ALASKA WORKERS' COMPENSATION BOARD

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

RANDY A. WEED, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 200416447
STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY Self-Insured Employer, Defendant.	)	AWCB Decision No. 13-0154 Filed with AWCB Fairbanks, Alaska on November 26, 2013.

Randy Weed's (Employee) September 12, 2011 claim was heard on June 13, 2013 in Fairbanks, Alaska before a full panel. This date was selected on January 14, 2013. Attorney Robert Beconovich represented Employee. Attorney Daniel Cadra represented the State of Alaska (Employer). Witnesses included Employee and his wife, Linda Gregory Weed, who testified in person for Employee. Captain Burke Barrick testified in person for Employer. The parties raised several evidentiary objections and a statute of limitations defense during the hearing. Those rulings are explained and memorialized here. At the parties' request, the record was held open until July 8, 2013 for post-hearing briefs to address the additional issues raised at hearing. That date was later extended until July 19, 2013 by stipulation of the parties. Following the hearing and prior to deliberations, the labor member resigned from the board. During deliberations, the industry member and the designated chair were unable to reach an initial consensus in this matter and a replacement labor member was provided with the parties' briefings and an audio recording of the hearing. The record closed following deliberations on September 26, 2013.

ISSUES

Employee contends evidence of Employee's diabetes should be considered in a permanent total disability (PTD) determination, including Employee's and Mrs. Weed's testimony. He also seeks to introduce medical records pertaining to the condition. Employee contends all of his medical conditions, both work related and non-work related, must be considered in his claim for PTD.

Employer objects to any consideration of Employee's diabetes on numerous grounds, including relevance, due process and hearsay. Its primary contentions are the condition was not an issue identified in the pleadings or the prehearing conference summaries and was only raised at hearing. It cites a plethora of authority in support of its positions.

1) Should evidence of Employee's diabetes be considered in a PTD determination?

Employee contends a June 12, 2012 report authored by Wandel Winn, M.D. is the product of an incomplete records review and is, therefore, inherently unreliable. He contends he filed a request for cross-examination of Dr. Winn. Employee also entered a "*Smallwood* objection" to Dr. Winn's report at hearing. Employee seeks an opportunity to cross-examine Dr. Winn or, in the alternative, is apparently requesting that Dr. Winn's report be stricken from the record.

Employer contends Dr. Winn's report was appropriately filed on a medical summary pursuant to regulation and is relevant evidence. Therefore, Employer contends the report should be considered.

2) Shall Dr. Winn's June 12, 2012 report be considered?

Employer contends Employee's claim for TTD from June 10, 2004 to May 8, 2006 is time-barred by AS 23.30.105(a).

Employee contends Employer's defense is untimely and, therefore, has been waived.

3) Is Employee's claimed period of TTD time-barred by AS 23.30.105(a)?

Employee makes a claim based on mental stress arising from exposure to a fatal automobile accident where a ten-year old boy was pinned under a truck and was later pronounced dead at the scene. Immediately following the accident, Employee contends he lost his self-confidence, had difficulty with his memory and concentration, and could not return to work because he could no longer drive his patrol car. He further contends exposure to the accident scene has caused him to have nightmares and difficulty sleeping and communicating with others. Employee contends he startles easily, does not like to go out in public, and he avoids the location of the accident. He seeks numerous benefits under the Act.

Employer contends Employee did not suffer a compensable mental injury so Employee's claim should be dismissed in its entirety. Specifically, it contends Employee's stress was not "extraordinary and unusual" in comparison to other Alaska State Troopers as the statute requires. Employer contends it is not "extraordinary and unusual" for an Alaska State Trooper to be the first responder to a motor vehicle accident or to observe and handle serious injuries and fatalities in the line of duty. It contends State Troopers who are assigned to patrol duties are expected to respond to motor vehicle accidents which, sometimes, involve child fatalities. Employer contends such accidents are foreseeable and to be expected by someone who has accepted a position as an Alaska State Trooper; "it is part of their job." It contends since Employee was not exposed to any stress different in character from that experienced by any other Alaska State Trooper, Employee's injury is not compensable.

4) Did Employee suffer a compensable mental injury?

Employee contends exposure to the June 6, 2004 accident is the predominant cause of his need for medical treatment and seeks an award of medical and related transportation benefits.

Employer contends Employee did not suffer a compensable mental injury so Employee's claim should be dismissed in its entirety.

5) Is Employee entitled to medical and transportation benefits?

Employee contends he has suffered a permanent impairment as a result of his exposure to the June 6, 2004 accident and seeks an award of PPI.

Employer contentions are set forth above.

6) Is Employee entitled to PPI?

Employee contends he is permanently and totally disabled as a result of his exposure to the June 6, 2004 accident and seeks an award of PPI.

Employer contentions are set forth above.

7) Is Employee entitled to PTD?

Employee contends he is entitled to an award of interest on unpaid benefits.

Employer contentions are set forth above.

8) Is Employee entitled to interest?

Employee contends he is entitled to penalty on unpaid benefits.

Employer contentions are set forth above.

9) Is Employee entitled to penalty?

Employee contends he is entitled to an award of attorney's fees and costs.

Employer contentions are set forth above.

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

FINDINGS OF FACT

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

1) Employee was raised on a farm in Devil's Lake, North Dakota. He graduated high school in 1974 then, served in the U.S. Army. Employee completed advanced individual training (AIT) and became a combat engineer. Employee came to Alaska in the Army, where he was assigned to Fort Richardson. After leaving the Army, he briefly returned to North Dakota to farm with his father, but crop prices "dried up," so he returned to Alaska. Once back in Alaska, Employee worked for the Peninsula Borough Maintenance Department and later for seven-and-a-half years with the Department of Public Safety as a court services officer. Employee started with the Alaska State Troopers in 1995. After completing the Academy, he was posted in Soldotna and worked the Kenai Peninsula until 1999, when he was posted to Tok. (Mr. Weed).

2) On June 6, 2004, Employee was assigned to patrol duty in Tok, Alaska. He had just come on duty when he was dispatched to the scene of a motor vehicle accident approximately 8 miles south of the Tok cut-off. As Employee approached the scene, he could see a woman along the road yelling something at him. There were also three children present on the shoulder with her. When Employee exited his vehicle, the woman was saying she could not find her son. Employee could see the vehicle, a 2001 Dodge Durango, sitting upright in a ditch on the right side of the road. It had rolled over three times and came to rest in a marshy area with trees. Employee looked into the interior of the vehicle and did not see the woman's son. He then went further into the trees to look for the boy, but did not see him. When he turned around to come back, Employee saw a "little bear kind of shoe" sticking out from under the vehicle by the driver's side rear tire. Employee tried unsuccessfully to lift the vehicle himself. He retrieved a tree branch and tried to use it as a lever to lift the vehicle, but the branch broke. Employee crawled under the vehicle. He could see the face of the boy. The boy's face "looked peaceful" and Employee could not feel a pulse. Other people were arriving at the scene as Employee was backing out from under the vehicle. Emergency Medical Service personnel lifted the vehicle with a handy-jack and blocks. A local physician, Dr. Steven Wahl of the Tok Medical Clinic, pronounced the ten-year-old boy dead. Employee delivered the death notice to the boy's mother. (Mr. Weed; Mr. Weed's recorded statement, November 8, 2004).

3) Employee learned the woman and her family were moving from Ketchikan and had taken the ferry. They spent the night in Tok and left town at about eight o'clock that morning. The family was traveling in three vehicles. The father was driving the lead vehicle, a U-Haul van; the mother was following in the 2001 Dodge Durango and the grandmother was in the rear, driving a

2000 Dodge pickup truck. The children did not want to ride with the father because he was too stern. They did not want to ride with grandma because she was boring. So, the children were riding with their mother that morning. It was not unusual for the father to get out ahead of the other two vehicles during the trip and then pull over and wait for them to catch up. At the time of the accident, the father was "probably a couple of miles ahead" of the other vehicles and had "gone around the bend." The father returned looking for his family about a half-an-hour after Employee had arrived at the scene. Employee notified the father of his son's death. The father felt guilty because he thought the accident might not have happened if he had not been driving so fast. (*Id.*)

4) Although Employee, as an Alaska State Trooper, had responded to motor vehicle accident scenes before, including motorcycle accidents and all-terrain vehicle (ATV) and snow machine overturns, and even though some of Employee's calls involved fatalities, including death from natural causes and suicides, as well as motor vehicle accident deaths, he found this accident particularly disturbing and stressful because it was his first fatality involving a child. (*Id.*)

5) Following the accident, Employee was unable to return to work. He lost all his self-confidence, and had difficulty with his memory and concentrating. He also stopped driving. (Mr. Weed).

6) June 10, 2004 was Employee's last day of work for Employer, according to Employee's counsel. (Employee Post-hearing brief, June 5, 2013).

7) On June 17, 2004, Employee did not return work because he could no longer drive his patrol car. (Martino report, September 29, 2013; Employer FMLA Memorandum, September 15, 2004).

8) Employee did not have a problem with alcohol before the June 6, 2004 accident. (Mr. Weed; Mr. Weed's recorded statement, November 8, 2004; *see also*, Employer's brief, p. 2 (stating Employee "began to abuse alcohol" following the accident).

9) In August 2004, Employee travelled to Tucson, Arizona for a planned vacation. The vacation was, at least in part, to get away from the stresses of his job. While in Tucson, he sought treatment from J. Michael Morgan, Ph.D. on August 10, 2004 and August 16, 2004. Employee reported driving avoidance, site avoidance, nightmares, withdrawal, subjective depression, passivity, lethargy, irritability, and an absence of enjoyment in previously enjoyable activities.

Dr. Morgan diagnosed acute stress disorder and posttraumatic stress disorder. (Morgan letter, May 10, 2004).

10) On August 30, 2004, Robert Dingeman, M.D., wrote a letter to Ronald Martino, M.D., Fairbanks Psychiatric and Neurological clinic, requesting Dr. Martino see Employee. Dr. Dingeman stated Employee's wife has contacted him "very distressed over her husband's distress." He also wrote Employee's former wife had reported Employee was "having a lot of sleep disturbances, inability to drive his official vehicle or private vehicle, and other concerns after coming upon a dead little boy, who has a lot of physical resemblance to his own." (Dingeman letter, August 30, 2004).

11) On September 7, 2004, Employee saw Mark Shields, Sr., LCSW, ACSW, Samaritan Counseling Center, for an initial evaluation. Mr. Shields opined Employee presented with "symptoms and associated history consistent with posttraumatic stress disorder, severe." He thought the severity of Employee's presentation was work related and "significantly compromises his ability to function, including the inability to adequately execute his professional responsibilities at this time." Employee decided to pursue treatment with Frederick Schamm, D. Min., LMHT, IMHC; Executive Director of Samaritan Counseling Center. (Shields report, September 17, 2004).

12) On September 15, 2004, Employee's counsel contends, Employer terminated Employee's employment. (Employee's post-hearing brief, June 5, 2013).

13) On September 15, 2004, Employee exhausted his available leave with Employer. (Leave tracking sheet, undated).

14) On September 20, 2004, Employee reported "POST TRAUMATIC STRESS DISORDER SEVERE" as a result of the June 6, 2004 accident. (Report of Occupation Injury or Illness, September 20, 2004).

