from the chart on page eight, above, it is undisputed Employee worked at least some hours for Employer in each calendar week from February 18, 2010, through April 3, 2010. Employee again worked some hours for Employer in each calendar week beginning April 18, 2010, through the week beginning May 2, 2010. TTD is intended to compensate an injured worker for disability "total" in character but temporary in quality. Accordingly, as Employee was paid wages, was already paid TTD, or was able to work some hours in each of the above-referenced weeks for Employer, any disability caused by his injury in these time periods was not "total." As a matter of law, he cannot be entitled to TTD during these periods. AS 23.30.185; AS 23.30.395(16) and (27).

It is further undisputed Employee did not work for Employer at all in the weeks beginning April 4, 2010, and April 11, 2010. It is undisputed Employee did not return to work for Employer after May 2, 2010. Therefore, as a legal matter, Employee's TTD claim is limited to the periods April 4, 2010 through April 17, 2010, and from May 2, 2010, through January 1, 2011. AS 23.30.185.

Employee's entitlement to TTD for these periods turns in part on factual issues to which the presumption of compensability ordinarily applies. AS 23.30.120. The factual issues include whether he was totally "disabled" because of his injury during periods for which he seeks TTD before the date of medical stability, and the date Employee became "medically stable." AS 23.30.185; AS 23.30.395(16) and (27). As stated above, as a legal matter Employee's TTD claim is limited to the periods April 4, 2010 through April 17, 2010, and from May 2, 2010, through January 1, 2011.

Employee did not file an injury report. Therefore, under AS 23.30.120(b), the burden of proof shifts to Employee and he does not enjoy the benefits of the statutory presumption. He must prove all aspects of his TTD claim by a preponderance of the evidence. Employee provided no medical evidence from a physician stating he was ever disabled as a result of his injury. Employer concedes

Employee was in TTD status from February 13 through February 17, 2010, and it paid Employee TTD for February 16 and February 17, 2010. It denied liability for TTD for February 13 through February 15, 2010, as a legal matter because these would be the first three days after Employee's injury, for which Employee would not be entitled to TTD unless his work-related disability lasted at least 28 days. AS 23.30.150.

The work injury must be "the substantial cause" of any TTD Employee claims. AS 23.30.010. Possible "substantial causes" of any TTD Employee may have experienced during the relevant periods include his work injury, his subjective belief he could not safely perform his duties, and matters related to renegotiating his contract with Employer.

Employee produced no medical evidence totally removing him from work as a result of his work injury. Specifically, there is no medical opinion from a physician stating Employee was totally disabled from his work from April 4, 2010 through April 17, 2010, and from May 2, 2010, through January 11, 2011. By contrast, his attending physician released him without limitations on March 3, 2010. Though the record is not clear, and Employee was rather vague and his testimony confusing, the claimed disability period from April 4, 2010, through April 17, 2010, may have been the time after which Employee was kicked in the toe by a student and decided he needed time to recover. But the evidence shows no physician agreed with Employee's assessment he could not work during this period. Though being kicked in the toe by a student was undoubtedly painful for a time, Employee subjectively believed he could no longer continue working for Employer. The attending physician's opinion stating Employee was released without limitations on March 3, 2010, is given more weight than Employee's subjective belief he could not continue working for Employer. AS 23.30.122. Therefore, Employee cannot establish his work injury with Employer was "the substantial cause" of any TTD in question. Employee was not "disabled" during this time because of his injury.

By contrast, the weight of evidence demonstrates Employee's subjective opinion he could not return to work for Employer and safely be a gymnastics coach, and his inability to renegotiate his contract with Employer are the real reasons Employee did not return to work after May 2, 2010. The fact Employee could have continued working for Employer notwithstanding his subjective feelings to

the contrary was demonstrated by the fact he did so, for several months. Furthermore, Loretta Cole testified convincingly she was able to continue coaching gymnastics while being wheelchair-bound, and this did not violate any USA Gymnastics' recommended safety standard. AS 23.30.122.

As Employee failed to prove he was ever totally disabled during any compensable period for which he seeks TTD, it is unnecessary to reach the second issue, the date Employee was medically stable. AS 23.30.395(16). Employee failed to demonstrate he was temporarily totally disabled because of his work injury for at least 28 days. Based on this evidence and analysis, Employee failed to demonstrate he was ever totally disabled because of his injury at any time after his statutory three-day waiting period, and his TTD claim will be denied. AS 23.30.150.

