ALASKA WORKERS' COMPENSATION BOARD

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

LEAH C. IBALE,	)	
	)	FINAL DECISION AND ORDER
Employee,	)	
Claimant,	)	AWCB Case Nos. 201204120, 201209804,
	)	201218806, 201301046, 201214174
v.	)	
	)	AWCB Decision No. 14-0062
STATE OF ALASKA,	)	
	)	Filed with AWCB Juneau, Alaska,
Self-Insured Employer,	)	on May 1, 2014
Defendant.	)	
	)	

Leah Ibale's (Employee) April 23, 2012, May 31, 2012, July 10, 2012, August 20, 2012, October 7, 2013, January 24, 2013 and February 27, 2013 claims were heard on April 8, 2014, in Juneau, Alaska, a date selected on January 30, 2014. Employee appeared, represented herself, and was the only witness. Attorney Patricia Huna appeared and represented the State of Alaska (Employer). The record closed at the hearing's conclusion on April 8, 2014.

ISSUES

Employee contends she is entitled to medical costs and related transportation expenses for treatment for her respiratory symptoms, eyes, ears, nose, throat, ocular irritation, floaters, posterior vitreous detachment (PVD), heart, right arm, chest, back, face, legs, and anxiety. She seeks an order awarding past and ongoing medical care and related transportation expenses for all these symptoms, conditions, body parts and functions.

Employer contends Employee's attending physicians and Employer's medical evaluator (EME) agree Employee's workplace exposure resulted in some initial respiratory symptoms and gave rise to some work-related need for medical treatment. Employer contends it paid for all medical

benefits Employee's attending physicians opined were work-related. It contends because her ongoing disability and need for medical treatment are not work-related, Employee is not entitled to further benefits.

1) Is Employee entitled to medical and related transportation expenses for her respiratory symptoms, eyes, ears, nose, throat, ocular irritation, floaters, PVD, heart, right arm, chest, back, face, legs and anxiety?

Employee contends her work injuries prevented her from working on the following dates: March 29, 2012 to May 13, 2012, July 13, 2012 to July 14, 2012, and January 30, 2013 to February 24, 2013. Employee contends she is entitled to temporary total disability (TTD) for these periods.

Employer contends it paid Employee TTD benefits from April 1, 2012 through April 5, 2012, and from April 29, 2012 through May 4, 2012. Employer contends it paid TTD benefits for periods Employee's treating physicians opined her disability was work-related, and no physician has opined dust or asbestos exposure, or any other work-related injury, caused any disability after May 4, 2012. It contends because Employee has no evidence showing her inability to work on these dates is work-related, her TTD claim should be denied.

2) Is Employee entitled to additional TTD for the periods March 29, 2012 to May 13, 2012, July 13, 2012 to July 14, 2012, and January 30, 2013 to February 24, 2013?

Employee contends she is entitled to a permanent partial impairment (PPI) benefit for her respiratory symptoms, eyes, ears, nose, throat, ocular irritation, floaters, PVD, heart, right arm, chest, back, face, legs, and anxiety.

Employer contends no physician opined Employee has any work-related PPI and Employee's PPI claim should be denied.

3) Is Employee entitled to PPI benefits?

Employee contends she is entitled to a compensation rate adjustment. She did not specify a reason or a rate.

Employer contends it paid Employee's disability at the allowable rate, $681.88 per week.

4) Is Employee entitled to a compensation rate adjustment?

Employee acknowledges she has returned to her regular work, but contends she is entitled to reemployment benefits.

Employer contends because Employee has returned to work, and no physician opined Employee has any inability to continue her regular work, she is not entitled to reemployment benefits.

5) Is Employee entitled to reemployment benefits?

Employee contends she is entitled to interest. She seeks an order requiring Employer to pay interest on all benefits awarded.

Employer did not address this issue in its hearing brief and at hearing acknowledged Alaska law provides interest is due on any late-paid benefits.

6) Is Employee entitled to interest?

Employee contends she is entitled to an unspecified penalty. She seeks an order requiring Employer to pay her a penalty.

Employer did not address this issue in its hearing brief and at hearing acknowledged Alaska law provides a penalty is due on any late-paid benefits.

7) Is Employee entitled to a penalty?

Employee contends she is entitled to a finding of unfair or frivolous controversion related to her claims.

Employer did not address this issue in its hearing brief or at hearing. It is presumed Employer opposes this request.

8) Is Employee entitled to a finding of unfair or frivolous controversion?