15) On September 29, 2004, Employee saw Ronald Martino, M.D. and reported he was very depressed, frequently tearful, suffered from nightmares and felt anxious during the day. Employee also reported a constant preoccupation with the accident and stated he felt humiliated when an Alaska State Trooper lieutenant came to his home to take his gun because a trooper never gives up his weapon. Employee was worried he would not be able to return to work and stated he felt like he failed the 10-year-old boy victim. He felt he had seen enough death and did not know how he would react to another dead body. Employee stated he thought about his son,

who looked a lot like the boy that was killed, when he was 10 years old. He also reported he keeps seeing little sneakers on the ground. Dr. Martino noted Employee was anxious and tearful throughout most of the interview and assessed severe posttraumatic stress disorder secondary to the June 6, 2004 accident. He also stated Employee's PTSD was complicated by "a major depression of at least moderate severity." Dr. Martino offered to treat Employee but noted he was in therapy with Dr. Schamm and recommended against being in therapy in two places at once. He assessed global assessment functioning (GAF) score of 40-45. (Martino report, September 29, 2013).

16) On October 8, 2004, Dr. Schamm wrote Employer and stated the consensus opinion of Employee's treatment providers at Samaritan Counseling Center was Employee's "dysfunctional condition" was "directly related to his services as a State Trooper." Dr. Schamm opined "the last death experience he handled was so traumatic that it will take some time in therapy for him to be functional again." He also stated Employee was not fit for duty. (Schamm letter, October 8, 2004).

17) On December 10, 2004, Employer controverted benefits. The controversion notice contains the following language: "You will lose your right to compensation payments unless you file a written claim within two years of the date you knew of the nature of your disability and its connection with your employment and after disablement." (Controversion Notice, December 10, 2004).

18) Employee continued periodic counseling with Mr. Shields at Samaritan Counseling Center. A December 16, 2004 chart note indicated Employee's wife was concerned with Employee's alcohol consumption since the accident. The odor of alcohol was also detected on Employee's person. Employee saw Mr. Shields for nine counseling sessions and then dropped-out of treatment. His last session was December 16, 2004. (Shields chart note, December 16, 2004; Termination report, March 18, 2005).

19) On January 11, 2005, Employee's former wife contacted the Tok Clinic concerned about Employee's excessive drinking. Employee was sleeping all day and occasionally vomiting. She reported seeing blood in the toilet and stated Employee was "not normal." R.E. Andreassen, D.O., advised Employee's former wife Employee needed an immediate evaluation and he would contact Emergency Medical Services (EMS). Employee later came to the clinic and reported drinking daily since last spring. He was having off-color stools. Dr. Andreassen noted

Employee's skin had a jaundice appearance. Employee also had a distended abdomen and an enlarged, non-tender liver. Dr. Andreassen assessed "ETOH abuse acute/chronic hepatosplenomegaly–hepatitis jaundice–acute," treated Employee with intravenous medications and discharged Employee. (Andreassen chart notes, January 11, 2005).

20) On January 12, 2005, Employee's wife telephoned Dr. Andreassen and reported still seeing blood in the toilet after Employee's bowel movements. Dr. Andreassen's chart notes state, "she now realizes [Employee] needs to be in a hospital. He is no longer fighting her about this." Dr. Andreassen advised Employee's former wife to call the ambulance and notified the Fairbanks Memorial Hospital (FMH). (Andreassen chart notes, January 12, 2005).

21) On January 12, 2005 Employee was admitted to FMH, where he was treated for alcohol withdrawal and liver failure for nearly a month. Records of Employee's hospitalization are extensive. (*See generally*, FMH records, January 12, 2005 to January 28, 2005).

22) The pre-hospital patient report indicates Employee had been refusing treatment and providers at the Tok Clinic had requested the "Mental Health Director" go to Employee's house to "try to get into the clinic," or "tell him he may be Tytle [sic] 47ed" if he did not go to the clinic. (Pre-Hospital Report, January 12, 2005).

23) Kenneth Starks, M.D., evaluated Employee. Employee reported drinking "about a fifth every day and has done so for the last five years." The report states Employee went through a divorce at that time with his wife of 23 years and Employee had been depressed ever since then. The report also noted "significant stressors" in Employee's life, including a child being pinned under a car causing him a "great deal of grief." Employee was noted to have had panic attacks and severe depression since then. Dr. Starks' impression was presumed acute alcoholic hepatitis with hepatosplenomegaly. (Starks report, January 12, 2005).

24) On January 14, 2005, Anthony Battone, M.D. performed a psychiatric consultation at Dr. Starks' request. Based on the history Employee provided, Dr. Battone identified two precipitating factors: 1) Employee's divorce five years earlier from his wife of 23 years and 2) the June 6, 2004 accident. Employee's depression reportedly worsened following the accident. And, in addition to his depression, he also developed symptoms of autonomic arousal with periods of rapid heart beating sweating, shaking and "basically having a panic attack." Employee also reported flashbacks to the June 6, 2004 accident scene, lowered self-esteem, less self-confidence, obsessive ruminations, psychic numbing, "which can relate to some of the

posttraumatic stress disorder symptoms," and vegetative signs such as trouble sleeping and decreased energy. Dr. Battone's diagnoses were: Axis I – Posttraumatic stress disorder, chronic. Major depressive disorder, recurrent. Panic disorder. Acute and chronic alcoholism. Axis II – Deferred. Axis III - Alcoholic hepatitis and hepatosplenomegaly. Axis IV – Stressors: Exposure to accident and divorce five years ago. Axis V – GAF=40. Dr. Battone recommended an inpatient alcohol treatment program, preferably out-of-state, because of Employee's position as a State Trooper. He also discussed the use of antidepressants to treat Employee's posttraumatic stress disorder. (Battone report, January 14, 2005).

25) On January 15, 2005, Victor Bell, M.D., performed a psychiatric evaluation. Employee told Dr. Bell he had been drinking about a fifth a day for approximately six months. He dated the onset of his drinking to the June 6, 2004 accident, which is described in the report. Dr. Bell noted "the patient may have been somewhat depressed following divorce from his wife, about five years previously, following a 23-year marriage." Employee described "flashbacks to the incident, decreased self esteem, loss of confidence, and excessive ruminations about his role in the event." He also described "emotional changes of psychic numbing and depression, and vegetative signs of difficulty sleeping and decreased energy." Dr. Bell found further history "indicates an extended period of drinking in lessor amounts for 5 years preceding this hospitalization." He also reported, "[Employee] does admit to being depressed after the divorce from his wife of 23 years in 1998. However, clearly, following the accident the situation has worsened." Dr. Bell's diagnoses were: Axis I - Alcohol dependence, chronic, severe. Depressive disorder, with chronic and acute features, partially related to chronic alcohol abuse as well as marital and occupational stresses. Posttraumatic stress disorder, acute, severe, for 6 months duration. Axis II – No disorder. Axis III – Alcoholic hepatitis, hepatosplenomegaly, acute. Axis IV – Stressors: Witnessing death of child, marital difficulties. Axis V – GAF=40. (Bell report, January 15, 2005).

26) On January 18, 2005, Employee signed a resignation letter, resigning his position as an Alaska State Trooper. (Employee letter, January 18, 2005; Employee).

27) Employee disputes certain facts concerning his resignation. He contends Employer terminated him while he was hospitalized with liver problems. Employee acknowledges the signature on the January 18, 2005 letter as his, but testified the letter was written by his former wife. He testified he signed the handwritten resignation letter because he had already been

effectively terminated by Employer. Employee contends he was terminated by Colonel Julia Grimes the day before signing the January 18, 2005 letter. He also testified he does not remember signing the January 18, 2005 letter. (Mr. Weed).

28) On January 21, 2005, Dr. Battone performed a follow-up evaluation. At the time of the evaluation, Employee's GAF was 35. (Battone report, January 21, 2005).

29) On January 28, 2005 Employee was discharged from FMH. (Inpatient Admission Record, January 28, 2005).

30) Between January 29, 2005 and February 29, 2005, Employee completed an inpatient alcohol rehabilitation program. (Recovery Center progress notes, January 29, 2005 to February 26, 2005).

31) On November 18, 2005, Employee was again admitted to FMH complaining of abdominal swelling and pain. Alcoholic hepatitis and ascites was diagnosed. (Tate report, November 18, 2005).

32) On November 29, 2005, Employee was discharged with a diagnosis of hepatic encephalopathy secondary to cirrhotic liver disease secondary to alcohol abuse, improved. (Footit report, November 29, 2005).

33) Employee's medical record is nearly silent until 2011 and only contains a few, miscellaneous records from the Tok Clinic in 2007. (Record; observations).

34) On May 11, 2006, Employee began employment with NANA Management Services where he worked as a security officer on the North Slope. (New hire checklist, May 11, 2006; Mr. Weed).

35) On June 13, 2011, Employee underwent a psychiatric evaluation with Premkumar Peter, M.D. of the Alaska Psychiatric Institute. Dr. Peter is a tele-medicine provider. Employee stated he had not seen a psychologist or a counselor for the past five years. Employee has difficulty articulating his complaints. He said he was depressed, lacked confidence and difficulty sleeping. He stated he would not even go to the grocery store because of anxiety. Employee began by discussing his experience as a State Trooper, including the June 6, 2004 accident. He also stated he was divorced in 2006 but was still fond of his wife, and when she passed away recently from cancer, it "put him in a tailspin." Employee reported drinking 10-12 beers per day, but denied drinking liquor. He reported he was given an "administrative separation" from the Employer. On his mental status examination, Dr. Peter noted:

> He sat down with his head down and he said: "It is hard." It took a long time for him to tell me his complaint. His mood was sad and anxious. . . . The patient's whole affect was one of depression. His mentation was slow and it took time to answer questions. He was very teary, I think at times. It took a long time to gather his thoughts and talk to me. He was oriented well. His affect was constricted. Thought process was organized well. Thought content showed pride in his work and pride in his habits of keeping everything in displays and neatness, etc. His short term memory was good, but his concentration was somewhat impaired.

Dr. Peter's diagnoses were: Axis I – Major depressive disorder, recurrent, severe without psychotic features; posttraumatic stress disorder; alcohol abuse. Axis II – Obsessional traits; Axis III – Obesity; [personal information removed]. Axis IV – Stressors: Severe. Problems with primary support group; other psychosocial environmental problems. Axis V – GAF=45. Dr. Peters recommended several medications, psychotherapy, and a "holistic approach," including losing weight, limiting drinking, improving his dietary habits and walking every morning. Dr. Peters also stated: "As far as spirituality is concerned, he needs to go to church or read something or listen to some tapes to slowly get back into his spiritual feelings." (Peters report, June 13, 2011).

36) On June 21, 2011, Dr. Peters saw Employee and noted he was improving. Employee's GAF was 55. Employee reportedly said: "I like the holistic approach." (Peters report, June 21, 2011).

37) On June 28, 2011, Employee saw Dr. Peters and reported he was "doing pretty well." His sleep had improved but he still worried "quite a bit." Dr. Peters administered supportive psychotherapy. Employee's GAF was 45. (Peters report, June 28, 2011).

38) On July 7, 2011, Employee's GAF was reported at 55. (Peters report, July 7, 2011).

