ALASKA WORKERS' COMPENSATION BOARD

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

PAUL D. PIETRO, Employee, Applicant, v. UNOCAL CORPORATION, Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 199530232 AWCB Decision No. 13-0156 Filed with AWCB Anchorage, Alaska on December 3, 2013

Unocal Corporation's (Employer) September 25, 2013 petition for recusal or disqualification of the hearing officer and Paul Pietro's (Employee) October 11, 2006 claim for benefits were heard on October 2, 2013, in Anchorage, Alaska, a date selected on August 21, 2013. Attorney Michael Jensen appeared and represented Employee, who appeared and testified. Attorney Richard Wagg appeared and represented Employer. Jeanette Pietro also appeared and testified for Employee. The record closed when the panel met to deliberate on November 19, 2013.

Employer's September 25, 2013 petition objected to the hearing officer based upon his prior representation of Edward Barrington, D.C., a person listed on Employee's witness list. After expressing his impartiality, the hearing officer declined to answer Employer's questions or to recuse himself. The remaining panel members deliberated and issued an oral order denying Employer's petition to disqualify the hearing officer. Employer then objected to Dr. Barrington's report and testimony, arguing he was not a valid "change" of physician. An oral order held because Dr. Barrington was an unauthorized "expert witness," he could not testify and his report would not be considered for any purpose. This decision examines the oral orders and decides Employee's claim on its merits.

ISSUES

As a preliminary matter, when the designated chair refused to recuse himself as Employer requested. Employer contended it had a right to ask the designated chair questions concerning his prior relationship with Employee's potential witness Dr. Barrington, before the remaining panel members decided whether the chair should be disqualified.

Employee contended it was "highly improper" for a party to ask the hearing officer questions concerning his fairness and impartiality. Employee further contended Employer had no legal right to question the chair. The panel agreed and the chair declined to answer any questions.

1) **Was the hearing officer's refusal to answer Employer's questions correct?**

Employer also contended the designated chair's prior representation of Dr. Barrington when the chair was in private law practice created an "appearance of impropriety" as Dr. Barrington was a listed witness. It contended this required the chair's recusal or disqualification.

Employee contended the "appearance of impropriety" is not legally sufficient to require the designated chair's recusal and does not support the chair's disqualification. Furthermore, Employee contended the chair previously declined to rely upon Dr. Barrington's opinion in another case demonstrating the chair's impartiality and lack of bias vis-à-vis Dr. Barrington. The chair and panel agreed. The chair declined to recuse himself and the remaining panel members denied Employer's disqualification petition.

2) **Was the hearing officer's refusal to recuse himself and the panel's refusal to disqualify him correct?**

As another preliminary matter, Employer contended Dr. Barrington should not be allowed to testify and his report should not be considered because he was an "unlawful change of physician." It contended Dr. Barrington was not a valid "referral," "change," or "substitution" physician. Therefore, Employer contended the only thing Dr. Barrington could have been was an "expert witness," which is not authorized under the Act.

Employee initially expressed uncertainty as to Dr. Barrington's role. He contended Dr. Barrington might be a "referral" or a "change" physician. However, after the panel deliberated on Employer's request to disallow Dr. Barrington's report and testimony, but before the panel issued its oral ruling, Employee through counsel clarified he had sought names from his attorney for physicians to perform a permanent partial impairment (PPI) rating, and Dr. Barrington was one of the names his attorney provided. The panel agreed with Employer's position and precluded Dr. Barrington's participation.

3) Was the oral order precluding Dr. Barrington's testimony and report correct?

Employee contends he has been disabled because of his work-related peripheral neuropathy since he stopped working for Employer. He contends he is entitled to temporary total disability (TTD) from February 12, 2002, to the present and continuing, or ending on the medical stability date.

Employer contends if Employee has been disabled since February 12, 2002, his disability was caused by his non-work-related rheumatoid arthritis, not his work-related peripheral neuropathy or skin cancers. Therefore, it contends Employee is not entitled to TTD because he was already disabled and cannot be disabled twice for the same time period. Alternately, Employer contends Employee could have worked at a lighter duty position and was not totally disabled.

4) Is Employee entitled to TTD?

Alternately, Employee contends he is entitled to permanent total disability (PTD) from February 12, 2002, to the present and continuing. He contends, given his overall situation, a return to work would be "futile" and he seeks an order awarding PTD.

Employer contends if Employee has been disabled since February 12, 2002, his disability was caused by his non-work-related rheumatoid arthritis, not his work-related peripheral neuropathy. Therefore, it contends Employee is not entitled to PTD because he was already disabled and cannot be disabled twice for the same time period. Alternately, Employer contends Employee is capable of readily available, consistent, full-time employment and is thus not otherwise qualified for PTD.

5) Is Employee entitled to PTD?

Employee contends Employer is responsible for his medical care and treatment for peripheral neuropathy and skin cancer. He seeks an order so stating.

Employer contends it does not dispute its liability for Employee's medical bills for treatment for his peripheral neuropathy and skin cancers as established in *Pietro VII*. It contends it is processing and will pay Employee's bills pursuant to the Act and regulations.

6) Is Employee entitled to an order stating Employer is responsible to pay Employee's medical bills for peripheral neuropathy and skin cancer?

Employee contends he is entitled to statutory pre-judgment interest on all past benefits. He further contends pre-judgment interest attaches to his attorney's fees and costs.

Employer did not specifically address this contention at hearing. This decision assumes Employer admits liability for interest on Employee's past indemnity benefits, if any, but disagrees Employee is entitled to pre-judgment interest on his attorney's fees and costs.

7) Is Employee entitled to statutory pre-judgment interest, including pre-judgment interest on attorney's fees and costs?

Lastly, Employee contends he is entitled to actual attorney's fees and costs for prevailing on compensability of his peripheral neuropathy and skin cancers, and additional fees and costs for PPI benefits he obtained through his attorney's efforts. He contends his prior attorney's fees should be awarded at his current hourly rate. However, if Employee is awarded pre-judgment interest on his attorney's fees as requested above, he will not seek his prior fees at his current rate.

Employer concedes Employee is entitled to attorney's fees for prevailing on compensability issues. However, it contends Employee's requested fees are too high given his overall results. Employer further contends there is no justification for retroactively increasing Employee's past hourly rate to his current hourly rate.

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

SUMMARY OF DECISIONS

Pietro v. Unocal Corp., AWCB Decision No. 05-0287 (November 4, 2005) (*Pietro I*), held Employee's "peripheral neuropathy" was not work-related and denied Employee's request for medical care and disability. It did not consider whether or not Employee was "economically disabled" (*id.* at 26).

Pietro v. Unocal Corp., AWCB Decision No. 05-0317 (November 30, 2005) (*Pietro II*), denied Employee's request for reconsideration of *Pietro I*.

Following *Pietro II*, Employee appealed to the superior court. The court stayed the appeal to permit review of Employee's post-*Pietro II* petition for modification, which he filed based upon new evidence of "dermatological issues." The superior court eventually affirmed *Pietro I* and *II*.

Pietro v. Unocal Corp., AWCB Decision No. 07-0260 (August 27, 2007) (*Pietro III*), heard Employee's petition for modification of *Pietro I* and *Pietro II*, and his October 11, 2006 claim for benefits related to basal cell carcinoma and melanoma. *Pietro III* denied the modification petition but did not rule on the cancer claim (*Pietro III* at 22-23).

Pietro v. Unocal Corp., AWCB Decision No. 07-0300 (September 28, 2007) (*Pietro IV*), addressed Employee's petition for reconsideration, modification, or clarification of *Pietro III*. Employee contended *Pietro III* failed to rule on his cancer claim. *Pietro IV* granted Employee's petition and ordered oral argument.

Pietro v. Unocal Corp., AWCB Decision No. 08-0029 (February 22, 2008) (*Pietro V*), denied Employee's petition for reconsideration, modification, or clarification of *Pietro III* and denied Employee's cancer claim (*Pietro V* at 8).

Pietro v. Unocal Corp., 233 P.3d 604 (Alaska 2010), reversed and remanded *Pietro II* with directions for the fact-finders to consider and analyze lay evidence describing Employee's arsenic exposure. The court also directed the fact-finders to decide whether Employee's peripheral neuropathy began before his rheumatoid arthritis.

Pietro v. Unocal Corp., AWCB Decision No. 10-0199 (December 10, 2010) (*Pietro VI*), examined the scope of the Alaska Supreme Court's remand. *Pietro VI* ordered the matter on remand would be decided on the existing record, and directed the parties to appear for oral argument with briefs and appropriate attachments to support their positions from the existing record (*Pietro VI* at 9).

Pietro v. Unocal Corp., AWCB Decision No. 11-0044 (April 15, 2011) (*Pietro VII*), addressed only compensability of Employee's peripheral neuropathy, basal cell carcinoma and melanoma. *Pietro VII* held Employee's peripheral neuropathy, basal cell carcinoma and melanoma all arose out of and in the course of his employment with Employer and were compensable (*Pietro VII* at 57).

Employer appealed *Pietro VI* and *VII* to the Alaska Workers' Compensation Appeals Commission (commission). While the appeal was pending, *Pietro v. Unocal Corp.*, AWCB Decision No. 11-0132 (August 25, 2011) (*Pietro VIII*), held the panel had no jurisdiction to hear and decide Employee's claim because the case was on appeal (*Pietro VIII* at 6).

The commission reversed and remanded *Pietro VI* stating it erred by not allowing Employer to call witnesses and present additional evidence on remand from the Alaska Supreme Court. *Unocal Corp. v. Pietro*, AWCAC Decision No. 170 (September 26, 2012).

Employee petitioned the Alaska Supreme Court to review the commission's September 2012 decision. The court accepted review and summarily reversed the commission's decision and remanded so the commission could consider any remaining issues appealed from *Pietro VI* and *VII* (Order, Petition for Review, November 27, 2012).

Unocal v. Pietro, AWCAC Decision No. 178 (March 19, 2013) found substantial evidence supported *Pietro VII* and the commission affirmed (*id.* at 17). *Pietro VII* having established compensability of Employee's peripheral neuropathy, basal cell carcinoma and melanoma, this decision decides his claims for specific benefits on their merits.

FINDINGS OF FACT

The following facts and factual conclusions are incorporated from *Pietro I* and *VII* or otherwise established through the October 2013 hearing by a preponderance of the evidence:

1) On November 29, 1982, Employee began working for Employer and continued his employment through February 12, 2002 (Audiometric Questionnaire, February 24, 1989; Employee).

2) Employee worked seven days on, seven days off, in 12 hour shifts (Employee).

3) Employee was employed as a physical operator and later promoted to Unit Coordinator (*id.*).

4) In "the late 80's," Employee first noticed painful feet beginning primarily in his left foot, and soon thereafter, bilaterally. He began wearing shoe inserts in his work boots and the pain gradually got worse over the years. As an operator, Employee was standing or walking 65 percent of the work day; as a Unit Coordinator, he was standing or walking 50 percent of the time (*id.*).

5) In 1997, Employee was diagnosed with rheumatoid arthritis and his doctor noted his "feet burned at the end of day of prolonged standing." At hearing in 2005, Employee described the pain as a burning underneath his toes, but not at his heels (Pietro).

6) On March 8, 2001, Employee saw Catherine Harmon, M.D., at the Mayo Clinic in Arizona. Employee provided a history of arthritis beginning in September 1996. "He then developed migratory arthralgias in his hands and feet and subsequently arthritis." Employee advised Dr. Harmon he did well for about two and a half years except for some ongoing foot pain. "The patient states that about six months ago he had intensification of the burning and aching sensation in his feet followed by knees which would ache when standing or walking as well as hip involvement and then multiple areas would also be involved." During this time, Employee was working 12-hour work days and his arthritis got so bad he had to stop working. The report states:

> His most bothersome joints are his feet which burn and ache particularly with standing and walking, his right wrist which flared up a week ago after he hammered a nail, he has triggering of his right fourth finger, pain in his right shoulder, his knees, and his hips. He describes morning stiffness for about an hour but both he and his wife state that his feet are always painful and according to his wife she has noted in the last month that this is the first time where there is visible evidence that it has impaired his walking.

Dr. Harmon suggested Employee try "metatarsal bars" in an attempt to "alleviate one of his primary problems which is the burning aching foot pain with walking" (clinical documents, March 8, 2001).

7) On July 19, 2001, Leo Schlosstein, M.D., reported: "Feet prevent him from working. Climbing ladder walking floor." Employee planned to get orthopedic shoes (chart note, July 19, 2001).

8) On July 19, 2001, Employee saw Matt Heilala, D.P.M., for a foot evaluation. Employee complained of "severe pain ball of feet daily" while ambulatory and in the evenings, which had been "progressive over the last 1-3 years" (chart note, July 19, 2001). Dr. Heilala diagnosed plantar fasciitis, hammer toe, and rheumatoid arthritis (Foot Orthotic Devices Letter of Medical Necessity, July 19, 2001).

9) On July 23, 2001, Dr. Schlosstein returned Employee to work effective August 8, 2001, with no restrictions (chart note, July 23, 2001).

10) On August 29, 2001, Employee saw Michael Armstrong, M.D., for an internal medicine consultation. Among other impressions, Dr. Armstrong opined Employee had seropositive rheumatoid arthritis, improved with medication, with persistent metatarsalgia and "sensation of burning in the feet," which Dr. Armstrong questioned as "neurogenic." Notably, Employee had recently changed his medication to treat rheumatoid arthritis and Dr. Armstrong said his arthritis symptoms were much improved but Employee still had persistent metatarsalgia and a "sensation of burning feet (periodic)" (Armstrong report, August 29, 2001).

11) On February 12, 2002, Employee "retired" because of pain in his feet (Employee).

12) On February 22, 2002, Dr. Armstrong completed a return to work release form stating Employee had rheumatoid arthritis with onset approximately 1996, which had recently flared. It was not a work-related condition but had disabled Employee from February 20, 2002, to date "uncertain." In response to the question can "the patient return to a different or restricted job status" Dr. Armstrong answered by checking the "no" box and said "not @ this time" (Agrium Return To Work Release, February 22, 2002; *see also*, Employer's Hearing Brief, September 24, 2013, Exhibit B (Note: the parties may believe Dr. Armstrong's report is dated February 22, 2008; because the date is poorly written and the last digit resembles an "8"; however, Employee dated this form "2-22-02" and another copy of the same report has a nurse's notation in the "For Office Use Only" section, which states Employee's "Next appt." is March 26, 2002, supporting an inference Dr. Armstrong signed this report on February 22, 2002, not "2/22/08." Medical Records of: Paul Pietro, Numbered from 1 to 422, record number 000252; judgment and inferences from all the above)).

13) On March 27, 2002, Dr. Armstrong completed a claim form for Employee's long-term disability insurer Unum stating Employee was disabled and restricted significantly in his physical activities because of "rheumatoid arthritis." Dr. Armstrong opined Employee would "never" return to work. The report does not mention peripheral neuropathy and states Employee had "severe inflammation hands, knees, shoulders." The "no" box is checked for the question: "Is illness or injury work related?" In response to the question: "Has patient been unable to perform job during this illness?" referring to "rheumatoid arthritis," the "yes" box is checked and the disability date is from "2/20/02 → Forever." Lastly, Dr. Armstrong opined Employee could not return to a restricted job status (Agrium Return to Work Release, March 27, 2002).

14) On April 9, 2002, Employee saw Stacey Newsom, M.D., an occupational medicine specialist. Employee stated his symptoms and Dr. Newsom concluded his bilateral metatarsal phalangeal joints (joints essentially under the balls of the feet) and his right shoulder were most bothersome. Dr. Newsom wanted to rule out peripheral neuropathy. It is unlikely Employee would have used the words "metatarsal phalangeal joints" when giving his history to Dr. Newsom to identify his pain location because this is a specialized medical term (Newsom report, April 9, 2002; judgment, observations and inferences drawn from all the above).

15) On April 9, 2002, Employee also saw Timothy Takaro, M.D., in conjunction with Dr. Newsom. Employee told Dr. Takaro he had lost considerable work time between February 9, 2001 and August 1, 2001, with sick leave "due to his peripheral neuropathy." Dr. Takaro questioned the likelihood arsenic caused Employee's suspected peripheral neuropathy because his symptoms worsened after the main exposure had ceased. He recommended a "complete workup for peripheral neuropathy." It is not likely Employee used the phrase "peripheral neuropathy" when giving his history to Dr. Takaro, because this condition had not yet been diagnosed and it is a specialized medical term. It is more likely Dr. Takaro used this term as part of his differential diagnosis (Takaro report, April 9, 2002; experience, judgment, observations and inferences drawn from all the above).

16) On June 11, 2002, Dr. Heilala performed a quantitative neurological testing procedure, using a pressure specified sensory device on Employee's bilateral lower extremities. The historical basis for performing this procedure included:

> The patient presented greater than one year prior noting complaints of numbness, tingling, and other ill-defined paresthesias, bottom of both feet. Duration several

> years. Following consultation with rheumatology [it] was revealed inflammatory arthropathy contributing to the symptoms. Independent medical evaluation over the last several months has suggested neurological testing. PSSD exam was offered as a noninvasive means of assessing nerve function namely, A-beta fibers, which are quite consistent and more sensitive for subtle neuropathic conditions in the lower extremities than nerve conduction studies. He presents this date for evaluation.

Dr. Heilala found:

> Dramatic loss of one-point and two-point static sensation at both the medioplantar heel in the plantar great toe pulp. Branches of the tibial nerve consistent with either bilateral tarsal tunnel syndrome or L4, L5, and S1 disc level or nerve pathology. This can be additionally suggestive of peripheral neuropathy. Severe loss of two-point discrimination, such as found in both of these branches of the tibial nerve are consistent with axonal loss. . . . (report, June 11, 2002).

17) On July 30, 2002, Dr. Heilala wrote to the Division of Vocational Rehabilitation the following letter:

> To Whom It May Concern:
>
> I am writing this letter on behalf of Mr. Paul Pietro who is [a] long time patient of mine who suffers from rheumatoid arthritis and neuropathic pain associated with both feet. Exhaustive conservative care including alteration [of] shoe gear, activity, custom orthosis, medications with management of his inflammatory arthropathy has been with limited benefit for his foot pain.
>
> In regards to his functional capacity and potential work duties, he would be able to tolerate, I will defer specific responses to perhaps a physiatrist or someone who may be able to perform a physical capacity evaluation, as this is not a regular part of my practice. I do, however, feel that any activity or work description, which would require more than a seated or sedentary position would not be tolerated due to the progressive nature of his primary illness. I feel that we do have a reasonable chance of stabilizing his symptoms, although a cure as unlikely as it is directly related to his underlying metabolic disease status, which obviously to this date, there is no cure for. . . . (Dr. Heilala letter, July 30, 2002).