5) Is Employee entitled to TPD?

Employee alternately claims TPD from May 4, 2010, through January 11, 2011. Employee's entitlement to TPD for this period turns in part on factual issues to which the presumption of compensability ordinarily applies. AS 23.30.120. The factual issues include whether he was partially "disabled" because of his injury during the period for which he seeks TPD before the date of medical stability, and the date Employee became "medically stable." AS 23.30.200; AS 23.30.395(16) and (27).

The TPD analysis is similar to the TTD analysis. He is not entitled to the presumption because he failed to file an injury report.

The work injury must be "the substantial cause" of any TPD Employee claims. AS 23.30.010. Possible "substantial causes" of any TPD Employee may have experienced during the relevant periods include his work injury, his subjective belief he could not safely perform his duties, and matters related to renegotiating his contract with Employer.

Employee produced no medical evidence partially removing him from work as a result of his work injury. Specifically, there is no medical opinion from a physician stating Employee was partially disabled from his work from May 4, 2010, through January 1, 2011. By contrast, his attending physician released him without limitations on March 3, 2010. On or about May 2, 2010, Employee subjectively decided he could no longer work safely as a gymnastics instructor. The evidence

shows no physician agreed with Employee's assessment he could not work during this period. Loretta Cole disagreed it was unsafe for Employee to work during this time and her testimony is credible. AS 23.30.122.

The attending physician's opinion stating Employee was released without limitations on March 3, 2010, is given more weight than Employee's subjective belief he could not continue working for Employer. AS 23.30.122. The fact Employee's attending physician, at Employee's request to address his personal, unwarranted concerns, stated Employee was released to light duty with minimal restrictions on May 4, 2010, does not mean he had previously been removed from work with greater restrictions. The evidence is devoid of any such prior restriction. Furthermore, Employer accommodated Employee's limitations, Employee was able to function with these limitations for a time, and ultimately made a personal choice to discontinue working for Employer. Therefore, Employee cannot establish his work injury with Employer was "the substantial cause" of any TPD in question. Employee was not disabled during this time because of his injury.

The weight of evidence demonstrates Employee's subjective opinion he could not return to work for Employer and safely be a gymnastics coach, and his inability to renegotiate his contract with Employer are the real reasons Employee did not return to work after May 4, 2010. Again, the fact Employee could have continued working for Employer notwithstanding his subjective feelings to the contrary was demonstrated by the fact he did so, for several months. Employer would have taken Employee back after May 4, 2010, with the previous employment arrangement but for Employee's refusal to work in violation of what he perceived incorrectly to be USA Gymnastics' rules, and Employee's inability to renegotiate a new employment contract with Employer. Employee conceded his inability to come to terms with Employer on a new contract was an important consideration in his refusal to return to work. Furthermore, Loretta Cole testified convincingly she was able to continue coaching gymnastics while being wheelchair-bound, and this did not violate any recommended safety standard by USA Gymnastics. AS 23.30.122.

As Employee failed to prove he was ever partially disabled during any compensable period for which he seeks TPD, it is unnecessary to reach the second issue, the date Employee was medically stable. AS 23.30.395(16). Employee failed to demonstrate he was ever temporarily partially

disabled as a result of his work injury. Based on this evidence and analysis, his TPD claim will be denied. AS 23.30.150.

6) Is Employee entitled to medical benefits?

There is no dispute as to this issue. Employer concedes it is responsible for Employee's medical care for his work injury. It has already tendered a check to Employee's counsel to reimburse the VA for benefits paid on Employee's behalf for medical care. The parties did not identify any additional unpaid medical expenses at hearing. Furthermore, Employer agreed Employee was entitled to a PPI rating evaluation from his physician. Employee's PPI claim is held in abeyance until he has a rating. *Egemo*. Employee's physician does not perform PPI ratings. Employee has the right to have his attending physician refer him to a specialist for this purpose. AS 23.30.095. Employer has already agreed to pay for costs associated with this PPI rating. If Employee's attending physician does not know to whom to refer Employee for a PPI rating, Employee may contact the division's workers' compensation technicians at 269-4980 for information and for suggestions of providers who may be willing and able to provide a PPI rating evaluation. Employer will be ordered to pay for this PPI evaluation.