FINDINGS OF FACT

The record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

1) On February 1, 2012, Jeanne Snyder, M.D., certified Employee had the physical ability to complete the job duties required for a Merchant Marine entry level rating position. (Merchant Marine Evaluation of Fitness for Entry Level Ratings, February 1, 2012).

2) On March 27, 2012, Employee was exposed to dust and asbestos when cleaning a forward lounge while working as a cashier for Employer on the M/V Columbia. She reported the exposure caused respiratory symptoms such as coughing, wheezing, shortness of breath, and a tightening chest. (Employee SIME Hearing Testimony, October 8, 2013; Report of Occupational Injury or Illness (ROI), March 29, 2012; Claim, April 23, 2012).

3) On March 29, 2012, Dr. Snyder treated Employee for respiratory symptoms and diagnosed: 1) upper respiratory inflammation, rhinitis and bronchitis, likely due to exposure at work, 2) low possibility of asbestos exposure, and 3) incidental finding of quite elevated blood pressure. Dr. Snyder prescribed an Albuterol inhaler and directed Employee to take two inhaler puffs at least three times a day for the next four to seven days. (Chart Note, Dr. Snyder, March 29, 2012).

4) On March 30, 2012, Dr. Snyder treated Employee for continued cough and breathing difficulties. Dr. Snyder stated, “She feels she is no better, mentions the asbestos again, despite my having told her yesterday at the end of yesterday’s visit about the negative finding of asbestos contamination in that work space.” Dr. Snyder opined, “Dust in the workplace is a likely contributing factor to this illness, but not asbestos exposure.” (Chart Note, Dr. Snyder, March 30, 2012).

5) On April 4, 2012, Dr. Snyder treated Employee and diagnosed upper respiratory inflammation, rhinitis and bronchitis related to dust exposure at work. Dr. Snyder stated, “She still is talking about asbestos exposure, so I remind (sic) her . . . the asbestos level inside the shrouded area in the ceiling of the area she was working in was extremely low, and well below acceptable levels. It is not asbestos that caused her this problem, but dust exposure, most likely.” Dr. Snyder also stated, “Symptoms better almost resolved. She will not need further follow-up for this problem.” (Chart Note, Dr. Snyder, April 4, 2012).

6) On April 4, 2012, Dr. Snyder restricted Employee from working from March 29, 2012 to April 6, 2012 because of her dust exposure. Dr. Snyder released Employee to return to her regular work beginning April 6, 2012. (Unfit/Fit for Duty Form, Dr. Snyder, April 4, 2012).

7) On April 23, 2012, Andrew Pankow, M.D., treated Employee for cough and diagnosed cough, sinus pain, and thyromegaly. He opined, "This is a work related injury," and stated, "I think it is quite unlikely that she had significant exposure to asbestos, however, appears that she very well could have had some dust exposure that has been now complicated by respiratory infection or sinusitis. Dr. Pankow recommended a sinus computerized axial tomography (CT) scan. (Chart Note, Dr. Pankow, April 23, 2012).

8) On April 27, 2012, Employer received Dr. Snyder's return to work slip and on that date had knowledge of Employee's March 29, 2012 to April 6, 2012 work-related disability. (Unfit/Fit for Duty Form, Dr. Snyder, April 4, 2012).

9) On May 3, 2012, Dr. Pankow evaluated Employee for a return to work slip, opined Employee was unable to return to work from April 29, 2012 to May 4, 2012 because of her dust exposure, and released Employee to her regular work as of May 4, 2012. (Chart Note, Dr. Pankow, May 3, 2012; Unfit/Fit for Duty Form, Dr. Pankow, May 3, 2012).

10) On May 3, 2012, Employer received Dr. Pankow's return to work slip via fax and on that date had knowledge of Employee's April 29, 2012 to May 4, 2012 work-related disability. (Unfit/Fit for Duty Form, Dr. Pankow, May 3, 2012).

11) On May 17, 2012, TTD for the April 29, 2012 to May 4, 2012 disability period became due. (Experience, judgment).

12) On May 25, 2012, eight days after the April 29, 2012 to May 4, 2012 TTD became due, a 25 percent penalty became due because Employer had not paid or controverted these benefits by May 24, 2012. *Id*.

13) On June 4, 2012, Employer paid Employee TTD benefits from April 1, 2012 through April 5, 2012, at a $636.52 weekly rate. Employer also paid Employee a 25 percent penalty, because it paid this benefit late, but did not pay Employee interest. (Compensation Report, June 8, 2012).

