ALASKA WORKERS' COMPENSATION BOARD

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

DONALD R. HINKLE, Employee, Claimant, v. CORNERSTONE REMODEL & DESIGN, Uninsured Employer, and the ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201213388 AWCB Decision No. 14-0023 Filed with AWCB Anchorage, Alaska on February 28, 2014

Donald R. Hinkle's (Employee) September 24, 2012 claim, as amended on July 3, 2013, was heard on February 6, 2014, in Anchorage, Alaska, a date selected on October 2, 2013. Employee appeared, represented himself and testified. Attorney William Artus appeared and represented Cornerstone Remodel & Design's (Employer). Darryl Waters appeared and testified for Employer. Joann Pride appeared and testified, Velma Thomas appeared telephonically, and both represented the Alaska Workers' Compensation Benefits Guaranty Fund (the fund). The record closed when the panel deliberated on February 12, 2014.

ISSUES

Employee contends he was totally disabled from work because of his work injury with Employer, from August 22, 2012 through July 29, 2013. He further contends though he was incarcerated from November 12, 2012, through March 31, 2013, and in a domiciliary treatment

center from April 23, 2013, through about August 10, 2013, he remained disabled until he started his own business on July 30, 2013. Though he is not sure "what the law allows," Employee contends he is entitled to temporary total disability (TTD) during the above-referenced time including periods he was incarcerated or receiving non-work-related medical treatment.

Employer concedes Employee is entitled to TTD from August 22, 2012, through November 11, 2012. It contends he is not entitled to TTD during any time he was incarcerated or was in a domiciliary treatment facility.

The fund contends Employee's TTD is limited to August 22, 2012, through November 11, 2012. Like Employer, it contends Employee cannot receive TTD while he was incarcerated, was in a rehabilitation clinic or had returned to self-employed work.

1) Is Employee entitled to TTD?

Alternately, Employee contends he was partially disabled from August 22, 2012, through July 29, 2013. He requests temporary partial disability (TPD) for this period.

Employer contends Employee's disability is limited to August 22, 2012, through November 11, 2012. It contends he is not entitled to TPD during any time he was incarcerated or was in a domiciliary treatment facility.

The fund contends Employee is not entitled to TPD while he was incarcerated, was in a rehabilitation clinic or had returned to self-employed work, and contends there is no evidence with which to compute any TPD.

2) Is Employee entitled to TPD?

Employee contends he has been rated with a five percent permanent partial impairment (PPI). He contends Employer should be ordered to pay him PPI based upon this valid rating.

Employer agrees Employee is entitled to five percent PPI.

The fund accepts the five percent PPI rating Employee's doctor provided.

3) Is Employee entitled to PPI?

Employee contends he incurred medical expenses related to his work injury and may need ongoing medical care for his foot. He contends Employer should be ordered to pay or reimburse for these expenses, including transportation and prescription costs.

Employer concedes liability for Employee's work-related medical expenses. It agreed with the fund's spreadsheet itemizing Employee's work-related medical bills.

The fund compiled a spreadsheet listing all work-related medical expenses it discovered for Employee's injury. It concedes he is entitled to an order requiring Employer to pay these.

4) Is Employee entitled to medical expenses?

Employee contends he is entitled to a compensation rate adjustment. He did not specify a reason or a rate.

Employer contends Employee should be compensated at the lowest possible rate. It did not provide any analysis.

The fund contends Employer should be ordered to pay Employee's disability at the minimum rate, $239 per week. It did not provide any analysis.

5) Is Employee entitled to a compensation rate adjustment?

Employee contends he is entitled to an unspecified penalty. He seeks an order requiring Employer to pay him a penalty.

Employer contends Employee presented no basis for a penalty. Therefore, it contends he is not entitled to a penalty.

The fund did not take a position on Employee's penalty claim.

6) Is Employee entitled to a penalty?

Lastly, Employee contends he is entitled to interest. He seeks an order requiring Employer to pay interest on all benefits awarded.

Employer concedes Employee and his providers are entitled to interest.

The fund did not dispute Employee's interest claim.

7) Is Employee entitled to interest?

FINDINGS OF FACT

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

1) On August 22, 2012, Employee fell about 12 feet from a ladder and fractured his left heel bone while working for Employer (Report of Occupational Injury or Illness, August 28, 2012).

2) Employee timely completed his portion of the injury report and filed a copy of it but Employer either failed or refused to complete and file the injury report (*id.*; observations and inferences drawn from the above).

3) Employee's wages from Employer at the time of injury were calculated by the hour and were either $14 or $15 (Employee; Waters; "Time Card," Workers' Compensation Claim, September 20, 2012, attachment).

4) Employee did not present evidence of his earnings for the two years' prior to his injury, or demonstrate he would have continued to earn $14 or $15 per hour through the period for which he is entitled to disability (record; Pride; observations).

5) Employer's owner Darryl Waters was present when Employee fell, immediately told Employee he had no workers' compensation insurance and had actual knowledge of the injury (Employee).

6) Waters, as Employer's on-scene representative who observed Employee's post-injury symptoms, knew Employee would be disabled for some period without needing a formal off-work slip from a physician (experience, judgment and inferences drawn from all the above).

7) The parties stipulated Employer was Employee's employer on August 22, 2012, when he fell from the ladder. They stipulated Employee's disability and need for medical treatment for his foot injury arose out of and in the course of his employment. The parties further stipulated Employee's fall from the ladder was the substantial cause of the need for treatment, disability and impairment for his left foot (parties' hearing stipulations).

8) Neither Employer nor the fund controverted Employee's right to benefits from this injury (record).

9) On August 22, 2012, Employee sought emergency medical care from Providence Hospital and incurred an associated bill as set forth below. The emergency room physician, John Hanley, M.D., directed Employee to go home, elevate his foot, non-weight bear and see an orthopedic surgeon (Emergency Department Encounter, August 22, 2012).

10) On August 31, 2012, Eugene Chang, M.D., completed a disability form stating Employee was "totally disabled" from a calcaneal facture and would be "non-weight bearing for 3 months" (Disability Status, August 31, 2012).

11) Between August 31, 2012, and June 19, 2013, Employee received conservative treatment from Dr. Chang, at Orthopedic Physicians Anchorage for his work injury (Chang medical records).

12) On September 1, 2102, and September 12, 2012, Employee purchased prescribed medications to address his work injury, as set forth below in factual finding 41 (Employee).

13) On September 12, 2012, Dr. Chang saw Employee and commented he "obviously cannot get back to the kind of job he has been doing for at least 10 to 12 weeks from now." Dr. Chang also completed another disability form stating Employee was "totally disabled" effective September 12, 2012 and would be "non-weight bearing for 3 months" (Disability Status, September 12, 2012).

14) On September 24, 2012, Employee filed a *pro se* claim for TTD from August 22, 2012, through October 17, 2012, stating he was "disabled, unable to work, unable to stand" because of his work injury with Employer. Employee also checked block "b" in section "25," which is only to be completed if Employee is claiming a compensation rate adjustment. By checking this box, Employee alleged his earnings were calculated by "the day, hour, or output." He did not attach wage documentation. Attached to Employee's claim were Employee's "Time Card," Dr. Chang's September 12, 2012 "Disability Status" report, and a letter from division staff to Employee, dated September 27, 2012 (Workers' Compensation Claim, September 20, 2012, with attachments).

15) On September 27, 2012, the board served Employee's claim with all above-referenced attachments on Employer, Employee and the fund (*id.*).

16) Employer never filed an answer to Employee's claim (record; observations).

17) Neither Employer nor the fund controverted Employee's claim (*id.*).

18) Upon service of Employee's claim and attached disability status report on Employer by the board, Employer was on notice Employee was disabled as a result of his work injury (experience, judgment, observations and inference from all the above).

19) On October 5, 2012, the fund filed its answer to Employee's claim, noted Employer appeared to be uninsured and explained the fund's role in such cases. It also averred it was "unclear" if there was an employee-employer relationship between Employee and Employer, and consequently said it was unclear if Employee had a "duly authorized" claim and thus entitled to benefits under the Act. The fund further stated even if Employee's claim was compensable, there was no order finding Employer was in default in paying any benefits due, and thus no current liability to the fund (Answer to Employee's Claim for Benefits From the Workers' Compensation Benefits Guaranty Fund, October 4, 2012).