39) On July 7, 2011, Dr. Peter wrote the Security Manager at NANA Management Services requesting a two-month leave of absence for Employee. Dr. Peters stated Employee was "depressed with sad mood, excessive guilt feelings, and a high degree of anxiety. His sleep is disturbed and his concentration is impaired." (Peters letter, July 7, 2011).

40) Employee continued psychotherapy with Dr. Peters. His GAF remained at 55. (Peters reports, July 19, 2011; July 26, 2011; August 2, 2011; August 16, 2011; August 30, 2011; September 6, 2011).

41) On September 13, 2011, Employee filed a claim for "Psychological injury" and "Severe PTSD" seeking temporary total disability (TTD) for an "unknown" period, permanent partial impairment (PPI), medical and transportation costs, penalty, interest and attorney's fees and costs. He later amended his claim to include permanent total disability (PTD). (Claim, September 12, 2011; Prehearing Conference Summary, January 14, 2013).

42) On September 14, 2011, Dr. Peters wrote the Security Manager for NANA Management Services requesting an additional two-month leave of absence for Employee, who "is suffering from severe symptoms of PTSD and Major Depression." (Peters letter, September 14, 2011).

43) Employee saw Dr. Peters twice more. His GAF remained at 55. (Peters reports, September 19, 2011; September 26, 2011).

44) On September 27, 2011, Employer controverted all benefits. (Controversion Notice, September 27, 2011).

45) On September 30, 2011, Employer answered Employee's September 12, 2011 claim. Employer's answer contains the following defense:

> The Employee does not claim any specific period of disability in his claim. AS 23.30.105(a) bars compensation for disability unless a claim is filed within two years after the employee has knowledge of the nature of his disability and its relation to employment and after disablement. The Employer reserves the right to assert this statutory defense upon clarification of the Employee's claim and further discovery.

(Answer, September 30, 2011).

46) On October 10, 2011, Employee was terminated from NANA Management Services after not returning to work. (Termination Property Checklist, October 10, 2011; Mr. Weed).

47) On October 21, 2011, Howard Detwiler, M.D., Bridges Counseling Connection, evaluated Employee. Dr. Detwiler diagnosed posttraumatic stress disorder, major depressive disorder and ETOH dependence. He thought Employee's prognosis was "fair," and opined Employee needed "extensive therapy" for his posttraumatic stress disorder and depression. (Detwiler report, October 21, 2011).

48) On December 19, 2011, David Glass, M.D., performed an employer's medical evaluation (EME). Dr. Glass administered a Minnesota Multiphasic Personality Inventory (MMPI-2). Employee provided valid responses that were "markedly abnormal." He had marked elevations on 5 of the 10 clinical scales "reflecting longstanding neurotic symptomology including somatic

preoccupation, depressive symptomology, histrionic psychodymanics, distrust and situational distress." Dr. Glass diagnoses were: Axis I – Alcohol dependence, in remission; nicotine dependence, recently in remission; history of posttraumatic stress disorder symptomology in remission with some lingering symptomology. Axis II – No diagnosis. Axis III – No diagnosis at present time. Axis IV – Moderate, concerns about finances. Axis V – GAF=80-85. Dr. Glass explained he thought Employee's posttraumatic stress disorder was in remission because he did not currently demonstrate criteria for that disorder, such as autonomic arousal, avoidance behavior, lack of involvement in life/relationships (psychic numbing), dysfunction, etc. Dr. Glass opined "prior and non-current concerns regarding the Posttraumatic Stress Disorder would relate to the incident in June 2004; however, around the time there were also other factors including drinking and the difficult relationship with [former wife] . . ." Regarding Employee's drinking, Dr. Glass stated:

> The "diagnosis of Alcohol Dependence is made; however, this is mitigated somewhat by [Employee's] report that he did not drink excessively prior to 2004 . . . . He subsequently was drinking excessive amounts to create a severe medical illness and relapsed, but he has been able to remain clean and sober with minimal formal drug treatment. . . . Alcohol Dependence is not caused by the vicissitudes of adult life . . . in terms of Alcohol Abuse, life circumstances can be a precipitant of the alcohol use.

Dr. Glass opined the "predominant cause" of Employee's posttraumatic stress disorder was the June 6, 2004 accident, but the accident "ceased to be the cause for any lingering or current psychiatric symptomology/distress." Rather, Dr. Glass thought other factors, such as Employee's concerns about the future and worries over finances, were now the cause of his symptoms. Dr. Glass stated it "is important to appreciate his ability to return to police work (security on the North Slope) and work there, apparently, successfully rule out Posttraumatic Stress Disorder (PTSD)." Dr. Glass recommended an exercise program, alcohol avoidance and counseling. He thought Employee did not present a permanent psychiatric impairment, but rather opined Employee suffered a temporary impairment in 2004-2005 that was now resolved. He stated Employee was medically stable and had no psychiatric work restrictions at that time. (Glass report, December 19, 2011).

49) Employer specifically asked Dr. Glass to opine on whether Employee's prior treatment was reasonable and necessary. Dr. Glass did not render an opinion, but rather recommended future counselling. (*Id.*).

50) On December 6, 2012, Ronald Early, Ph.D., M.D., performed a secondary independent medical evaluation (SIME). Dr. Early prefaced the clinical interview section of his report with the following remarks:

> In today's evaluation, [Employee] described the traumatic incident of June 6, 2004 in a manner consistent with what is included in all of the records. [Employee] had some difficulty describing the event and was obviously emotionally upset in doing so. He has not resolved his emotional response that [sic] incident and both his emotional response in the office and the acknowledgement verify that he still has considerable psychological distress when he thinks about that incident.

Dr. Early administered the Beck Depression Inventory. Employee's score of 36 was consistent with "severe depression." In the "summary and conclusions" section of his report, Dr. Early repeatedly mentions Employee's lack a psychiatric treatment:

> However, the medical records reflect that the only ongoing therapy he received within the first years after the onset of PTSD was some counseling from a Christian counseling service. . . . He was provided with some psychiatric care via telecast on a monthly basis for a while. However, he never has the intensive treatment by a psychiatrist that PTSD requires. The lack of intensive care and the inadequacy of medication management resulted in chronic symptoms and development of severe depression. . . . It is unfortunate that his claim was not accepted, and he was not given intensive psychiatric treatment early in the period following psychological trauma. Over the years, without intensive treatment, the PTSD evolved into serious [sic] of anxiety and depression as often occurs. Without treatment he could not overcome the symptoms of PTSD, and was unable to continue as a State Trooper.

Dr. Early concluded:

> He is not nearly the person he was in June 2004, but he is trying to improve his situation. He does not have the marked symptoms of PTSD, and his depression is better. However, he remains vulnerable to relapse into more severe PTSD symptoms if he has more psychological trauma. He is at risk for relapse if he remains in the isolated community and has no ongoing treatment to prevent relapse. He should have ongoing therapy and assessment for medication.

Dr. Early diagnoses were: Axis I – Posttraumatic stress disorder, in partial remission; major depressive disorder, in partial remission; anxiety disorder, in partial remission; Alcohol dependence, in remission. Axis II – No diagnosis. Axis III – No diagnosis except hepatitis, now in remission. Axis IV – Stressors, including living in a small community and issues related to Employee's ex-wife. Axis V – GAF=50. Dr. Early opine the posttraumatic stress disorder

symptoms that began following the June 6, 2004 accident are solely related to that incident. He twice noted: "there was no problem with alcohol prior to June 6, 2004," and there is "no history of preexisting alcohol abuse." Regarding his diagnosis of posttraumatic stress disorder, Dr. Early wrote the "basis for reaching that diagnosis includes all of the criteria identified in 309.81." He then discussed each of the criteria as they pertained to Employee, such as feelings of helplessness and overwhelming emotion, vivid flashbacks and nightmares, driving and location avoidance, withdrawal from meaningful activities, sleep disturbance, irritability, anger reactions, problems concentrating, hypervigilance and startle reactions. He also thought Employee's anxiety was the primary symptom complex in the initial phase of his posttraumatic stress disorder, but subsequent events, such as the marriage to his former wife, also contributed. Dr. Early stated the June 6, 2004 accident did not aggravate, accelerate or combine with any pre-existing mental health problems to cause Employee's conditions but added Employee's accumulation of experiences as a State Trooper was a pre-disposing factor. "There is no alternate cause for the PTSD symptoms described following the June 6, 2004 incident." Dr. Early opined the treatment Employee received was both inadequate and ineffective. Regarding treatment recommendations, he stated:

> At this time, the condition of PTSD is chronic and he will continue to have varying levels of symptoms over the course of time. Any individual who experiences Post-Traumatic Stress Disorder is vulnerable to relapse and recurrence of symptoms under conditions of stress, especially if inadequately treated. Untreated Post-Traumatic Stress Disorder becomes incurable after a period of time and symptoms continue throughout life to varying levels of severity depending on stressful circumstances. Therefore, treatment at this time would not be curative, but would be directed at diminishing symptoms and assisting [Employee] in developing coping skills and strategies for preventing major relapse and assisting him in moving forward with a productive lifestyle. Inasmuch as he no longer has his career as a State Trooper, he needs assistance in developing a meaningful alternative career. Failure to find a suitable career will make him more vulnerable to relapse.

He thought Employee was medically stable but his condition remained vulnerable to worsening. Dr. Early assigned Employee a 15 percent permanent partial impairment (PPI) rating. (Early report, December 6, 2012).

51) The clinical interview section of Dr. Early' report contains comprehensive details of Employee's description of his illness. These details are also consistent with the other numerous

provider reports in this case. (*Id*., pp. 20-25; experience, judgment, observations and inferences drawn from the above).

52) On December 11, 2012, Employee filed an affidavit of readiness for hearing (ARH), swearing he had completed the necessary discovery, obtained the necessary evidence and was fully prepared for a hearing on his claim. (Employee's ARH, December 10, 2012).

53) At a January 14, 2013 prehearing conference, the parties requested a hearing date on Employee's claim. The issues for hearing were Employee's claim for PTD, TTD, PPI, medical and transportation benefits, penalty, interest and attorney's fees and costs. The hearing was scheduled for June 13, 2013 "pursuant to the regulations," and the summary contains an order stating: "evidence must be filed 20 days prior to the hearing pursuant to 8 AAC 45.120." (Prehearing Conference Summary; January 14, 2013).

54) On May 31, 2013, Employer filed a medical summary containing a June 7, 2012 report by Wandal Winn, M.D. The report is titled a "Psychiatric Review Technique," and was apparently prepared by Dr. Winn for purposes of Employee's eligibility determination for social security disability benefits. The report consists of 15 pages, the first 10 of which are check-box answers listing various psychiatric conditions. The last 5 pages of the report consist of a "Consultant's Notes" section and a "Case Analysis" section. Dr. Winn's case notes state: "Per the Psych. Eval. Dated 12/11: All the clmt's records trough [sic] the years have been reviewed, and all his psych. And medical history and conditions have been discussed in the evaluation." It cannot be determined from the report what specific records Dr. Winn reviewed. The report's case analysis section contains numerous documented contacts with Employer's adjuster. Dr. Winn opined Employee did not demonstrate the criteria for PTSD and concluded there was "[n]o evidence of any significant mental impairment." (Medical Summary, May 29, 2013; Winn report, June 12; 2012; experience, judgment, observations and inferences drawn from the above).