18) On August 1, 2002, Dr. Heilala became the first physician to diagnose "primary peripheral neuropathy," bilaterally. He suggested Dr. Armstrong try prescribing Neurontin to address Employee's foot complaints, which had been in existence prior to his current medication regime (Progress Note, August 1, 2002).

19) Prior to Dr. Heilala's August 1, 2002 opinion, Drs. Armstrong, Takaro, Newsom and Heilala had only considered peripheral neuropathy was a possibility (Armstrong report, August 29, 2001 (foot pain could be "neurogenic"); Takaro report, April 9, 2002 (needs "complete workup for peripheral neuropathy"); Newsom report, April 9, 2002 ("rule out peripheral neuropathy"); Heilala report, June 11, 2002 (symptoms and findings were "suggestive" of peripheral neuropathy).

20) On September 4, 2002, Dr. Armstrong recorded Employee's feet had been burning for "+6 yrs" (chart note, September 4, 2002).

21) On September 4, 2002, Dr. Armstrong objectively tested Employee's feet and determined he had peripheral neuropathy. After September 4, 2002, Dr. Armstrong had no objective evidence demonstrating Employee's peripheral neuropathy was worsening (Armstrong deposition, August 2005, at 24, 35).

22) By September 4, 2002, Employee's peripheral neuropathy was medically stable (Armstrong; experience, judgment, and inferences drawn from all the above).

23) No clear and convincing evidence rebuts the medical stability presumption (judgment, and inferences drawn from all the above).

24) On September 21, 2002, the Social Security Administration provided Employee a notice indicating he was disabled effective February 20, 2002. Employee's initial entitlement was $1,795.00 per month (Notice of Award, September 21, 2002).

25) On October 21, 2002, Tim Takaro, M.D., wrote Employee stating he had reviewed Employee's medical records. He noted Dr. Heilala's findings were "consistent with axonal loss," which "is consistent with arsenic poisoning" (letter, October 21, 2002).

26) On November 7, 2002, Mindy Julian with ACE USA sent a facsimile to the board advising an injury report filed with Employer's predecessor in interest was filed with the wrong entity and given a "current" though incorrect "doi," or "date of injury." Julian advised the board the injury report should have been filed with Employer, and the correct injury date was "1/4/95" (Fax Transmission, November 7, 2002).

27) Employee filed an injury report stating he was "exposed to chemicals" ending in 1995, and claimed "neuropathy of feet." The division gave this case a January 4, 1995 injury date (Report of Occupational Injury or Illness, October 29, 2002; observation).

28) On January 10, 2003, Employee filed a claim not requesting specific benefits, but disagreeing with Employer's controversion denying his rights to benefits for peripheral neuropathy (claim, January 8, 2003).

29) On March 20, 2003, Sandra Denton, M.D., stated Employee was seeking treatment for "severe neuropathy of both of his feet" (letter, March 20, 2003).

30) On April 29, 2003, Dr. Armstrong wrote Employee was under his care for treatment of rheumatoid arthritis "which began about 1996." Employee also had a history of neuropathy of the feet since "about 1991," which was "not considered related to rheumatoid arthritis" (letter, April 29, 2003).

31) On July 7, 2003, Employer's adjuster wrote to its employer's medical evaluator (EME) panelists giving background information preparatory to their evaluation. The adjuster noted Employee's symptoms first "began in 1995" with "burning in his feet." She related how in late 1996, Employee began having pain in the shoulder and different joints. She stated he was ultimately diagnosed with rheumatoid arthritis. The adjuster further noted though his arthritis was pretty well under control, Employee continued to have burning feet (letter, July 7, 2003).

32) On July 8, 2003, Employee returned to Harborview Medical Center for further evaluation. He brought with him additional information Dr. Takara had previously requested. Dr. Takaro concluded Employee's "peripheral neuropathy preceded his diagnosis of rheumatoid arthritis by over five years" (Takaro report, July 8, 2003).

33) On July 14, 2003, Employee attended an EME with Lynne Bell, M.D. Dr. Bell's report does not discuss medical stability or disability (EME report, July 14, 2003).

34) On July 14, 2003, Employee saw Gerald Peterson, D.P.M., as part of the EME. Dr. Peterson did not offer an opinion about medical stability or disability (EME report, July 14, 2003).

35) On July 14, 2003, Employee also saw Dejan Dordevich, M.D., as part of the EME panel. Dr. Dordevich's primary diagnosis was rheumatoid arthritis. Peripheral neuropathy, which he suspected was secondary to rheumatoid arthritis, was a secondary diagnosis. As of this examination, Employee had "no significant functional loss secondary to rheumatoid arthritis." His rheumatoid arthritis was "well-controlled" and had no "unusual features." Dr. Dordevich did not provide an opinion about medical stability or disability (EME report, July 14, 2003).

36) On July 15, 2003, Employee saw Brent Burton, M.D., as part of the EME panel. Dr. Burton opined there was no justification for restricting Employee's work activities and he could participate in at least light to medium duty work; Dr. Burton found insufficient impairment to preclude Employee from resuming his "usual work duties." He did not offer an opinion about medical stability (EME report, July 15, 2003).

37) On or about July 24, 2003, Employee through counsel filed a new claim for peripheral neuropathy and requested TTD from February 12, 2002, through continuing, PPI to be determined, medical and related transportation costs, interest, vocational rehabilitation benefits, and attorney's fees and costs (claim, July 24, 2003).

38) On August 15, 2003, Dr. Armstrong completed a form presumably for Employee's long-term disability insurer. He opined Employee could perform simple grasping and fine manipulation, but could not determine his ability for "medium" or "bimanual" dexterity. Employee could not perform power gripping and would probably not be able to perform a sedentary occupation because of "generalized joint pain & swelling" (Dr. Armstrong's response to Trisha Langer's letter, August 5, 2003).

39) On October 23, 2003, Employer controverted Employee's claim based upon Dr. Burton's report (Controversion Notice, October 16, 2003).

40) On November 5, 2003, Dr. Armstrong completed Employee's Unum long-term disability form. He listed Employee's primary diagnoses as rheumatoid arthritis, peripheral neuropathy and hemochromatosis. Employee's symptoms were described as "swollen joints" and pain, numbness and burning in his feet. The secondary condition "impairing patient's work capacity" was "peripheral neuropathy." Dr. Armstrong said Employee was not released to his normal occupation or to "any occupation." Dr. Armstrong opined: "the combination of sx [symptoms] 2° [secondary] to RA [rheumatoid arthritis] & peripheral neuropathy greatly limit capacity to work." Lastly, Dr. Armstrong limited Employee to six hours per day "sedentary activity," and stated his bilateral "feet neuropathy" limit his walking and standing to one half hour in a five to six hour day (UNUM Attending Physician Statement, November 5, 2003).

41) On November 18, 2003, Employee saw Lee Dellon, M.D., on referral from Dr. Denton. Employee provided a history of symptoms consistent with peripheral neuropathy since the "late 1980s" when he had burning in the top and bottom of both feet. The pain level was, at the time of Dr. Dellon's evaluation, approximately the same. Employee explained he went without a real

diagnosis as to the cause for his peripheral neuropathy and without anyone documenting it because he attributed his burning pain to working long hours in Employer's fertilizer plant. Dr. Dellon noted Employee has received conflicting information; for example, a diagnosis of mild, rheumatoid arthritis that did not develop until 1997. At the time of Dellon's evaluation, Employee had "mild if any evidence" of rheumatoid arthritis and "certainty no active disease." Employee's arthritis was "much more severe" when it first developed but was at the time of Dr. Dellon's examination "in relative remission." Dr. Dellon concluded:

> Accordingly, it is completely unacceptable to believe that his peripheral neuropathy could be related to rheumatoid arthritis. Rheumatoid arthritis affects peripheral nerves either by direct involvement of swollen tissues or by granulomas or by deformities of joints and he does not have any of those present at examination nor does he have a focal localizing signs of carpal tunnel syndrome, cubital tunnel syndrome, or tarsal tunnel syndrome when he tapped along areas of the peripheral nerves that are known to cross tight areas. Rheumatoid arthritis can give a vasculitis that makes the nerves susceptible to compression but, as indicated above, I do not detect that today. Accordingly, within a reasonable degree of medical certainty and probability, his neuropathy symptoms cannot be due to rheumatoid arthritis (Dellon report, November 18, 2003).

42) On April 1, 2004, Employee gave a deposition. He first attributed his foot pain to chemical exposure rather than to working on a concrete floor when doctors told him he had peripheral neuropathy in 2002. He was asked:

> Q. When -- well, first let me ask: Are the problems you're having with your feet disabling?
>
> A. No. I mean, I can walk. It's just I live with the pain and burning (Pietro deposition, April 1, 2004, at 42-43).

43) Employee's burning and aching in his feet started in the late 80s and never went away. It got worse over time, and as of Employee's 2004 deposition, the burning and aching had gotten to a certain point around 1997, stayed there, and never changed. Between 1997 and Employee's 2004 deposition, the pain remained the same. Employee has the pain every day, it never goes away and he has it while sitting, driving and walking. For example, walking around the mall makes his foot pain worse. As of his 2004 deposition, Employee believed he could do his "rounds" at work if he was not on pain medications. He was taking Darvocet. Employee began taking Darvocet in 2002 because he had a bad arthritis flareup. But as of his 2004 deposition, if

Employee's peripheral neuropathy pain increased he would take a Darvocet to relieve some of his painful sensations. As of 2004, Employee's daily activities were limited: He got up in the morning, had breakfast, sat around the house, went for afternoon coffee, came home, ate dinner, watched TV and went to bed (*id*. at 44-48).

44) In his 2004 deposition, Employee conceded from 1993 to 2002, he was working for Employer with "pretty much" the same foot pain he had in 2004, but his arthritis was a lot more severe in 2001 and 2002. By 2004, Employee conceded his arthritis was in "good control." Employee stated:

> Q. What caused you to leave work in February of 2002?
>
> A. Arthritis.
>
> Q. And is that what is prevented you from working?
>
> A. Well, the medication, actually. I'm not allowed to be around machinery taking medication.
>
> Q. And you're now taking the medication both for your arthritis and for your feet?
>
> A. Yes (*id*. at 49-50).
>
> . . .
>
> Q. If the pain in your feet were gone, would you be able to work?
>
> A. I feel I could, yes. If my arthritis didn't act up.
>
> Q. So it's possible that your arthritis would prevent you from returning to work regardless of the pain your feet?
>
> A. Probably so, yes.
>
> Q. And at least that's what Social Security has said, that you're disabled from the arthritis?
>
> A. Yes. Disabled from the arthritis.
>
> Q. Do you have any plans return to work?
>
> A. Not at this time. Not the way my feet feel. No (*id*. at 53).

45) On September 22, 2004, as part of a second independent medical evaluation (SIME) Employee saw Neal Birnbaum, M.D., a rheumatology expert. Dr. Birnbaum reviewed Employee's "very extensive medical records" and opined Employee had symptoms suggesting a peripheral neuropathy. Employee's rheumatoid arthritis was under reasonably good control with medications, but his feet still burned, sometimes awakening him at night. Dr. Birnbaum opined:

> If this patient has a peripheral neuropathy, I do not believe it should be attributed to the rheumatoid arthritis. Although rheumatoid arthritis on rare occasions can have neurologic involvement such as mononeuritis multiplex, that usually occurs only in the setting of severe active rheumatoid disease. In addition, this patient's foot symptoms predate the development of any joint complaints by quite a few years.
>
> I will defer any discussion as to the presence of the peripheral neuropathy or its causation to experts in the field of neurology or toxicology (Birnbaum, October 9, 2004).

46) On September 23, 2004, Employee saw SIME physician Jonathan Schleimer, M.D., who evaluated him for a peripheral neuropathy and performed nerve conduction studies. The study resulted in "mildly abnormal" findings of: 1) absent distal medial plantar sensory responses, and 2) mild prolongation of the distal sural and peroneal latencies bilaterally. Dr. Schleimer concluded these abnormal electrodiagnostic studies provided evidence for a "mild polyneuropathy with distal degeneration of sensory axons" (Schleimer, September 23, 2004).

47) Dr. Schleimer examined Employee and noted some hyperpigmentation over the anterior tibial region bilaterally. Sensory examination showed a mild "stocking" diminution of pinprick, soft touch and temperature sensation, sparing vibration, and proprioception. Dr. Schleimer opined the nerve conduction tests were consistent with a "small fiber sensory neuropathy." Dr. Schleimer diagnosed rheumatoid arthritis with multi-joint involvement, causation of which was deferred to rheumatology experts, and small fiber peripheral neuropathy likely related to his arthritis. Though Dr. Schleimer did not believe Employee's peripheral neuropathy was work related, he recommended Employee obtain additional treatment including pain medications such as Neurontin or amitriptyline. He suspected Employee's neuropathy would progress with time as most do, but did not otherwise given an opinion concerning medical stability. Dr. Schleimer opined Employee should be precluded from working around unprotected heights or elevations or

around dangerous machinery and could not have a Class A driver's license (Schleimer report, October 11, 2004, at 10).

48) On October 9, 2004, Dr. Birnbaum as part of the SIME opined Employee's rheumatoid arthritis appeared "under reasonably good control" with various medications (Birnbaum report, October 9, 2004, at 3).

49) On November 17, 2004, Dr. Armstrong opined, based on numerous medical reports, the "subjective report of Employee's onset of symptoms" consistent with peripheral neuropathy "seemed to begin in the late 80's to early 90's" and "well preceded" the "temporal onset of rheumatoid arthritis." Dr. Armstrong concluded: "I do not feel, from a medical viewpoint, that rheumatoid arthritis is the cause of his peripheral neuropathy" (Armstrong, November 17, 2004).

50) On December 22, 2004, SIME Dr. Schleimer opined he would expect Employee's neuropathy to worsen with time as nothing would reverse it (Schleimer, December 22, 2004).

51) On January 5, 2005, Dr. Birnbaum said the neuropathy preceded the development of Employee's rheumatoid arthritis (Birnbaum, January 5, 2005).

52) On June 29, 2005, it was Dr. Armstrong's considered medical opinion that Employee "remains," as Dr. Armstrong had previously stated on March 27, 2002, permanently totally disabled relative to his prior employment as a unit coordinator, with dominant symptoms of bilateral foot pain related to neuropathy with limited ability to stand and walk necessitating the use of at least twice daily pain medication (Armstrong, June 29, 2005).

53) On August 3, 2005, Dr. Armstrong gave a deposition. Dr. Armstrong opined Employee's rheumatoid arthritis was under good control with medication. However, Employee was also prescribed medication for pain, including Darvocet. Darvocet was unrelated to rheumatoid arthritis and was prescribed to address Employee's peripheral neuropathy in his feet. "Burning" is a peripheral neuropathy symptom. Dr. Armstrong conceded Employee complained to him for about six years of burning feet, but Dr. Armstrong did not know the cause and did not hear of a potential for arsenic exposure until September 2002. Dr. Armstrong did not have any basis to say Employee's peripheral neuropathy "was getting worse" but opined it has not improved and "has been an ongoing problem." As far as physical limitations, Dr. Armstrong opined:

> A. From a strict medical point of view, I would not say he could not stand for six or eight hours. I have to rely on what the patient says as far as discomfort that he experiences. . .

. . .

> And there is no way that I, or as far as I know, anyone else could sit and look at someone and say, 'Well, you can stand five hours, but you can't stand seven hours.' There is no way you can say that. I believe you have to rely somewhat on the voracity [sic] of the patient in the context of the medical picture.
>
> And in a situation where there are reported symptoms of burning in the feet and electrical studies . . . consistent and evidencing neuropathy, the patient says, 'You know, I'm good for an hour or two or three. But, you know, I don't know. Anything after an hour, I'm really uncomfortable, and I've got to get off my feet,' then I think one has to go with that (Armstrong deposition, August 3, 2005, 21, 24-25).

54) Dr. Armstrong confirmed the opinions set forth in his June 29, 2005 letter remained his opinions. Employee's pain medication also contributed to his disability because it made it difficult for him to focus and caused him to be "a little groggy." Employee is 100 percent disabled from a job requiring standing for an eight hour day. However, talking "about sitting at a desk," that "did not require 100% mental alertness," then "that would be something else" (*id*. at 29).

55) Employee's rheumatoid arthritis was under "good control." It did not disable him as of Dr. Armstrong's August 3, 2005 deposition, as an "active disease," but he was deconditioned. The "major contributing factor" for Employee's disability given his inability to stand and engage in "more mentally demanding occupations" affected by his pain medication was his peripheral neuropathy (*id*. at 31).

56) Dr. Armstrong confirmed opinions set forth in his November 2004 letter still remained his opinions. He tested Employee for objective evidence of peripheral neuropathy on September 4, 2002, and had not done objective testing since then (*id*. at 35).

57) Dr. Armstrong reviewed his March 2004 disability form he completed for Employee and conceded he said Employee was disabled as a result of rheumatoid arthritis and did not mention peripheral neuropathy. He explained:

> Q. In reading that form, it appears to me that you've indicated that he is forever disabled from his position as a unit coordinator as a result of his rheumatoid arthritis. Is that correct?
>
> A. Yes, that was my impression at the time.

Q. Has there been any change in that impression?
A. Well, the rheumatoid arthritis has improved, and I believe at this time, from the rheumatoid arthritis point of view, that I could not say he would be disabled forever.
. . .

Q. So is it fair to say that while his rheumatoid arthritis condition has been improved as a result of medication, you continue to restrict his employment activities because of it?

A. I would.

Q. And as I understand your testimony with Mr. Jensen, you would also restrict his activities now as result of the peripheral neuropathy?

A. Yes.
. . .

Q. At the time that you indicated in March of 2002 that he was disabled from being a unit coordinator and filled out this form, do I understand correctly that you were not doing that because of his peripheral neuropathy?

A. That's correct.
. . .

Q. And just in reference to your June 29, 2005 letter you indicate that you believe that he's totally and permanently disabled relative to his employment as a unit coordinator.

Do I understand you correctly to be saying, though, that he's not permanently and totally disabled from any employment?

A. Correct.

Q. So there may well be employment that he would be able to do even with the limitation on standing and walking?

A. Correct.

Q. And even with the imitation of taking pain medication as needed?

A. Correct, possibility (*id*. at 36-41).

58) On August 8, 2005, Dr. Dordevich gave a deposition. As he had stated in his written report, Dr. Dordevich opined Employee's sole problem was rheumatoid arthritis, which he

suspected caused the peripheral neuropathy. When Dr. Dordevich saw Employee in November 2003, he did not believe Employee was "physically particularly disabled" because he was able to walk and had good joint function. In his view, peripheral neuropathy is "garden variety" and literally hundreds of thousands are "running around with that kind of finding" usually because of diabetes and they are not disabled. In Dr. Dordevich's opinion, peripheral neuropathy is very mild and does not cause disability. Therefore, as of November 2003, Dr. Dordevich did not believe either rheumatoid arthritis or peripheral neuropathy would have restricted Employee from work in any way. Dr. Dordevich's deposition does not address medical stability (Dordevich deposition, August 8, 2005, at 51).