20) On October 17, 2012, Dr. Chang stated Employee was "partially disabled" and limited to "sedentary duties only" (Disability Work Status, October 17, 2012).

21) Employee believes shortly after this work status report he contacted Employer and asked Waters to put him back to work as discussed below (Employee).

22) On October 25, 2012, an investigator from the Special Investigations Unit (SIU), Employee, Waters on Employer's behalf and Thomas and Pride representing the fund appeared at a prehearing conference. The board's designee explained the claim process to all present and Waters stated he was unaware he needed workers' compensation insurance because he thought Employee was an independent contractor. Waters further stated if found responsible, he would "meet his obligations." Employee's specific claims were "ongoing TTD benefits," PPI, medical and related transportation costs and a compensation rate adjustment (Prehearing Conference Summary, October 25, 2012).

23) From November 12, 2012, through March 31, 2013, Employee was incarcerated. He asked the jailers to take him to an appointment with Dr. Chang but they declined, so he received no treatment for his work injury while in jail (Employee).

24) After being released from jail, Employee was homeless and lived at the Brother Francis Shelter for about three weeks (*id.*).

25) On February 27, 2013, Employer, the fund and an SIU investigator appeared at a prehearing conference. The investigator reported Employee may be incarcerated. Employer admitted Employee's accident occurred at work and averred it offered Employee work but Employee did not take the offer. Employer also said it told Employee it would pay Employee's work-related medical bills, but Employer had not yet received any (Prehearing Conference Summary, February 27, 2013).

26) On March 31, 2013, Employee was released from jail (Employee).

27) From April 23, 2013, through August 10, 2013, Employee participated in a Veterans Administration (VA) domiciliary treatment program. It was a live-in facility, and Employee had to stay there. However, he could have left the facility and ended the program at any time. In this sense, it was "voluntary." This treatment was partly to satisfy sentencing requirements and partly on Employee's own volition. Employee was being treated in the domiciliary center for personal issues and received minor treatment for his foot injury from the VA clinic, including x-rays and medication to address swelling in his foot (Employee).

28) Employee said in respect to this period: "I was incarcerated not able to walk." In Employee's view, this was a time of recovery from his injury. During the periods Employee was incarcerated and was in treatment, he believes he could have done light duty work but he would have had a limp as his foot was swollen and painful (*id*.).

29) On June 26, 2013, Employee, the fund and an SIU investigator attended another prehearing conference. Employee presented medical records and bills related to his injury and the designee advised him to provide a copy to the fund's adjuster in an adjacent building, and to file and serve all work-related records and bills on a medical summary, which was provided. Employee clarified he wanted his medical bills paid, related transportation costs, TTD, possible permanent total disability (PTD) and PPI. The designee told Employee to amend his claim to add previously unclaimed issues and to file another claim against the fund, which the designee explained might be liable for benefits. The designee attached a copy of the proffered medical records and bills to the conference summary, which was served on all parties on June 28, 2013 (Prehearing Conference Summary, June 26, 2013).

30) The June 26, 2013 prehearing conference summary in the board's file does not contain the attachments, so it is not possible to determine what medical records and bills were served on Employer along with the summary (observations).

31) On July 3, 2013, Employee filed an amended claim, seeking to join the fund and requesting TTD from August 22, 2012, through November 12, 2012, and from March 31, 2013, through the

then-present; TPD from August 22, 2012, through November 12, 2012, and from March 31, 2013, through the then-present; PPI, ongoing medical costs including prescriptions, penalty and interest. Employee again checked block "b" in section "25," which is only to be completed if Employee is claiming a compensation rate adjustment. By checking this box, Employee again alleged his earnings were calculated by "the day, hour, or output," but again he did not attach wage documentation (Workers' Compensation Claim, July 3, 2013).

32) On July 3, 2013, the division served Employee's July 3, 2013 amended claim on Employee, the SIU, Employer, and the fund and its adjuster (*id.*).

33) Neither the fund nor Employer answered Employee's July 3, 2103 amended claim (record).

34) On October 2, 2013, the fund and Employee agreed to set Employee's claim for hearing on February 6, 2014 (Prehearing Conference Summary, October 2, 2013).

35) On October 17, 2013, Employee saw Shawn Johnston, M.D., for a PPI rating on Dr. Chang's referral. Dr. Johnston examined Employee and provided a five percent PPI rating for Employee's work injury, based on the American Medical Associations *Guides to the Evaluation of Permanent Impairment*, 6th Edition (*Guides*). The fund did not serve the medical summary to which Dr. Johnston's record was attached on Employer (Johnston's report, October 17, 2013; the fund's Workers' Compensation Medical Summary, October 25, 2013).

36) Dr. Johnston's PPI rating is done strictly and solely in accordance with the proper *Guides* edition (experience, judgment, observations).

37) On November 21, 2013, attorney William Artus entered his appearance as Employer's lawyer (Entry of Appearance, November 21, 2013).

38) On January 10, 2014, the fund filed and served on all parties documents upon which it intended to rely at hearing. These included:

- September 27, 2012 letter from Thomas to Employer advising it Employee had reported an injury and Employer was uninsured.
- September 27, 2012 letter from Thomas to Employee informing him Employer had no insurance and Employee could elect a remedy and either file a workers' compensation claim against Employer before the board or sue Employer in civil court, and the fund may have liability to pay if Employer failed to pay Employee's benefits.
- October 17, 2012 "Disability Work Status" report for Employee from Dr. Chang.

- September 12, 2012 "Disability Status" report for Employee from Dr. Chang.
- August 31, 2012 "Disability Status" report for Employee from Dr. Chang
- December 31, 2013 Division of Corporations sheet showing a partnership established July 30, 2013 for A-1 Dry Cleaning Carpet Services, for which Employee was a listed owner.
- October 17, 2013 PPI rating from Dr. Johnston.
- Employee's "Time Card" from an unidentified employer listing hours Employee worked from August 6, 2012, through August 22, 2012.
- December 27, 2013 Division of Corporations sheet showing a partnership established May 9, 2011 for Employer Cornerstone Remodel & Design, for which Jesus Garcia and Darryl Waters were listed owners (Benefits Guaranty Fund Intent to Rely #1, January 10, 2014).

39) There is no evidence anyone served a copy of Dr. Johnston's PPI rating on Employer before the fund served it on January 10, 2014 (observations).

40) Upon service of the above, Employer was again on notice Employee began being disabled on August 22, 2012, continued to be disabled and had incurred a five percent, work-related PPI rating (experience, judgment, observations).

41) The parties stipulated Employee incurred the following work-related medical bills as a result of his August 22, 2102 fall from the ladder:

Provider	**Date**	**Amount**
Providence Emergency Room	August 22, 2012	$ 4,173.83
Employee's out-of-pocket	September 1 - 12, 2012	$ 49.68
Dr. Chang	August 31, 2012	$ 266.28
Dr. Chang	September 5, 2012	$ 133.03
Dr. Chang	September 5, 2012	$ 153.98
Dr. Chang	September 12, 2012	$ 169.98
Dr. Chang	September 12, 2012	$ 183.77
Dr. Chang	October 17, 2012	$ 353.75
Dr. Chang	June 19, 2013	$ 381.12
Dr. Johnston	October 17, 2013	$ 1,351.00

42) On January 23, 2014, the fund filed and served its hearing brief and argued Employee was incarcerated during various periods and contended he was not entitled to TTD or TPD during these periods. It further argued Employee returned to work in self-employment and at some point also entered a rehabilitation clinic, terminating his disability on both occasions. The fund provided no authority for its positions. The fund noted Dr. Johnston's five percent PPI rating and suggested Employee might have received unemployment benefits (Alaska Workers' Compensation Benefits Guaranty Fund Brief for Hearing Scheduled for February 6, 2014, January 23, 2014).