7) Is Employee entitled to interest?

Employee has been awarded no additional benefits in this decision. However, there is no evidence Employer paid Employee statutory interest on the TTD benefits it previously paid him. Similarly, there is no evidence Employer paid the VA statutory interest on the check it tendered to Employee's lawyer for VA reimbursement. Therefore, Employee's interest claim will be granted. AS 23.30.155(p). Employer will be directed to pay Employee directly statutory interest on the TTD previously paid and will be directed to pay statutory interest to the VA directly on the amount of the check previously tendered to Employee's counsel. 8 AAC 45.142(b)(1) and (3)(C).

8) Is Employee entitled to attorney's fees and costs?

This is an unusual case. It is also a sad case. Employee had, on its face a typical, work-related injury. However, the case became unnecessarily complicated because Employer unlawfully failed to maintain workers' compensation insurance. Had Employer been insured, the hearing giving rise to this decision never would have occurred. The case is further complicated by Employee's tacit

agreement with Robert Davila to protect him, at his request, because Employer had no workers' compensation insurance, while at the same time obtaining medical treatment for his Achilles tendon injury from the VA funded facility.

Following Employee's injury, he learned Employer had no workers' compensation insurance and, while riding with Robert Davila to the hospital, agreed and decided at Employer's request that Employee would misrepresent how he was injured to the military hospital staff. As Employee's counsel's fee affidavit states in its initial entry, Employer asked Employee to not file a workers' compensation claim, and Employee initially complied. Employee would thus at least protect his former friend Robert Davila, and Employer would at best be liable for minimal medical charges incurred at a military hospital compared to what the local hospitals would likely charge had Employee honestly told his emergency room providers the truth -- this was a work-related injury.

There is no other reasonable explanation for why Employee did not tell his physicians how he injured himself. There is similarly no other reasonable explanation for why Employer did not point out the February 12, 2010 and February 16, 2010 medical reports in which Employee misrepresented to his physicians how his injury occurred. Employer was well aware Employee misrepresented the truth "related to a benefit" in violation of AS 23.30.250(a), because Employer asked him to. Ironically, Employee's intentional misrepresentation did not result in him obtaining a benefit, and therefore is not actionable; but rather, it resulted in his benefits being delayed. Contrary to what he told the emergency room physician and his surgeon several days later, Employee did not injure itself when he "started to run" or "while walking." Employee injured himself demonstrating a back handspring while on the job for Employer. There was a witness who signed a sworn statement to this effect and Robert Davila personally drove Employee to the emergency room. Robert Davila also violated AS 23.30.250(a) by knowingly assisting, abetting, soliciting, and conspiring with Employee and by convincing Employee to make a false or misleading statement and submission affecting a benefit under the Act -- his medical care and treatment.

To further minimize his exposure as an uninsured employer, Robert Davila insisted Employee return to work, which he did almost immediately following his surgery. As discussed above, Employee was able to continue working but eventually became frustrated and believed he could not safely continue to be a gymnastics coach and instructor. At this point, Employee's relationship with

Robert Davila broke down. To make matters worse, once Employee determined he could not successfully renegotiate his employment contract with Employer, he chose not to return to work for the reasons discussed above. Employee applied for unemployment insurance benefits, Employer said he had "quit" his job and Employee was found not eligible for unemployment insurance benefits. Thereafter, Employee with few if any remaining options retained an attorney who filed a claim and Employee began telling the truth, at least to his physicians if not his attorney.