14) On June 4, 2012, Employee saw Victor Van Hee, M.D., with Harborview Medical Center, for a self-referred second opinion regarding her workplace exposure. Dr. Van Hee declined to render an opinion regarding work-relatedness until he had received additional information, including Drs. Snyder and Pankow's chart notes. Dr. Van Hee noted some incidental findings on

his exam of Employee, including a heart murmur and abdominal discomfort on palpation. (Chart Note, Dr. Van Hee, June 4, 2012).

15) On June 15, 2012, Employer controverted TTD, temporary partial disability (TPD), and PPI benefits for Employee's March 27, 2012 work injury, based on Dr. Snyder's opinion Employee was fit for duty as of April 6, 2012. (Controversion Notice, June 15, 2012).

16) On June 21, 2012, Employer recalculated Employee's TTD rate based on a correction to her marital and dependent status. It paid Employee additional TTD benefits and additional penalty based on this recalculation and also paid Employee for the April 29, 2012 through May 3, 2012 TTD period. As of June 21, 2012, Employer had paid Employee $487.10 TTD for April 1, 2012 through April 5, 2012, $584.52 TTD for April 29, 2012 through May 3, 2012, and $121.78 in a penalty on the April 1, 2012 through April 5, 2012 TTD. Employer did not pay Employee any penalty on the April 29, 2012 through May 3, 2012 TTD. It also did not pay Employee interest on either TTD period. (Compensation Report, June 26, 2012).

17) On June 22, 2012, Diane Liljegren, M.D., treated Employee for sore throat and ear pain, diagnosed: 1) upper respiratory tract infection with associated wheezing, 2) ongoing wheezing and dyspnea, suspicious for asthma, which may or may not be work-related, 3) multinodular goiter, 4) systolic murmur, 5) sensation of neck fullness, 6) elevated blood pressure, and 7) possible nasal congestion or allergic rhinitis. Dr. Liljegren stated Employee, "had an occupational exposure to dust. . . . Since that exposure, she has had a persistent cough." Dr. Liljegren also stated Employee, "has never been told she had a heart murmur until she saw Dr. Van Hee. She shares this information when I tell her I hear a murmur." Dr. Liljegren prescribed Employee an Albuterol inhaler. An Outpatient Medication Profile states it is for "cough" and, "this is an AK Marine Hwy work comp illness." Dr. Liljegren also prescribed Flonase nasal spray to treat Employee's nasal congestion, but did not relate it to any work injury. She also referred Employee to William Anthes, M.D., for an echocardiogram, but did not relate this referral or Employee's heart murmur to any work injury. (Chart Note, Dr. Liljegren, June 22, 2012; Outpatient Medication Profile, June 22, 2012).

18) On June 26, 2012, Employee filed a *Smallwood* objection to an air sampling conducted by White Environmental Consultants, Inc. Employer never provided Employee with the opportunity to cross-examine the author of the air sampling reports and based on Employee's *Smallwood* objection, this decision does not consider the air sampling reports for any purpose.

Employee also filed a *Smallwood* objection to Dr. Snyder's chart notes, but these medical records are admissible under Alaska Rule of Evidence 803(4) as an exception to the hearsay rule. (Request for Cross-Examination, June 26, 2012).

19) On July 13, 2012, Employee reported she had shortness of breath while working for Employer on the M/V Columbia. Employee claimed this shortness of breath was caused by her March 2012 asbestos exposure. (Employee SIME Hearing Testimony; Report of Injury, July 13, 2012; Claim, August 17, 2012).

20) On July 17, 2012, Catherine Bjerum, M.D., treated Employee for shortness of breath, and diagnosed allergic rhinitis. Dr. Bjerum stated Employee, "last March has (sic) a dust exposure at work. Since that time, she has been having respiratory complaints." Dr. Bjerum also stated, with regard to Employee's respiratory complaints and shortness of breath, "This has been an ongoing issue for her. From her symptoms at this time, it does seem more like allergic rhinitis." (Chart Note, Dr. Bjerum, July 17, 2012).

21) On July 27, 2012, Dr. Van Hee opined Employee had at least exacerbation of her chronic sinusitis because of dust exposure at work and recommended Employee follow up with her local provider for treatment. (Chart Note, Dr. Van Hee, July 27, 2012).