43) On January 24, 2014, the fund filed a medical itemization spread sheet and its TTD and PPI calculations. The fund's spread sheet incudes many but not all of the bills set forth in the above chart, and includes an amount for Providence Hospital, Dr. Johnston, some of Dr. Chang's bills and a prescription incurred by Employee. The fund calculated Employee's TTD at $239 per week for 12 weeks and one day, for a total of $2,680.34, and calculated his five percent PPI at $8,850 (Benefits Guaranty Fund Intent to Rely #2, January 24, 2014).

44) On January 27, 2014, Employer filed and served its hearing brief stating it did not "contest the assertion that Donald Hinkle was injured while working for Cornerstone." Employer further said it did not believe Employer suffered any "permanent disability" or is entitled to a "permanent disability rating" or award. Employer agreed the award should include work-related medical expenses and compensation at the lowest weekly rate for not more than 12 weeks. Lastly, Employer argued an independent medical examination is necessary and anticipated the fund would "request" one (Hearing Brief, January 27, 2014).

45) On January 6, 2014, the board served a notice for the February 6, 2014 hearing on all parties and their representatives at their addresses of record (Hearing Notice, January 6, 2014).

46) According to the certificates of service on each summary, the fund did not serve any medical summaries on Employer (Workers' Compensation Medical Summary, July 24, 2013; October 25, 2013; and January 30, 2014; observations).

47) With exception of the disability status form attached to Employee's original claim served by the board on Employer on September 27, 2012, there is no evidence Employer was served with Employee's medical records until the fund served medical records attached to its first notice of intent to rely (observations; Benefits Guaranty Fund Intent to Rely #1, January 10, 2014).

48) There is no evidence Employer was ever served with the medical bills associated with Employee's work-related medical treatment (observations).

49) It is undisputed neither Employer nor the fund paid Employee any disability, impairment or medical benefits in relation to this injury (record; observations and inferences drawn from the above).

50) At hearing on February 6, 2014, Waters stated he had offered Employee lighter duty work following his injury, but when asked for details about this stated "that gets real fuzzy" and could not recall specifically when the parties had their "discussion." After Employee's injury had "subsided somewhat," he and Employee discussed Employee "expediting." Waters said he offered Employee lighter duty expediting work, which would have required him to drive a truck and deliver materials to Employer's work crews at various sites. Waters believed he offered to pay Employee at his "normal rate," which he believed was $14 to $15 per hour. Waters testified Employee was willing to come back to work and perform light duty so long as it "was not too strenuous." The parties were trying to finalize this arrangement, but for some reason unknown to Waters, the modified job did not "come together." Waters conceded he was extremely busy at the time, which may have contributed to the lack of any specific employment arrangement. Waters had started a real estate company around the same time and could not recall why the job "offer" never came to be. There was no written employment offer. On further examination, Waters testified his company is very "fast-moving" and his customers very demanding so it made no sense to ask somebody on crutches to come back to work to expedite. Waters disagrees he never tried to get back to Employee about further employment. He further clarified he did not know Employee was on crutches during the telephone conversations about Employee returning to work as an expediter. He may have offered only $10 per hour. These conversations occurred over a month following Employee's injury according to Waters. Waters understood Employee was well enough to get around and possibly do expediting. Waters further clarified "I would not offer someone a job on crutches." Crutches would have been a "deal breaker" as it would create too many hazards for him and for Employee (Waters).

51) At hearing on February 6, 2014, Employee testified he was "begging" Employer to give him work at even $10 an hour following his work injury. When Employee and Waters discussed Employee being an expediter, Employee told Employer "no problem," he would do whatever he could to return to work. Waters suggested Employee could expedite, but Employer never called him back nor did he make any final arrangements to come to work. Employee believes Waters "dropped the ball" on him, not the other way around. Employee averred Waters had plenty of opportunities to call him and offer him a specific date to return to work but never did (Employee).

52) From the date of injury through July 2013, Employee had a painful foot injury that was not amenable to surgery, and received limited medical care. Eventually Employee worked for Tony's Enterprises doing handyman work and started his own business cleaning carpets around July 30, 2013. His work with Tony's began around September 1, 2013 (*id.*).

53) Neither Employee nor Employer was sure exactly how much Employer paid Employee per hour at the time of his injury (Waters; Employee).

54) Following his work injury with Employer, Employee applied for unemployment insurance, but was denied (*id.*).

55) Employee has not filed income tax returns for five or six years, and thought he had been incarcerated in 2010 and 2011 and had no income. Employee filed no earnings information from any prior year, or any earning information from his work with Employer. Employee believes he worked about a month or so for Employer before getting injured. He thinks he earned about $15 per hour working about 40 hours a week with some overtime. Of the date of injury, Employee was single and could claim only himself as a dependent for tax purposes. Employee thought he was entitled to a compensation rate adjustment (*id.*).

56) Employee provided no evidence of his earnings at self-employment beginning in July 2013, and provided inadequate evidence from which to determine a TPD rate or to support a compensation rate adjustment (Employee; experience, judgment, observations and inferences from all the above).

PRINCIPLES OF LAW

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

The Alaska Supreme Court in *Ranney v. Whitewater Engineering*, 172 P.3d 214 (Alaska 2005) said where a statute expressly enumerates "the things or persons to which it applies," the court invokes the principle of statutory construction called *expressio unius est exclusio alterius.* This principle establishes an inference that, where certain things are designated in a statute, "all omissions should be understood as exclusions" (footnote omitted). *Ranney* further noted this

doctrine is "particularly compelling," where the scheme in question "is purely statutory and without a basis in the common law" (footnote omitted). *Ranney* said the Act creates a "detailed and complicated scheme" for requiring employers to provide benefits to injured workers and their families. In this context, the court denied Ranney's request for death benefits because she was not married to the decedent at the time of his death, reasoning had the legislature wanted to compensate unmarried cohabitants, it would have done so (*id*. at 219). Injured workers have an economic interest in their disability benefits. *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994).

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

In *Burke v. Houston NANA, LLC,* 222 P.3d 851 (Alaska 2010) the Alaska Supreme Court reversed a board decision implementing an internal process, which the board in its rulemaking authority had not chosen to adopt. Burke asserted the board could not by adjudication "add requirements to the law that neither the legislature nor the executive branch in its rule-making power chose to add to the Act or regulations, respectively." The court said: "We agree: If the board wished to add to the deadlines it explicitly set in the regulations -- via adoption of a discovery rule -- it was required to do so by regulation." *Id*. at 867. The court further stated:

> We have previously held that an administrative agency can set and interpret policy using adjudication instead of rulemaking, absent statutory restrictions and due process limitations, (footnote omitted) and noted that the board has broad powers to administer the Alaska Workers' Compensation Act, including the authority to interpret statutes (footnote omitted). But the board's power is not unlimited. Alaska law requires an agency to follow certain procedures, including public notice and an opportunity for public comment, before it can supplement or amend a regulation (footnote omitted). Alaska Statute 44.62.640(a)(3) defines 'regulation' to include 'every rule, regulation, order, or standard of general application *or the amendment, supplement, or revision* of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by [the agency]' (emphasis in original).
> . . .

> The dissent argues that it was reasonable for the board to interpret its regulation. . . . (footnote omitted). As to the first point, it is true that the board could have adopted a regulation to provide for a new ninety-day period, but it did not do so. This is critical, because there is no doubt that the interpretation given by the board here -- enforcement of a discovery rule -- 'interprets and makes more specific' the former statute *and it does so in a way that alters the rights of the parties*. In these circumstances, an agency must act through rule-making, not adjudication (footnote omitted; emphasis added) (*id*. at 868).

In *Johns v. State, Department of Highways*, 431 P.2d 148 (Alaska 1967), the Alaska Supreme Court addressed a dispute over stays in workers' compensation appeals and said:

> In light of the broad public policy considerations which shaped and are embodied in workmen's compensation legislation, we believe cross-appellees' authorities are inapposite. Ideally, *final resolution of this issue lies within the province of our legislature*. The legislature is well equipped to study the question of balancing the need on the part of injured claimants for compensation payments against possible instances of employer's inability to recover unwarranted payments (emphasis added).