55) On June 4, 2013, Employee filed a request for cross-examination of Dr. Winn. (Employee's request for cross examination, June 4, 20013).

56) On June 7, 2013, Employee filed an affidavit of attorney's fees and costs in an total amount of $25,023.54 including, $2,518.54 in costs and $22,505.00 in fees. Attorney's fees are billed at $350.00 per hour. (Employee affidavit, June 7, 2013).

57) Dr. Winn did not appear and testify at hearing. (Record).

58) Employee narrowed the issues at hearing to exclude his claim seeking a finding of unfair or frivolous controversion. (Record).

59) Linda Gregory Weed (Mrs. Weed) testified on behalf of Employee. Her boyfriend at the time was in the timber industry, so they moved to Alaska. Employee and Mrs. Weed met on the internet and they started dating in 2011, when she lived in Wasilla. Employee worked for NANA at the time and he would see her when he was on leave from the North Slope. In June 2011, Mrs. Weed moved to Tok. She and Employee were married on October 14, 2012 following a "domestic relationship." She is Employee's third wife. Mrs. Weed stated Employee's condition deteriorated during the time they have been together. Employee would self-medicate with alcohol, was often teary-eyed, had sleeping problems and would not eat. "He was a mess," and was "going to pieces." Employee "had no interest in anything." He became "withdrawn and isolated." Employee does not like to go outside their home and they can't even go out to dinner. If they go to the grocery store, Employee stays in the truck. He does not socialize. Regarding Employee's sleep disturbances, she testified Employee is "up every hour." They sleep apart. Employee sleeps in a recliner and they can't "normally cohabitate." Trying to get Employee to perform normal chores, such as cutting wood, is a "significant fight." Regarding Employee's driving ability, Mrs. Weed testified lights, accidents and locations of pervious trauma cause Employee to have "panic attacks." It is one mile to the grocery store and that is the extent of Employee's ability to drive. Mrs. Weed knows the location of the June 6, 2004 accident and they "don't go there." They have been on that road three times and each time it was a "traumatic event." Mrs. Weed explained Employee has a large family and he does not interact with them. She described a recent trip to North Dakota for a family reunion. She drove there and back. Employee's family had not seen Employee in 27 years, but Employee spend most of the time in his camper. He "did not make sense." Employee's parents were upset and his family expressed concern about Employee's self-medication and his overall mental state. Giving examples of Employee's symptoms, Mrs. Weed testified they stayed in a hotel last night. The police were called to the hotel for some reason, which caused Employee to become "anxious." He broke into a sweat and got "cold and clammy." Also, a car alarm went off last night and Employee "jumped." Mrs. Weed explained "daily life activities are a daily battle." Employee's amount of stress if "off the wall." It is hard to get Employee to take an interest in life. Neither she, nor Employee, interact with their respective children. Employee won't interact

and she can't interact with her children because she takes care of Employee and can't leave him. Employee's daughter came to visit Employee last year for Father's Day. She had planned to stay for four days, but spent one night and left the next day because she "could not stand to see her father like that." On cross-examination, Mrs. Weed stated she is not employed. She makes the house payments from social security disability benefits and acknowledged an award would help her family. She testified Employee's drinking is "sporadic," he could go a week or a day without drinking. The period of time he drinks is equal to the period when he does not drink. She adamantly stated Employee just drinks beer, not liquor, and stated she does not monitor how much he drinks. Mrs. Weed denied she buys Employee beer and explained she is a smoker and he buys beer when they go to the store for her to buy cigarettes. She stated she is more concerned about Employee's mental condition than his drinking. When questioned about participating in activities with Employee, Mrs. Weed stated they used to do things like go hunting, fishing and boating together, but not anymore. She and Employee have not gone camping "forever." She tries to get Employee to sit on the deck or do something in the yard. She got Employee a dog, thinking that would help. Employee will respond to the dog one day, and push the dog away the next, "like he does to [her]." (Mrs. Weed).

60) In response to a question concerning Employee's "recent medical problems," Mrs. Weed stated Employee "has a very severe case of stress-related Type II diabetes according to Dr. Wahl." Employer objected on the basis of hearsay and because Employee had not filed diabetes related medical records on a summary as required by regulation. The designated chair sustained Employee's objection. (Record).

61) Employee contended evidence of his diabetes should be considered in a permanent total disability (PTD) determination, including Employee's and Mrs. Weed's testimony. He also sought an opportunity to introduce medical records pertaining to that condition after the hearing. Employee contended all his conditions, both work related and non-work related, must be considered in his claim for PTD. (*Id.*).

62) Employee did not address any issues relating to the diabetes condition in his post-hearing brief. (Employee's post-hearing brief, June 5, 2013 [sic]; observations).

63) In its post-hearing brief, Employer presented detailed and comprehensive arguments against the admissibility and consideration of Employee's diabetes condition. (Employer's post-hearing brief, July 18, 2013).

64) Mrs. Weed was generally credible, but not credible when testifying about Employee's drinking and how he obtains alcohol. (Experience, judgment, observations and inferences drawn from the above).

65) Captain Barrick testified on behalf of Employer. For the last 23 years, he has been employed by the State of Alaska, Department of Public Safety, Division of the Alaska State Troopers. Captain Barrick is a detachment commander. He supervises two lieutenants, one rural and one in Fairbanks, who, in turn, supervise patrol units. He attended the Training Academy in Sitka in 1990, then was assigned to three months of field training where he worked with other officers. After that he was released to work on his own. In 2004, he was assigned to Galena, where he also worked the surrounding villages. After three years, he was promoted and became an Academy instructor. Later he was promoted and assigned to Nome, where he worked as a supervisor. He was next assigned to Fairbanks as the deputy commanding officer, and later became the commanding officer. During the course of his duties as a State Trooper, Captain Barrick has experienced homicides, suicides and motor vehicle fatalities. At the Academy, Captain Barrick taught "practicals," such as tactics and scenarios. Academy training used to involve Emergency Medical Technician (EMT) training, but now only first aid is taught. He testified any State Trooper is expected to be an initial responder. He stated being an initial responder is not "extraordinary" duty, "it is expected." At the time of the June 6, 2004 accident, Employee was assigned to the patrol division, D Detachment, Tok, Alaska. Employee's duties involved taking calls for service, including unexpected or unattended deaths, motor vehicle accidents, conducting searches and investigations, domestic violence, etc. Duties of a State Trooper sometimes involve examining and transporting dead bodies. These duties are "reasonably known" to cadets at the Academy. Captain Barrick explained some State Troopers experience more death in their duties, some less death, and acknowledged he has experienced stress in his line of work. He explained every death circumstance is different and it affects each State Trooper differently. Captain Barrick stated all motor vehicle accidents are different. In Tok, it is not unusual to be sole responder or the only one on duty. It is "much more likely" to be an initial responder in Tok than in Fairbanks. State Trooper duties include notifying the next-of-kin in death cases, although not all Troopers have had to deliver death notices. State Trooper duties also include dealing with distressed people. On cross-examination, Captain Barrick acknowledged every person "processes" trauma differently. Although he was trained to use a

firearm, he stated some Troopers might never fire their firearm in their career. Captain Barrick agreed the ability to talk about traumatic events is important and an important tool. Employee was in Captain Barrick's detachment in Tok. He knew Employee, but not well. Captain Barrick was in the National Guard and he has "dealt with" vets with "emotional" behavior and has seen changes in personality. (Captain Barrick).

66) Captain Barrick was credible. (Experience, judgment, observations and inferences drawn from the above).

67) Administrative notice is taken that the duties of an Alaska State Trooper include responding to fatal motor vehicle accidents and delivering death notices to a decedents' next-of-kin. (*Id.*).

68) Employee testified on his own behalf. As a State Trooper, he handled motor vehicle accidents, though they were never "routine." Just the procedure was routine. After the accident on June 6, 2004, he and Trooper Miller returned to take measurements. He never finished the accident report, Trooper Miller did. He finished work that day and worked the next couple of days. He had trouble doing his job. He was not confident. He stated he does not remember events clearly after the accident. At the time, Employee was seeking treatment from the Schamms, but he contended Employer sent him to Dr. Martino for a second opinion. Employee denied alcohol was a problem at the time, but stated his consumption changed after the accident and became a physical problem because of his dependence. He was hospitalized in Fairbanks as a consequence. Employee contended he did not successfully complete the alcohol recovery program. He stated the program was difficult because he was the only law enforcement officer in the facility and he was in the program with rapists, burglars, etc. Employee testified he did not report to work after returning from his trip to Arizona. He stated he surrendered his handgun to a Sergeant Wells in June 2004 and a Lieutenant Lee Furman from Fairbanks later came to retrieve his state-issued shotgun. He explained he found the NANA job on the internet. It involved working two weeks "on," followed by one week "off." He worked with 125 officers, including some former State Troopers. Lack of confidence was a problem for him. He was not getting treatment at the time. After he met Mrs. Weed, she encouraged him to seek treatment at the Tok Counseling Center, but Employee contends the doctor there, Dr. Hawthorne, said he was not qualified to treat PTSD. He started seeing Dr. Peters once every two weeks, then he sought treatment from Dr. Detwiler. Employee testified Dr. Peters recommended controlled breathing

techniques, getting in touch with his inner self and personal yoga. He stated he only saw Dr. Detwiler three times. After talking with Dr. Detwiler, he never went back to his job with NANA and was terminated. Employee explained Tok is limited with regards to employment. A couple of months after being terminated from NANA, he spoke with a man at the grocery store about a job with "weights and scales," but the job was moved from Tok to Fairbanks. He is not looking for work now because he cannot find anything in Tok and he cannot afford to move away from Tok. Employee does not feel like his son and daughter want to have "anything to do with [him]." He stated he does not communicate well, so people think he just does not care. He is apprehensive about going into public and he does not like to. Employee also stated he has developed diabetes, which causes pain in his legs. He explained he tries to not think about death or drive by the location of the June 6, 2004 accident, but he still has dreams about it. Employee can sleep for an hour-and-a-half at a time, then he is up for one to three hours trying to get back to sleep. He has thoughts of people harming him and others. He gets startled at times, such as last night when a car alarm went off. On cross-examination, Employee acknowledged he has not really tried to find work. He did not know if he held an armed security guard license and a commercial driver's license. Employee stated he is not good with computers and is not interested in being trained in computers. When asked if he was interested in a job with Weights and Measures, he replied "no." Employee is not interested in any employment because "his legs burn so bad" as a result of his diabetes. Employee was also asked about his drinking. He stated he prefers beer and started drinking liquor after the June 6, 2004 accident. He would drink up to a ½ gallon of vodka daily. When asked about who was working the night of the accident, Employee explained he was working days and Trooper Miller was working nights. He stated his stress was different than Trooper Miller's because of the different shifts. Employee also explained, when you respond to an accident scene, "you always leave a little bit there, and always take a little with you." It is a difference, Employee stated, of "being stoic and robotic" versus "a person who has feelings." (Mr. Weed).

69) Employee's presentation at hearing was decidedly distinct and unusual. He appeared aloof, staring straight ahead most of the time and avoiding eye contact. Employee appeared to have a difficult time remembering events when testifying. (Experience, judgment, observations and inferences drawn from the above).

70) Although Employee appeared to have a difficult time remembering events, and although he made certain factual errors during his testimony, such as why he saw Dr. Martino, he was credible. (*Id*.).