59) At hearing on September 1, 2005, Employee's spouse Jeanette Pietro testified credibly Employee began complaining about his feet burning in the late '80's and she would rub his feet to alleviate his symptoms. Both attributed his foot pain to working long hours and overtime. Employee's foot complaints gradually got worse and he described his pain as "like he was walking on blisters" (Jeanette Pietro).

60) At the September 1, 2005 hearing, Employee credibly testified he initially believed his burning feet were caused by being on his feet all day and walking around the plant for 12 hour shifts with significant overtime. He worked an average of 600 hours overtime per year and one year worked 1,000 hours overtime. In 1991, Employee had the burning sensation in his feet. He recalled the burning starting in the late 80's. It never went away. It stayed about the same until 2000 when it seemed to gradually get a little worse. In 1997, Employee was diagnosed with rheumatoid arthritis. He did not recall any arthritis symptoms in his ankle joints. Employee did not take pain medication for arthritis, but for the burning in his feet (Employee).

61) At the September 1, 2005 hearing, Dr. Burton opined even if Employee had peripheral neuropathy, it did not disable him from his work as a unit coordinator (Burton).

62) At the 2005 hearing, Dr. Burton conceded he had never been provided with a job description for Employee's job (*id.*).

63) On April 21, 2006, Employee was diagnosed with skin cancer, including basal cell carcinoma and melanoma (Pathology Report, April 21, 2006; *see also*, *Pietro*, 233 P.3d at 609).

64) On or about October 11, 2006, Employee filed another claim for benefits related to the skin cancers, and petitioned for modification of *Pietro I*, alleging a mistake of fact. The claim requested

undetermined TTD, PPI, medical and related transportation, interest and attorney's fees and costs (claim, October 11, 2006; *see also*, *Pietro*, 233 P.3d at 609).

65) On June 19, 2007, another hearing was held at which Dr. Burton testified for Employer, and Employee and Dr. Takaro testified for Employee. There was some disagreement about the hearing's scope, as Employee sought a decision on the skin cancer claim along with the *Pietro I* modification petition. Evidence on the skin cancer was allowed to the extent it addressed Employee's *Pietro I* modification petition (*Pietro*, 233 P.3d at 609).

66) At the June 19, 2007 hearing, Employee repeated much of his 2005 hearing testimony. Employee ultimately developed basal cell cancer on his ears, and melanoma on his shoulder. Employee reiterated he noticed the burning sensation in his feet prior to August 1991, in the "late 1980s." Employee clarified his March 18, 1991 questionnaire referred to "tingling, pins and needles sensations in his feet," as opposed to the other body parts listed in the question. The burning in Employee's feet continued up until the time of the 2007 hearing. Employee was diagnosed with rheumatoid arthritis in 1997 and cancer in 2006 (Employee).

67) At the June 19, 2007 hearing, Dr. Takaro testified as an internist, with a subspecialty in occupational, environmental, and toxicology medicine. The fact Employee's physicians did not record complaints consistent with peripheral neuropathy until 2000 would not surprise Dr. Takaro, because the condition's progressive nature would cause many people to put it off as nothing or attribute it to "standing around for 12-hour shifts," as did Employee. Once a person has the "pins and needles" sensation in his feet for several months, it is unlikely they will ever recover from the condition, because it is "established" and the axons cannot repair themselves beyond a certain point. Dr. Takaro's history obtained from Employee, taken April 9, 2002, included "relentless symptoms" beginning in 1993 (Takaro).

68) On December 12, 2007, Dr. Armstrong completed another disability questionnaire and stated Employee's "primary diagnosis" was "rheumatoid arthritis." He also stated Employee's physical findings included "painful feet" and as a secondary diagnosed condition impairing Employee's work capacity, "neuropathy." Dr. Armstrong stated a return to work was not a treatment plan focus because Employee suffered from a "chronic condition." Dr. Armstrong had not released Employee to his normal occupation or to another occupation and restricted him physically to no squatting, climbing ladders or lifting more than 20 pounds (Claimant's Supplemental Statement, December 12, 2007).

69) Loretta Cortis has been a vocational reemployment specialist and on the board's list of reemployment providers for about 20 years. Employer asked her to review Employee's medical records and his deposition. She has never met Employee and has not interviewed him. However, given her record review and her experience, specialist Cortis opined Employee has the ability to be retrained to perform regularly available work in the labor market at the "sedentary" to "light" exertional level. "Sedentary" refers to "basically sitting," while "light" allows Employee to change positions and limits his lifting between 10 and 20 pounds frequently. Specialist Cortis identified basic jobs she opined Employee could perform with training, including administrative clerk and receptionist. She recommended adaptive equipment such as a proper workstation and probably Dragon Dictate, a voice-actuated word-processing system. These positions, however, would be entry-level at $10.00 to $12.00 an hour. Specialist Cortis reviewed the labor market in the Kenai area were Employee lives, and at the time of her deposition did not find anything available. Historically, these positions have been open in the Kenai Peninsula region. Throughout Alaska and the United States, these positions have very high annual openings. Specialist Cortis found three openings for administrative clerk and three for receptionist in Anchorage. Specialist Cortis anticipated about six months training involving computers to prepare Employee for one of these positions. Once trained, Employee could perform at least these two positions on a regular, full-time basis. These jobs would have been available in the labor market at all times since 2002. Specialist Cortis was confident she could put Employee back to work in one of these positions if he was interested (Telephonic Deposition of Loretta Cortis, September 23, 2013, at 4-11).

70) Specialist Cortis acknowledged Employee was 68 years old but she has retrained people up to age 70. She acknowledged the jobs she opined Employee could perform after being retrained would not meet his remunerative wage rate. Specialist Cortis' opinion about Employee's ability to work was based upon her understanding of his physical limitations, which she conceded are determined by a physician. She referenced a physician's 2007 release to work with no lifting over 20 pounds, and EME Dr. Burton's opinion Employee could return to work as support for her opinion he could work on a full-time basis. In reference to Dr. Armstrong's December 12, 2007 opinions, she acknowledged he said Employee could not return to his job at the time of injury and was not released to work in any other occupation. However, specialist Cortis thought the report was unclear as to whether the limitation was for part-time or full-time employment. She further acknowledged Dr. Armstrong in 2003 released Employee to sedentary activity but to less than an

eight hour day. She was unaware Dr. Armstrong had ever lifted this restriction or said Employee could work a full eight hour day. She conceded Dr. Armstrong also limited Employee's standing to half an hour in a five to six hour period per day. Specialist Cortis was aware of several reemployment programs specifically designed for senior citizens. She has had one person in their 60s return to work as an administrative clerk. In specialist Cortis' opinion, Dr. Armstrong's December 12, 2007 work limitations, including no walking, climbing ladders or lifting greater than 20 pounds, is consistent with both "sedentary" and "light" work duties. Based on Employee's physical limitations and his age, prior abilities, and medical restrictions, specialist Cortis is confident she could re-train him to return to work if requested (*id*. at 11-25).

71) Specialist Cortis did not testify Employee had been capable of working at any exertional level without retraining at any time since February 20, 2002 (observations).

72) Employee's peripheral neuropathy symptoms have gradually gotten worse over the last 10 years, with more severe burning pain. Burning pain in Employee's feet make him unable to function very well. In an eight hour day, Employee could walk for perhaps one and one-half hours. He agrees with Dr. Armstrong's 2003 opinion that his peripheral neuropathy would limit him to walking or standing for only one-half-hour in a five or six hour day. Employee will be 69 in December and does not believe he could work eight hours a day even doing a sit down job because of his peripheral neuropathy. He believes an attempt to return to work would be futile. Employee does not believe he could hold down an eight hour a day job. Employee's doctors have never released him to work more than five to six hours per day. He could not sit eight hours a day either because his peripheral neuropathy causes his feet to hurt even when seated (Employee).

73) Employee continues to receive treatment for his rheumatoid arthritis, which is under good control with only one medication. Employee rejected Employer's suggestion he frequently does not tell his physicians about his peripheral neuropathy. Every time he goes to a physician, wherever it might be, he always tells his physicians, even in emergency rooms, that he has peripheral neuropathy, skin cancer and rheumatoid arthritis. He cannot explain why his medical records do not always include peripheral neuropathy (*id*.).

74) In his opinion, if he only had rheumatoid arthritis and skin cancer, and did not have peripheral neuropathy, he could have returned to work doing something. The skin cancer and rheumatoid arthritis did not bother him enough to prevent him from working. However, in Employee's view, it

would be futile to try working given his peripheral neuropathy and the resultant burning pain in his feet (*id.*).

75) Employee's attending physician, Dr. Armstrong, has never released him to return any kind of full-time work since 2002. He sees Dr. Armstrong approximately three times per year. Each time he sees Dr. Armstrong, Employee tells him his arthritis is doing okay but his "feet are trashed" (*id.*).

76) When Employee left Employer's plant in 2002, he went out with two conditions: arthritis and peripheral neuropathy. In 2002 when he stopped working for Employer, however, Employee did not know he had peripheral neuropathy because it had not yet been diagnosed. In Employee's opinion, both the burning pain in his feet, later diagnosis as peripheral neuropathy, and rheumatoid arthritis both disabled him from working for Employer in 2002. He has tried numerous medications to address the peripheral neuropathy and nothing works very well; pain medication knocks the pain down about 10 to 15 percent in his view (*id.*).

77) Employee also has a red blood cell issue, and blood clotting problems in his intestines. He recently lost about three feet of his lower intestine because of these medical issues and he is concerned about his need for future medical care resulting from his arsenic exposures with Employer (*id.*).

78) Employee conceded he had aching and burning in his feet all through the 1990s. Over time it has "gotten a lot worse." Employee's rheumatoid arthritis was in his shoulders. In his April 2004 deposition, Employee conceded he said his arthritis is what caused him to leave work in 2002. However, he now says this statement was not correct because both arthritis and peripheral neuropathy were present in 2002, and disabled him. He did not know what was causing his burning pain in his feet in 2002. When Employee went on Social Security Disability it was because of his rheumatoid arthritis. He remained on disability until he turned 65 years of age when he went on Social Security retirement. Employee was also on long-term disability through Unum, which required him to sign up for Social Security Disability. Because Employee was receiving both Social Security Disability and long-term disability concurrently, Unum had to pay less than what it ordinarily would have paid him for long-term disability (*id.*).

79) Employee believes he was forced to retire because of burning in his feet. When he left employment in 2002, and went on disability, Employee knew his feet ached and burned but he did not know the condition was called peripheral neuropathy because it was not yet diagnosed as such.

Once Dr. Heilala suspected peripheral neuropathy in June 2002, Employee showed the records to Dr. Armstrong who agreed completely with the diagnosis (*id.*).

80) Employee has not tried to return to work at any time since he left Employer's work in 2002. When he left work and 2002, part of his disability was his burning in the feet and part of it was his rheumatoid arthritis (*id.*).

81) Employee graduated from high school but never attended college. He worked in Michigan for 17 years in an iron ore mine. In the mines, Employee drove trucks, operated a chain hoist and was an operating engineer. Employee came in Anchorage in 1982 and began working for Employer. This is Employee's complete adult work history (*id.*).

82) Employee continues to see Dr. Armstrong for rheumatoid arthritis and for peripheral neuropathy. He has a separate physician who takes care of his cancer issues (*id.*).

83) When Employee left work in February 2002, he left because he had diagnosed rheumatoid arthritis, which affected multiple joints including primarily his shoulder, and because he had undiagnosed peripheral neuropathy that affected his feet. Early on in his disability, Employee's rheumatoid arthritis was more severe than it was after medication brought it under good control. Both these medical conditions independently were disabling and prevented Employee from obtaining and keeping reasonable, consistent, readily available employment within his age, education, training, experience, and physical restrictions caused by these conditions, from February 20, 2002, and continuing. However, by November 5, 2003, Employee's rheumatoid arthritis had been medicated to good control, was no longer a primary disabling factor and his peripheral neuropathy became the main reason for his continued disability (experience, judgment, and inferences drawn from all the above; Armstrong).

84) At the October 2, 2013 hearing, the panel disallowed Dr. Barrington's report and testimony. Employee made the following offer of proof as to what Dr. Barrington's report and testimony would have revealed: Dr. Barrington talked to Employee at length, evaluated Employee and performed a PPI rating, supporting a 25 percent whole person PPI. Dr. Barrington reviewed all of Employee's medical records. He confirmed Employee's peripheral neuropathy and rheumatoid arthritis diagnoses. Employee has a blood clotting issue consistent with arsenic exposure and has undergone recent intestinal surgery as a result. Employee has balance issues related to his peripheral neuropathy, not his rheumatoid arthritis. He cannot lift or carry due to balance issues and needs frequent breaks even while sitting. As of June 20, 2012, Employee was not medically stable

because his skin cancer continued to cause him difficulties and needed additional treatment. His peripheral neuropathy has worsened over the last 10 years. Dr. Barrington opined Employee needed occasional physical therapy as well as other palliative treatment and must keep his feet warm. Employee's cancers need to be continually monitored and lesions removed as necessary (Employee's offer of proof, October 2, 2013).

85) In response to Employee's offer of proof, Employer objected to Dr. Barrington's testimony based on his lack of credentials to give opinions about the areas suggested in the offer of proof (Employer's hearing statements).

86) Jeanette Pietro has been Employee's wife for about 49 years. She followed Employee to Alaska in 1983, where Employee obtained employment with Employer. She recalls Employee coming home in the late 80s and early 90s and complaining about pain in his feet. Employee has continued to suffer from burning pain in his feet since he left work in 2002. Employee is "miserable" as evidenced by his "affect." He has tried everything doctors could think of to relieve the pain in his feet but nothing has really worked very well. At night, Employee cannot even stand the bed sheets to touch his toes and must position himself a certain way to reduce the painful symptoms. Employee struggles with his foot pain and it appears to have gotten worse over the years. Employee can walk and stand, but he suffers from foot pain and does not like to travel. Even driving to Anchorage, Employee complains bitterly about his feet hurting. Employee's wife acknowledges his pain is subjective but he appears miserable. She doubts he could work an eight hour day because he would be sitting "in misery." Employee seems "distant" and distracted because of his pain notwithstanding the pain medication he takes daily. Employee's wife was present when Dr. Dellon suggested foot surgery to relieve the symptoms. However, she later learned this was an experimental surgery and they were cautioned to avoid it. Furthermore, Employee's health insurance would not cover it. Employee has balance issues and he drops things and Employee's wife believes peripheral neuropathy may now be affecting his hands. By contrast, Employee seldom complains about his rheumatoid arthritis and only sometimes says his knuckles hurt after a weather change. In her view, "there's nothing really going on" with Employee's rheumatoid arthritis (Jeanette Pietro).

87) Employee's wife accompanies him to nearly all his medical appointments. Either Employee or she tells every physician they see that he has peripheral neuropathy resulting from arsenic exposure. Employee's wife thinks some physicians "back off" when he says this because this

information has something to do with an "employment injury." She also noted at times Employee becomes confused especially when filling out forms, and sometimes she will complete forms for him at doctors' offices. In her view, Employee is worse now in respect to his peripheral neuropathy symptoms. Employee's wife is not aware of any rheumatoid arthritis issues in Employee's lower extremities (*id.*).

88) Employee's wife agrees it would have been futile for Employee to attempt to return to work after 2002, based on her knowledge of his condition and symptoms (*id.*).

89) Based on Employee's foot pain and related symptoms caused by his work-related peripheral neuropathy, it would have been futile for Employee to attempt to return to work since February 12, 2002 (experience, judgment and inferences drawn from all the above).

90) There would be no "double recovery" in this case if the board finds in Employee's favor and awards TTD or PTD benefits, because Employee has a contractual agreement with Unum, which provides for reimbursement to Unum for long-term disability it paid, in accordance with the contract. However, though Employer has the right to an offset for Social Security Disability, the parties agreed, given the calculations in this case, there would be no Social Security offset for disability. Employee conceded there may be an offset for Employer for Employee's entitlement to Social Security retirement (Employee; experience, judgment and inferences drawn from all the above; parties' hearing arguments).

91) At hearing, Employer contended Employee became disabled because of rheumatoid arthritis only. It contended there is no medical evidence Employee has ever been released to return to work by virtue of his disability caused by rheumatoid arthritis. Consequently, Employer contends Employee cannot be entitled to disability for the same period of time for which he already receives disability for a non-work-related condition. Plus, Employer reasons Employee can have no "economic loss" because he was already disabled because of a non-work-related condition. In short, Employer contends timing is everything. If an injured worker is disabled because of a work-related condition, is receiving disability benefits, and subsequently develops a non-work related condition that could also be disabling, the injured worker continues to receive his disability through workers' compensation. However, if a worker first becomes disabled because of a non-work related condition, and subsequently develops disability from a work-related condition, he is not entitled to disability under workers' compensation because he has lost nothing (Employer's hearing arguments).

92) As a preliminary matter at hearing, Employer had petitioned for the designated chair's disqualification as the hearing officer in this case because Edward Barrington, D.C., was expected to be a witness, and because the chair previously represented Dr. Barrington when the chair was in private practice. Employer specifically stated it was not alleging an "actual conflict of interest" or "actual impropriety," but was alleging only "the appearance of impropriety." Employer argued the Hearing Officer Code of Conduct required the designated chair recuse himself or that he be disqualified by the remaining panel members (Employer's hearing arguments).