In *Alyeska Pipeline Service Co. v. DeShong*, 77 P.2d 1227 (Alaska 2003), the Alaska Supreme Court, in addressing the board's interpretation of a statute, affirmed the board's order allowing and requiring an injured worker to repay unemployment benefits before she could receive TTD. A statute states an injured worker cannot receive TTD in any week in which she also received unemployment. Yet the board found this did not preclude the worker from paying the unemployment back so she could receive board-ordered TTD. *DeShong* noted: "

> The board's interpretation of the statute -- that a week for which the employee has repaid benefits is not a week 'in which the employee receives unemployment benefits' -- is consistent with the language of the statute. Moreover, under the facts of this case, the board's interpretation leads to the result the workers' compensation system was created to provide: *the award of compensation benefits to which the injured worker was entitled* (*id*. at 1237; emphasis added).

> **AS 23.30.070. Report of injury to division**. (a) Within 10 days from the date the employer has knowledge of an injury . . . alleged by the employee . . . to have arisen out of and in the course of the employment, the employer shall send to the division a report setting out
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> (1) the name, address, and business of the employer;
> (2) the name, address, and occupation of the employee;

> (3) the cause and nature of the alleged injury or death;
> (4) the year, month, day, and hour when and the particular locality where the alleged injury or death occurred; and
> (5) the other information that the division may require.
> . . .
>
> (f) An employer who fails or refuses to send a report required of the employer by this section or who fails or refuses to send the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
> . . .
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> (d) If at any time during the period the employee unreasonably refuses to submit to medical or surgical treatment, the board may by order to spend the payment of further compensation while the refusal continues, and no compensation may be paid at any time during the period of suspension, unless the circumstances justified the refusal. . . .

Injured workers have undergone employers' medical evaluations while they were incarcerated. *Smith v. VECO, Inc*., AWCB Decision No. 94-0202 (August 19, 1994).

> **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*.; emphasis

omitted). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or his injury and the employment. *Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence, which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 7 (March 25, 2011). Because the employer's evidence is considered by itself and not weighed against the employee's evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985). If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. He must prove that in relation to other causes, employment was "the substantial cause" of the disability or need for medical treatment. *Runstrom*, AWCAC Decision No. 150 at 8. 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 third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered.

The Alaska Supreme Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012) reiterated the well-settled rule: "'Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary.' We therefore examine whether the employer rebutted the presumption" (*id*. at 573).

The presumption need not be applied when liability for or entitlement to benefits are not disputed, but only the amount is at issue. *Rockney v. Boslough Construction Co*., 115 P.3d 1240 (Alaska 2005). Lay evidence in relatively uncomplicated cases is adequate to raise the presumption and rebut it. If an injured worker raises the presumption and the employer fails to rebut it, the board may rely on the injured workers' uncontradicted testimony that after his injury he was unable to perform all his job duties. *VECO, Inc. v. Wolfer*, 693 P.2d 858 (Alaska 1985). If an employer fails to rebut the raised presumption, the injured worker is entitled to benefits

based solely on the raised but unrebutted presumption. *Williams v. State, Department of Revenue*, 938 P.2d 1065 (Alaska 1997).

> **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 finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **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. . . .
> . . .
>
> (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. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the time period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. . . .

Hammer v. City of Fairbanks, 953 P.2d 500 (Alaska 1998) held:

> 'Knowledge' does not appear to be a term of art. In context, it means no more than awareness, information, or notice (footnote omitted) of the injury. . . . Unless the employer is unsatisfied with the rating or is suspicious of the injury and chooses to controvert the rating, the payment 'becomes due' within fourteen days after the submission of the rating. Thus, construing AS 23.30.155(b) and (e) together, unless the employer files a controversion, the employer has twenty-one days after receiving the PPI rating to pay or be subject to the statutory penalty (citation omitted) (*id*. at 505).

> **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.

The Alaska Workers' Compensation Act attempts to replace an injured employee's lost wage-based income. *Gunter v. Kathy-O Estates*, 87 P.3d 65, 70 n. 15 (Alaska 2004).

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 permanent total disability (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 was PTD as a result of his industrial injury simply because another totally unrelated condition also rendered him PTD. *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.*).

Vetter v. Alaska Workmen's Compensation Board, 524 P.2d 264 (Alaska 1974) reversed the board's decision denying TTD. On April 24, 1970, Vetter was assaulted on the job by a customer while working for her uninsured employer. At hearing, Vetter won medical care but lost her disability claim. In denying Vetter's disability claim, the board found:

> That the applicant did not suffer disability from work as a result of injury on April 24, 1970. She was able to continue working for the remaining five to six hours of her shift and did not find need to see the doctor until the afternoon of a (sic) day when she was hurt at 2 a. m. The Board believes that applicant 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. We believe the fact that she gives a previous earning history of minimal employment during the three years previous to injury is indicative of this (*id*. at 265).

Given these facts, in its analysis *Vetter* concluded, as a general proposition:

> 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).

Vetter said the above-referenced legal doctrine was correct and if substantial evidence supported the board's finding that Vetter chose not to work for various reasons not connected to her work injury (*e.g.*, no need to work; her husband's desire she not work; her desire not to work), the board's decision denying disability would be affirmed (*id*. at 267). *Vetter* explained:

> The Board in the instant case determined . . . Vetter was no longer employed, not because of any injury but because of her own personal desires, and found no actual impairment of her earning capacity. If this determination is supported by substantial evidence, the claim for compensation was correctly denied (*id*. at 267).

But *Vetter* found "considerable evidence in the record that [Vetter] was unable to return to work due to complications resulting from her injury." And while the employee stated "her main

reason for not returning to work was that she wanted no more fights or arguments with anyone," she also testified headaches and kidney problems she suffered as a result of her work injury limited her public activities. Vetter also declined a waitress job at another restaurant because she was physically unable to perform the work. Vetter's physician testified it was his opinion "she was incapacitated as a result of her injury and was not malingering," and no contrary medical evidence was presented (*id*. at 268). *Vetter's* majority found a lack of substantial evidence to support the board's finding Vetter "was unwilling to work." The court said:

> In short, the focus of the hearing was not upon the defense [Vetter] was unwilling to work but rather upon the defense that her injuries resulted from a deliberate attack by her upon a customer. And whatever testimony reflected adversely upon her willingness to work was given incidentally in response to questions directed to this latter issue. Such testimony, even given its most favorable inference, does not support the finding of her unwillingness to work.
>
> We thus find a lack of substantial evidence to support the finding of the Board that [Vetter] was unwilling to work and reverse the decision of the superior court affirming the Board's refusal to grant appellant disability compensation. We remand this case to the superior court with instructions to in turn remand the case to the Workmen's Compensation Board for further proceedings in conformity with this opinion (*id*.).

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 reversed and remanded with more forceful instructions. *Vetter v. Wagner*, 576 P.2d 979 (Alaska 1978).

In *Jones v. Alaska Workmen's Compensation Board*, 600 P.2d 738 (Alaska 1979), *per curiam*, Jones suffered an angina attack while trudging up a steep, slippery slope on the job and later underwent coronary surgery. The board denied his TTD claim on grounds his disability was caused by his arteriosclerosis and the factors bringing on the angina attack did not affect the underlying condition. On appeal, the Alaska Supreme Court reversed, noting substantial evidence supported the board's finding that the work-induced angina did not aggravate, accelerate or combine with his hardening of the arteries to necessitate surgery. However, the court could find no evidence to support the board's ruling that the angina attack caused no disability at all. All medical evidence before the board demonstrated the work caused the angina

attack. Therefore, as this attack was itself temporarily disabling, the injured worker was entitled to TTD for as long as the angina attack temporarily disabled him (*id*. at 738-40).