Both attorneys in this case were misled by their clients to some degree. Employee's counsel vigorously prosecuted his client's claim and defended against fraud allegations, probably unaware his client initially conspired with and tried to protect Employer, as described above. Employee's counsel incurred attorney's fees trying to defend his client against unsupportable fraud and theft allegations. He succeeded when Employer eventually dropped these allegations. Similarly, once Employee's and Robert Davila's friendship broke down, Employer who probably failed to fully inform his lawyer about the parties' initial, tacit agreement, developed theories and evidence to show Employee perhaps was not injured while "on the clock" and thus not covered by the Act. As the hearing drew nearer, Employer's experienced defense counsel determined the alleged facts supporting his client's defenses made no sense. Accordingly, just prior to hearing, Employer dropped its defenses, accepted Employee's claim and paid limited benefits, including $3,000.00 to Employee's counsel as a fee. Employer has presumably paid his attorney for Robert Davila's deceptive practices, and this decision has no jurisdiction over those fees. It is within this historical framework, however, that this decision must now determine if Employee is entitled to the $3,000.00 he already received from Employer and any additional attorney's fees.

Employee's attorney's fee affidavit adequately itemizes his lawyer's hours expended and the character of work he performed on Employee's behalf. Employee's attorney's hourly rate is reasonable given his experience and fees charged by other attorneys with equal or greater experience. Employee being charged with fraud and theft by deception is a significant issue, with far-reaching implications had Employer succeeded. Employee fully prevailed on this issue when, in part through his attorney's efforts, Employer dropped those allegations and accepted Employee's claim. Employee had a claim for a modest period of TTD and alternately TPD. Employer eventually paid the TTD this decision determined was proper, though it was *de minimis*. As Employee's compensation rate is relatively low, the ultimate TTD and TPD benefits at issue were

also relatively minor. Employee succeeded on his interest claim, which is also *de minimis*. He also successfully obtained medical reimbursement and payment for a PPI rating, with any associated PPI. This is a relatively significant benefit because PPI ratings can be expensive and a rating will result in Employee being entitled to PPI benefits from Employer.. Employer did not timely controvert Employee's right to benefits. It had actual knowledge of his work-related injury on February 12, 2010, but did not file a Controversion Notice until September 24, 2010. Therefore, attorney's fees are awardable under AS 23.30.145(b).

On balance, considering the actual work performed and the nature, length and complexity of the legal services as well as the benefits resulting to Employee, and the overall benefits involved, Employee's attorney has earned his fee. AS 23.30.145(b). Based on the above analysis, Employee has prevailed on the primary issue, which was Employer's claim Employee committed fraud and theft by deception. On balance, these were the most important issues. Employee otherwise prevailed on most issues and lost on two issues, TTD and TPD, which were of relatively limited value. Therefore, Employee will be awarded $10,081.50 in total, actual fees, less $3,000.00 in fees already tendered, for a balance of $7,081.50 from Employer.

CONCLUSIONS OF LAW

1) The oral order allowing Employee to call only himself as a witness was correct.
2) The oral order accepting Employee's late attorney's fee affidavit and allowing Employer 10 days to file an objection to it was correct.
3) The oral order allowing Employer to call a rebuttal witness was correct.
4) Employee is not entitled to additional TTD.
5) Employee is not entitled to TPD.
6) Employee is entitled to medical benefits.
7) Employee is entitled to interest.
8) Employee is entitled to attorney's fees and costs.

ORDER

1) Employee's TTD claim is denied.
2) Employee's TPD claim is denied.

3) Employee's claim for medical benefits is granted. Employee and his counsel are directed to reimburse VA with the amount from the check tendered from Employer. Employer is ordered to pay for a PPI rating from Employee's physician, or from a physician to whom Employee's physician refers him for this purpose. Jurisdiction is reserved to resolve any further disputes over additional medical care.

4) Employee's interest claim is granted. Employer is ordered to pay Employee statutory interest on the TTD payments previously tendered, and to pay the VA statutory interest on the check previously tendered.

5) Employee's request for attorney's fees is granted. Employer's payment to Employee of $3,000.00 in attorney's fees previously tendered is approved. In addition, Employer is ordered to pay Employee's counsel directly additional attorney's fees totaling $7, 081.50.

Dated in Anchorage, Alaska on October 9, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Patricia Vollendorf, Member

_____
Robert C. Weel, Member

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

If compensation is awarded, but not paid within 30 days of this decision, the person to whom the compensation is payable may, within one year after the default of payment, request from the board a supplementary order 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 board 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 grounds 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 accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of JOSEPH S. LOTT employee / applicant v. EXCEL GYMNASTICS, uninsured defendant; Case No. 201012662; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties on October 9, 2013.

_____
Pamela Murray, Office Assistant