71) During his opening statement at hearing, Employee specified he was seeking TTD benefits from June 10, 2004 to May 8, 2005, a period he referred to as the "gap period." (Record).

72) In his post-hearing brief, Employee's counsel contends Employee is seeking TTD from June 10, 2004 to May 8, 2006. (Employee post-hearing brief, June 5, 2013).

73) During its opening statement at hearing, Employer asserted an AS 23.30.105 defense to Employee's claimed period for TTD benefits. (Record).

74) Employee objected to Employer's assertion of its §105 defense and contended it was not timely raised. (*Id*.).

75) Employee did not specify a period of TTD until his opening statement at the June 13, 2013 hearing. (Record; observations).

76) The parties raised other objections at hearing, including: Employee objected to Dr. Winn's June 12, 0212 report and entered a "*Smallwood* objection" to it; Employer objected to evidence concerning Employee's diabetes. (Record).

77) The medical record does not contain evidence Employee has diabetes or evidence his diabetes is related to his employment as a State Trooper. (Record; observations).

78) Each of the prehearing conference summaries list Employee's September 12, 2011 claim as the sole issue for hearing. The summaries do not contain any references to Employee's diabetes condition. (Prehearing conference summaries, October 24, 2011; April 18, 2012; June 25, 2012; January 14, 2013).

79) Employee contends the definition of "disability" under the Act differs from the definition used by the Social Security Administration. (Employee post-hearing brief at 4 n. 11).

80) Administrative notice is taken the definition of "disability" under the Alaska Workers' Compensation Act differs from the definition under the Social Security Act. (Experience, judgment, observations and inferences drawn from the above).

81) On July 19, 2013, Employee filed a supplemental affidavit of attorney's fees and costs in a total amount of $36,352.93, including $2,518.54 in "RMBLO costs." $627.19 in client costs, and $33,352.93 in attorney's fees. Attorney's fees are billed at $350.00 per hour. (Employee supplemental affidavit, July 19, 2013).

82) Employer did not file an objection to Employee's attorney's fees and costs. (Record).

83) The parties participated in four prehearing conferences, and engaged in relatively little litigation in advance of hearing. (Record; experience, judgment, observations and inferences drawn from the above).

84) Employee's medical history is substantial and the medical record contains over 700 pages. (*Id.*).

PRINCIPLES OF LAW

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

> **AS 23.30.001. 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;
> . . .
>
> (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 crux of due process is the opportunity to be heard and the right to adequately represent one's interest. *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192 (Alaska 1980). The board's authority to hear and determine questions with respect to a claim is limited to the questions raised by the parties or the agency upon notice given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981). While the actual content of the notice is not dispositive in administrative proceedings, the parties must have adequate notice so they can prepare their cases: "[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings." *Groom v. State, Department of Transportation*, 169 P.3d 626, 635 (Alaska 2007) (quoting *North State Tel. Co. v. Alaska Pub. Util. Comm'n.*, 522

P.2d 711, 714 (Alaska 1974). Defects in administrative notice may be cured by other evidence that the parties knew what the proceedings would entail. *North State Tel. Co.*

At the time of the June 6, 2004 accident, AS 23.30.010 provided:

> **AS 23.30.010. Coverage**. Compensation is payable under this chapter in respect of disability or death of an employee.

Decisional law interpreted former AS 23.30.010 to require payment of benefits when employment was "a substantial factor" in disability or need for medical treatment. *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590 (Alaska 1979). Employment is "a substantial factor" in bringing about the disability or need for medical care where "but for" the work injury, a claimant would not have suffered disability at the time he did, in the way he did, or to the degree he did, and reasonable people would regard it as the cause and attach responsibility to it. *Fairbanks North Star Borough v. Rogers and Babler*, 747 P.2d 528 (Alaska 1987). A preexisting disease or infirmity does not disqualify a claim if employment aggravated, accelerated, or combined with disease or infirmity to produce death or disability. *Thornton v. Alaska Workers' Compensation Board*, 411 P.2d 209 (Alaska 1966). Aggravation of a preexisting condition may be found absent any specific traumatic event. *Providence Washington Insurance v. Banner*, 680 P.2d 96 (Alaska 1984).

> **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 23.30.105. Time for filing of claims.** (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. . . . It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding.
>
> (b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of

> the claim in which all parties in interest are given reasonable notice and opportunity to be heard.
> . . . .

The purpose of §105 is to "'protect the employer against claims too old to be successfully investigated and defended.'" *Morrison-Knudson Co. v. Vereen,* 414 P.2d 536, 538 (Alaska 1966) (citing 2 Larson, Workmen's Compensation s 78.20 at 254 (1961)). However, an employee must have "actual or chargeable knowledge of his disability and its relation to his employment" to start the running of the two year period under §105(a). *Collins v. Arctic Builders, Inc.,* 31 P.3d 1286, 1290 (Alaska 2001). In *Leslie Cutting Inc. v. Bateman*, 833 P.2d 691 (Alaska 1992), the Court clarified that when an injured worker believed a condition was controlled by medication, the statute of limitations at AS 23.30.105(a) started running only when the worker discovered the treatment no longer controlled the disability. *Id.* at 694. "The mere awareness of the disability's full physical effects is not sufficient" to trigger the running of the statute. *Id.* The statute is only triggered when "one knows of the disability's full effect on one's earning capacity." *Id.* Similarly, in *Egemo v. Egemo Construction Co*., 998 P. 2d 434 (Alaska 2000), the Court held the statute of limitations at AS 23.30.105(a) starts running only when the injured worker (1) knows of the disability, (2) knows of its relationship to the employment, and (3) must actually be disabled from work. *Id.* at 441. A claim is not "ripe," requiring filing under §105(a) until the work injury causes wage loss. *Id.* at 438-439.

> **AS 23.30.110. Procedure on claims.** . . . . (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . .
>
> **AS 23.30.115. Attendance and fees of witnesses.** (a) . . . the testimony of a witness may be taken by deposition or interrogatories according to the Rules of Civil Procedure. . . .
>
> **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 . . . .

> ***(c) The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress.*** (Emphasis added).

To determine whether the presumption of compensability applies: work-related mental injuries are divided into three different categories: mental stimulus that causes a physical injury, or "mental-physical" cases; physical injury that causes a mental disorder, or "physical-mental" cases; and mental stimulus that causes a mental disorder, or "mental-mental" cases. *Kelly v. State of Alaska, Dept. of Corrections*, 218 P.3d 291; 298 (Alaska 2009). Where a work-related physical injury results in a mental disorder, such as depression, the presumption is applied. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249; fn 36 (citing *Williams v. Abood*, 53 P.3d 134 (Alaska 2002)). However, where work-related stress results in a mental injury, such as posttraumatic stress disorder, a claimant is required to prove each element of the test for mental injury by a preponderance of the evidence, without the benefit of the presumption of compensability. *Kelly* at 297 (discussing the former AS 23.30.395(17)).

Medical benefits including continuing care are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The legislative history of AS 23.30.122 states the intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation Act." *De Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013). The Alaska Workers' Compensation Appeals Commission is required to accept the board's credibility determinations. *Id.* The Alaska Supreme Court defers to board determinations of witness credibility. *Id.* If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, and elects to rely on one opinion rather than the other, the Supreme Court will affirm the

board's decision. *Id.* at 147. The board can also choose not to rely on its own expert. *Id.* It was error for the commission to disregard the board's credibility determinations. *Id.* at 145-147.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **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. . . .
>
> (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 a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986), held attorney's fees awarded by the board should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on the merits of a claim. (*Id.* at 973). The board was instructed to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney's fees for the successful prosecution of a claim. (*Id.* at 973, 975).

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which 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 AWCAC 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.*

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid. . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." But when nonpayment results from "bad faith

reliance on counsel's advice, or mistake of law, the penalty is imposed." *State of Alaska v. Ford,* AWCAC Decision No. 133, at 8 (April 9, 2010) (citations omitted).

The courts have consistently instructed the board to award interest for the time-value of money, as a matter of course. *See Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984); *Harp v. Arco Alaska, Inc*., 831 P.2d 352 (Alaska 1994); *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1191 (Alaska 1993). For injuries which occurred on or after July 1, 2000, AS 23.30.155(p) and 8 AAC 45.142 require payment of interest at a statutory rate, as provided at AS 09.30.070(a), from the date at which each installment of compensation is due.

> **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. . . . [P]ermanent 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.

In *Vetter v. Alaska Workmen's Compensation Board.,* 524 P.2d 264 (Alaska 1974), the court explained disability benefits under the Act. "The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment." *Id.* at 266. An award of compensation must be supported by a finding the claimant suffered a decrease in earning capacity due to a work-connected injury or illness. *Id.* An employee is not entitled to disability compensation when he continues to work

light-duty jobs and earns wages comparable to his pre-injury wages. *Hagel v. King Steel, Inc.*, 785 P.2d 1207 (Alaska 1990).

Even though an employee may have limited capabilities, she is not entitled to temporary total disability (TTD) or permanent total disability (PTD) when work is regularly and continuously available to her within her capabilities. *Summerville v. Denali Center*, 811 P.2d 1047; 1051 (Alaska 1991). The availability of regularly and continuously available work is relevant in determining whether an employee is entitled to disability benefits and is clearly set forth in the PTD statute. *Robles v. Providence Hosp.*, 988 P.2d 592; 596 (Alaska 1999). However, the ability to perform any kind of work does not determine whether a disability has ended, and employment by an employee's father, where employee does not receive a wage, did not mean disability benefits should cease. *Olson v. AIC/Martin J.V.,* 818 P.2d 669; 674 (Alaska 1991).

A claimant is not entitled to compensation when he, through voluntarily conduct unconnected with his injury, takes himself out of the labor market. *Vetter* at 266. Voluntary removal from the labor market includes being fired for misconduct after returning to work when the impairment plays no part in the discharge. *Id.* A claimant is not entitled to disability compensation following his termination for cause when work was available within his physical restrictions. *Fitzgerald v. Home Depot*, AWCB Decision No. 05-0242 (September 23, 2005). When a claimant is offered light duty work but is later terminated for cause for failing to come to work, he is not entitled to compensation. *Dillard v. Dick Pacific Ghemm, J.V.*, AWCB Decision No. 07-0086 (April 13, 2007). Once an employer overcomes the presumption of compensability, an employee is required to prove his loss of earnings was due to a work-related injury and resultant disability, not to a voluntary retirement. *Strong v. Chugach Electric Assoc., Inc.*, AWCAC Decision No. 09-0075 (February 12, 2010) at 9. An employee's reasonable efforts to seek work within his physical restrictions may be considered when deciding if loss of earnings after a voluntary retirement is due to disability. *Id.* at 8.

When both work related and non-work related medical conditions prevent a disabled employee from returning to work, the non-work related condition does not necessarily destroy the causal link between the work injury and the loss of earning capacity and a worker may still be entitled to

disability benefits. *Estate of Ensley v. Anglo Alaska Constr.,* 773 P.2d 955; 958 (Alaska 1989). Similarly, a disabled worker may be entitled to compensation even though he is unavailable for work for some other, personal reason. *Cortay v. Silver Bay Logging*, 787 P.2d 103; 108 (Alaska 1990).