A concurring opinion from Justice Boochever addressed the question whether Jones was entitled to compensation for the period his temporary total disability attributable to his employment overlapped the period during which he could not otherwise have been available for employment because of the non-work-related coronary surgery. The concurring justice cited *Electronic Associates, Inc. v. Heisinger*, 266 A.2d 601 (N.J. 1970), in which the injured employee quit her job because she was pregnant and then underwent surgery for her wrist because of a job-related injury. The court held her reason for terminating employment, her pregnancy, was unrelated to her employment. Since her "right to receive wages" ceased before the onset of her disabling occupational disease, the court reasoned she suffered no wage loss and was not entitled to TTD (*id*. at 740). The concurring justice also cited another New Jersey case, *Tamecki v. Johns-Manville Products Corp*., 311 A.2d 20 (N.J. 1973), in which a college student was injured while working during the summer. The injury necessitated emergency surgery for which disability benefits were paid. But when the student returned to college as a full-time student in the fall, and had to undergo additional reconstructive surgery several times, the court refused to allow additional TTD reasoning the injured worker was unavailable for work because of his college program, not his need for additional surgery. Justice Boochever reasoned:

> With all due respect to the New Jersey court which decided *Tamecki* (footnote omitted) I believe that where a worker is disabled from employment because of work connected disability, he should be entitled to utilize the period during which he is necessarily disabled from work to further his education, to take care of any medical treatment or to engage in any similar activity without forfeiting his compensation benefits. I therefore would hold that Jones is entitled temporary disability payments for the period which he would have been disabled as a result of the work connected angina attack even though that period may overlap the period of his disability attributable to the surgery (*id*. at 741).

In a footnote, the justice further noted: "Different considerations may be applicable where, as in Electronic Associates, an employee terminates employment for non-work-related reasons before the onset of any disability. It is not necessary for us to pass on that question. *But see Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266-67 (Alaska 1974)" (*id*).

The Alaska Supreme Court in *Bailey v. Litwin*, 713 P.2d 249, 253 (Alaska 1986) noted: "[T]he fact that Bailey returned to work . . . is sufficient evidence to rebut the presumption of continuing compensability for temporary total (footnote omitted) disability."

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) (*id*. at 958).

The court noted *Estate of 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 *Shea*, above. *Estate of Ensley* agreed with *Shea*'s reasoning and said:

> 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).

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 *Thurston v. Guys With Tools, Ltd*., 217 P.3d 824 (Alaska 2009), the board 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. 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 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." *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).

Mallott v. Fluor Alaska, Inc., AWCB Case No. 76-01-0149 (June 7, 1978) (unpublished), apparently denied an injured worker's claim for TTD benefits during a period he was in jail. He

appealed to the superior court. On appeal, the employer argued the board correctly denied TTD under AS 23.30.095(d) because while in jail, the employee could not obtain medical treatment for his work injury thus prolonging his disability, which in turn cost the employer more money. The employer reasoned: "Since the appellant's incarceration was the source of his problems, and since his incarceration was obviously not as a result of his industrial injury, that decision of the board should be affirmed" (Employer's Appeal Brief).

Rejecting this argument, the superior court reversed, finding fault with the board's reasoning, which stated: "[A]lthough [the] applicant did not refuse medical treatment, due to his own actions he was not available for necessary treatment." *Mallott v. Fluor Alaska, Inc.*, Superior Court Case No. 3AN-78-5089 Civil (May 28, 1980) at 1. The superior court noted the board, relying on the above reasoning, improperly imposed a "penalty" by refusing to award TTD during the period Mallott was unavailable for surgery because he was in prison. The court, however, noted the applicable law denies benefit payments only where an injured worker "refuses" to undergo beneficial surgical treatment, unless the refusal is deemed reasonable. The court stated the law clearly contemplates that before benefit payments may be withheld under AS 23.30.095(d), the injured worker "must refuse treatment." The court held since the appellant did not refuse treatment but rather "was prevented by virtue of his incarceration for reporting for surgery," the board was in error in denying the appellant's claim for TTD during his incarceration. On remand, the board calculated the benefits and ordered the employer to pay Mallott the TTD. *Mallott v. Fluor Alaska, Inc.*, AWCB Decision No. 81-0118 (April 30, 1981).

Norris v. City & Borough of Juneau, AWCB Decision No. 86- 0324 (December 17, 1986), considered an employer's argument the employee was not entitled to TTD benefits after he was incarcerated because any earnings loss was attributable thereafter to prison rather than to work-related disability. *Norris* could find no administrative or Alaskan court decisions addressing an injured worker's entitlement to TTD while incarcerated. *Norris* found four other jurisdictions addressed the issue and three were in favor and one was against paying TTD during incarceration. Notwithstanding these results, *Norris* concluded an injured employee is not entitled to TTD while incarcerated. *Norris* likened its facts to the court's *Bailey* and *Vetter*

decisions, and held the applicant had withdrawn involuntarily from the labor market due to his incarceration and was therefore not entitled to TTD benefits (*Norris* at 4).

Lajiness v. H.C. Price Construction Co., AWCB Decision No. 89-0046 (February 24, 1989), dealt with the employer's claim for an offset under AS 23.30.155(j) from an injured worker's future benefits to recover benefits previously paid during the employee's incarceration. Employer paid the employee disability benefits until it learned he had been jailed for the period for which TTD benefits had been paid. Employee requested a compensation rate adjustment based on his expected future earnings but for his injury. The employer made two arguments: First, it argued the employee's gross weekly earnings for rate calculation purposes should not include earnings during the period he was incarcerated following his injury, as he could not reasonably be expected to earn wages during those periods given his past history of incarceration. Second, the employer argued it was entitled to offset from any future benefits an alleged "overpayment" it had made during the employee's incarceration. The board did not include in the gross earnings calculation potential earnings from the two-week incarceration period. But, citing *Mallott*, the board also declined to grant the employer an offset for compensation paid while the employee was incarcerated (*Lajiness* at 4). The employee appealed to the superior court, which affirmed in all respects. *Lajiness v. H.C. Price Construction Co*., Superior Court Case No. 4FA-89-491 Civil (February 7, 1990). However, the question of the employee's entitlement to TTD while he was incarcerated was not an issue on appeal (*id*.).

The employee appealed again to the Alaska Supreme Court, but again the issue of the employee's entitled to TTD while he was in jail was not an issue. However, the court addressed the employee's claim he was entitled to include earnings he would have made during the time of his disability, but for the fact he was in jail and could not work. The Alaska Supreme Court stated:

> Our review of the record persuades us that the Board erred when it excluded the two weeks that *Lajiness* was incarcerated from its estimate of *Lajiness*' earnings during the period his disability (*id*. at 1070).

In short, the *Lajiness* court held the employee's future criminal behavior and related punishment were too speculative. What he might or might not do and whether or not he would have been

incarcerated were uncertain possibilities which could not furnish a basis for excluding two weeks' worth of wages at issue (*id*.). On remand from the Alaska Supreme Court, the board calculated a new TTD rate for the employee which included his potential earnings during the period he was otherwise incarcerated. *Lajiness v. H.C. Price Construction Co*., AWCB Decision No. 91-0205 (July 18, 1991).

In *Collins v. Trident Seafoods*, AWCB Decision No. 91-0109 (April 18, 1991), an injured worker hurt his back in April 1989, and underwent surgery in May 1990. His physician removed him from work for several months following his surgery. During part of this period, the employee received unemployment insurance benefits and in the middle of the TTD period in dispute, the employee went on a drinking binge and was admitted to an alcohol treatment center for several weeks. The employee claimed he was entitled to TTD benefits throughout this period. Employer argued he was not entitled to TTD when he received unemployment insurance benefits and because his alcohol-related problems equated to a decision to voluntarily remove himself from the labor market (*id*. at 2-3). *Collins* denied the employee's claim for TTD in weeks during which he received unemployment insurance, based upon the statute specifically excluding these benefits. AS 23.30.187. *Collins* addressed the question whether the employee "removed himself from the labor market" when drinking and seeking alcohol treatment such to preclude his entitlement to TTD benefits. The board cited *Vetter* as well as *Estate of Ensley*, *Jones*, *Lajiness* and *Mallott*. *Collins* concluded the employee was disabled during the time he was in treatment and this did not constitute voluntary removal from the labor market (*Collins* at 5). Notably, a dissenting board member distinguished *Collins* from *Estate of Ensley* and from *Mallott* and stated Ensley did not volunteer to contract cancer and Mallott did not voluntarily choose to be imprisoned. The dissent would have held the employee voluntarily removed himself a labor market by getting drunk and requiring medical treatment for detoxification (*Collins* at 6).

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. 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. 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. 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.