93) The designated chair declined to recuse himself for the following reasons: The chair had no personal, financial or other interest in this case or in its outcome, much less a substantial and material interest. He had never represented any party in this case -- Employee, Unocal or the insurance adjusting company. The chair had no personal or professional relationship with Dr. Barrington. Dr. Barrington had been in the chair's home office once in connection with the chair's representation of him, over five years ago. The chair has never done anything with Dr. Barrington or his family socially and had seen him only once since the chair last represented him five years ago; that was in connection with a fundraiser about two years ago where the chair happened to see him. The chair had been practicing law in Alaska since 1986 and in that time, to the best of his knowledge and recollection the chair represented Dr. Barrington in two cases. The chair reviewed hearings in which he was the designated chair since he became a hearing officer, not including compromise and release hearings, in which Dr. Barrington was a potential witness or had simply been involved as a treating doctor. In an unrelated matter a panel chaired by the hearing officer did not rely upon Dr. Barrington's PPI opinion. *Hanson v. Municipality of Anchorage*, AWCB Case No. 200808717. In another unrelated case, Dr. Barrington was a physician and another lawyer from attorney Wagg's law firm represented the employer did not object to his participation. The employer won on a preliminary issue in that case. In a third case, Dr. Barrington had provided a PPI rating and the decision did not really involve him or his rating directly. Ultimately, the employer prevailed in that case as well. Based upon prior decisions involving Dr. Barrington, the chair determined there was no historical basis for the employer's objection and no past evidence of impropriety or even the appearance of impropriety on the hearing officer's part. The designated chair stated he was certain he could be fair and impartial in this case notwithstanding the fact Dr. Barrington may be a witness. The chair also cited a

recent Alaska Supreme Court decision which said: "A hearing officer is generally not disqualified simply because he or she has previously represented one of the parties on an unrelated matter." The designated chair reasoned the instant matter presented a lower concern level because Dr. Barrington was only a witness, not a party to Employee's case. The chair also cited an old superior court decision which noted hearing officers enjoy a presumption they are unbiased and that only a "direct, usually personal and pecuniary, interest can operate to rebut the presumption." The chair determined as a practical matter, the board's work process would be significantly disrupted if he were disqualified from every matter in which Dr. Barrington was involved. The chair could not see any particular difference between Dr. Barrington testifying as a witness, giving a deposition or simply providing written reports. The designated chair explained if all it takes to remove him from a case is the fact he once represented Dr. Barrington five years ago in an unrelated matter, then he would not be able to hear any case in which Dr. Barrington was involved in any way, including even reviewing a compromise and release. Someone in the division's office would have to review compromise and releases and all files set for hearing to see if Dr. Barrington was involved in any way before a case could be assigned to the designated chair. The chair noted Dr. Barrington is involved in many cases and this process would be burdensome for the division. The designated chair concluded Employer had not provided any evidence and "certainly not clear and convincing evidence" to show: 1) he had a personal or financial interest that is substantial and material; or 2) he had shown actual bias or prejudgment in this case. Therefore, the chair did not recuse himself because Employer's petition did not meet the requirements for recusal or disqualification set out in 8 AAC 45.105(d) (hearing officer's hearing statement).

94) Employer wanted to ask the hearing officer questions concerning his prior relationship with Dr. Barrington while the designated chair was a private practice attorney representing injured workers before the board and on appeal. Employer contended it had a right to inquire and did not have to take the hearing officer's word and accept his subjective belief he could be fair and impartial at face value (Employer's hearing statement).

95) The panel deliberated privately on Employer's request to question the designated chair before the remaining panel members decided whether or not he should be disqualified as the hearing officer. The panel denied Employer's request to question the hearing officer for several reasons: Employer presented no statutes, regulations or case law supporting its argument it had a right to

question the hearing officer on a recusal petition. The panel was unaware of any precedent where this occurred. It was unclear what process would be followed and whether the hearing officer would be placed under oath before answering such questions, and by whom he would be placed under oath. The panel further determined such practice would also presumably lead to parties asking board members questions to determine whether or not their subjective beliefs they could be fair and impartial should be more closely scrutinized. As a result of this deliberation, an oral order issued denying Employer's request to ask the designated chair questions about his prior relationship with Dr. Barrington (oral order).

96) Following the above deliberation, the remaining two panel members deliberated privately and issued an oral order denying Employer's petition to disqualify the designated chair, finding there was no evidence supporting the petition (oral order).

97) Prior to 1988, it was commonplace for parties in workers' compensation cases to seek numerous opinions from serial doctors until the party found an opinion supporting their respective positions. This process was known as "doctor shopping" (experience; observations).

98) Consent by an employee or employer for a change in the employee's or employer's choice of physician under AS 23.30.095 is rarely given (*id.*).

99) Employee's counsel documented litigation costs totaling $26,549.16 for work done from April 16, 2003 through August 24, 2011, and $184.89 since August 30, 2011. Employer did not object to these costs (Affidavit of Attorney's Fees and Costs for Services Before the Alaska Workers' Compensation Board Incurred Through August 25, 2011 Interlocutory Decision and Order, July 15, 2013; Affidavit of Attorney's Fees and Costs for Services before the Alaska Workers' Compensation Board Incurred since August 25, 2011 Interlocutory Decision and Order, September 19, 2013).

100) Employee's counsel documented 260.36 hours attorney time and 186.50 hours paralegal time for services rendered from April 16, 2003 through August 24, 2011. He documented 21.30 hours attorney time and 20.80 hours paralegal time for services rendered from August 30, 2011 through the hearing and requested 3.5 hours attorney's time for services at the hearing. Employer did not object to the hours requested, but objected to the lack of affidavits from the paralegals (*id.*; Employer's hearing argument).

101) Employee provided no cost affidavits for his past or current paralegals and did not request that the record be left open to receive post-hearing affidavits (Employee's hearing arguments; observations).

102) Employer provided a table demonstrating Employee's attorney's fees and paralegal costs, which have been requested in this case and awarded in the past at the following rates; Employee did not object to these dates or figures:

Timeframe for Rates	Attorney Hourly Rate	Paralegal Hourly Rate
April 16, 2003 through June 30, 2005	$265.00	$105.00
July 1, 2005 through September 1, 2005	$285.00	$125.00
November 4, 2005 through June 13, 2007	$295.00	$125.00
July 12, 2007 through August 30, 2010	$350.00	$150.00
September 1, 2010 through present	$385.00	$165.00

Employer's Hearing Exhibit 1, October 2, 2013.

103) Employee's through counsel suggested 8 AAC 45.180 is "new" and does not apply retroactively to his paralegals' costs and said he could not obtain affidavits from some of his past paralegals because they no longer work for him. Furthermore, he argued the cost regulation has never been applied to Employee's counsel before and his counsel recently obtained a cost award for his paralegal's fees without having the paralegal file an affidavit (Employee's hearing arguments).

104) Employee has unpaid or un-reimbursed medical bills for peripheral neuropathy and skin cancer; Employer has not yet paid any work-related medical bills; Employer raised no specific objection to any bills Employee has submitted to date (Employee; Employer).

PRINCIPLES OF LAW

This case comes under substantive law in effect in 1995 when Employee was injured. The Act has changed in several respects since 1995. Therefore, some of the Act's current provisions do not apply to this case because they contain substantive changes, or procedural changes which are substantive in character. *Pan Alaska Trucking v. Crouch*, 773 P.2d 947 (Alaska 1989). *Crouch* explained:

> But in deciding whether a change is substantive in character, it will hardly suffice that a new rule has proved dispositive in a particular case: if ignored, nearly any procedural rule can play a role in the disposition of a case. Rather, a change in a procedural rule is substantive in character where the change makes it appear to one just starting down the road to vindication of his cause that the road has become more difficult to travel or the goal less to be desired. For example, a change in the burden of proof to be borne by a party, though clearly a change in procedure, may make it less likely from the outset that the party will arrive at a favorable resolution of his claim (*id*. at 949).

Therefore, this decision cites statutes and case law applicable to Employee's 1995 injury date.

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . .
>
> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). A finding reasonable persons would find employment was a cause of the employee's disability and impose liability is, "as are all subjective determinations, the most difficult to support." However, there is also no reason to suppose Board members who so find are either irrational or arbitrary. That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable" (*id*.).

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

> **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. . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician,

> the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
> . . .
>
> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the physician resides, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. . . .
>
> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute (*id*.). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Credibility is not examined at the first step. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the employee's evidence raises the presumption, it attaches to the claim and in the presumption analysis' second step the burden of production then shifts to the employer. Credibility is not examined at the second step either. *Id*. If the employer's evidence is sufficient to rebut the presumption, it drops out and in the analysis' third step the employee must prove his case by a preponderance of the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the presumption analysis' third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685, 691 (Alaska 2000).

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

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007). When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 at 11 (August 25, 2008).

> **AS 23.30.145. Attorney Fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered. . . .

Subsection 145(b) requires an employer to pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. *Harnish Group, Inc.*, 160 P.3d 149 (Alaska 2007). Attorney's fees in

workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990). Fees for time spent on minor issues will not be reduced if the employee prevails on the primary issues at hearing. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 at 14-16 (May 11, 2011).

> **AS 23.30.155. 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. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. . . .

The current AS 23.30.155 specifically provides for interest. The law in effect at the time Employee was injured in 1995 did not contain the interest section. *Wolfe v. Wolfe Dental Services*, AWCB Decision No. 10-0126 (July 22, 2010) (*Wolfe V*), addressed pre-judgment interest on attorney's fees and costs. In 2003, *Wolfe v. Wolfe Dental Services*, AWCB Decision No. 03-0280 (November 26, 2003) (*Wolf I*), found the insurer liable for all benefits due the employee after March 1, 1999. *Wolf I* ordered the employer to reimburse the employee's out-of-pocket medical expenses, PPI, and legal costs of $9,621.86, among other benefits. The employer appealed *Wolf I* to the superior court which stayed all benefits in December 2003. In November 2005, the superior court affirmed *Wolf I* in part, but remanded for further findings on one question. *Wolfe v. Wolfe Dental Services*, AWCB Decision No. 06-0319 (December 4, 2006) (*Wolf II*), answered this question in the employee's favor. The employer appealed *Wolf II* to superior court and requested an order keeping the 2003 stay in place. In 2007, the superior court granted the employer's motion continuing the stay as to past benefits, but denied it as to ongoing benefits. In 2007, the superior court affirmed *Wolf II*. The employer appealed to the Alaska Supreme Court and requested a stay, which the court granted in 2007 as to the lump sum

awarded in *Wolf I* but denied as to ongoing benefits. However, in September 2007, while the appeal was pending, the employer agreed to pay benefits for the employee's workers' compensation claim and waived the point on appeal regarding compensability. The Alaska Supreme Court appeal was eventually dismissed in May 2008, by stipulation.

Meanwhile, while *Wolf II* was still on appeal to the Alaska Supreme Court, the board heard other issues and the employee contended he was entitled to additional interest on past legal costs incurred for the 2003 hearing. The employer contended the employee's request for interest on legal costs from the "date incurred" rather than the "date awarded" would amount to a new rule, and argued there was no Board authority for this concept. In short, the employee sought "pre-" and "post-judgment" interest on his attorney's fees and costs incurred for the 2003 hearing. *Wolfe V* at 2-4. *Wolfe V*, in awarding the employee pre-judgment interest on his attorney's fees and costs, cited extensive case law regarding interest and stated the Alaska Supreme Court had consistently instructed the board to award interest to claimants for the time-value of money, as a matter of course. *Wolfe V* was never appealed and resolved through mediation.

The Alaska Supreme Court has addressed interest on many occasions. In the days before the Act expressly provided for interest, the law applicable to this case, the seminal case *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187 (Alaska 1984), provided the basic rationale for the universal application of interest in Alaska workers' compensation cases. *Rawls* said:

> This court recognizes the economic fact that money awarded for any reason is worth less the later it is received. *Farnsworth v. Steiner*, 638 P.2d 181, 184 (Alaska 1981). In *Farnsworth*, we specifically pointed out that the principal that judgment creditors are entitled to the time value of the compensation for their injuries has been recognized by this court in all civil cases. A system of resolving work-related injuries 'in the most efficient, most dignified, and most certain form,' *Gordon v. Burgess Construction Company*, 425 P.2d 602. 605 (Alaska 1967) (quoting 1 Larson, Workmen's Compensation Law §2.20, at 5 (1966)), must recognize the time value of money. . . .
>
> Allowing interest also complements our workers' compensation law. At present the only visible incentive to the employer to make compensation payments within fourteen days after it is due is the risk of a . . . penalty. However, for fourteen days there is no incentive to release the money owing the employee. In fact, it would serve the employer's or the carrier's best interest to hold the money as long

> as possible in order to continue collecting a favorable rate of return on it or in order to continue to have the use of the money without the cost of hiring it. By allowing interest the motivations to retain money owing the employee beyond the time it should have been paid over to the worker become less compelling.
>
> In addition, the prevailing modem view clearly supports the assessment of interest with respect to workers' compensation awards. A substantial majority of the jurisdictions have adopted the practice (citations omitted). The federal courts have likewise approved the practice of awarding interest under the analogous Federal Longshoremen's and Harbor Workers' Compensation Act. Today we join those states which recognize the workers' right to interest when compensation payments are not promptly and timely made (footnote omitted).

In a footnote, *Rawls* further stated:

> Our decision might well be different if the purpose of the penalty provision in AS 23.30.155(f) was in part to provide compensation for lost use of the money due to claimants. In such a situation an award of prejudgment interest coupled with the penalty might constitute an impermissible double recovery. However, we read AS 23.30.155(f) as providing an incentive to employers to make prompt payment of compensation owed to employees, and as a punishment to employers who do not do so, and not as a mechanism to provide compensation for lost use of money owed. This court has elsewhere distinguished between interest and penalty provisions, concluding that interest is 'non-pejorative' and thus may be awarded where a penalty is unwarranted. *See, North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534. 546 (Alaska 1978) (*Rawls*, 686 P.2d 1187 at 1192 n. 8).

In conclusion, *Rawls* said:

> We hold that a workers' compensation award, or any part thereof, shall accrue lawful interest, as allowed under AS 45.45.010, which provides a rate of interest . . . and no more on money after it is due, from the date it should have been paid (*Rawls*, 686 P.2d 1187 at 1192).

Wise Mechanical Contractors v. Bignell, 718 P.2d 971 (Alaska 1986) addressed the employee's request for pre-judgment interest on his attorney's fees for work performed on a successful appeal to the superior court in a workers' compensation claim. The superior court awarded Bignell's lawyer about double the hourly fees he documented for work done on a successful appeal. However, Bignell claimed the superior court erred in refusing to award pre-judgment interest on the fee awarded, which would reflect "the three year delay" occurring between the completion of the legal work and the court's order. Without analysis, *Bignell* said:

> We have never required the addition of pre-judgment interest to an award of attorney's fees. That is not to say that the fact of a long delay in receiving compensation might not be relevant in determining what amount to award. However, the fee awarded in the present case appears reasonable in light of the purpose of attorney's fees in workers' compensation cases even though the fact of delay was not taken into account. Thus, we do not believe that the court abused its discretion in refusing to award interest. The judgment is AFFIRMED (*id*. at 975).

In *Moretz v. O'Neill Investigations*, 783 P.2d 764 (Alaska 1989), the issue was whether a workers' compensation claimant was entitled to pre-judgment interest on medical expenses which the claimant's private medical insurer paid to health care providers on his behalf prior to a determination by the board that the work injury was compensable. In denying the interest claim on amounts Moretz's health care provider had paid, the board reasoned:

> [A]n award of interest is appropriate *only* when the employee has 'suffered the loss of money' during the period of disability. In this case, however, there is no evidence that Moretz suffered a loss of money when he had to repay Blue Cross for the medical benefits it provided. If the employee was not required to pay interest on the amount due Blue Cross and, at the same time, awarded interest on that amount due, he has been unjustly enriched at the defendant's expense. Quite naturally, such a situation cannot be tolerated. Accordingly, [Moretz's] claim must be denied (*id*. at 765; emphasis in original).

On appeal, *Moretz* determined this issue did not involve Board expertise, and applied the rule of law most persuasive in light of "precedent, reason, and policy." *Id*. at 765; *citing Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979). On appeal, Moretz argued *Alyeska Pipeline Service Co., Inc. v. Beadles,* 731 P.2d 572 (Alaska 1987) was dispositive. In *Beadles*, the employer said the pre-judgment interest awarded Beadles on a tort claim unjustly enriched him, because he had been receiving workers' compensation benefits for the same injury and thus arguably was not "deprived of the use of that money." *Id.* at 577. *Beadles* rejected this argument and sustained the inclusion of pre-judgment interest. *Id. Moretz* said in respect to this same argument: "We reject it again." *Moretz*, 783 P.2d at 765.

Beadles relied on *Webster v. M/V Moolchand, Sethia Liners, Ltd.,* 730 F.2d 1035 (5th Cir. 1984). In *Webster,* the court allowed the injured employee pre-judgment interest on the entire amount of his claim, which included private insurance carrier payments. *Id.* at 1040. The employer in

Webster objected on grounds the employee would not end up with the amount paid, the private carrier would, so if anyone should get interest on it, the private carrier should. *Webster* held:

> To the extent that [the employee] received periodic payments from his insurer after the date he filed his claim [the date on which prejudgment interest commenced], the insurer may in turn be entitled to the interest on what it paid. If some division of interest is equitable, its sharing lies between the [private] insurer and [the employee] (*Webster*, 730 F.2d at 1041).

Moretz also argued public policy dictated that workers' compensation carriers not have the use of eventual workers' compensation awards "without paying for the privilege." The compensation carrier contended this theory would unjustly enrich Moretz. The Alaska Supreme Court said: "Moretz's argument is persuasive." *Id*. at 765. *Moretz* held the policy expressed in *Rawls* provided the answer to the insurer's contention: "Money loses its value over time, regardless of why it is awarded, be it for tort or for workers' compensation. Indeed, if anyone has been unjustly enriched, it is [the insurer] by delaying payment of Moretz's medical benefits." *Id*. at 766. *See also*, *Merdes v. Underwood,* 742 P.2d 245, 251 (Alaska 1987). *Moretz* concluded pre-judgment interest, paid to the employee, is compensable in such circumstances, and reversed. In *Green v. Kake Tribal Corp*., 816 P.2d 1363 (Alaska 1991), an insurer appealed the board's refusal to give it pre-judgment interest on the value of its sizable overpayment to Green resulting from a Social Security offset, and the Alaska Supreme Court affirmed. The insurer cited *Rawls* in making a "what's good for the goose" argument, but *Green* noted the insurer's argument ignored "a crucial aspect of our decision in *Rawls* -- the right to interest only attaches once a payment is late," and emphasized *Rawl's* "*from the date it should have been paid*" language (*id*. at 1367-68; emphasis in original). In shedding minimal light on when a workers' compensation benefit "should have been paid," the court said since an insurer's right to recover an overpayment is controlled by statute, and the recovery right is limited to "each unpaid installment or installments of compensation due" the overpayment at issue "is not *due* to [the insurer] until such time as each installment is payable, just as a worker is not entitled to his compensation payments until such time as they are due." *Id*. at 1368.

In *Circle De Lumber v. Humphrey*, 130 P.3d 941 (Alaska 2005), the board granted the employee retroactive TTD at a higher rate and interest, among other things, and later awarded interest on

the first interest award when the employer failed to pay the first awarded interest. The employer appealed arguing the board erred by retroactively accruing interest from the date Humphrey was originally entitled to benefits. The employer contended the due date for payment of the awarded benefits was not when Humphrey was initially entitled to receive the benefits, but rather after the board's decision awarding the benefits. In other words, the employer contended any interest on late-paid benefits, *i.e.*, "pre-judgment interest" did not begin to accrue until after a Board order and after the post-order due date had passed. *Humphrey* rejected this argument and reviewed its past cases involving interest, including: *Childs v. Copper Valley Electric, Inc.*, 869 P.2d 1184, 1191 (Alaska 1993) ("We have recognized that awards of pre-judgment interest in workers' compensation cases 'are a way to recognize the time value of money, and they give 'a necessary incentive to employers to . . . release money due.'"); *Houston Contracting, Inc. v. Phillips*, 812 P.2d 598 (Alaska 1991) (Interest should be awarded from the date an employee was originally entitled to receive such benefits, and does not accrue only after the employer received notice of the employee's claim for increased benefits.); *Childs*, 869 P.2d at 1191 ("Similarly, we have rejected an employer's argument that pre-judgment interest could not be awarded on medical payments because 'medical benefits have no due date' until the board has made a specific order of payment.").