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $135,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations. . . .
>
> At the time of the June 6, 2004 accident, AS 23.30.395(17) provided:
>
> **AS 23.30.395. Definitions.** In this chapter . . . .
>
> (10) "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 . . . .
>
> (17) "injury" means accidental injury or death arising out of and in the course of employment, and an occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury; . . . . ***"injury" does not include mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events.*** A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer. (Emphasis added).

Following legislative amendments to the Act in 2005, the latter part of former AS 23.30.195(17), defining mental injury, is now codified at AS 23.30.010(b). The Act defines "injury" restrictively if mental injury is caused by work-related stress. *Williams v. State of Alaska, Dept. of Revenue*, 938 P.2 1065 (Alaska 1997). To prevail, a claimant must satisfy each element of

the test for mental injury by a preponderance of the evidence, without the presumption of compensability. *Id.* at 1071.

Although the Act does not define "individuals in a comparable work environment," it has been interpreted to mean other employees holding the same position for an employer. *Id.* The Act also does not define "extraordinary and unusual" stress, and an examination of the common meanings of those words does not clarify the legislature's intent. *Kelly* at 300. The Alaska Supreme Court has looked to legislator's comments to provide insight into what types of events would qualify as "extraordinary and unusual." *Id.* at 300-01. It noted such examples as an iron worker nearly falling to his death and an air traffic controller who felt responsible for a plane crash that killed many people. *Id.* at 301. Quoting Professor Larson, the Court noted cases involving sudden fright and fear are generally "rated unusual in comparison with any norm. . . . [c]ontinuous terror and dramatic brushes with death are not the normal routine of life." *Id.* (citation omitted).

In determining whether an employee's stress was "extraordinary and unusual" compared to his co-workers, it is an error to focus on the frequency of an event rather than the "character and quality" of an event. *Id.* Unusual and serious circumstances should be considered. *Id.* at 302. For example, when a prison guard was threatened, circumstances that distinguish that threat from threats other prison guards experienced should be considered, such as the guard was alone and unarmed, was cornered by a strong inmate who has been convicted of murder, the inmate was armed with a sharpened pencil, which he threatened to use to stab the guard in the eyes and then stab him to death, and the corrections officials treated the guard differently than other guards. *Id.* at 301-02. In a case involving a posttraumatic stress disorder claim by a convenience store clerk following a robbery, it was held a "manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain, the legal-causation test is met irrespective of the absence of similar stress on other employees." (*Id.* at 302 (citing *Brown v. Quik Trip Corp.*, 641 N.W.2d 725, 729 (Iowa 2002) with approval).

Although work-related stress must "be measured by actual events," the statute does not prohibit consideration of claimant's perception of the actual events, since such a prohibition could prevent compensation claims based on diagnostic criteria for posttraumatic stress disorder. *Id.* at 299-300.

However, a claimant's perception he feels stress is, by itself, inadequate to establish "extraordinary and unusual" stress. *Id.* at 300. Rather, the inquiry is whether the claimed mental injury is the result of "actual, not merely perceived or imagined employment events." *Id.* (citation omitted).

> **8 AAC 45.052. Medical summary.** (a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim or petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board. . . .
>
> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed. . . .
>
> > (3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,
> >
> > > (A) all updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary; and
> > >
> > > (B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary.
>
> (4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.
>
> **8 AAC 45.054. Discovery.** (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. In addition, the parties may agree or, upon a party's petition, the board or designee will exercise discretion and direct that the deposition testimony of a witness be taken by telephone conference call. The party seeking to introduce a witness' testimony by deposition shall pay the initial cost of the deposition.

(b) Upon the petition of a party, the board will, in its discretion, order other means of discovery.

(c) The board or division will issue subpoenas and subpoenas duces tecum in accordance with the Act. The person requesting the subpoena shall serve the subpoena at the person's expense. Neither the board nor the division will serve subpoenas on behalf of a party. . . .

8 AAC 45.065. Prehearings. . . . (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing. . . .

8 AAC 45.070. Hearings. . . . (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

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

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

(2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and

(3) ambulance service or other special means of transportation if substantiated by competent medical evidence or by agreement of the parties. . . .

(e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.

8 AAC 45.120. Evidence. . . . (b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.

(c) Each party has the following rights at hearing:

(1) to call and examine witnesses;

(2) to introduce exhibits;

(3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;

(4) to impeach any witness regardless of which party first called the witness to testify; and

(5) to rebut contrary evidence. . . .

(k) The board favors the production of medical evidence in the form of written reports, but will, in its discretion, give less weight to written reports that do not include

(1) the patient's complaints;

(2) the history of the injury;

(3) the source of all facts set out in the history and complaints;

(4) the findings on examination;

(5) the medical treatment indicated;

(6) the relationship of the impairment or injury to the employment;

(7) the medical provider's opinion concerning the employee's working ability and reasons for that opinion;

(8) the likelihood of permanent impairment; and

(9) the medical provider's opinion as to whether the impairment, if permanent, is ready for rating, the extent of impairment, and detailed factors upon which the rating is based. . . .

The Alaska worker's compensation system favors the production of medical evidence in the form of written reports and this preference serves a legitimate purpose. *Employers Commercial Union Insurance Group v. Schoen*, 519 P.2d 819; 822 (Alaska 1974). However, "the statutory right to cross-examination is absolute and applicable to the Board." *Id*. at 824. The Alaska Supreme Court re-affirmed *Schoen* in *Commercial Union Insurance Companies v. Smallwood*,

550 P.2d1261 (Alaska 1976), and stated "the right of cross-examination does not carry a price tag." *Id.* at 1266. *Smallwood* has been widely interpreted to require a party relying on documentary evidence to pay the initial cost of cross-examination by the opponent. *Frazier v. H.C. Price/Ciri Construction JV*, 794 P.2d 103; 106-08 (Alaska 1990) (concurring opinion). However, this interpretation has been questioned. *Id.*; s*ee also Geister v. Kid's Corps, Inc.,* AWCAC Decision No. 045 (June 6, 2007) at 7 (quoting *Dobos v. Ingersoll*, 9 P.3d 1020 (Alaska 2000) and *Loncar v. Gray*, 28 P.3d 928 (Alaska 2001)).

The concurring opinion in *Frazier* stated "it is wrong to say that cross-examination may not carry a price tag." *Id.* at 108. According to that opinion, the quotation instead refers to the "procedural void" for cross-examination that existed at the time *Smallwood* was decided and should not be interpreted as a mandate for cost-shifting. *Frazier* at 107. It went on to point out misinterpreting *Smallwood* to require a party relying on documentary evidence to pay the initial cost of cross-examination by the opponent had led to litigation abuses, *i.e.* "*Smallwooding*," that were counter to the Court's fundamental policy of 'providing inexpensive and expeditious resolution of claims for compensation.' *Frazier* at 108. "The cost disincentive inherent in the normal rule which makes to deposer pay is apparently of considerable importance in deterring needless depositions," therefore, a "party desiring to depose or examine the author of a report should bear the initial cost of the deposition or examination." *Id*. However, the majority in *Frazier* declined to-re-examine *Smallwood* since the "ramifications of any change" were not "fully identified by the parties," and expressing "no view" on the position taken by their concurring colleagues. *Frazier* at 104 n.2.

A party that authorizes a medical report vouches for the credibility and competence of its physician. *Frazier* at 105. Cross-examination is only required when the written medical report is hearsay. *Id.* at 106. Since medical records kept by hospitals and doctors are business records, they are hearsay exceptions and an opportunity to cross-examine the author the document's author need not be given. *Geister* at 8 (citing *Dobos* and *Loncar*). However, letters written by a physician to a party to express an expert medical opinion on an issue before a tribunal are not admissible absent a requisite foundation for admission. *Id.* (citing *Liimatta v. Vest*, 45. P.2d 310 (Alaska 2002).

> **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. . . .
>
> > (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. . . .
>
> 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. . . .

ANALYSIS

1) *Should evidence of Employee's diabetes be considered in a PTD determination?*

At hearing, Employee contended he had diabetes and sought to introduce evidence of that condition, including his own testimony, his wife's testimony and additional medical records following the hearing. In its post-hearing brief, Employer presented numerous, detailed and comprehensive arguments against the admissibility and consideration of the purported condition. Even though he was afforded an opportunity to address these issues in his post-hearing brief, Employee did not, which indicates he has abandoned the issues. Therefore, it is not thought necessary to now address each of Employer's many comprehensive arguments. Instead, this decision will only briefly address the issue of Employee's purported diabetes.

Workers' compensation proceedings must be fair, and parties are to be afforded due process, which includes an opportunity to be heard. AS 23.30.001. Toward this end, parties must have adequate notice so they can prepare their cases. *Groom*. Employee's September 12, 2011 claim clearly stated he was seeking benefits arising from a mental stress injury. Each of the prehearing summaries, which govern the issues and course of the hearing, identify Employee's September 12, 2011 mental stress claim as the sole issue for hearing. 8 AAC 45.065(c); 8 AAC 45.070(g). None of the summaries reference a diabetes condition. Employee did not file any medical records, as required by the regulations, referencing his purported diabetes. 8 AAC 45.052; 8 AAC 45.120(b)-(c). On December 11, 2012, Employee filed the statutorily required ARH,

swearing he had completed the necessary discovery, obtained the necessary evidence, and was fully prepared for a hearing on his claim. AS 23.30.110(c). Only at hearing, did Employee seek to introduce diabetes as an additional component of his mental stress claim.

The authority to hear and determine questions with respect to a claim is limited to the questions raised by the parties. *Simon*. The question is: did Employer have sufficient notice and information to understand the nature of the proceedings? *Groom*. Here, it did not. There is no evidence Employer had any indication diabetes was going to be an issue for hearing or that Employee was pursuing a "combination" or "aggravation" claim. *North State Tel. Co.* Any consideration of the diabetes issue would deny Employer due process under the Act since it would deprive Employer of a meaningful opportunity to cross-examine Employee, Mrs. Weed and any physician who may have diagnosed diabetes or opined on what, if any, connection the condition may have had to Employee's employment or his claimed inability to work. AS 23.30.001; 8 AAC 45.120(b)-(c). Therefore, evidence concerning Employee's purported diabetes, including Employee's and Mrs. Weed's testimony and any late-filed medical records, cannot be considered under Employee's instant mental stress claim. *Id*. Should Employee believe he has a work-related diabetes condition, he may file a claim for benefits, at which point, the issue can be fairly addressed. *Id*.

2) Shall Dr. Winn's June 12, 2012 report be considered?

Employee's position, as it is understood, seems to be consideration of Dr. Winn's report should be contingent upon Employer producing him, in person, at hearing for cross-examination. Since *Schoen*, a party's right to cross-examine the author of written medical evidence has been extensively litigated for nearly forty years in this state. Beginning with *Schoen*, the Alaska Supreme Court called on the board to adopt rules addressing a party's right to cross-examine the author of a medical report. The Court renewed its call in *Smallwood*. The board then adopted regulations, which the Court later reviewed in *Frazier*.