The defendants argued the employee removed himself from the work force because he was seeking treatment of a non-work-related medical condition. 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" (*Yinger* at 6). *Yinger* concluded: "We find the employee remains totally disabled, in substantial part because of the work-related injury. . . . [W]e find the employee is entitled to total disability benefits" (*id*.).

In *Ayson v. D&A Mechanical*, AWCB Decision No. 92-0196 (August 14, 1992), it was undisputed the employee injured his back at work. His attending physician removed the employee from work and shortly thereafter he began serving a jail sentence. The employer began paying TTD benefits but controverted the employee's right to TTD and vocational reemployment benefits when it learned he was imprisoned, arguing: "Employee has voluntarily removed himself the workforce. He has committed a crime. As a result, he is incarcerated and cannot participate in vocational rehabilitation activities" (*id*. at 1). The board noted at the time the employer controverted, the record contained no evidence the employee was not medically disabled. Citing Professor Larson's treatise on workers' compensation law, *Ayson* held: "Absent a controlling statute, payments for medical disability continues through the period of incarceration." Larson, *The Law of Workers' Compensation*, §47.31(g). *Ayson* also cited *Cortay,* which held TTD benefits cannot be denied to a disabled employee even though the

employee may be unavailable for work for other reasons. The board further noted since there was no medical evidence stating the employee was not still totally disabled from work while incarcerated, the employer acted in bad faith when it terminated the employee's temporary benefits (*Ayson* at 4).

However, in *Leblanc v. Rowan Companies, Inc*., AWCB Decision No. 94-0061 (March 21, 1994), the board came to the opposite result. The parties in *Leblanc* stipulated the employee met all other requirements for receiving TTD benefits during his incarceration. The board reviewed *Mallott*, *Norris*, *Lajiness* and *Ayson* as well as Supreme Court cases including, *Vetter*, *Bailey*, *Estate of Ensley* and *Cortay*. *Leblanc* agreed there was no explicit provision in the Act for this issue and the Alaska Supreme Court had not addressed it. Nevertheless, relying upon *Vetter* and *Bailey*, *Leblanc* decided *Vetter* was still "viable" and concluded being imprisoned amounted to an injured worker's withdrawal from the labor market. *Leblanc* denied the employee's claim for TTD during his incarceration.

Thereafter, three more board decisions followed *Leblanc*, and denied an injured worker's entitlement to TTD during incarceration. In *Largent v. Alaska Concrete Sawing, Inc.*, AWCB Decision No. 95-0154 (June 8, 1995), the board cited 10 jurisdictions that allowed TTD to incarcerated injured workers, and three that did not. Nonetheless, *Largent* relied upon *Leblanc* and considered incarceration the result of the employee's voluntary acts, which removed him from the labor market, thus extinguishing his entitlement to TTD benefits (*Largent* at 2).

Sheets v. Capitol Disposal, AWCB Decision No. 02-0021 (January 24, 2002), cited *Vetter* and *Largent* in support of its decision to deny the employee TTD benefits for the first three days following his injury, because he was incarcerated before 28 days of disability could be reached. *Sheets* held the employee's inability to work was the result of his incarceration two days after surgery for his work injury, and not his injury. Because the employee could not demonstrate that his surgery resulting from his work injury resulted in a disability more than 28 days in duration, the board denied the employee's TTD claim for the first three days of disability (*Sheets* at 7).

Randolph v. Fullford Electric, Inc., AWCB Decision No. 07-0339 (November 9, 2007), again relied upon *Vetter* and concluded the injured worker, though otherwise qualified for TTD benefits, was not entitled to TTD benefits because he was withdrawn from the labor market while incarcerated and consequently did not "suffer an actual decrease in earning capacity as a result of the work injury, during the incarceration" (*Randolph* at 10).

> **AS 23.30.187. Effect of unemployment benefits**. Compensation is not payable to an employee under AS 23.30.180 or AS 23.30.185 for a week in which the employee receives unemployment benefits.
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> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
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> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. . . .
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> **AS 23.30.200. Temporary partial disability**. (a) In case of temporary partial disability resulting in decreased of earning capacity to compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability. . . .
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> **AS 23.30.225. Social security and pension or profit sharing plan offsets.** (a) When periodic retirement or survivors' benefits are payable under 42 U.S.C. 401 - 433 (Title II, Social Security Act), the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.
>
> (b) When it is determined that, in accordance with 42 U.S.C. 401 - 433, periodic disability benefits are payable to an employee or the employee's dependents for an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 -

433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury.
(c) If employer contributions to a qualified pension or profit sharing plan have been included in the determination of gross earnings and the employee is receiving pension or profit sharing payments, weekly compensation benefits payable under this chapter shall be reduced by the amount paid or payable to the injured worker under the plan for any week or weeks during which compensation benefits are also payable. The amount of the reduction may not in any week exceed the increase in weekly compensation benefits brought about by the inclusion of employer contributions to a qualified pension or profit sharing plan in the determination of gross earnings.

AS 23.30.395. Definitions. In this chapter,
. . .

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

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

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate . . . in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

(b) The employer shall pay the interest
. . .

(3) on late-paid medical benefits to

(A) the employee . . . if employee has paid the provider or the medical benefits; . . . .

Interest awards recognize the time value of money, and they give "a necessary incentive to employers to release . . . money due." *Moretz v. O'Neill Investigations*, 783 P.2d 764, 765-66 (Alaska 1989).

ANALYSIS

1) Is Employee entitled to TTD?

A) Periods Employee was not incarcerated and not in treatment.

Employer and the fund do not dispute Employee was initially disabled following his work injury and not medically stable, and concede he is entitled to TTD from August 22, 2012, through November 11, 2012. AS 23.30.185; AS 23.30.395(27). Thus, the presumption analysis need not be applied to this part of his claim, and his TTD request for this period will be granted. *Rockney*. Employer and the fund dispute the length of time Employee remained disabled. This creates a factual dispute about his disability to which the presumption of compensability applies. AS 23.30.120; *Meek*. Employee raises the presumption he is entitled to TTD with his testimony stating he was injured while at work for Employer and consequently unable to earn wages, and with Dr. Hanley's emergency room report directing him to go home, elevate his foot and non-weight bear until he saw an orthopedic surgeon. *Tolbert*. He raises the presumption as to continuing disability from this injury with Dr. Chang's August 31, 2012 disability status form stating Employee is "totally disabled" and non-weight bearing for three months. *Runstrom*.

Employer and the fund offered no evidence rebutting the presumption Employee's disability continued after November 11, 2012 or that he ceased being disabled from April 1, 2013 through April 22, 2013, the period between the time he got out of jail on March 31, 2013, and went into treatment on April 23, 2013. Employer and the fund offered no legal theory, such as medical stability, preventing Employee from receiving TTD during these periods either. AS 23.30.395(27). Therefore, Employee prevails on this part of his claim because Employer and the fund conceded liability for TTD from August 22, 2012, through November 11, 2012, and because he prevails on the raised and unrebutted presumption for the period April 1, 2013, through April 23, 2013. *Williams*.

Alternately, Employee also prevails on the April 1, 2013, through April 23, 2013 period by a preponderance of evidence. *Saxton*. When released from jail on March 31, 2013, Employee had a swollen and painful foot and ankle. He credibly testified he was not physically able to work during this three week period because of his work-related symptoms. AS 23.30.122. During the period from April 1, 2013, through April 22, 2013, Employee was, at best, an "odd lot" worker. *Olson*. Employer did not satisfactorily demonstrate he ever offered Employee a job. They discussed Employee returning to work, but Waters could not recall why this plan never came to fruition. Employee clearly and credibly testified Waters never actually offered him the job or told him when or where to appear for work on a particular day. Therefore, there was no "offer" of employment from Employer and thus no refusal to work on Employee's part. Given his physical condition, it would have been fruitless for Employee to seek work with another employer during this three-week period. Thus, Employee is entitled to TTD for these periods by concession, on the raised but unrebutted presumption, and alternately, based upon the preponderance of the evidence analysis. AS 23.30.120; *Wolfer*; *Saxton*.

B) Periods Employee was incarcerated.