22) On August 30, 2012, allergy and immunology specialist Emil Bardana, Jr., M.D., examined Employee for an EME. Dr. Bardana diagnosed: 1) documented transient irritational rhinitis and bronchitis, 2) documented changes of chronic sinusitis, 3) possible obstructive sleep apnea, 4) history of dyspepsia, 5) essential hypertension, 6) probable valvular heart disease, 7) pre-diabetes mellitus Type II, 8) documented thyromegaly, 9) exogenous obesity, 10) remote history of dermatographism, and 11) history of adverse reactions to sulfa and Doxycycline. Dr. Bardana questioned Dr. Snyder's opinion dust exposure caused Employee's initial respiratory symptoms and resultant need for medical treatment, opining the initial respiratory symptoms could have been caused by a common cold. However, Dr. Bardana also stated, "There are no comprehensive industrial hygiene surveys…of the forward lounge area where this incident occurred," "It is impossible to know how much nonspecific dust exposure played a part in [Employee's] symptomatology" and "It is possible that nonspecific dust contributed to the induction of some or all of her respiratory symptoms. It is not possible to make a precise judgment on this since there are no industrial hygiene data that actually measure nonspecific particulate, either respirable or otherwise, in the lounge area at the time of the incident." As a result, he opined Employee's

March 27, 2012 work injury contributed to her initial respiratory symptoms, but opined such symptoms would have been transient, and would not have lasted beyond 72 hours. He opined, "As indicated, if in fact it is assumed that dust played some role, it would not have caused symptoms that went beyond 72 hours." He stated Employee's July 13, 2012 work injury was not the substantial cause of any disability or need for medical treatment. Employee needed no further work-related medical treatment, and had no permanent partial impairment as a result of the work injury. He opined Employee was medically stable and able to return to her original work on the date Dr. Snyder stated she could return. In his report, Dr. Bardana listed Employee's past medical history and stated "She has had some angioedema and swelling periorbitally." He opined the echocardiogram and other studies being carried out were unrelated to Employee's workplace exposures. Finally, he noted Employer had not provided him with numerous, relevant medical records and Employee's recent thyroid, heart and pulmonary function studies and stated, "All of these are lacking and it becomes impossible to compare the studies which I was able to obtain over a few hours of examination against anything that was done either in the distant past or in the recent past in answers to questions where you require precise and definitive opinions." (EME Report, Dr. Bardana, August 30, 2012).

23) On September 6, 2012, Employee claims she suffered an allergic reaction following taking a shower while working for Employer onboard the M/V Columbia. She alleged her allergic reaction was caused by haloacetic acid in the shower water, airborne contaminates from ceiling fibers, laundry soap, or her March 2012 asbestos exposure. (Employee SIME Hearing Testimony; Employee's Report of Maritime Injury or Illness, September 10, 2012; Report of Occupational Injury or Illness, September 10, 2012; Denial of Controversion Notice, October 19, 2012; Claim, September 30, 2013; Petition for Review and Reconsideration, December 2, 2013).

24) On September 8, 2012, Employee claims she suffered an allergic reaction after eating cream cheese bread, while working for Employer on the M/V Columbia. She alleged her allergic reaction was caused by the cream cheese bread, haloacetic acid in the water, airborne contaminates from ceiling fibers, laundry soap, or her March 2012 asbestos exposure. *Id.*

25) On September 9, 2012, Jeffrey Stieglitz, M.D., with the Ketchikan General Hospital Emergency Department, treated Employee for, "generalized allergic reaction of unknown cause." (Chart Note, Dr. Stieglitz, September 9, 2012).

26) On September 10, 2012, William Anthes, M.D., performed an echocardiogram. The echocardiogram findings included: 1) left ventricle diastolic dysfunction with impaired relaxation, 2) mild left atrial enlargement, 3) trivial aortic regurgitation, 4) acceleration of systolic flow in the LVOT is present without hemodynamic significant, 5) mild tricuspid regurgitation, and 6) normal sinus rhythm. Dr. Anthes did not relate these findings, or any need for medical treatment or disability related to them, to any work injury. (Echocardiogram Report, Dr. Anthes, September 10, 2012).

27) On September 13, 2012, cardiologist Kenneth Tye, M.D. evaluated Employee for chest pain and dyspnea, and opined the cause of these conditions "is still not quite clear to me at this point." (Evaluation Report, Dr. Tye, September 13, 2012).

28) On September 26, 2012, Employer controverted all benefits relating to Employee's March 27, 2012 work injury, based on Dr. Bardana's EME report. (Controversion Notice, September 26, 2012).