The employer in *Humphrey* tried to distinguish these cases arguing only the board had discretion to calculate benefits and the employer could not go outside the statutes to calculate an alternate compensation rate. *Humphrey* rejected this argument as well and said: "Although awards of interest are intended to encourage employers to make timely payments of compensation benefits, they are not imposed to punish employers; rather, their primary function is to fairly compensate an injured worker for the time value of money lost over the period of time in which he did not have access to money that was owed to him" (*Humphrey*, 130 P.3d at 951).

Croft v. Pan Alaska Trucking, Inc., 820 P.2d 1064 (Alaska 1991) dealt with an insurer's request to recover attorney's fees paid to an injured worker's lawyer following a victory at the board level. The matter was reversed on appeal and the injured worker no longer prevailed. *Croft* said:

> The remaining question is whether attorney's fees are 'compensation' within the meaning of AS 23.30.155(j). Croft equates attorney's fees to time loss benefits,

> medical payments, vocational rehabilitation, and costs, all of which are part of the compensation package. Therefore, he argues, attorney's fees should be considered 'compensation' and subject to the limited reimbursement procedures of AS 23.30.155(j). Alaska National contends that attorney's fees do not fall within the definition of 'compensation' because they are payable either 'in addition to the compensation awarded' or 'out of the compensation awarded.' AS 23.30.145. We conclude that compensation includes attorney's fees for purposes of AS 23.30.155(j).
>
> 'Compensation' is defined in the Act as 'the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter.' AS 23.30.265(8) [now renumbered AS 23.30.395(12)]. Alaska Statute 23.30.045(a) provides in part: 'An employer is liable for and shall secure the payment to employees of the compensation payable under [AS] 23.30.145. . . .' Alaska Statute 23.30.145 is the attorney's fees provision in the Act, thus it follows that attorney's fees are compensation in the context of employer liability. We conclude that the phrase 'payable to an employee' in AS 23.30.265(8) does not limit 'compensation' to payments made directly to the employee, but includes attorney's fees paid on behalf of the employee. . . . (*Id*. at 1067).

Other states have weighed in on the issue of pre-judgment interest on attorney's fees: *Spaulding v. Albertson's, Inc*., 610 So. 2d 721 (Fla. App. 1992) held interest on an attorney fee award on appeal in a workers' compensation case accrued as of the date the attorney fee award was made. In short, the claimant's lawyer was entitled to post- but not pre-judgment interest (*id*. at 724). In *Wells Fargo Armored Services v. Lee*, 692 So. 2d 284 (Fla. App. 1997), the court said: "We have been unable to find any legal basis for the award of pre-judgment interest on fees in workers' compensation cases before the amount of the fee has been established." The court reasoned the legislature intended to preclude the payment of attorney's fees until the amount was established by a final order (*id*. at 285). In *Johnson v. Walmart Stores, Inc*., 88 So. 2d 527 (La. App. 2012), the court refused to allow pre-judgment interest on attorney's fees because under Louisiana law, attorney's fees were not considered "compensation" (*id*. at 533). In *Guidry v. Booker Drilling Co. (Grace Offshore Co.)*, 901 F.2d 485 (5th Cir. 1990), a federal court held attorney's fees were not "compensation" under the Longshore & Harbor Workers' Compensation Act (LSHCA). Nevertheless, the court also held the LSHCA contained a requirement for interest "on any money judgment" and further held the LSHCA contained no prohibition against pre-judgment interest on attorney's fees. In approving the pre-judgment interest, *Guidry* reasoned a pre-judgment interest award would provide "an incentive for attorneys to represent longshoremen" (*id*. at 488).

> **AS 23.30.180. Permanent total disability**. (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. If a permanent partial disability award has been made before a permanent total disability determination, permanent total disability benefits must be reduced by the amount of the permanent partial disability award, adjusted for inflation, in a manner determined by the board. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
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> (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(p) does not, by itself, constitute permanent total disability.

In *J.B. Warrack Company v. Roan*, 418 P.2d 986, 988 (Alaska 1966), the Alaska Supreme Court described PTD and stated:

> For workmen's compensation purposes total disability does not necessarily mean a state of abject helplessness. It means the inability because of injuries to perform services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. The evidence here discloses that Roan is a carpenter but is unable physically to follow that trade. He is not qualified by education or experience to do other than odd jobs provided they are not physically taxing. As the Supreme Court of Nebraska has pointed out, the 'odd job' man is a nondescript in the labor market, with whom industry has little patience and rarely hires. Work, if appellee could find any that he could do, would most likely be casual and intermittent. In these circumstances we believe the Board was justified in finding that appellee was entitled to an award for permanent total disability under the Alaska Workmen's Compensation Act (footnotes omitted).

In *Shea v. Department of Labor and Industries*, 529 P.2d 1131 (Wash. App. 1974), relied upon by the Alaska Supreme Court in *Estate of Ensley*, discussed below, the court considered whether an employee with two, independent, totally disabling conditions, one work-related and the other not, was entitled to PTD. The defendant argued Shea was no longer entitled to benefits because several years prior to the time the department closed his claim, he was PTD as a result of disabilities entirely unrelated to his work injury. Shea argued he should not be denied PTD

benefits where the evidence established he is PTD as a result of his industrial injury simply because another totally unrelated condition also rendered him PTD "prior to the last closing of his industrial claim." *Shea*, 529 P.2d at 1133. The court agreed with Shea and remanded the case to determine whether or not he was PTD as a result of his industrial injury (*id.*). In rejecting the department's position that the non-work-related disability prevented a workers' compensation disability award, *Shea* relied upon the notion that the compensation law was designed to provide benefits "not only to workmen with no prior physical or mental impediments, but also to workmen who may be afflicted with preexisting physical or mental infirmities or disabilities" (*id.*). Secondly, *Shea* stated "the remedial and beneficial purposes of the act should be liberally construed in favor of workmen and beneficiaries" (*id.*).

Providence Washington v. Fish, 581 P.2d 680 (Alaska 1978) a *per curiam* decision affirmed the board's determination the employee was PTD because she had "a prior tendency to be hypertensive or hysterical or emotional" but "these characteristics did not cause her disability from work prior to injury" and since her "injury they have combined with the pain and restrictions caused by the injury to bring about continuing disability." The Alaska Supreme Court concluded:

> Thus, the Board could rely on evidence of Ms. Fish's psychological or emotional disorders or infirmities to find that, when combined with other factors such as her work-connected back injury, she was permanently and totally disabled (*id*. at 681).

Bailey v. Litwin Corp., 780 P.2d 1007, 1011 (Alaska 1989) addressed the question whether PTD benefits end at retirement:

> The permanent disability award constitutes a substitute remedy for the remedy which was lost when the Legislature took away the right to sue an employer for damages. If an applicant were denied a permanent disability award simply because he has retired, he would be deprived of his quid pro quo in that legislative bargain (citation omitted).
> . . .
>
> If permanent disability or death benefits become payable, they are not limited to the period of what would have been claimant's active working life. In other words, if a man becomes totally permanently disabled at age twenty-five, and is awarded benefits for life, they obviously do not stop when he is sixty-five, but

> extend on into the period of what probably would have been retirement. This being so, if a man is permanently and totally disabled at age sixty, it is not correct to say that his benefits should be based on the theory that his probable future loss of earnings was only five years of earnings. The right to have compensation benefits continue into retirement years is built into the very idea of workmen's compensation as a self-sufficient social insurance mechanism.

In *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996), a PTD case, the court explained:

> The Act defines 'disability' as 'incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.' AS 23.30.265(10) [now renumbered AS 23.30.395(16)]. We have held that 'total' disability means 'the inability because of injuries to perform services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.' *J.B. Warrack Co. v. Roan,* 418 P.2d 986, 988 (Alaska 1966). Under the 'odd-lot' doctrine, which we have adopted, 'total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.' *Olson v. AIC/Martin, J.V*., 818 P.2d 669, 674 (Alaska 1991), (quoting 2 Arthur Larson, *Workmen's Compensation,* §57.51, p. 10-53 (Desk Ed.1990)).
>
> The concept of total disability includes an education component. *See Roan, supra; Vetter v. Alaska Workmen's Compensation Bd.,* 524 P.2d 264, 266 (Alaska 1974) ("Factors to be considered in making [a finding that a person's earning capacity was decreased due to a work-related injury] include not only the extent of the injury, but also age, education, employment available in the area for persons with the capabilities in question, and intentions as to employment in the future."). Thus, a person's lack of education, as much as his physical injury, may be the 'handicap' preventing him from obtaining all but 'odd-lot' jobs. *See generally* 1C Arthur Larson, *Workmen's Compensation Law* §57.51(d), p. 10-336 (1994) ("A considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury was constricted by lack of mental capacity or education.").
>
> If a lack of education can be overcome through vocational rehabilitation, then a disability that was once 'total' may no longer be so. This is precisely what section .041 aims to do; its goal is to retrain and educate permanently impaired employees (footnote omitted) so that they can attain 'remunerative employability.' (Footnote omitted). *Id.* 'Reemployment benefits' available under section .041 include on-the-job training, vocational training, academic training, and self-employment. AS 23.30.041(i). Through the rehabilitation process established by section .041, a person suffering from a 'total' disability can gain the skills and education necessary to allow him or her to reenter the job market and attain 'remunerative employability.' As this analysis makes clear, a

> claim for PTD benefits is not incompatible with a request for reemployment benefits (*id*. at 1278-79).

In *Sulkosky v. Morrison Knudsen*, 919 P.2d 158 (Alaska 1996), the Alaska Supreme Court said: "To avoid paying permanent total disability benefits, an employer need show only that there is 'regularly and continuously available work in the area suited to the [employee's] capabilities,' *i.e*., that he is not an "odd lot" worker (*id*. at 166).

In *Carlson v. Doyon Universal Ogden Services*, 995 P.2d 224 (Alaska 2000), the injured worker appealed the board's denial of her PTD claim. On appeal, the employer argued the employee failed to provide medical evidence she was PTD. *Carlson* stated this argument "oversimplifies" the total disability concept because Alaska adopted the "odd lot doctrine" in defining what constitutes PTD. Under the odd lot analysis, a vocational reemployment expert's testimony demonstrated evidence of disability despite overwhelming medical evidence Carlson could perform "light duty" work. A competing vocational expert said a regular, stable labor market existed for people with Carlson's skills and capabilities. *Carlson* explained:

> To avoid paying PTD benefits, an employer must show that 'there is regularly and continuously available work in the area suited to the [employee's] capabilities, *i.e*., that [she] is not an 'odd lot' worker' (footnote omitted). The Board concluded that the three doctors' unanimous view that Carlson was not PTD and Jacobsen's testimony identifying continuous and suitable work sufficed to overcome the presumption. This evidence satisfies the 'comprehensive and reliable' requirement propounded in *Stephens* (footnote omitted). The Board considered Carlson's medical limitations and her competitiveness in the job market, specifically referring to the testimony of rehabilitation expert Jacobsen and her Anchorage area labor market survey (*id*. at 229).

Carlson also affirmed the board's reliance on testimony from a vocational reemployment expert who reviewed Carlson's claim file and a labor market survey. The expert identified job classifications suitable to the employee given her physical and educational limitations (*id*.).

In *Thurston v. Guys With Tools, Ltd*., 217 P.3d 824 (Alaska 2009), the employee: (1) had a preexisting condition; (2) suffered a work injury implicating the preexisting condition; and (3) suffered a subsequent unrelated medical condition independently rendering the employee disabled (*id*. at 825). The board found Thurston eligible for PTD benefits. The board first used a

three-step analysis to evaluate whether Thurston's condition remained compensable: It found Thurston had attached the presumption of compensability, the employer rebutted it, and Thurston had proven her claim by a preponderance of the evidence. The board concluded, based primarily on medical reports, that Thurston's condition continued to be compensable and Thurston's work for the employer "was a substantial factor in her resulting left knee disability." The decision did not explicitly say Thurston's knee disability was a substantial factor in her total disability but said she was entitled to PTD benefits if she proved "her work injury [was] a substantial factor in her resulting disability" and "the combination of the employee's work injury and her cancer render her entitled to PTD benefits." The board then found the combination of Thurston's knee disability and cancer rendered her totally disabled, and awarded her PTD benefits (*id*. at 826-27).

On appeal, the Alaska Workers' Compensation Appeals Commission held the board used the wrong legal test, and vacated the decision. The commission reasoned the board should not have combined the work-related and non-work-related symptoms to find the employee disabled and concluded the board should have determined whether or not the work-related knee injury alone would have rendered the employee disabled (*id*. at 827).

On appeal to the Alaska Supreme Court, the parties disagreed how to analyze a case where an employee who suffered a work-related injury is subsequently diagnosed with an unrelated condition. The employer argued the board incorrectly applied *Tolbert* and *Fish* to Thurston's case. It asserted both cases expressed a rule about preexisting conditions rather than subsequent illnesses, and argued *Estate of Ensley* controlled Thurston's case and precluded her claim (*id*. at 827). Relying on *Estate of Ensley* and *DeYonge*, Thurston argued the board correctly used the substantial factor test when it found she was permanently and totally disabled by a combination of her cancer and knee injury (*id*. at 828).

The court noted the board found Thurston's work injury "was a substantial factor in her resulting left knee disability" before determining "the combination of the employee's work-related knee injury and her cancer condition has rendered her permanently totally disabled." *Thurston* explained the different analyses used when a case involves "aggravation or acceleration of or combination with" a preexisting condition versus two independently disabling conditions. The

court further explained in the different context of a subsequent independent condition -- in this case Thurston's cancer -- the employee must show the work-related condition is a substantial factor in the overall disability. The court agreed an employer does not "take on unrelated diseases that find the employee after a work-related injury." But *Thurston* said the commission's decision was potentially ambiguous because it appeared to adopt the employer's incorrect position that the work injury must be analyzed "in isolation." *Thurston* reasoned taken to its logical end, this theory could result in application of the "but-for" test "we rejected in *Tolbert*" (footnote omitted). The court held the employee "does not need to show that but for her work injury she would not be disabled." To be eligible for TTD or PTD benefits the employee "needs to show that her work-related disability is a substantial factor in her total disability, without regard to whether her cancer could independently have caused the total disability" (footnote omitted). This test "does not require the Board to pretend that Thurston does not have cancer" (*id.* at 828).

Thurston further explained the employer is not liable for a subsequent, non-work-related condition, but remains liable for the work-related injury and disability, even though the subsequent, non-work-related illness may prolong the employee's disability. Citing *Estate of Ensley*, *Thurston* said "to deny coverage to an employee in such circumstances would 'create a windfall to employers simply because of the employee's misfortune in developing an independent medical condition'" (*Thurston*, 217 P.3d 824 at 829).

Yinger v. Arctic Slope/Wright Schuchart, AWCB Decision No. 91-0141 (May 10, 1991), addressed a case where an injured worker's doctor said he could only do limited work because of a right shoulder work injury and could not return to work as a millwright. He subsequently had more treatment and was approved for a trial work release as a carpenter. Thereafter, the employee worked briefly as a millwright. The employee also held two other short-term jobs; it is not clear from the decision if these were as a carpenter or as a millwright. He last worked in late summer 1986. In summer 1987, the employee saw his doctor for various health issues and nine months later, was diagnosed with prostate cancer, which had metastasized to, among other things, his right shoulder, subject of his work injury.

The employee concluded he was unable to perform all duties associated with his millwright and carpenter professions, and applied for disability retirement through his union. In May 1988, his doctor wrote a letter to the employee's retirement plan administrator in support of his disability retirement request. The letter read, in part, as follows:

> During the time . . . [from March 6, 1987 to November 30, 1984], Mr. Yinger was totally disabled for work as a carpenter. As a result of his injury, I felt that Mr. Yinger was able to do bench work but he would not be able to do routine carpentry work or any employment that required reaching or lifting above the level of a bench. I have not seen Mr. Yinger since 1984 and have no other information regarding his condition. I am inclined to determine that Mr. Yinger was permanently disabled from the carpentry industry in 1984 although I do think there are small specific jobs that he could do on a part-time or hobby basis as long as they did not require repeated lifting overhead.

His union application was granted and he received disability benefits, effective August 1987. The employer conceded the employee was disabled but argued it was not because of his work injury to his right shoulder. The employer presented evidence the union disability was paid because of the employee's chronic obstructive pulmonary disease, not his right shoulder injury.

Yinger analyzed the evidence and found the employee raised the presumption of compensability. The doctors agreed the employee had limited ability to work overhead. A co-worker and union business agents testified overhead work is regularly required and carpenter helpers normally are not dispatched to help journeyman carpenters. Although the employee's physician testified the employee was not substantially disabled if he was not required to work overhead, or had a carpenter's helper to assist, no doctor testified the 1984 injury was not a substantial factor in his disability if no carpenter's helpers were available. *Yinger* noted before the injury the employee regularly worked over 2,000 hours per year but after worked 400 hours per year or less. *Yinger* found the defendants had not rebutted the raised presumption and the employee's shoulder condition and any related disability remained work related.

The defendants argued the employee removed himself from the work force because he was seeking treatment of his non-work-related medical conditions. Citing *Vetter* and *Estate of Ensley*, *Yinger* relied upon *Estate of Ensley* and held "in neither case did the defendants show the work-related injury was not a substantial factor in the concurrent disability." *Id*. at 6. *Yinger*

concluded: "We find the employee remains totally disabled, in substantial part because of the work-related injury. Accordingly, we find the employee is entitled to total disability benefits."

With regard to the employee's request for PTD benefits, *Yinger* noted the employer did not deny the employee was only able to do "odd-jobs" and is in the "odd-lot category." *Yinger* further found the employer made no showing a reasonably stable and continuous labor market existed for the employee with his limited physical capabilities, and held he was entitled to PTD (*id*. at 6).

> **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.

Vetter v. Alaska Workmen's Compensation Board, 524 P.2d 264 (Alaska 1974) affirmed the board's decision denying temporary disability benefits. Vetter was hurt on the job and at hearing won medical care but lost her disability claim. The board found Vetter was not working because she does "not want to work and that her husband, who did not want her to work before the injury, probably keeps her from working now." The board had further found the fact she had "a previous earning history of minimal employment during the three years previous to injury is indicative of this" (*id*. at 265). *Vetter* concluded:

> If a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability. If an employee, after injury, resumes employment and is fired for misconduct, his impairment playing no part in the discharge, there is no compensable disability (footnote omitted). Total disability benefits have been denied when a partially disabled claimant has made no bona fide effort to obtain suitable work when such work is available (footnote omitted). And, a claimant has been held not entitled to temporary total disability benefits even though she had a compensable injury when she had terminated her employment because of pregnancy and thereafter underwent surgery for the injury. Since the compensable injury was not the reason she was no longer working, temporary disability benefits for current wage losses were denied (*id*. at 266-67).