Employer and the fund offered no evidence rebutting the presumption of continuing disability during the period Employee was incarcerated from November 12, 2012 through March 31, 2013. *Runstrom*. They do not contend he was no longer disabled, but rather, they contend he is not entitled to TTD during periods Employee was in jail as a matter of law. Both parties claim Employee's incarceration ended his entitlement to TTD. Neither Employer nor the fund cited any legal authority for this position. Some administrative decisions hold an incarcerated injured worker is not entitled to TTD as a matter of law, in essence reasoning the worker is not working because he is in jail, and not disabled because of an injury. *Norris*; *LeBlanc*; *Largent*; *Sheets*; *Randolph*. Some decisions say an otherwise disabled worker is entitled to TTD while incarcerated. *Mallott*; *Lajiness*; *Collins*; *Ayson*. One decision of each persuasion was authored by the same hearing officer.

Of all these cases, only *Mallott* was appealed on this issue. The superior court reversed the initial decision holding Mallott was not entitled to TTD because he missed his work-related surgery because he was in jail, and remanded for calculation of TTD during the period Mallott

was incarcerated. None of these agency or superior court decision is precedent. There is no statute in the Act addressing this issue and no regulation. There are no commission or Alaska Supreme Court decisions specifically addressing this issue either. This is a legal question.

The legislative branch is charged with implementing public policy. *Johns*. The legislature passes bills to implement the public's will and, if he or she approves, the governor signs bills into law. The Alaska Workers' Compensation Act is one such expression of public policy. The Act is purely statutory and has no basis in common law. *Ranney*. The Act sets forth all power and authority granted to this panel to adjudicate workers' compensation claims. It sets forth "comprehensive and specific" rights and remedies. Thus, the Act implies the "legislature did not intend to allow further unenumerated remedies." When rights or duties are designated in a statute, "all omissions should be understood as exclusions." This is a "longstanding" maxim based on "common sense and logic." *Croft*.

The Act is not silent on when and how an injured worker qualifies for TTD and under what circumstances TTD may be reduced, offset or terminated. For example, the Act contains a provision stating an injured worker's TTD benefits may be suspended if he refuses to proceed with reasonable medical treatment. AS 23.30.095(d). The Act says an injured worker is not entitled to TTD in any week in which they also received unemployment insurance benefits, unless they first repay those benefits. AS 23.30.187; *DeShong*. It says advanced compensation payments or overpayments can only be recovered from an injured worker by withholding a certain amount from the employee's future benefits. AS 23.30.155(j); *Croft*. The law also states if an injured worker receives Social Security Disability or retirement, or if his employer contributes to a qualified pension or profit sharing plan, which amounts were included in calculating the employee's gross earnings, there is to be an offset. AS 23.30.225. These provisions demonstrate the legislature is aware of its ability to carve out exceptions to the general rule stating qualified disabled workers are entitled to TTD. Noticeably absent from the Act is any mention of a TTD offset or suspension in the event an otherwise disabled worker is incarcerated during a period for which he would otherwise be entitled to TTD. *Ranney*.

Once an injured worker qualifies for TTD, he has a property right and an economic interest in his disability benefits. *Gilmore*. Absent specific authority in the Act to take Employee's property, this panel exceeds its authority if it denies Employee's right to TTD solely because he is in jail. *Ranney*. This decision will not legislate public policy through decisional law when the Act and regulations specify how and when an injured worker's TTD may be suspended or terminated, but are silent on this specific issue. *Burke*. Such a decision to take Employee's property will be left to the legislature, which is better equipped to debate the pros and cons of why a disabled but incarcerated worker should or should not receive disability benefits. *Johns*. This decision is limited to situations in which the injured worker is disabled before he goes to jail and there is no evidence demonstrating his ability to work has changed while he is incarcerated. In other words, the question is whether or not the injured worker remains "disabled" as defined in the Act, regardless of whether he is at home or in jail. *Estate of Ensley*; *Cortay*. In this instance, there is no evidence Employee's conceded disability from his work injury changed while he was in jail. Notwithstanding administrative decisions which in the past denied an injured worker's right to TTD because he was incarcerated, this decision will decline to follow those cases, citing a lack of authority under the Act and regulations. *Ranney*; *Burke*.

Alternately, even if it could be said some basis exists in the law to take Employee's TTD while he is incarcerated, without statutory or regulatory authority, past agency decisions are split. The only appellate decision addressing this issue reversed an agency decision denying benefits to a disabled, incarcerated worker. *Mallot*. Alaska Supreme Court decisions in analogous situations do not support denying Employee TTD because he was in jail. This decision does not suggest being jailed for a crime is the same as being stricken with cancer or taking care of a loved one who is disabled. They are not the same thing. However, Alaska Supreme Court cases examining roughly similar situations have focused on the "disability" and not the unrelated event that could also prevent an injured person from working and earning wages. AS 23.30.395(16). Thus, as an alternate analysis, this decision also looks at whether Employee was "disabled" as defined in the Act, while he was also in jail.

In *Estate of Ensley*, the intervening event was terminal cancer. The court reversed a denial of benefits and said the question was whether or not the work injury disabled the worker regardless

of whether the non-work-related cancer would also prevent him from working. In *Cortay*, the court made a more sweeping pronouncement and said "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*" (emphasis added). Imprisonment is another reason why an otherwise disabled person would not be available for work. Furthermore, TTD is "wage replacement." *Gunter*. Injured workers' families also rely upon these benefits. Denying an injured worker TTD solely because he is in jail would result in his dependents being denied the wage replacement benefit they derive from the TTD. Incarceration does not present an insurmountable problem for employers as employers' medical evaluations have been conducted on inmates, thus protecting an employer's right to have an injured worker examined, and his claim controverted, if appropriate. *Smith*. Lastly, the law's change to "the substantial cause" makes no difference in this case. The parties stipulated the work injury was the substantial cause of Employee's disability. There is only one reason why he is disabled -- his work injury with Employer. Incarceration is another reason why he was not working for a time, but incarceration is not "disability." AS 23.30.010; AS 23.30.395(16). Therefore, even under this alternative analysis, Employer's and the fund's request for an order denying Employee's request for TTD during his incarceration will be denied.

C) Period Employee was in a domiciliary treatment program.

Employee was in a domiciliary treatment center from April 23, 2013 through August 10, 2013. He was free to come and go as he pleased and was making plans to start his own business as a carpet cleaner while he was in treatment. AS 23.30.122. The fact he was obtaining treatment presents an easier TTD case than imprisonment. Employee's residential treatment for an undisclosed but admittedly non-work-related condition does not disqualify him from TTD eligibility. This portion of Employee's TTD claim is most similar to the otherwise legally disabled worker who is also unable to work because of concurrent terminal cancer. *Estate of Ensley*; *Jones*. Coupled with the unrebutted presumption of continuing disability, and Employee's "odd lot" status discussed above, Employee's request for TTD from August 22, 2012 through July 29, 2013, will be granted. AS 23.30.120; AS 23.30.185; *Olson*.

As to continuing TTD after July 29, 2013, Employer and the fund rebutted the raised presumption with evidence Employee started his own business around July 30, 2013, and began working for Tony's Enterprises as a handyman beginning around September 1, 2013. AS 23.30.120; *Runstrom*. This shifts the burden of production and persuasion to Employee who must prove his claim for continuing TTD from July 29, 2013 forward by a preponderance of the evidence. Once Employee began working for himself and for Tony's, he was no longer legally disabled. He was working. AS 23.30.395(16). His request for TTD after July 29, 2013, will be denied.

2) Is Employee entitled to TPD?

Employee raised an alternate claim for TPD. AS 23.30.200. As Employee will be awarded TTD in accordance with this decision, his TPD claim for this same period is moot. His TPD claim will be denied.

3) Is Employee entitled to PPI?

There are no factual disputes on the PPI issue so the presumption of compensability analysis need not be applied. *Rockney*. The parties agree Employee is entitled to the five percent PPI rating Dr. Johnston provided. As this rating is in conformance with the *Guides*, Employee will be awarded five percent PPI, totaling $8,850 ($1,770 x 5% = $8,850). *Saxton*.

4) Is Employee entitled to medical expenses?