29) On November 17, 2012, Employee claims she was injured while working for Employer on the M/V Columbia when, after vigorous activity, she suffered blurry vision and right eye floaters. Employee claimed her symptoms were caused by her vigorous activity, March 2012 asbestos exposure, September 8, 2012 exposures, and continuous exposure to toxins. (Employee SIME Hearing Testimony; Report of Injury, November 18, 2012; Petition for Review and Reconsideration, December 2, 2013; Petition, January 24, 2013).

30) On November 18, 2012, Scott Kirchner, M.D., with the Ketchikan General Hospital Emergency Department, treated Employee for eye floaters and decreased vision in her right eye. Dr. Kirchner opined her condition was not work-related. (Chart Note, Dr. Kirchner, November 18, 2012; Physician's Report, Dr. Kirchner, November 20, 2012).

31) On November 29, 2012, Employer controverted all benefits relating to Employee's November 17, 2012 work injury stating, "no medical evidence established to support work-related injury." (Controversion Notice, November 29, 2012).

32) When Employer controverted Employee's November 17, 2012 work injury, there was no medical evidence establishing a work-related injury. (Record; experience, judgment).

33) On January 17, 2013, Dr. Van Hee opined asbestos exposure only causes problems following many years of exposure; a single high level exposure does not cause immediate problems; exposure to dust can cause irritation of the nose, throat, and lungs and can cause asthma-like

symptoms in some people, but once exposure ends, the symptoms typically get much better; if symptoms do not get much better, a primary care doctor or lung doctor can treat any conditions which result from dust exposure. (Letter from Dr. Van Hee to Employee, January 17, 2013).

34) On January 29, 2013, Employee alleges she suffered PVD, a right eye hemorrhage, bilateral eye irritation and light flashes, blurred vision, chest pain, shortness of breath, and anxiety after exerting herself climbing up stairs while working for Employer on the M/V Taku. She claims these conditions and symptoms were caused by strenuous activity, allergic reaction after exposure to cleaning chemicals, her March 2012 asbestos exposure, her September 8, 2012 and November 17, 2012 exposures, and continuous exposure to toxins. (Employee SIME Hearing Testimony; ROI, January 30, 2013; Claim, February 27, 2013; Petition, February 24, 2013).

35) On January 31, 2013, Karl Richey, M.D., with the Ketchikan General Hospital Emergency Department treated Employee for vision problems and diagnosed chest wall pain, possible right eye vitreous hemorrhage, possible right eye acute retinal detachment, and visual disturbance. Dr. Richey referred Employee to Ketchikan Eye Care Center and restricted Employee from working until February 7, 2013. He did not relate Employee's need for medical treatment or disability to any work injury and stated, "History limited by vague historian." (Emergency Department Note, Dr. Richey, January 31, 2013).

36) On January 31, 2013, Erik Christianson, O.D., with Ketchikan Eye Care Center, treated Employee for right eye symptoms and diagnosed ophthalmic (acephalic) migraine and right eye PVD. Dr. Christianson recommended no specific treatment and reassured Employee her symptoms are probably from migraine aura. He did not relate Employee's need for eye medical treatment to any work injury. (Chart Note, Dr. Christianson, January 31, 2013).

37) On March 8, 2013, Employer controverted all benefits relating to Employee's January 29, 2013 work injury stating, "no medical evidence established to support work-related injury." (Controversion Notice, March 8, 2013).

38) When Employer controverted Employee's January 29, 2013 work injury, there was no medical evidence establishing a work-related injury. (Record; experience, judgment).

39) On March 14, 2013, the parties appeared at a prehearing conference. Because Employee had filed numerous petitions and workers' compensation claims from which it was difficult to determine the relief or benefits Employee was requesting, Employee clarified her claims and requested benefits included TTD, PPI, medical and related transportation costs, reemployment

benefits, a compensation rate adjustment, penalty, interest, and a finding of unfair or frivolous controversion relating to numerous dates of injury and body parts. (Prehearing Conference Summary, March 14, 2013).

40) On March 22, 2013, Rick Swearingen, O.D., with Ketchikan Eye Care Center, treated Employee for floaters, diagnosed bilateral ophthalmic (acephalic) migraine and right eye PVD, and recommended no additional treatment. He did not relate Employee's need for eye medical treatment to any work injury. (Chart Note, Dr. Swearingen, March 22, 2013).

41) On April 10, 2013, Maria Faylona, M.D., treated Employee for chronic obstructive pulmonary disease and stated, "In order to avoid aggravation of [Employee's] medical conditions, it is advised that she be excused from work for three months for her medical treatments." Dr. Faylona did not relate Employee's disability to any work injury. (Chart Note, Dr. Faylona, April 10, 2013; Letter from Dr. Faylona, April 10, 2013).