The current regulations were developed under the Court's supervision through repeated judicial review and are now set forth at 8 AAC 45.052 and 8 AAC 45.120. "However, the regulations are silent on the question of who is to pay for cross-examining author of a document entered into

evidence." *Frazier* at 106. As pointed out above, although interpreting *Smallwood* as a mandate for cost-shifting has been questioned, since the majority in *Frazier* declined to re-examine that decision, *Smallwood* remains binding precedent and it must continue to be applied. *Geister* at 8 ("We conclude *Smallwood* is still the law in workers' compensation cases . . . ."). However, cross-examination is only required when the written medical report is hearsay. *Frazier*. Since Dr. Winn's report represents a business records exception to the hearsay rule, the report will not be excluded. *Geister*; 8 AAC 45.120(e); *see also* 8 AAC 45.120(h) (hearsay exceptions applicable to documents other than medical reports).

Employee also point out the definition of "disability" under the Alaska Workers' Compensation Act differs from the definition under the Social Security Act. Employee's point is well taken and administrative notice is taken the definitions differ. With respect to Employee's contentions Dr. Winn's report is the product of an incomplete records review and inherently unreliable, it is noted the production of medical evidence in the form of written reports is favored. 8 AAC 45.120(k). However, the regulation also sets forth specific criteria to assist in determining what evidentiary weight should be afforded a given report. *Id.* Employee's point is here noted as well, and Dr. Winn's report will be afforded whatever evidentiary weight it merits.

3) Is Employee's claimed period of TTD time-barred by AS 23.30.105(a)?

As a preliminary matter, during his opening statement at hearing, Employee specified he was seeking TTD benefits from June 10, 2004 to May 8, 2005. Latter, in his post-hearing brief, Employee specified the claimed period of TTD as June 10, 2004 until May 8, 2006. Since Employee began work for NANA on May 11, 2006, it is presumed the latter date of 2006 is the date Employee intends.

Employee claims benefits arising from mental stress as a result of his exposure to the June 6, 2004 accident. Immediately following the accident, Employee contends he lost his self-confidence, had difficulty with his memory and concentration, and reported he did not return to work because he could no longer drive his patrol car. On September 20, 2004, Employee reported severe posttraumatic stress as a result of the June 4, 2004 accident. Employer controverted benefits on December 10, 2004, and the notice informs Employee of the limitation

prescribed by AS 23.30.105. As Employer points out in its post-hearing brief, Employee was aware of the nature of his claimed disability and its relation to his employment in May of 2004 or, at the very latest, by September 2004. Employee did not file his claim until September 13, 2011, at least six years later. Employee's claimed period of TTD is time barred by AS 23.30.105. *Egemo*.

With respect to Employee's contention Employer has waived the defense, it is noted Employee's claim did not specify a period for his claimed TTD. Instead, the claim was made for an "unknown" period of time. Meanwhile, Employer's answer to Employee's claim noted Employee's claim for TTD benefits was for an unspecified period of time and explicitly reserved a §105 defense. Employee only specified the period he now seeks in his opening statement at hearing, and Employer promptly objected "at the first hearing of the claim in which all parties in interest [were] given reasonable notice and opportunity to be heard." AS 23.30.105(c). Employer did not waive its §105 defense. *Id.*

4) Did Employee suffer a compensable mental injury?

Employee's claim is based on posttraumatic stress disorder arising from his exposure to the June 6, 2004 accident. The Act defines injury restrictively if mental injury is caused by work-related stress. *Williams*. To prevail, Employee must prove each element of the test for mental injury by a preponderance of the evidence without the benefit of the presumption of compensability. *Kelly*. Specifically, Employee must demonstrate: 1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and 2) the work stress was the predominant cause of the mental injury. AS 23.30.395(17). Although the Act does not define "individuals in a comparable work environment," it has been interpreted to mean other employees holding the same position for an employer. *Williams*.

Since Employee worked as an Alaska State Trooper, his stress will be compared to that of other State Troopers. *Id.* Captain Barrick has worked as an Alaska State Trooper for 23 years and testified for Employer. His experience has included working in the field, serving as an Academy instructor and supervising other State Troopers. During the course of his career, Captain Barrick

has experienced homicides, suicides and motor vehicle fatalities. He explained any State Trooper is expected to be an initial responder and further stated being an initial responder is not extraordinary, but rather, "it is expected." The duties of a State Trooper sometimes involve examining and transporting dead bodies and delivering death notices to next-of-kin. At the time of the June 6, 2004 accident, Employee was assigned to the patrol division and his duties included taking calls for service in cases of unexpected or unattended deaths and responding to motor vehicle accidents.

The Alaska Supreme Court provided guidance on applying the "extraordinary and unusual standard" in *Kelly*. Quoting Professor Larson, the Court noted cases involving sudden fright and fear are generally "rated unusual in comparison with any norm. . . . [c]ontinuous terror and dramatic brushes with death are not the normal routine of life." *Id.* Captain Barrick acknowledged he has experienced work related stress and explained some State Troopers experience more death than others on the job. He also explained every death circumstance is different, and every motor vehicle accident is different from others. Some State Troopers have had to deliver death notices during the course of their career and some have not. Captain Barrick's testimony demonstrates that while Alaska State Troopers can be tasked with unpleasant or stressful duty, continuous terror and dramatic brushes with death are not the normal routine of life, even for them. However, it cannot be said that Employee's experience was unusual in comparison "with any norm." *Id.* Captain Barrick's testimony illustrates that any State Trooper may, and some State Trooper's do, respond to motor vehicle accidents, including those involving child fatalities.

Additionally, the Alaska Supreme Court has cited the Iowa Supreme Court case of *Brown* with approval. *Kelly*. In *Brown*, it was held a convenience store clerk had experienced unusual strain as a result of a robbery even though other employee's did not experience similar stress. The facts here are distinguishable from *Brown*. While it is generally known that convenience stores are susceptible to robbery, experiencing a robbery is not within the expected duties of a convenience store clerk. However, Captain Barrick's testimony makes clear, being an initial responder to motor vehicle accidents involving fatalities and delivering death notices are squarely within the expected duties of a State Trooper, even if those duties are only sporadically experienced by some who hold

that job. The determination does not rest on the frequency of an event, but rather the character and quality of the event. *Kelly*.

Here, the character and quality of the event was not extraordinary and unusual compared to other Alaska State Troopers. One does not need to solely rely on Captain Barrick's testimony to arrive at this conclusion. As he pointed out, the duties of a State Trooper are reasonably known, even to Academy recruits. In fact, administrative notice is taken that State Troopers respond to fatal motor vehicle accidents and deliver death notices. As Employer contends, "it's part of their job." Since Employee's work stress was not extraordinary and unusual, he has not suffered a compensable mental injury and his claim will be denied in its entirety. AS 23.30.395(17); *Kelly*.

5) Is Employee entitled to medical and transportation benefits?

The law provides for payment of medical and related transportation benefits arising from a compensable injury. AS 23.30.010; AS 23.30.095; 8 AAC 45.084. However, since Employee has not sustained a compensable mental injury, his claim for these benefits will be denied. *Id*.; AS 23.30.395(17); *Kelly*.

6) Is Employee entitled to PPI?

The law provides for payment of PPI resulting from a compensable injury. AS 23.30.010; AS 23.30.190. However, since Employee has not sustained a compensable mental injury, his claim for PPI will be denied. *Id*.; AS 23.30.395(17); *Kelly*.

7) Is Employee entitled to PTD?

The law provides for payment of PTD arising from a compensable injury. AS 23.30.010; AS 23.30.190. "Disability" means an inability to earn wages because of injury. AS 23.30.395(10). Since Employee has not sustained a compensable mental injury, and since he is not disabled by definition, his claim for PPI will be denied. *Id*.; AS 23.30.395(17); *Kelly*.

8) Is Employee entitled to interest?

The law provides for interest to compensate for the time value of money in the event of late-paid compensation. AS 23.30.155(p). However, since Employee did not suffer a compensable mental injury, no compensation is owed and Employee's claim for interest will be denied. *Id.*; AS 23.30.395(17); *Kelly*.

9) Is Employee entitled to penalty?

The law provides for penalty on compensation not timely paid. AS 23.30.155(e). However, since Employee did not suffer a compensable mental injury, no compensation is owed and Employee's claim for penalty will be denied. *Id.*; AS 23.30.395(17); *Kelly*.

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

The law provides for an award of reasonable attorney's fees and costs upon successful prosecution of a claim. AS 23.30.145(b). However, since Employee's claims for compensation will be denied, he has not successfully prosecuted his claim and his claim for attorney's fees and costs will be denied. *Id.*

CONCLUSIONS OF LAW

1) Evidence of Employee's diabetes will not be considered in his PTD determination.
2) Dr. Winn's June 12, 2012 report may be considered.
3) Employee's claimed period of TTD is time-barred by AS 23.30.105(a).
4) Employee did not suffer a compensable mental injury.
5) Employee is not entitled to medical and transportation benefits.
6) Employee is not entitled to PPI.
7) Employee is not entitled to PTD.
8) Employee is not entitled to interest.
9) Employee is not entitled to penalty.

10) Employee is not entitled to attorney's fees and costs.

ORDER

Employee's claim is denied and dismissed.

Dated in Fairbanks, Alaska on November 26, 2013.

ALASKA WORKERS' COMPENSATION BOARD

/s/______________________________
Krista Lord, Member

/s/______________________________
Zeb Woodman, Member

ROBERT VOLLMER, DESIGNATED CHAIR, DISSENTING

The dissent concurs with the majority on the three additional issues raised by the parties at hearing: evidence of Employee's diabetes may not be considered, Dr. Winn's report will be included, and Employee's TTD claim is barred by §105(a). However, I respectfully dissent from the majority's analysis and conclusion regarding the compensability of Employee's injury, and would analyze the remaining issues as follows:

4) Did Employee suffer a compensable mental injury?

There is little doubt the events of June 6, 2004 profoundly affected Employee's life. Every medical provider since the accident has assessed posttraumatic stress disorder, including Dr. Morgan, Mr. Shields and Dr. Schamm, Dr. Martino, Dr. Battone, Dr. Bell, Dr. Peters, Dr. Detwiler, Dr. Glass and Dr. Early. Every provider who has expressed an opinion also opines the June 6, 2004 accident is the predominant cause of Employee's posttraumatic stress disorder, including Dr. Glass, the EME. However, as the majority points out, the threshold issue is whether Employee's mental stress was extraordinary and unusual under the statute.

The majority relies on *Kelly's* citation of *Brown* and Captain Barrick's testimony. Regarding *Brown*, and as a general proposition, the dissent does not dispute experiencing a robbery is not

within the expected duties of a convenience store clerk. However, *Brown* primarily stands for the proposition that the absence of mental stress on other employees does not necessarily preclude a compensable mental injury. Thus, merely because other State Troopers, like Captain Barrick, respond to fatal motor vehicles accidents and deliver death notices as part of their expected duties does not mean that another State Trooper, like Employee, cannot suffer a compensable mental injury while performing those same duties. The dissent would focus more on the unique circumstances of the June 6, 2004 accident, like in *Kelly*, where it was held a posttraumatic stress disorder claim by a prison guard was not precluded on the basis other prison guards had also experienced death threats.