However, upon reviewing the record, *Vetter's* majority found a lack of substantial evidence to support the board's finding Vetter "was unwilling to work." The court reversed the board's refusal to grant Vetter disability (*id*. at 268). Ironically, on remand the board again found Vetter

voluntarily removed herself from the labor market and again denied her disability claim. In Vetter's second appeal, the Alaska Supreme Court found the board reconsidered an issue already decided on appeal, without authority. The court again reversed and remanded with more forceful instructions. *Vetter v. Wagner*, 576 P.2d 979 (Alaska 1978).

Estate of Ensley v. Anglo Alaska Construction, Inc., 773 P.2d 955 (Alaska 1989), addressed the question of successive, independently and temporarily disabling conditions, one work-related and one not. In *Estate of Ensley*, the board terminated Ensley's TTD benefits finding he could no longer work as a result of medical treatments for non-work-related cancer. The court reversed the board's decision and remanded the case for determination as to the date Ensley's back condition no longer constituted a disability. *Estate of Ensley* held: "We believe the Board erred by failing to consider whether Ensley's back condition constituted a disability regardless of his treatment for cancer. Liability for workers' compensation benefits will be imposed when employment is established as a causal factor in the disability" (citation omitted). A causal factor is a legal cause if it is a substantial factor in bringing about the harm or disability at issue (citation omitted) (*id*. at 958).

The court noted Ensley's fact pattern was "a unique situation." The medical records showed Ensley suffered from "two independent conditions" -- one work-related and one not -- "either of which would have prevented him from working." *Estate of Ensley* held the board "erred in ignoring Ensley's temporary loss of earning capacity due to the work-related back injury" and reasoned the fact Ensley "also suffered a concurrent total loss of earning capacity due to the cancer does not destroy the causal link between the work injury and his temporary total loss of earning capacity" (*id*.).

Ensley's employer cited *Vetter* and other cases holding an employee who "voluntarily removes herself from the work force" is no longer entitled to TTD benefits. But the court concluded *Vetter* did not control this case because "an employee's voluntary departure from the work force is not analogous to the situation where a terminal illness prevents an already totally disabled individual from returning to work" (*id*. at 958). Rather, *Estate of Ensley* relied upon a

Washington case, *Shea v. Department of Labor and Industries*, 529 P.2d 1131 (Wash. App. 1974). *Estate of Ensley* agreed with *Shea*'s reasoning and said:

> The Act was designed to be a liberal remedial scheme to partially compensate workers for lost wages due to employment related disabilities. *Hewing v. Kiewit & Sons,* 586 P.2d 182, 187 (Alaska 1978). We conclude that the remedial policy of the Act is furthered by providing compensation for temporary disabilities even when a concurrent unrelated medical condition has also rendered the worker unable to earn his or her normal wages. To construe the Act so as to deny coverage would create a windfall to employers simply because of the employee's misfortune in developing an independent medical problem (*Estate of Ensley*, 773 P.2d 955 at 959).

Interestingly, in a footnote, *Estate of Ensley* said, in reference to tort law principles:

> Arguably, coverage should be denied if the employee's disease or condition was known at the time of the industrial accident. In tort law,
>
> > [I]t has been held that an existing disease or a prior accident which reduces the plaintiff's life expectancy will limit accordingly the value of the life in an action for wrongful death. Then what is the value of a burning house which the defendant prevents a fire engine for [sic] extinguishing, or one in the path of a conflagration which the defendant destroys? What damage has the plaintiff suffered when defendant blocks the passage of the plaintiff's barge into a canal in which passage was already blocked by a landslide?
> >
> > Value is an estimate of worth at the time and place of the wrong. It is obvious that if such factors as these are to be considered as reducing value, they must be in operation when the defendant causes harm, and so imminent that reasonable persons would take them into account. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* §52, at 353 (5th ed. 1984) (*Estate of Ensley*, 773 P.2d 955 at 959 n. 6).

Estate of Ensley concluded the medical evidence indicated Ensley may have suffered TTD as a result of his job-related back injury, regardless of whether he later contracted cancer. *Estate of Ensley* held Ensley was entitled to TTD payments for the period in which his work-related back injury would have prevented him from working regardless of the fact he was also undergoing disabling cancer treatment.

In *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990) the court reviewing a TTD decision was again urged to apply *Vetter*. Again, the court concluded "*Vetter* does not control

this case." The court noted: "There is no evidence that Cortay intended to remove himself from the labor market" (*id*. at 107). *Cortay* cited *Estate of Ensley* and stated:

> Today we clarify our holding in *Estate of Ensley* that TTD benefits cannot be denied to a disabled employee because he or she may be unavailable for work for other reasons. Though *Estate of Ensley* concerns unavailability for medical reasons, the rationale for not denying TTD benefits applies to any reason that might render the employee unavailable for work (*id*. at 108).

In *Olson v. AIC/Martin, J.V.*, 818 P.2d 669 (Alaska 1991), the board held the employee was not entitled to TTD because he was capable of performing work without regard to the work's availability. The Alaska Supreme Court applied the "odd lot" doctrine to TTD claims and said:

> Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. Larson, *supra,* §57.51 at 10-53 (emphasis added). Therefore, the Board's termination of TTD because Olson was capable of performing any work, regardless of availability of employment, was error (*id*. at 674).

In *Tolbert v. Alascom, Inc*., 973 P.2d 603 (Alaska 1999), an injured worker appealed the board's denial of her claimed TTD and other benefits from hand injuries from a specific work injury and from cumulative keyboarding. Expert medical testimony disclosed the employee's tendonitis could have been aggravated by repetitive trauma, repetitious motion, the normal aging process, or "activities at home." The board denied Tolbert's claims, finding she failed to prove "but for" her work she would not have been disabled (*id*. at 611). Reversing this holding, the Alaska Supreme Court reiterated its rule stating "when two or more forces" operate to "bring about an injury" and each of them operating alone would be sufficient to cause harm, the "but for test is inapplicable" because it would "tend to absolve all forces from liability" (*id*.; citation omitted). *Tolbert* reasoned:

> In such cases, it is necessary to ask whether the work-related injury was a substantial factor in causing the disability: 'If one or more possible causes of a disability are [work related], benefits will be awarded where the record establishes

> that the [work-related] injury is a substantial factor in the employee's disability regardless of whether a [non-work-related] injury could *independently* have caused disability' (*id*. at 612; emphasis in original; citation omitted).

Since the employee's work, natural aging and her home activities all could have caused or aggravated her hand symptoms, the board incorrectly applied the "but for" test to this case, because it conflicted with the "substantial factor test" (*id*.).

> **AS 23.30.260. Penalty for receiving unapproved fees and soliciting**. A person is guilty of a misdemeanor, and upon conviction is punishable for each offense by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both, if the person
>
> (1) receives a fee, other consideration, or a gratuity on account of services rendered in respect to a claim, unless the consideration or gratuity is approved by the board or the court. . . .
>
> **AS 23.30.395. Definitions**. In this chapter,
> . . .
>
> (16) 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. . . .
>
> **AS 44.64.050. Hearing officer conduct**. . . .
>
> (b) The chief administrative law judge shall, subject to AS 39.52.920 and by regulation, adopt a code of hearing officer conduct. The code shall apply to the chief administrative law judge, administrative law judges of the office, and hearing officers of each other agency. The following fundamental canons of conduct shall be included in the code: in carrying out official duties, an administrative law judge or hearing officer shall
>
> (1) uphold the integrity and independence of the office;
> (2) avoid impropriety and the appearance of impropriety;
> (3) perform the duties of the office impartially and diligently. . . .;

In *Rosales v. Icicle Seafoods, Inc*., ___ P.3d ___ (Alaska 2013), an injured worker claimed a hearing officer was biased against him. The Alaska Supreme Court stated AS 44.64.050 governs hearing officer conduct. Rosales argued the hearing officer should have recused herself because she represented the workers' compensation insurance company involved in his case, in a separate

matter, within the previous two years while she was an attorney in private practice before she became a hearing officer. *Rosales* concluded:

> A hearing officer is generally not disqualified simply because he or she has previously represented one of the parties on an unrelated matter.
>
> In this case, there was no evidence that the Board chairperson had previously represented Seabright in connection with Rosales's workers' compensation claim or any related matter. Her previous representation of Seabright, therefore, did not involve the same 'specific subject' as the current litigation. We conclude that the chairperson did not have a disqualifying conflict of interest (*id*. at 8).

AS 45.45.010. Legal rate of interest. (a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section. . . .

2 AAC 64.040. Conflicts. (a) A hearing officer . . . shall refrain from hearing or otherwise deciding a case presenting a conflict of interest. A conflict of interest may arise from a financial or other personal interest of the hearing officer . . . or of an immediate family member. A conflict of interest exists if

> (1) the financial or other personal interest reasonably could be perceived to influence the official action of the hearing officer . . . ; or
>
> (2) a hearing officer . . . previously represented or provided legal advice to a party on a specific subject before the hearing officer. . . .

2 AAC 64.030. Canons of conduct. (a) The canons of conduct in AS 44.64.050(b) are part of the code of hearing officer conduct. A hearing officer . . . shall comply with the canons and requirements of 2 AAC 64.010 - 2 AAC 64.090. . . .

(b) To comply with the requirement

> . . .
>
> (2) to avoid impropriety and the appearance of impropriety, a hearing officer . . . shall
>
> > . . .
> >
> > (B) act in a manner that promotes public confidence in the hearing function; and
> >
> > (C) refrain from allowing familial, social, political or other relationships to influence the conduct of the hearing;

. . .

(4) to conduct unofficial activities in ways that minimize the risk of conflict with the obligations of the office or the hearing function, a hearing officer . . . shall

(A) seek reassignment of a case in which the hearing officer . . . has a conflict of interest under 2 AAC 64.040. . . .

8 AAC 45.105. Code of Conduct. . . .

. . .

(d) The recusal of a board panel member to avoid impropriety or the appearance of impropriety under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a personal or financial interest that is substantial and material; or

(2) shows actual bias or prejudgment. . . .

8 AAC 45.106. Procedures for board panel members to avoid conflict of interest, impropriety, and appearance of impropriety. (a) Before conducting a hearing on a case, each board panel member shall be given the names of the parties involved in the hearing and any other appropriate information necessary for the board panel member to determine if the individual member, or another member, has a conflict of interest as described in 8 AAC 45.105.

(b) If a board panel member determines that the member has a potential conflict of interest, the potential conflict of interest must be disclosed to the board panel chair before the hearing.

(c) Upon notification by a board panel member of potential conflict of interest under (b) of this section, the board panel chair shall request that the board panel member recuse oneself or refer the matter to the remainder of the board panel to determine if recusal is appropriate.

(d) If before a scheduled hearing begins, a party has knowledge . . . that a board panel member's circumstances may present a potential impropriety or appearance of impropriety, the party may file a petition with the commissioner, or the commissioner's designated hearing officer under AS 23.30.005(b), objecting to the board panel member and briefly outline the reasons. If a petition is filed under this subsection, the commissioner, or the commissioner's designated hearing officer, shall forward the objection to the board panel member who is the subject of the petition for the member's review. If the board panel member does not recuse oneself from the proceeding, the remaining board panel members shall

> determine whether the board panel member who is the subject of the petition may hear the case.

In *DeNardo v. Maassen*, 200 P.3d 305 (Alaska 2009), DeNardo moved for recusal and argued the superior court judge on his case should recuse himself because DeNardo had sued the judge in another case. DeNardo argued the judge's participation under these circumstances evidenced "impropriety and the appearance of impropriety" and destroyed public confidence "in the integrity and impartiality of the judiciary" (*id*. at 310). The judge denied the motion and said: "This court does not feel as though it must recuse itself merely because it is being sued in another case by Mr. DeNardo." The judge then dismissed DeNardo's case before him on summary judgment. Another judge reviewed the trial judge's decision to not recuse himself and concluded the trial judge had properly denied the recusal motion. The Alaska Supreme Court affirmed, noting the record did not contain, nor did DeNardo point to, any specific evidence of actual bias or an appearance of bias by the judge. *DeNardo* held the fact a party was suing a judge in another matter does not require the judge's disqualification, so long as the judge "believes he or she can be fair and impartial" (*id*. at 311).

In *Rodvik v. Rodvik*, 151 P.3d 338, 352 (Alaska 2006), the Alaska Supreme Court said:

> A judge's conclusion that he or she can decide the case fairly will constitute an abuse of discretion only when it is 'plain that a fair-minded person could not rationally come to that conclusion on the basis of the known facts.'

No case has been found stating a party has the right to *voir dire* or question a judge or hearing officer to obtain facts to support a recusal motion. According to *DeNardo* and *Rodvik*, the decision to recuse or not recuse is based on the judge's subjective belief concerning their impartiality, and a hearing officer's decision to not recuse him or herself is an abuse of discretion only if a fair-minded person could not come to that conclusion based on "known" facts.

> **8 AAC 45.142. Interest.** (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000. . . . If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation. . . .

8 AAC 45.180. Costs and attorney's fees.

. . .

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed. . . .

. . .

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed. . . . Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.

(2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

. . .

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

. . .

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

. . .

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

ANALYSIS

1) Was the hearing officer's refusal to answer Employer's questions correct?

Employer filed a petition requesting the designated chair recuse himself or be disqualified. Employer contended the chair's prior representation of a potential witness and his possible, past referral of clients to this witness rendered the chair incapable of being fair and impartial. Thus, Employer contended this created the "appearance of impropriety" because the chair may credit the witness' testimony more favorably. Employer contended the designated chair had an ethical duty to either recuse himself or be disqualified. Employee disagreed.

The designated chair gave a detailed statement concerning his prior involvement with the witness and his limited involvement with him since becoming a hearing officer. The chair gave far more information than required by any applicable statute, regulation or case law controlling hearing officer conduct. 44.64.050; *Rosales*; 2 AAC 64.030-040; 8 AAC 45.105-106; *Rodvik*. Nevertheless, Employer insisted it had a right to inquire more deeply into the designated chair's prior relationship with listed witness Barrington. Employer argued it did not have to accept the designated chair's subjective belief he could be fair and impartial. The panel deliberated and issued an oral order denying Employer's request.

The Alaska Supreme Court affirmed a trial judge's refusal to recuse himself in a case where a party had sued the judge in an unrelated matter. In such cases, the judge's continued participation was proper so long as the judge believed "he or she can be fair and impartial." *DeNardo*. The Alaska Supreme Court also stated a judge's subjective conclusion he or she can decide a case fairly will constitute an abuse of discretion only when it is "plain that a fair-minded person could not rationally come to that conclusion on the basis of the known facts." Thus, hearing officer recusals and disqualifications are, by analogy to similar judicial cases, based only on the hearing officer's subjective view and reviewed based on "known facts." *Rodvik*.

Employer cited no statute, regulation or decisional law providing a party the right to question the hearing officer prior to a recusal decision or before the other panel members determine whether the hearing officer should be disqualified. No such authority could be found. Furthermore,

Employer's proposed practice and procedure would conceivably lead to parties also questioning other panel members and perhaps deposing panels prior to hearing to support petitions to disqualify one or more panel members. Given there is no authority for such practice or procedure, granting Employer's request would result in an onerous burden upon the division and its panel members and interfere with the summary and simple process and procedure the Act hopes to accomplish. AS 23.30.005(h). Therefore, Employer's request to question the hearing officer to support its recusal petition was without legal support, is against public policy as set forth in the Act and the oral order denying Employer's request was correct.

2) Was the hearing officer's refusal to recuse himself and the panel's refusal to disqualify him correct?

A hearing officer has a duty to, among other things "avoid impropriety and the appearance of impropriety." AS 44.64.050. Recusal of a hearing panel member "to avoid impropriety or the appearance of impropriety" may occur only if the recusal is based on "clear and convincing evidence" the panel member (1) has a personal or financial interest that is substantial and material; or (2) shows actual bias or prejudgment. 8 AAC 45.105(d). If a panel member does not recuse him or herself from the proceeding, the remaining "panel members shall determine" whether the subject panel member may hear the case. 8 AAC 45.106(d).

In this case, the designated chair made it clear he had no personal or financial interest in this case. Employer provided no evidence to the contrary. The chair also clearly articulated he could be fair and impartial. Employer provided no evidence the chair was biased or prejudged the evidence. The chair's ability to be fair and impartial in matters involving Dr. Barrington was evidenced by the fact in a recent decision, a panel chaired by this same hearing officer declined to rely upon Dr. Barrington's PPI rating in an unrelated case. *Hanson*. Similarly, the absence of any personal, professional or business relationship between the designated chair and Dr. Barrington for over five years demonstrated he has no interest in this case or in Dr. Barrington as a witness. Thus, there was no factual support for Employer's petition.

Similarly, there was no legal support for it either. The Alaska Supreme Court recently determined a hearing officer is generally not disqualified "simply because he or she has

previously represented one of the parties on an unrelated matter." The court implied a hearing officer should recuse herself if she previously represented a party in the case before her on the same "specific subject" as in the pending case. *Rosales*. In this case, Dr. Barrington is not a party; he was only a proposed witness. If, pursuant to *Rosales*, a hearing officer is not disqualified simply because she represented a party before her, in an unrelated matter on an unrelated subject within the last two years, then certainly a hearing officer who represented a potential witness in an unrelated case five years ago has no duty to recuse himself and should not be disqualified. Employer's petition thus failed to provide legal support to recuse or disqualify the designated chair. Therefore, the oral order denying Employer's petition was correct.

3) Was the oral order precluding Dr. Barrington's testimony and report correct?

Ironically, following all the above, Employer at hearing contended Dr. Barrington should not be allowed to testify and his report should not be considered because he was an "unlawful change of physician." AS 23.30.095(a). Employee initially contended Dr, Barrington might be a "referral" or a "change" of physician. However, Employee through counsel clarified he had sought names from his attorney for physicians to perform a PPI rating and his attorney provided Dr. Barrington's name. Employee provided no evidence his attending physician referred him to Dr. Barrington, his attending physician refused to provide services so Dr. Barrington became a "substitution" physician, or Employee had "changed" his attending physician to Dr. Barrington. The panel agreed with Employer's position and issued an oral order preventing Dr. Barrington from testifying and declining to rely upon his report.

In 1988, the legislature amended the Act to prevent a process known as "doctor shopping." Before the amendments, it was commonplace for parties to obtain opinions from diverse physicians until they obtained an opinion to their liking. The legislature implemented AS 23.30.095(a) and (e) to rectify this perceived problem. Employee's right to obtain medical care and opinions is governed by AS 23.30.095(a). It states Employee may not make "more than one change" in Employee's "choice of attending physician" without Employer's written consent. Written consent is seldom given. However, "referral to a specialist" by Employee's attending physician or obtaining a "substitution" physician "is not considered a change" in physicians. Employee must give notice "of a change in his attending physician before the change." This

statute is plain on its face and states Employee can select a physician, and can "change" his physician only one time.