42) On May 23, 2013, Employer controverted all benefits relating to Employee's September 8, 2012 work injury alleging Employee failed to timely report the injury and also because there was no medical evidence supporting a work-related injury. (Controversion Notice, May 23, 2013).

43) When Employer controverted Employee's September 8, 2012 work injury, there was no medical evidence establishing a work-related injury. (Record; experience, judgment).

44) On May 24, 2013, ophthalmologist Ted Zollman, M.D., examined Employee for an EME. Dr. Zollman diagnosed: 1) ocular irritation, 2) floaters, 3) cataracts, and 4) refractive error. He opined Employee's workplace exposures were the substantial cause of her ocular irritation, but not the substantial cause of her other eye conditions. He recommended Employee treat her work-related condition with hot compresses and artificial tears. He opined silicone punctal plugs may be helpful to promote healing and also recommended a course of anti-inflammatory eye drops to help reduce irritation. He opined Employee was not medically stable, but stated her ocular irritation is mild to moderate in degree and is not a substantial cause of any disability. He opined Employee could return to full duty work without restrictions. (EME Report, Dr. Zollman, May 24, 2013).

45) On August 1, 2013, Employer controverted all benefits relating to Employee's September 8, 2012 work injury, except for ocular irritation medical benefits.

46) On August 1, 2013, Employer controverted all benefits relating to Employee's March 27, 2012 work injury, except for ocular irritation medical benefits. (Controversion Notice, August 1, 2013).

47) On September 5, 2013, Maureen Northway, FNP, with Creekside Family Health Clinic, referred Employee to ear, nose and throat specialist James Rockwell, M.D., for evaluation of a lump on the roof of Employee's mouth and chronic sinusitis. Ms. Northway restricted Employee from working until September 19, 2013. Ms. Northway did not relate Employee's need for medical treatment or disability to any work injury. (Patient Referral Request, FNP Northway, September 5, 2013; Unfit/Fit for Duty Form, September 5, 2013).

48) On October 29, 2013, *Ibale I* denied Employee's request for an SIME. *Ibale I* found no significant medical dispute between Employee's attending physicians and Employer's EME physicians. *Ibale I*.

49) On November 6, 2013, Employer filed an affidavit of hearing (ARH) on Employee's claims. (ARH, November 6, 2013).

50) At a January 30, 2014 prehearing conference, Employee's claims were scheduled to be heard on April 8, 2014. Employee received notice of the prehearing conference but did not appear. (Prehearing Conference Summary, January 30, 2014).

51) On March 13, 2014, the parties appeared at a prehearing conference and confirmed Employee's claims would be heard on April 8, 2014. The parties agreed the hearing issues would be the merits of the following claims, dates of injury, and body parts:

Case No.	**Date of Injury**	**Date Claims Filed**	**Body Parts Injured**
201204120M	March 27, 2012	April 23, 2012; May 31, 2012; July 10, 2012	Respiratory symptoms; eye; ear; nose; throat; ocular irritation; floaters; PVD
201209804	July 13, 2012	August 20, 2012	Respiratory symptoms; heart
201214174	September 8, 2012	October 7, 2013	Left eye; right arm; chest; back; face; legs
201218806	November 17, 2012	January 24, 2013	Right eye
201301046	January 29, 2013	February 27, 2013	Right eye; anxiety

(Prehearing Conference Summary, March 13, 2014).

52) Employee's compensation rate calculation includes Employee's PERS and SBS earnings. (Huna Hearing representations).

53) At hearing on April 8, 2014, Employee testified she developed her symptoms and conditions following workplace exposure to various contaminants including asbestos and haloacetic acid. Employee contended Dr. Bardana's statement, "She has had some angioedema and swelling periorbitally" supports her contention ongoing medical treatment is related to her workplace

exposures. Employee also contended she has not received the ocular irritation medical treatment Dr. Zollman recommended. Employee acknowledged Employer has not controverted the recommended medical treatment for her ocular irritation condition. The reason she has not obtained further medical treatment for this condition is because she did not want to take time off work for treatment. She received anti-inflammatory eye drops as well as prescription goggles to wear at work. Employee testified Dr. Anthes' echocardiogram bill was $300.00 and it has never been paid. Employee failed to file or serve a copy of Dr. Anthes' bill and provided no reason for this failure. Other than a few, short disability periods, Employee has continued to work for Employer. (Employee).