There are no factual disputes on the medical care issue so the presumption of compensability analysis need not be applied. *Rockney*. The parties agree Employee is entitled to the medical care set forth on the fund's demonstrative exhibit, as set forth in factual finding 41, above. The evidence shows these bills were incurred solely to treat Employee's work injury with Employer. Therefore, Employee's request for an order awarding these medical costs against Employer will be granted. Employee is entitled to $7,216.42 in work-related medical expenses. Of this amount, Employer will be directed to pay $49.68 directly to Employee, and $7,166.74 directly to the providers identified in factual finding 41, above. If Employee incurs additional medical expenses for his work injury, he will be directed to submit the medical records and associated

medical billings to Employer with a demand for payment. If Employer fails to pay such bills, Employee may file another claim and the issue will be adjudicated.

5) Is Employee entitled to a compensation rate adjustment?

Employee's compensation rate adjustment claim was vague and reluctant at best. His rate adjustment claim raises factual issue to which the presumption analysis applies. AS 23.30.120. He failed to provide evidence of his past, pre-injury earnings, admitted he had not filed income tax returns for several years, and neither he nor Employer positively identified Employee's earnings at the time of injury. Employee also failed to offer evidence his earnings would have continued at a given, higher hourly wage during the continuance of his work-related disability, and failed to state a legal basis for his guarded contention the minimum weekly rate was not fair given his circumstances. AS 23.30.001(1). In short, Employee failed to raise the presumption on this issue. AS 23.30.120. This same failure of evidence means he also failed to prove a basis for his rate adjustment claim by a preponderance of the evidence. *Saxton*. Consequently, Employee's compensation rate adjustment claim also fails for lack of proof and will be denied.

6) Is Employee entitled to a penalty?

Employer argued Employee presented no basis for a penalty. This is incorrect. The law requires Employer, who had actual knowledge of the injury, to file an injury report within 10 days of the injury. AS 23.30.070(a); *Hammer*. The undisputed facts show he did not. Employee completed his portion and filed it, but Employer did not complete its portion. Under AS 23.30.070(f), as Employer either failed or refused to file the required report, Employee is entitled to a 20 percent penalty, "if so required." Waters was present when Employee fell and broke his heel and injured his foot and immediately advised Employee he had no workers' compensation insurance. This statement evinced Employer's knowledge of workers' compensation. It is undisputed Waters was present when Employee fell, knew it was a work injury and promptly told Employee he had no insurance. There is no apparent reason why Employer could not have completed the injury report and timely filed it. Employer offered no reason. Therefore, there is no reason to excuse Employer from the 20 percent penalty, which will be attached to all "amounts that were unpaid when due," as will be discussed below. AS 23.30.070(f).

Furthermore, the law also required Employer to either pay Employee's benefits in a timely manner, without an award, or controvert them on the prescribed form. AS 23.30.155(a), (d), (e). If benefits due without an award are not controverted, or paid within seven days after they become due, Employer is required to pay a 25 percent penalty in addition to the benefits unless there is some reason to excuse the penalty. There is no evidence Employee's medical providers, or Employee, ever provided Employer with copies of Employee's work status forms advising Employee was disabled. However, it is undisputed on September 27, 2012 Employer was served with Employee's claim to which was attached the off work slip from Dr. Chang. It is undisputed on January 10, 2014, the fund served Employer's attorney with copies of all three off-work status reports from Dr. Chang. Upon receiving these medical reports, Employer was on further notice Employee was totally disabled effective August 31, 2012. It is also undisputed Employer never paid Employee any disability benefits and neither Employer nor the fund ever controverted his right to any benefits.

Employer, who was present at the time of injury, knew Employee would be disabled from his work injury the day it occurred. *Hammer*. It did not require expert medical evidence to raise the presumption. *Wolfer*. Employer's knowledge of the injury and its employment relationship was enough to prompt Employer to voluntarily start paying Employee benefits beginning 14 days after the injury. AS 23.30.155(a). Clearly, the disability benefits triggered by Dr. Chang's off work slips were due without an award 14 days after September 27, 2012, when Employer was served with the claim with Dr. Chang's note attached, and January 14, 2014, the date the fund served them on Employer, at the latest. Nevertheless, as Employer never controverted and never paid Employee any disability benefits, and more than 14 days have elapsed since either date Employer was served proof of Employee's disability, there is no reason to excuse Employer from paying an additional 25 percent penalty on TTD awarded in this decision. AS 23.30.155(e).

Similarly, the fund served Dr. Johnston's five percent PPI rating report on Employer on January 10, 2014. *Hammer*. Employer and the fund did not controvert Employee's right to this PPI. Similarly, Employer never paid Employee any PPI, and more than 14 days have elapsed since it received Dr. Johnston PPI rating report. There is no reason to excuse Employer paying an

additional 25 percent penalty on PPI awarded in this decision. All the TTD and PPI were "due" as they were incurred and subject to the two penalties discussed above.

However, Employee's medical bills require a different analysis. Employee's agency file contains various medical summaries with his work-related medical records and some medical billings attached. However, these medical summaries, provided by the fund, were never served on Employer according to the service certificates. Consequently, though Employer agrees it owes Employee's work-related medical bills in accordance with this decision, there is no evidence in Employee's file illustrating if or when any party filed and served medical records and associated billings on Employer. Therefore, Employer will not be required to pay any penalty on the medical bills awarded in this decision. However, if Employer does not pay these bills within 14 days of this decision, Employee may file a claim for a separate, 25 percent penalty under a different statutory provision, which could be payable to the providers.

In summary, because Employer had actual knowledge of the injury, never filed a timely injury report, and has no excuse for not timely filing one, Employee will be awarded a 20 percent penalty on the TTD and PPI awarded in this decision. AS 23.30.070(f). Similarly, because Employer neither controverted Employee's right to benefits nor paid benefits in a timely manner, Employee is entitled to a separate, 25 percent penalty on the TTD and PPI awarded in this decision. AS 23.30.155(e). Employer will be ordered to pay these penalties to Employee.

7) Is Employee entitled to interest?

Interest on workers' compensation benefits is mandatory. AS 23.30.155(p); 8 AAC 45.142; *Moretz*. Interest is paid on late-paid indemnity benefits and out-of-pocket medical expenses to Employee. Therefore, Employee is entitled to interest on $49.68 in medical reimbursements, and on all TTD, and PPI awarded in this decision. Interest is paid on late paid medical benefits to the medical provider to whom the benefits are owed. Therefore, Employee's medical providers identified in factual finding 41 are entitled to interest from Employer in accordance with this decision.

CONCLUSIONS OF LAW

1) Employee is entitled to TTD.
2) Employee is not entitled to TPD.
3) Employee is entitled to PPI.
4) Employee is entitled to medical expenses.
5) Employee is not entitled to a compensation rate adjustment.
6) Employee is entitled to a penalty.
7) Employee is entitled to interest.

ORDER

1) Employer is ordered to pay Employee TTD from August 22, 2012, through July 29, 2013.
2) Employee's claim for TPD is denied as moot.
3) Employer is ordered to pay Employee five percent PPI in the amount of $8,850.
4) Employee's claim for a compensation rate adjustment is denied.
5) Employer is ordered to pay Employee $49.68 in medical reimbursement.
6) Employer is ordered to pay Employee's medical providers $7,166.74 in accordance with this decision.
7) Employer is ordered to pay Employee a 20 percent penalty on all TTD and PPI awarded in this decision.
8) Employer is ordered to pay Employee a separate, 25 percent penalty on all TTD and PPI awarded in this decision.
9) Employer is ordered to pay interest on all benefits awarded in this decision at the statutory rate for each year, calculated from the date each benefit was due through the date it is paid.
10) Employer is ordered to pay interest awarded in paragraph nine, above, to Employee on all benefits payable directly to him, and to Employee's medical providers on benefits payable directly to them.

Dated in Anchorage, Alaska, on February 28, 2014.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Robert C. Weel, Member

_____
Pam Cline, Member

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

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of DONALD R HINKLE, employee / claimant; v. CORNERSTONE REMODEL & DESIGN, uninsured employer; and the Alaska Workers' Compensation Benefits Guaranty Fund, defendants; Case No. 201213388; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on February 28, 2014.

_____

Kimberly Weaver