Employer has a similar limitation found in AS 23.30.095(e). This section requires Employee to attend medical evaluations when Employer requires it, with certain restrictions. However, Employer may not make more than one change "in its choice" of a physician without Employee's written consent. Again, written consent is seldom given. Referral to a specialist by Employer's physician is not considered a change in physicians. Employer also has the right to have Employee seen by a multi-physician "panel," again with some restrictions. In any event, both Employee and Employer have ample opportunity to have Employee seen by multiple physicians. But "changing" physicians by either party is strictly regulated.

The Act and administrative regulations contain no reference or even a suggestion that a party has a right apart from rights provided under AS 23.30.095(a) and (e) to obtain additional opinions or evaluations from medical experts. Such practice would contravene the statutes and revert back to "doctor shopping," which the legislature eliminated years ago.

In some instances, employees have procured medical experts without objection from employers and these experts' opinions have been considered. Dr. Barrington is not one of those instances. Here, Employer objected to Dr. Barrington's participation alleging he was an unlawful change in Employee's choice of attending physician. Regulation 8 AAC 45.082(c) codifies decisional law disallowing reliance by a party on unlawfully obtained medical opinions. If a party makes an unlawful change of physician in violation of AS 23.30.095(a) or (e), or 8 AAC 45.082, the panel "will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose." The panel has no discretion. Employee conceded through counsel he got Dr. Barrington's name from his attorney. Employee failed to show any exception to the one-change-rule applied to his situation.

Consequently, the only role Dr. Barrington could play at hearing was as an unauthorized expert medical witness. Accordingly, under AS 23.30.095(a) and 8 AAC 45.082(c), the panel could not consider Dr. Barrington's reports, opinions or testimony in any form, proceeding or for any

purpose. The fact Employer relied upon Dr. Barrington's PPI rating and paid it without objection is immaterial. Employer made a litigation choice by not objecting to Dr. Barrington's PPI rating. The relevant regulation prohibits "the board" from relying upon the unauthorized report; it does not restrict Employer from relying upon or accepting it for PPI purposes. The fact Employer relied upon it for one purpose does not waive Employer's right to object to it for another reason. The oral order disallowing Dr. Barrington's testimony and declining to rely upon his report was correct.

4) Is Employee entitled to TTD?

Employee requested TTD from February 12, 2002, to the present and continuing until medical stability as an alternative disability argument. Employee is entitled to TTD if his work injury is a substantial cause of his disability. *Tolbert*. TTD cannot be awarded after the date of "medical stability." AS 23.30.185; AS 23.30.395(27). This decision must decide if Employee's peripheral neuropathy or skin cancers were temporarily disabling, and if they were when they became medically stable.

Pietro VII found Employee's peripheral neuropathy and skin cancer compensable injuries. Whether or not Employee is entitled to TTD involves factual questions to which the presumption of compensability applies. AS 23.30.120; *Meek*. Employee provided no evidence his skin cancer disabled him since February 12, 2002. He conceded at hearing his occasional skin cancer treatments are brief, usually last under an hour, and result in a relatively small bandage. Therefore, Employee has not raised the presumption as to disability resulting from skin cancer and he must prove his skin cancer TTD claim by a preponderance of the evidence. *Tolbert*. Even had Employee raised the presumption, Employer would have rebutted it with Drs. Burton's and Dordevich's opinions stating no work-related injury disabled Employee. *Wolfer*. Since he provided no evidence skin cancer disabled him at any time after February 12, 2002, Employee cannot meet his burden of proof or persuasion on this issue and his TTD claim based on skin cancer will be denied. *Saxton*.

If Employee has been temporarily disabled for any period since February 12, 2002, it is because of his non-work-related rheumatoid arthritis, his peripheral neuropathy or a combination of both. Employee's claim for TTD caused by Employee's peripheral neuropathy alone or in combination

with rheumatoid arthritis also invokes factual disputes subject to the presumption of compensability. AS 23.30.120. The complex medical causation issues were resolved in *Pietro VII*. Foot pain causing disability is not medically complex. Employee raises the presumption on this issue through his own testimony stating he has been disabled by foot pain caused by his peripheral neuropathy since February 12, 2002, and through Dr. Armstrong's reports and opinions stating Employee's foot pain, which *Pietro VII* found was caused by arsenic poisoning renders him unable to work more than five to six hours per day. *Tolbert*. Employer rebuts the presumption through Drs. Burton's and Dordevich's EME opinions stating Employee was not disabled by any work-related condition. *Wolfer*. Therefore, the burden shifts back to Employee who must prove his TTD claim based upon peripheral neuropathy by a preponderance of the evidence. *Saxton*.

If *Estate of Ensley* was a "unique situation," this is an extraordinarily unusual case. Peripheral neuropathy is an uncommon work-related condition. *Pietro VII* found Employee's peripheral neuropathy began long before he was ever diagnosed with rheumatoid arthritis. In fact, Employee left work on February 12, 2002, thinking he had pain caused by rheumatoid arthritis, as this was the diagnosis given him by his physicians. The medical records, however, show Employee's peripheral neuropathy was not diagnosed until months after he left work with Employer ostensibly because of rheumatoid arthritis. The fact Employee's peripheral neuropathy was undiagnosed does not mean it was not disabling.

No case law with this fact pattern was presented or found. Not surprisingly, if a person is disabled because of a non-work-related condition, it is difficult to find a case in which the worker subsequently becomes disabled because of a work-related condition, since he has been disabled from work and typically not subjected to work-related risks. Employee's case is unusual because he developed a work-related condition, peripheral neuropathy, which was undiagnosed until after he became disabled because of non-work-related rheumatoid arthritis. However, Employee's extraordinary unique situation, though it may be one of first impression, does not present an insurmountable analytical problem. Case law from Alaska and other jurisdictions provide guidance.

Legally and factually Employee could have been disabled effective February 12, 2002, by more than one medical cause. Under the law and legal analysis in effect at the time of his 1995 work

injury, Employee is entitled to TTD if his work-related peripheral neuropathy was "a substantial factor" in his temporary disability, notwithstanding an independent cause could have also disabled him. *Estate of Ensley; Tolbert*; *Thurston*. While no case law is on point, because the disability chronology is "backwards," *Estate of Ensley, Tolbert* and *Thurston* are persuasive legal authority.

Estate of Ensley found the employee suffered two independent conditions either of which would have prevented him from working. The court held it was error to ignore the injured worker's temporary loss of earning capacity caused by the work related injury. The court said a non-work-related condition does not destroy "the causal link" between the work injury and the injured worker's temporary loss of earning capacity. The court stated to allow an employer to escape liability because of the injured workers' non-work-related misfortune would create a "windfall" for the employer. In a footnote, *Estate of Ensley* references how under tort law the order in which the concurrently disabling events occur might "arguably" affect the outcome. But here, though the "disease," *i.e.*, peripheral neuropathy, was not "known" in the sense it was not yet diagnosed at the time Employee left work because of rheumatoid arthritis, the condition and symptoms pre-existed the rheumatoid arthritis. It is unclear why *Estate of Ensley* included footnote six since tort principles generally do not apply to workers' compensation cases.

Tolbert rejected the "but for" causation test and stated when two or more forces operate to bring about an injury and each operating alone would be sufficient to cause harm, the "but for" test is inapplicable. In such cases, the question is whether the work-related injury was "a substantial factor" causing the disability. If it is, disability benefits will be awarded. In Employee's case, both peripheral neuropathy and rheumatoid arthritis could have independently disabled him.

Thurston dealt with a subsequent independently disabling condition. *Thurston* stated it was error to analyze each disabling condition "in isolation." The court held an employee does not need to show that but for his work injury he would not be disabled. All Employee needs to show is that his work-related disability is a substantial factor in his total disability without regard to whether or not his non-work related rheumatoid arthritis could have caused the total disability.

With this analytical framework in mind, this decision reviews the medical and lay evidence: Employee's peripheral neuropathy and its symptoms pre-existed his rheumatoid arthritis by several years. Employee and his wife are credible witnesses. AS 23.30.122. Employee left work on February 12, 2002, because of a combination of symptoms caused by undiagnosed peripheral neuropathy and diagnosed rheumatoid arthritis. The main reason Employee ceased working for Employer was foot pain, though his shoulder hurt from rheumatoid arthritis. Employee's disabling foot pain was caused primarily by peripheral neuropathy. There is relatively little evidence of rheumatoid arthritis causing Employee foot pain. His foot pain remains and has slowly progressed notwithstanding the fact his rheumatoid arthritis has been under good control for many years. Pain medication eases only 10 to 15 percent of Employee's foot pain and standing, walking, sitting and even lying in bed causes Employee's feet to hurt. *Pietro VII* determined Employee's work for Employer caused his peripheral neuropathy, which causes his foot pain. Disability related to foot pain is not a complex medical concept. It is easily conceivable how significant foot pain could be disabling to a person notwithstanding his use of prescription medication twice daily to control the pain. Here, Employee and his wife convincingly explained he left his job on February 12, 2002, because his feet hurt. The fact he one time believed only rheumatoid arthritis caused his disability is immaterial. Employee initially relied upon his doctors' opinions and they did not initially diagnosis peripheral neuropathy. AS 23.30.122.

Employee's medical evidence also supports his TTD claim. Dr. Armstrong said Employee was disabled from February 20, 2002. In his deposition, Dr. Armstrong said his initial reports stated Employee was disabled because of rheumatoid arthritis, but, contrary to Employer's arguments, in retrospect Dr. Armstrong opined Employee was also restricted because of his peripheral neuropathy. Employee told Dr. Newsom in April 2002 his feet and right shoulder were the "most bothersome." Employee and his wife's credible testimony combined with Dr. Armstrong's credible opinion supported by Employee's reports to Dr. Newsom demonstrate Employee stopped working for Employer on February 12, 2002, because of rheumatoid arthritis primarily in his shoulder, and undiagnosed peripheral neuropathy causing foot pain. AS 23.30.122.

By contrast, Employer's physicians Drs. Burton and Dordevich testified Employee was never disabled by any work-related condition, and Dr. Burton further opined Employee was not disabled

by any condition, including rheumatoid arthritis. Employer's other physicians did not give disability opinions. Dr. Burton's opinion is given less weight because his opinion Employee was not disabled from working by any condition stands alone. AS 23.30.122. Even the Social Security Administration found Employee was disabled at least by rheumatoid arthritis. Dr. Dordevich's opinion is given less weight because he did not believe Employee had work-related peripheral neuropathy. *Pietro VII* discounted Dr. Dordevich's opinion on that issue and this decision similarly discounts it on this one. Particularly, Dr. Dordevich tried to minimize Employee's foot pain by suggesting "hundreds of thousands" of people suffering from peripheral neuropathy "run around" each day and none of them are disabled. Dr. Dordevich relates Employee's condition by analogy to people suffering from diabetic neuropathy. Employee does not have diabetes or diabetic neuropathy. It is unknown how much foot pain hundreds of thousands of diabetic neuropathy suffering people have each day. None of them testified in this case. Only Dr. Dordevich analogizes Employee's foot pain caused by arsenic induced peripheral neuropathy to diabetic neuropathy. His opinion sounds like advocacy. No other evidence exists demonstrating this is a fair comparison and no other evidence supports his opinion. Therefore Dr. Dordevich's disability opinion is given less weight. AS 23.30.122.

Only Employee knows for sure how badly his feet hurt, how much the pain disables him and how much effect his prescription medication prescribed to address his foot pain causes him to lack focus and become groggy. If one believes his account and his wife's observations, as Dr. Armstrong did, this evidence supports the inference Employee has been disabled by foot pain caused by peripheral neuropathy since at least February 20, 2002, when Dr. Armstrong completed disability paperwork. Because Employee and his wife are credible witnesses, their testimony concerning Employee's foot pain and resultant disability and Dr. Armstrong's testimony are given greater weight than Dr. Dordevich's opinion that people suffering from diabetic neuropathy are comparable to Employee's arsenic induced peripheral neuropathy in his feet. Therefore, the totality of Employee's medical records including Dr. Armstrong's opinions and his and his wife's credible testimony show by a preponderance of the evidence that his peripheral neuropathy alone was "a substantial factor" in his disability beginning February 12, 2002. AS 23.30.122. The same record also demonstrates the combined effect of Employee's work-related peripheral neuropathy and his non-work-related

rheumatoid arthritis was also "a substantial factor" in his disability beginning February 12, 2002. *Estate of Ensley*; *Tolbert*; *Thurston*.

Employer's "double recovery" argument does not defeat Employee's disability claim. To the extent a TTD award overlaps Employee's long-term disability benefits from Unum, Employee is required to reimburse Unum in accordance with the insurance contract between Employee and Unum. The parties agreed there is no offset for Social Security disability Employee received during any overlapping period. Employer pointed to no other legal basis for an alleged "double recovery." Therefore, under this decision's analysis, Employer pays what it should under the Act and Employee keeps whatever he is entitled to under his Unum contract. There is no double recovery.

Given his unrelenting and worsening foot pain, and his limitation to no more than six hours work per day effective in 2002, it would have been futile for Employee to seek work. It is little solace to Employee that a reemployment specialist claims she could have retrained him to a sedentary job; none did. Specialist Cortis' testimony by inference demonstrates Employee has not been employable at sedentary or light work since 2002 without retraining and accommodations. Employee seeks TTD benefits beginning February 12, 2002. Based upon the above analysis, his claim for TTD beginning on February 12, 2002, will be granted.

The next question is when his TTD entitlement ends. This date turns on the date of medical stability for Employee's peripheral neuropathy. Employee's doctors do not address the topic directly. Most of Employer's doctors similarly do not address the date of medical stability. Because the limited issue addressed in *Pietro VII* was causation, there is little medical evidence directed toward the medical stability date. Employee's credible testimony joined by his wife's credible testimony demonstrates he tried everything to control his foot pain caused by peripheral neuropathy. Nothing worked very well; medication reduces his foot pain by about 10 to 15 percent. AS 23.30.122.

Employee's medical records show no appreciable, objectively measurable improvement occurred from any medical care addressing his peripheral neuropathy after approximately September 4, 2002. On this date, Employee saw Dr. Armstrong who objectively demonstrated Employee's peripheral neuropathy through testing. Dr. Armstrong testified he performed no further objective testing to

demonstrate Employee's peripheral neuropathy was worsening. It appears from the medical records and Employee's and his wife's testimony that the peripheral neuropathy slowly progressed, remained stable for many years, and subsequently and gradually worsened. There is little medical or lay evidence showing any objectively measurable improvement.

As Dr. Schleimer expected, Employee's peripheral neuropathy is progressing over time and will continue to worsen. However, the date of medical stability is fixed at a date where objectively measurable "improvement" from the result of medical treatment is not reasonably expected. AS 23.30.395(27). The records and lay testimony therefore suggest an early medical stability date for Employee's peripheral neuropathy because nothing he tried objectively improved his bilateral foot symptoms. Therefore, the best inference from the medical record shows Employee's peripheral neuropathy became medically stable by September 4, 2002, the last time Dr. Armstrong performed objective testing. Because he was disabled by peripheral neuropathy, which was not medically stable until September 4, 2002, Employee is entitled to TTD benefits from February 12, 2002 through September 4, 2002. His claim for TTD benefits for that period will be granted, and his request for TTD after that period will be denied.

5) Is Employee entitled to PTD?

The next question is whether Employee is permanently totally disabled by either his skin cancers or his peripheral neuropathy, from September 5, 2002 through the present and continuing. Employee is entitled to PTD if, "in accordance with the facts" his work injury is a substantial cause of his disability, and because of his age, education, and available employment he has been unable because of his work injury to perform services other than those so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. AS 23.30.180; *Tolbert*; *Roan*; *Shea*; *Fish*; *Bailey*; *Carlson*. Whether or not Employee is entitled to PTD because of skin cancer involves factual questions to which the presumption of compensability applies. AS 23.30.120; *Meek*. Employee provided no evidence his skin cancer rendered him PTD since September 5, 2002. Therefore, Employee has not raised the presumption as to PTD resulting from skin cancer and he must prove his skin cancer PTD claim by a preponderance of the evidence. *Tolbert*. Even had Employee raised the presumption, Employer would have rebutted it with Drs. Burton's and Dordevich's opinions stating no work-related injury disabled Employee. *Wolfer*. Since he provided

no evidence skin cancer rendered him PTD at any time beginning September 5, 2002, Employee cannot meet his burden of proof or persuasion and his PTD claim based on skin cancer will be denied. *Saxton*.

Whether or not Employee is entitled to PTD because of peripheral neuropathy involves factual questions to which the presumption of compensability applies. AS 23.30.120; *Meek*. The causation part of the PTD analysis for peripheral neuropathy is similar to the TTD analysis, above. The TTD causation analysis is incorporated here by reference. The same medical and lay testimony supporting Employee's TTD claim also supports his PTD claim. If Employee has been permanently disabled for any period beginning September 5, 2002, it is because of his non-work-related rheumatoid arthritis, his peripheral neuropathy or a combination of both. Again, foot pain causing disability is not a medically complex issue. Employee raises the presumption on the causation part of his PTD claim through his own testimony stating he has been disabled by foot pain caused by his peripheral neuropathy since September 5, 2002, and through Dr. Armstrong's opinions stating Employee's foot pain, which *Pietro VII* found was caused by arsenic poisoning renders him unable to work more than five to six hours per day. *Tolbert*. Employer rebuts the presumption as to causation for any PTD through Drs. Burton's and Dordevich's EME opinions stating Employee was not disabled by any work-related condition. *Wolfer*. Therefore, the burden shifts back to Employee who must prove his PTD claim based upon peripheral neuropathy by a preponderance of the evidence. *Saxton*.

Employee's PTD claim has two elements: He must show his peripheral neuropathy is a substantial factor in his disability status beginning September 5, 2002, and he must show he is in fact permanently totally disabled. *Roan*; AS 23.30.180.

As to the first component, Employee's and his wife's credible lay testimony demonstrates his foot pain caused by his work-related peripheral neuropathy has continuously disabled him since September 5, 2002. As was the case with Employee's TTD claim, only he knows how disabling his foot pain is and what affect his pain medication has on his mental acuity. As discussed above, Dr. Armstrong opined Employee's peripheral neuropathy also disabled him and was a chronic condition. Dr. Armstrong's last opinion confirmed he continued to believe Employee was not able

to work more than five to six hours a day because of his foot pain. Dr. Schleimer confirmed and predicted Employee's peripheral neuropathy would progressively worsen. It has. Their opinions are given greater weight on this issue. AS 23.30.122. This is consistent with Employee's and his wife's testimony as well. AS 23.30.122. A reasonable inference from this evidence is that if because of his foot pain Employee was only able to work five to six hours a day in 2005, it is likely his work tolerance has decreased as his peripheral neuropathy and foot pain have slowly worsened.