54) Employee contends Employer unfairly or frivolously controverted benefits based on Dr. Bardana's statements no comprehensive industrial hygiene surveys were conducted in the forward lounge and his statements, "It is impossible to know how much nonspecific dust exposure played a part in [Employee's] symptomatology" and "It is possible that nonspecific dust contributed to the induction of some or all of her respiratory symptoms. It is not possible to make a precise judgment on this since there are no industrial hygiene data that actually measure nonspecific particulate, either respirable or otherwise, in the lounge area at the time of the incident." She also contends her anxiety claim arises from her deteriorating vision due to delayed eye medical treatment. (Denial of Controversion Notice, October 19, 2012; Employee's Hearing Brief, April 7, 2014).

55) Employee's hearing testimony and pleadings imply she alleges she became hypersensitive as a result of her March 2012 workplace exposure, and all her ongoing, numerous, complex and diffuse symptoms and conditions arose out of and were caused by this exposure. She simultaneously alleges other exposures, such as haloacetic acid, airborne contaminates from ceiling fibers, or laundry soap may have combined with or caused her September 2012, November 2012 and January 29, 2013 reported symptoms and conditions, and strenuous activity may have also caused her November 17, 2012 and January 29, 2013 eye conditions and symptoms. (Employee SIME Hearing Testimony, ROI, March 29, 2012; Claim, April 23, 2012; ROI, July 13, 2012; Claim, August 17, 2012; Employee's Report of Maritime Injury or Illness, September 10, 2012; ROI, September 10, 2012; Denial of Controversion Notice, October 19, 2012; ROI, November 18, 2012; Petition, January 24, 2013; ROI, January 30, 2013; Claim, February 27, 2013; Petition, February 24, 2013; Claim, September 30, 2013; Petition for Review and Reconsideration, December 2, 2013).

PRINCIPLES OF LAW

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

(1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at . . . reasonable cost to . . . employers . . . subject to . . . this chapter; . . . .

AS 23.30.005. Alaska Workers' Compensation Board.
. . .

(h) The department shall adopt rules . . . and . . . regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

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

AS 23.30.010. Coverage. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

A finding reasonable persons would find employment was or was not a cause of the Employee's disability and impose or deny liability is, "as are all subjective determinations, the most difficult to support." *Rogers & Babler*, 747 P.2d at 534.

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . .
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> (f) An employee is not eligible for reemployment benefits if
> . . .
>
> (4) at the time of medical stability, no permanent impairment is identified or expected.
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> **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.
> . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .
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> **AS 23.30.120 Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (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 her injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). The evidence necessary to raise the presumption of compensability varies

depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. 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*, Alaska Workers' Comp. App. Comm'n Dec. No. 150 at 7 (March 25, 2011). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility of the parties and witnesses is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the board finds the employer's evidence is sufficient, in the third step the presumption of compensability drops out, the employee must prove her case by a preponderance of the evidence, and must prove in relation to other causes, employment was the substantial cause of the disability or need for medical treatment. *Runstrom* at 8. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *See 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.

> **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). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007). The board has the sole discretion to determine the weight of the medical testimony and reports. When doctors'

opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 087 at 11 (Aug. 25, 2008).

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

When a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice it may be filed at a later date when it becomes timely. *Egemo v. Egemo Const. Co.*, 998 P.2d 434, 441 (Alaska 2000).

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

> **AS 23.30.155. Payment of compensation.** (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. . . .
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> (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. . . .
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> (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. . . .
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> (e) If any installment of compensation payable without an award is not paid within seven days after 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.

> . . .
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> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (p) An Employer shall pay interest on compensation that is not paid when due. . . .

A controversion notice must be filed "in good faith" to protect an employer from a penalty or to avoid referral to the Division of Insurance. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." *See also* 3 A. Larson, *Larson's Workmen's Compensation Law* §83.41(b)(2) (1990) ("Generally a failure to pay because of a good faith belief that no payment is due will not warrant a penalty."). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Harp*, 831 P.2d at 358. Evidence the employer possessed "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id*.

AS 23.30.155 imposes a penalty on an employer who fails to pay an installment due to an employee if the employer does not controvert the employee's right to compensation within twenty-one days, or within seven days if the employer has previously made compensation payments.

> **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.
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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. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041. . . .

(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. . . .

(c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. . . .

AS 23.30.220. Determination of spendable weekly wage. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

(1) if at the time of injury the employee's earnings are calculated by the week, the weekly amount is the employee's gross weekly earnings;

(2) if at the time of injury the employee's earnings are calculated by the month, the employee's gross weekly earnings are the monthly earnings multiplied by 12 and divided by 52;

(3) if at the time of injury the employee's earnings are calculated by the year, the employee's gross weekly earnings are the yearly earnings divided by 52;

(4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee. . . .