The Alaska Supreme Court distinguished the death threat in *Kelly* from the death threats of other prison guards by pointing out the guard in that case was alone and unarmed, and the prisoner had already been convicted of murder, possessed a sharpened pencil, etc. *Id.* at 301-02. So, when the Court stated the focus of the inquiry should be on the "character and quality" of the event, it is referring to the surrounding circumstances that may be unique to a particular event. *Id.* at 301. The circumstances here involved a ten year-old boy who was violently ejected from, and crushed by, a motor vehicle. The boy lay trapped under the vehicle. Employee attempted to do what he could under the circumstances. He tried to free the child victim by using a tree branch as a lever. The branch broke. Ultimately, Employee's efforts were unsuccessful and the child was pronounced dead at the scene. Yet, Employee's duty was not yet done. First, he delivered a death notice to the mother, who was driving the vehicle, and then again later, to the boy's father, who blamed himself for driving too fast in the lead vehicle.

In *Kelly*, the Court stated unusual and serious circumstances should be considered. *Id.* at 302. Here, Captain Barrick acknowledged all death circumstances and motor vehicle accidents are different and these events affect each State Trooper differently. He testified some State Troopers experience more death while on the job, others encounter less. Although they are trained in the use of firearms, some State Troopers never fire their firearms. Some State Troopers never deliver a death notice. Here, the circumstances were unique to this particular event which, in turn, qualifies them as "unusual" under the statute. June 6, 2004 was not just another day at the office for

Employee, and neither would it have been for Captain Barrick or any other State Trooper. Finally, the seriousness of the event is self-evident.

Just as *Kelly* held the statute was not intended to prevent claims for posttraumatic stress disorder, neither was the statute meant to prohibit posttraumatic stress disorder claims by State Troopers or any other class of employees based on their expected job duties. *Kelly* cited examples to illustrate the legislative intent with respect to the extraordinary and unusual standard, including a hypothetical iron worker and an air traffic controller. *Id.* at 301. Iron workers are expected to work on high structures. As Employer states, "it is part of their job." So is the accompanying risk of falling to their death. Yet, the legislature contemplated the compensability of mental stress resulting from a nearly fatal fall even though the risk of such a fall is inherent in the expected job duties of an iron worker. The same logic applies to air traffic controllers and State Troopers. State Troopers are expected to respond to motor vehicles accidents and, in so doing, there is a possibility the accident will involve a child fatality and delivering death notices to the parents. The dissent thinks mental stress resulting from exposure to such an accident can be compensable even though responding to motor vehicle accidents is within the expected job duties of a State Trooper. To bar mental stress claims merely because they arise during the performance on an employee's expected duties would be to virtually bar mental stress claims altogether. *Kelly* make's clear, such was not the legislative intent. The dissent would find Employee's exposure to the June 6, 2004 accident did subject him to extraordinary and unusual stress and would also find that stress was the predominant cause of his mental injury.

5) Is Employee entitled to medical and transportation benefits?

Having satisfied the test for mental injury without the benefit of the presumption of compensability, the issue now becomes Employee's entitlement to medical and transportation benefits. This is a factual dispute to which the presumption applies. *Carter*; *Sokolowski*. Employee raises the presumption with his own testimony as well as the reports of Dr. Morgan, Mr. Shields, Dr. Martino, Dr. Battone, Dr. Bell, Dr. Peters, Dr. Detwiler, and Dr. Early, which relate Employee's posttraumatic stress disorder to the June 6, 2004 accident. Without regard to credibility, Employer rebuts the presumption with Dr. Glass's report, which eliminates the June 6, 2004 accident and Employee's posttraumatic stress disorder as the cause of his current symptoms

and need for treatment. Instead, Dr. Glass attributes Employee's need for counselling to his worries about the future. Employee must now prove by a preponderance of the evidence the June 6, 2004 accident is the predominant cause of his need for medical treatment.

Employee contends Dr. Glass opines Employee "is leading a bucolic existence in the woods of Tok out of choice, that he suffers from a somatoform disorder, and that all that needs to happen is for him to stop drinking, lose weight and buck up." (Employee's post-hearing brief at 5). While Employee presents a rather crass characterization of Dr. Glass's opinions, he is essentially correct. Dr. Glass diagnosed posttraumatic stress disorder and opined the June 6, 2004 accident was the predominant cause of that condition; however, he also believed that condition resolved in 2005 and has been in remission ever since. It is Dr. Glass's opinion that Employee does not currently suffer from any specific psychiatric condition but merely presents "symptomology" arising from his worries about finances and the future, for which Dr. Glass recommended an exercise program, alcohol abstention and counselling.

However, Dr. Glass's opinions stand alone in the medical record. He ignores Employee's many years of well-documented history and symptoms, both reported and observed, by a multitude of providers, and which have remained consistent throughout the medical record. Dr. Glass's opinions also ignore some of his own findings. For example, his own MMPI results were "markedly abnormal," yet he attributes those results to Employee having a mere "moderate" concern over finances. It is believed Dr. Glass's opinions also fail to explain Employee's presentation at hearing, which was decidedly distinct and unusual as set forth above. Even based a lay-person's observations, Employee appeared to be affected by something infinitely more significant than a moderate concern over finances. Finally, Dr. Glass's opinions are also suspect due to the dramatic differences between his GAF score of 80-85 and the scores of every other provider, including Dr. Martino (40-45), Dr. Battone (35-40), Dr. Bell (40), Dr. Peter (45-55). Even accounting for the passage of time, Dr. Early' score of 50 demonstrates Dr. Glass's to be a suspect outlier.

On the other hand, Dr. Early' report is notable in a number of respects. In the clinical interview section of his report, Dr. Early thoroughly reports Employee's description of his illness, which

contains comprehensive details when compared to other medical reports in the record, including Dr. Glass's. As mentioned above, these details are also extremely consistent with the other numerous provider reports in this case, some dating back eight years, and includes: Employee's feelings of helplessness and overwhelming emotion, vivid flashbacks and nightmares, driving and location avoidance, withdrawal from meaningful activities, sleep disturbance, irritability, anger reactions, problems concentrating, hyper-vigilance and startle reactions. Furthermore, these details are also consistent with Employee's and Mrs. Weed's credible testimony regarding these symptoms. Meanwhile, Dr. Glass opined Employee no longer suffers from any of these symptoms. Dr. Early commented on the importance and inadequacy of early treatment in this case, which seems apparent, even to the lay person. Dr. Glass did not comment on prior treatment, even when Employer specifically asked him to do so. Dr. Early considered the effects of living remotely in Tok upon Employee's condition, Dr. Glass did not. Rather than just mentioning other possible causes of Employee's condition, such as Employee's marriage to his former wife, as Dr. Glass did, Dr. Early thoroughly explained the role other possible causes played in the development of Employee's condition.

Dr. Early thought Employee's anxiety was the primary symptom complex in the initial phase of his posttraumatic stress disorder, but subsequent events, such as the marriage to his ex-wife, also contributed. He stated the June 6, 2004 accident did not aggravate, accelerate or combine with any pre-existing mental health problems to cause Employee's conditions but added Employee's accumulation of experiences as a State Trooper was a pre-disposing factor. He definitively rules out other causes: "There is no alternate cause for the PTSD symptoms described following the June 6, 2004 incident." Finally, although Dr. Early' report contains a tone of advocacy, *i.e.* "[i]t is unfortunate his claim was never accepted," under these circumstances, his report is nevertheless afforded great weight.

Dr. Early thinks Employee's condition is chronic and stated Employee will continue to have varying levels of symptoms over time. Although Dr. Early believes Employee cannot be cured at this point, he emphasized Employee remains vulnerable to relapse and opined Employee needs ongoing treatment to diminish his symptoms and to develop his coping skills in order to prevent

a major relapse and to maintain a productive lifestyle. Based on Dr. Early' recommendations, the dissent would award medical and related transportations costs. AS 23.30.010; AS 23.30.095.

6) Is Employee entitled to PPI?

Dr. Early assessed a 15 percent whole person PPI. Based on the analysis set forth above, the dissent would award 15 percent PPI. AS 23.30.010; AS 23.30.190.

7) Is Employee entitled to PTD?

Employee raises the presumption with his testimony, which relates his current difficulties with driving, being in public, etc. to the June 6, 2004 accident. Employer rebuts the presumption with Dr. Glass's report, which found no psychiatric work restrictions. Once an employer overcomes the presumption of compensability, an employee is required to prove his loss of earnings was due to a work-related injury and resultant disability, not to a voluntary retirement. *Strong*. In the instant case, it remains unexplained why Employee left his employment at NANA. Additionally, Employee also acknowledged on cross-examination he has not really tried to find work and he also stated he is not interested in being trained on computers.

A claimant is not entitled to compensation when he voluntarily removes himself from the labor market. *Vetter*. Even though Employee and Mrs. Weed might feel Employee is impaired such that he cannot earn wages, the physicians disagree. Even, Dr. Early indicated Employee could, with assistance, develop a "meaningful, alternative career." Employee cannot demonstrate by a preponderance of the evidence he is permanently and totally disabled and, the dissent would not award PTD. *Id.*; *Strong*; AS 23.30.010. It is incidentally noted, however, Dr. Early' report makes clear Employee may suffer future periods of temporary disability as his chronic condition waxes and wanes.

8) Is Employee entitled to interest?

Based on the analysis set forth above for medical and transportation costs, the dissent would award interest on these benefits. AS 23.30.010; AS 23.30.155.

9) Is Employee entitled to penalty?

Issues for hearing were narrowed at the January 14, 2013 prehearing conference and Employee's claim seeking a finding of unfair or frivolous controversion was omitted. In this case, Employer filed both pre-claim and post-claim controversions. A valid controversion protects an employer from penalty. *Harp*. Since Employee no longer challenges the sufficiency of Employer's controversions, it is unknown on what basis he seeks penalty. The dissent would therefore deny an award of penalty. *Id.*; AS 23.30.155.

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

Employee seeks an award of attorney fees and costs totaling $36,352.93. The statute provides for an award of reasonable fees upon the successful prosecution of the claim. AS 23.30.145(b). In determining fees, the nature, length and complexity of the services performed will be considered, as well as the amount of resulting benefits to beneficiaries. *Bignell*; 8 AAC 45.180(d)(2). Costs may be awarded relating to issues prevailed upon at hearing. 8 AAC 45.180(f).

Employee presented a mental stress claim. As discussed above, mental stress claims involve a heightened legal standard and can be difficult to prove. The contingency nature of workers' compensation claims must also be considered. *Bignell*. Additionally, Employee's medical history is substantial. On the other hand, the parties only participated in four prehearing conferences and this case involved relatively little litigation in advance of hearing.

Under the dissent's analysis, Employee would have prevailed on medical and transportation costs, PPI and interest. However, he would have remained unsuccessful on his claims for TTD, PTD and penalty. While an award of medical costs and PPI would certainly constitute valuable benefits, potentially the most significant benefit claimed was PTD. Additionally, Employee's claim for nearly two-years TTD can hardly be characterized as insignificant, and neither can his claim for a 25 percent penalty on all benefits awarded. In consideration of the factors set forth above, the dissent would award Employee one-half his claimed fees and costs, AS 23.30.145(b); 8 AAC 45.180.

/s/______________________________________
Robert Vollmer, Designated Chair, dissenting

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 the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of RANDY A. WEED employee / claimant v. STATE OF ALASKA, DEPT. OF PUBLIC SAFETY, self-insured employer / defendant; Case No. 200416447; dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, and served upon the parties this 26th day of November, 2013.

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Nicole Hansen, Office Assistant II