By contrast, only Employer's Drs. Burton and Dordevich commented on disability. The analysis from the TTD section, above, is incorporated here by reference. For the reasons stated above, their opinions are given lesser weight. AS 23.30.122. The medical evidence shows numerous examiners found little or no evidence after around November 2003 that Employee had any active rheumatoid arthritis. It was well controlled by medication. Unlike the case with his TTD claim, Employee's ongoing disability is not caused by rheumatoid arthritis combined with peripheral neuropathy but by peripheral neuropathy alone. Employee convincingly explained he probably could have worked since 2002 if his feet did not hurt, so long as his arthritis did not act up. AS 23.30.122. By contrast, Employee's peripheral neuropathy has never been well controlled or mitigated since September 2002. Based upon a preponderance of the lay and medical testimony, Employee's peripheral neuropathy was and is a substantial factor causing his disability beginning September 5, 2002, which disability is permanent.

Employer's argument Employee has been committing "fraud" against Social Security is without merit for two reasons: First, the initial medical evidence used to obtain Employee's Social Security Disability was based on rheumatoid arthritis. It was an independently disabling condition. That does not mean Employee's peripheral neuropathy was not also independently disabling. Second, this decision has no jurisdiction over Social Security. If Employee has a duty to inform Social Security that this decision found his peripheral neuropathy now permanently disables him under the Act, such issue is between Employee and Social Security.

The next question is whether or not Employee is actually "disabled." AS 23.30.180; AS 23.30.395(16). The facts support an inference Employee cannot earn the wages he was receiving at the time of his injury through employment. This point is not really disputed. He has

not worked since February 12, 2002. AS 23.30.395(16). As to this second component of Employee's PTD claim, *Roan* is the seminal PTD case from the Alaska Supreme Court. It states total disability does not mean a state of "abject helplessness." PTD means the inability because of work-related injury to perform services other than those so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *Roan* adopted the "odd job" or "odd lot" employment doctrine. If Employee can demonstrate he is not capable of obtaining consistent, readily available employment given his age, education, experience, and physical limitations caused by his peripheral neuropathy, he is entitled to PTD. Employee's entitlement, if any, to PTD benefits does not end at retirement. *Bailey*. A PTD finding does not necessarily require medical evidence. *Carlson*.

By contrast, Employer can show Employee is not entitled to PTD benefits by showing he voluntarily left the labor market for reasons unrelated to his employment injury. *Vetter*. Employer can also avoid paying PTD benefits by showing there is regularly and continuously available work suited to Employee's capabilities. In other words, Employer can avoid paying Employee PTD benefits by showing he was and is not an "odd lot" worker. *Sulkosky*.

Employer relies primarily on its *Vetter* argument, stating Employee was disabled because of rheumatoid arthritis and not peripheral neuropathy. Employer reckons since Employee was already disabled, he cannot be disabled twice for the same time period. This is akin to Employer's "double recovery" argument discussed above. There is no double recovery if Employee is awarded PTD because he must reimburse Unum in accordance with his long term disability policy. The parties agreed there is no Social Security disability offset. Thus, if Employee is entitled to PTD, Employer will pay what it owes, Employee will receive what he deserves and the third-party insurer will be made whole in accordance with its agreement with Employee.

Vetter is distinguishable from this case. Vetter was not working and thus not entitled to TTD because she did not want to work and her husband did not want her to work. Thus, she voluntarily removed herself from the labor market for reasons completely unrelated to her work injury. The result would be the same if Vetter was seeking PTD rather than TTD. *Vetter's* facts clearly support its result. There is no such evidence in Employee's case. Employee was hard-working and prior to

his injury consistently obtained significant overtime work. Vetter voluntarily left the labor market; Employee left the labor market because of both peripheral neuropathy and rheumatoid arthritis. He volunteered for neither. There are no similarities between *Vetter* and Employee's situation and it does not support Employer's position. *Estate of Ensley*; *Cortay*.

Specialist Cortis' opinion does not support Employer's position either. Specialist Cortis did not say Employee has been employable since September 5, 2002. She said in her opinion she could retrain Employee to become employable at a sedentary to light duty position and he would need accommodations. A permanently totally disabled person may ultimately become employable through retraining. *Meek*. Assuming for argument's sake her opinion is correct, implicit in specialist Cortis' opinion is the fact Employee was not employable since September 5, 2002, without accommodations and without retraining. He has had neither. His failure to request retraining in a controverted case is immaterial. Specialist Cortis' opinion therefore does not prove Employee is not an "odd lot" worker. *Sulkosky*; *Yinger*.

When viewed in total, a preponderance of the lay and medical evidence supports a conclusion Employee is an "odd lot" worker. He could possibly work a few hours a day, with superhuman effort to ignore his foot pain which plagues him even while he is in bed. It is highly unlikely he can, without retraining, return to work at any full-time, consistent, readily available employment. There is no evidence he could have done so since September 5, 2002. By contrast, Employee and his wife's credible lay testimony combined with his physicians' opinions describing the chronicity and worsening of his peripheral neuropathy support the conclusion he has been permanently totally disabled as a result of his peripheral neuropathy symptoms since September 5, 2002. AS 23.30.122. Therefore, his request for PTD benefits beginning September 5, 2002 and continuing will be granted. Employer will be entitled to a credit against the PTD awarded, for PPI benefits Employer previously paid him, in accordance with the Act.

6) Is Employee entitled to an order stating Employer is responsible to pay Employee's medical bills for peripheral neuropathy and skin cancer?

Employee seeks an order requiring Employer to pay his medical bills for peripheral neuropathy and skin cancer. At hearing, Employer conceded it was required in a general sense to pay medical bills

for peripheral neuropathy and skin cancer because the commission affirmed *Pietro VII* and Employer did not further appeal. Employer said it was processing bills submitted by Employee and implied Employee may have failed to comply with procedural requirements to provide medical bills and associated reports for processing and payment. Employer did not object to any particular bill or service. On the other hand, Employer provided no evidence it had voluntarily paid any work-related medical bills either. Employee's pending claim did not request a penalty for Employer's alleged late payment of these medical and related bills and Employee did not contest Employer's position. Even though *Pietro VII*'s practical effect requires Employer to pay medical expenses for peripheral neuropathy and skin cancer, and Employer has agreed to pay them, no decision actually ordered Employer to pay, because this issue has not yet been decided. Therefore, Employee's request will be granted and Employer will be ordered to pay Employee's medical bills for peripheral neuropathy and skin cancer, in accordance with the Act.

7) Is Employee entitled to statutory interest, including pre-judgment interest on attorney's fees and costs?

The law recognizes the time value of money. *Rawls*. A litany of Alaska Supreme Court cases all require pre-judgment interest on benefits not paid when due. *Farnsworth*; *Moretz*. Since Employee's injury date is in 1995, he is entitled to pre-judgment interest at 10.5 percent. AS 45.45.010. The pre-judgment interest must be calculated from the initial benefit entitlement date. *Humphrey*. As a matter of law, Employee is entitled to statutory interest for all benefits awarded in this decision. All interest goes to Employee as his injury arose prior to the current law, which requires interest on medical care be paid to the person entitled to the benefit. *Moretz*.

Employee also requests pre-judgment interest on all his attorney's fees and costs incurred in this case. His request is rather unique and this issue is compelling. Only one agency decision has addressed this question and it awarded pre-judgment interest on attorney fees. *Wolfe*. The Alaska Supreme Court has issued numerous opinions addressing interest in workers' compensation cases, and some addressing pre-judgment interest. However, no case is precisely on point. Cases from other jurisdictions routinely deny pre-judgment interest on attorney's fees and costs. *Spaulding*; *Lee*; *Johnson*. One federal case awarded it. *Guidry*. The Alaska Supreme Court has made it clear interest is awarded to compensate an injured worker for the time lost value of his indemnity

benefits. The question remains, is Employee's attorney entitled to pre-judgment interest on his attorney's fees awarded in this decision? This is a legal question to which the presumption of compensability need not be applied.

The answer to this question turns on whether or not attorney's fees are treated differently in respect to pre-judgment interest than other benefits to which an injured worker could be entitled. It is clear attorney's fees are considered "compensation" for purposes of recovering overpayments. *Croft*. It is not clear they are similar to indemnity and medical compensation on which Employee may be entitled to pre-judgment interest. Numerous attempts over the years to curtail or alter the extent to which pre-interest is paid on indemnity and medical benefits have all failed. *Humphrey*; *Moretz*; *Beadles*. Ordinary pre-judgment interest is awarded based upon the date an employee was initially entitled to receive the benefits, once a decision and order determines he is entitled to them.

But attorney's fees are treated differently in the Act. AS 23.30.145 requires that all attorney's fees paid to a claimant's attorney be approved. Both the entitlement and the amount must be approved. Unapproved receipt of attorney's fees may be a crime. AS 23.30.260. Attorney's fees and costs are only approved if the attorney prevails at hearing or in a settlement and gets some benefit for the claimant. The attorney is not entitled to the fees and costs unless and until they are awarded after a hearing or in an approved stipulation or settlement agreement. Thus, the attorney's services, though provided in the past, are not of any financial "benefit" to an employee unless and until an order declares the employee has prevailed, at least on some preliminary issue like an SIME.

This is not to say an attorney's services prior to a decision or settlement in general are not beneficial to injured workers; they most definitely are. But medical and indemnity benefit statutes are self-effectuating and require the employer to pay the employee benefits without the employee filing a claim or hiring an attorney, unless the claim is controverted. Even in a controverted case, if the injured worker prevails, he was always entitled to the benefits at issue; they were just delayed pending adjudication of disputes. Attorney's fees and costs on the other hand must always be approved. Injured workers' attorney's fees and costs in workers' compensation cases at the trial level are always contingent. Thus, they are not "due" unless and until an order says they are due.

Green. Therefore, unlike other benefits subject to pre-judgment interest, attorney's fees and costs are not.

It could be plausibly argued that a claim for attorney's fees and costs for representing an injured worker is no different than a claim for a medical provider's fees or indemnity benefits payable to the injured worker. In a controverted claim, it could be argued neither benefit is payable and "due" unless and until some order says they are. This argument is somewhat appealing. However, there are some important distinctions. A medical provider's services and the indemnity benefits benefit the injured worker at the time they are provided or paid. If they are controverted, once the controversion is overcome, the benefits are due. By contrast, in a controverted case it is usually unknown whether or not the attorney's services or expended costs benefit the claimant unless and until the claim is decided on its merits. Similarly, medical and indemnity benefits need not be approved in an uncontroverted case, while attorney's fees must always be approved. In a controverted case, once the impediment upon which the controversion was based is overcome, and the employee prevails, the benefits are due and they were always due but for the controversion. Therefore, these distinctions make a difference.

This decision will not follow *Wolfe* because it disagrees with its legal conclusion for the reasons stated above. There is no Alaska Supreme Court case precedent expressly preventing an award of pre-judgment interest on attorney's fees and costs. However, *Bignell* stated the court has never "required" the addition of pre-judgment interest on an award of attorney's fees in a superior court appeal in a workers' compensation case. *Bignell* concluded long delays in the claimant's attorney's fees being paid through years of litigation can be accounted for in the amount of fees awarded. Thus, *Bignell* affirmed the superior court's refusal to award prejudgment interest on attorney's fees and costs on appeal. Unfortunately, *Bignell* offers no analysis. While Employee makes a plausible argument and several Alaska Supreme Court cases could be read to support his position, a higher authority must render a final opinion on this issue. However, on balance, interpreting the Act and case law together as a whole, Employee's claim for pre-judgment interest on his attorney's fees and costs, in this decision, will be denied.

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

Employee requests an award of actual attorney's and paralegal fees, and costs. If he did not prevail on his claim for pre-judgment interest on his attorney's fees and costs, Employee requested his attorney's and paralegal fees incurred beginning 2003 through the present be awarded at his and his paralegal's current hourly rate. Employee's current hourly fee rates are significantly higher than his rates were in 2003, and in several subsequent years. As stated above, Employee's request for pre-judgment interest on his attorney's and paralegal fees and costs will be denied, thus invoking his alternative argument for all his attorney's and paralegal fees being paid at his current $385.00 per hour and his paralegal fees at their current $165.00 per hour rates. Employee provided no law supporting his request for a retroactive hourly rate increase on his attorney's fees. This decision is aware of none. Therefore, this request will also be denied.

Employer objected to all the paralegal costs because they were not supported by an affidavit as required by 8 AAC 45.180(f)(14)(D). Paralegal "fees" are actually "costs" subject to 8 AAC 45.180. Employer's argument as to Employee's request for paralegal costs is well taken. Regulation 8 AAC 45.180 is not "new." It has been in effect and not amended since 1990; this was five years before Employee's injury date. The fact Employee's counsel may have been awarded paralegal costs in other instances without his paralegals having filed an affidavit, is immaterial. Employer has objected in this case and this decision must apply the applicable law to these facts. Employee failed to comply with 8 AAC 45.180(f)(14(D) because his paralegal costs are not supported by the required affidavits. The regulation does not state when the affidavits must be filed, unlike the "three working days" requirement for attorney's fees affidavits. 8 AAC 45.180(b), (d). Employee did not request the record be left open to receive post-hearing affidavits and through counsel stated most the paralegals are no longer employed by his lawyer, making the affidavit requirement problematic at best. Therefore, Employee's request for paralegal costs totaling 207.30 hours will be denied.

Nevertheless, Employee's attorney is clearly entitled to attorney's fees and non-paralegal costs. His attorney diligently represented Employee in an extraordinarily difficult case for about 10 years. As mentioned above, peripheral neuropathy and skin cancer cases are rare. The medical causation issues were unique and complex. Employee's counsel prepared for and attended

numerous depositions and hearings. His fees were contingent and he had to wait over 10 years to be paid for his services. Ultimately, Employee was correct in his factual and legal arguments concerning causation of both his peripheral neuropathy and his skin cancers. It is not Employee's or his attorney's fault *Pietro I* and several subsequent decisions were eventually reversed by the Alaska Supreme Court, and Employer sought appellate review of decisions in which Employee prevailed, which were affirmed by the appeals commission or the court. His attorney will not be punished for persevering through years of litigation when he ultimately prevailed on the vast majority of Employee's primary issues. The only issue upon which Employee did not prevail was pre-judgment interest on his attorney's fees and costs.

Employee sought fees under AS 23.30.145(b). This case was controverted and the law allows for fee awards in controverted cases under AS 23.30.145(b). *Harnish*. Employer did not object to the hours Employee's attorney incurred as reflected in his attorney's fee affidavits. Employer did not object to itemized costs other than paralegal costs, as discussed above. Employer objected to a retroactive hourly rate increase. As already discussed, Employer's objection in this respect is well taken. Nevertheless, considering the nature, length, and complexity of the legal services performed and the significant benefits resulting from the services to Employee, Employee's attorney will be awarded the total hours requested in his fee affidavits. He succeeded on complex causation issues and successfully obtained medical benefits, PPI, a period of TTD and PTD and interest for Employee. However, Employer is directed to calculate Employee's attorney's fees in accordance with the hourly rates Employee's attorney requested in this case and was awarded in prior cases in each of the applicable time periods from 2003 through the present as set forth in factual finding 102, above. Employer will be ordered to pay 285.16 hours attorney's fees, all calculated in this manner. Employer will also be ordered to pay Employee's itemized legal costs totaling $26,734.05.

Employee did not anticipate this decision not awarding his paralegal costs, which he has treated as fees. This decision does not calculate the actual monetary value to Employee of the already paid PPI, medical benefits being processed for payment, or the awarded TTD, PTD and related 10.5 percent pre-judgment interest. Similarly, this decision does not calculate the actual attorney's fees resulting from the above directive. These calculations are jobs for the parties.

Any disagreement as to amounts may be brought back for further adjudication if necessary. However, it is conceivable the statutory minimum fee under AS 23.30.145(a) may exceed Employee's actual attorney's fees. This decision cannot award less than the statutory minimum fee by law. Therefore, if the parties determine statutory minimum fees exceed Employee's actual attorney's fees calculated as directed in this decision, Employer will be ordered to pay statutory minimum fees on all benefits awarded.

CONCLUSIONS OF LAW

1) The hearing officer's refusal to answer Employer's questions was correct.
2) The hearing officer's refusal to recuse himself and the panel's refusal to disqualify him was correct.
3) The oral order precluding Dr. Barrington's testimony and report was correct.
4) Employee is entitled to TTD.
5) Employee is entitled to PTD.
6) Employee is entitled to an order stating Employer is responsible to pay Employee's medical bills for peripheral neuropathy and skin cancer.
7) Employee is entitled to statutory pre-judgment interest, but is not on attorney's fees and costs.
8) Employee is entitled to attorney's fees and costs.

ORDER

1) Employee's request for TTD is granted in part and denied in part. Employer is ordered to pay Employee TTD from February 12, 2002, through September 4, 2002. Employee's claim for TTD from September 5, 2002, and continuing, is denied.
2) Employee's request for PTD is granted in part and denied in part. Employee's claim for PTD from February 12, 2002 through September 4, 2002 is denied. Employee's claim for PTD from September 5, 2002 and continuing is granted. Employer is ordered to pay Employee PTD from September 5, 2002 through the present and continuing during the continuance of his total disability.
3) Employee's request for an order stating Employer is responsible to pay Employee's medical bills for peripheral neuropathy and skin cancer is granted. Employer is ordered to pay these bills in accordance with the Act.

4) Employee's request for statutory pre-judgment interest on indemnity benefits is granted. Employer is ordered to pay Employee statutory 10.5 percent pre-judgment interest on all benefits awarded in this decision, calculated from the date each installment or payment was due, until paid.

5) Employee's request for pre-judgment interest on attorney's fees and costs is denied.

6) Employee's request for attorney's fees and costs is granted in part and denied in part. Employee's request for a retroactive hourly rate increase is denied. Employer is ordered to pay Employee's counsel costs totaling $26,549.16. Employee's request for paralegal costs is denied. Employer is ordered to pay Employee 285.16 hours attorney's fees in accordance with this decision.

7) Alternately, if the parties determine statutory minimum fees on all benefits awarded and paid as a result of *Pietro VII* or this decision exceed the actual fees requested, Employer is ordered to pay Employee's counsel statutory minimum fees on all benefits paid and awarded and on all continuing benefits.

8) Jurisdiction is reserved over the attorney's fee issue to resolve any disputes.

Dated in Anchorage, Alaska on December 3, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Patricia Vollendorf, Member

_____
Dave Kester, Member

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of PAUL D. PIETRO Employee / applicant v. UNOCAL CORPORATION, Employer; UNION OIL CA. / UNOCAL, insurer / defendants; Case No. 199530232; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, on December 3, 2013.

_____
Anna Sebeldia, Clerk