8 AAC 45.120. Evidence.

. . .

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

> (c) Each party has the following rights at hearing:
> . . .
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> (2) to introduce exhibits;
> . . .
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> (f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing...

Pursuant to 8 AAC.45.120(f), certain documents, which would necessarily include medical bills, served on the parties and in the board's possession "20 or more days before hearing, will ... be relied upon by the board in reaching a decision[.]" An exception to this provision is set forth in AS 23.30.130(a), the statute addressing modification of Board orders, and 8 AAC 45.150(d), the board regulation covering the same subject. The statute and regulation read together allow for a procedure whereby Board orders may be modified based on a mistake in the board's determination of a fact. Thus, they are, among other things, a means of relieving a party of the requirement in 8 AAC 45.120(f) of having to submit documentary evidence 20 days before the original hearing is held. *Failla v. Fairbanks Resources*, Alaska Workers' Comp. App. Comm'n Dec. No. 162 (June 8, 2012). *Failla* said:

> However, 8 AAC 45.150(d)(2) provides that if modification is sought owing to newly discovered evidence, an affidavit must be filed explaining the reasons why, with due diligence, the evidence could not have been discovered and produced at the time of the hearing. As the Alaska Supreme Court commented: "The key language in this regulation is the requirement that new evidence could not have been discoverable prior to the hearing through due diligence.... This requirement is fair because an allegation of mistake 'should not serve as "a backdoor route to retrying a case because one party thinks he can make a better showing on a second attempt."'" [Citation omitted].
>
> With respect to her medical bills predating July 22, 2009, it is difficult to conceive a set of circumstances under which Failla could potentially satisfy the requirement of AS 23.30.130(a) and 8 AAC 45.150(d) that she demonstrate the evidence consisting of her medical bills could not have been discovered and produced prior to the hearing....

Failla at 19-20.

> **8 AAC 45.142. Interest**. (a) If compensation is not paid when due, interest must be paid at the rate established in . . . AS 09.30.070(a) for 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.
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> (b) The Employer shall pay the interest
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> (1) on late-paid time-loss compensation to the Employee. . . .
> . . .
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> (2) on late-paid medical benefits to
> . . .
>
> (B) to an insurer, trust, organization, or government agency, if the insurer, trust, organization, or government agency has paid the provider of the medical benefits; or
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> (C) to the provider if the medical benefits have not been paid.

ANALYSIS

1) Is Employee entitled to medical and related transportation expenses for her respiratory symptoms, eyes, ears, nose, throat, ocular irritation, floaters, PVD, heart, right arm, chest, back, face, legs and anxiety?

Employee's claims raise factual issues to which the presumption of compensability applies. AS 23.30.120; *Meek*. Employee alleges workplace exposures to contaminants were the cause of the following reported injuries and symptoms:

Case No.	**Date of Injury**	**Date Claims Filed**	**Body Parts Injured**
201204120M	March 27, 2012	April 23, 2012; May 31, 2012; July 10, 2012	Respiratory symptoms; eye; ear; nose; throat; ocular irritation; floaters; PVD
201209804	July 13, 2012	August 20, 2012	Respiratory symptoms; heart
201214174	September 8, 2012	October 7, 2013	Left eye; right arm; chest; back; face; legs
201218806	November 17, 2012	January 24, 2013	Right eye
201301046	January 29, 2013	February 27, 2013	Right eye; anxiety

It is unclear whether Employee is claiming all her injuries are a continuation of her March 2012 workplace exposure or whether each workplace exposure is a new injury. Employee implies she became hypersensitive as a result of her March 2012 workplace exposure and all her ongoing, symptoms and conditions arose out of and were caused by this exposure. She also alleges other exposures may have combined with or caused her September 2012, November 2012 and January 29, 2013 symptoms and conditions. She further contends strenuous activity may have also caused her November 17, 2012 and January 29, 2013 eye conditions and symptoms.

Regardless of whether her claims are treated as all arising from the March 2012 workplace exposure or treated as separate workplace exposure incidents, the basis of Employee's claims is workplace exposure to contaminants and possibly strenuous activities at work caused her to have medical reactions, such as rashes, eye swelling, PVD, floaters, problems with her heart, right arm, chest, back, face, legs, anxiety and shortness of breath. These are highly complex medical issues. Medical evidence is necessary under the facts of this case to raise the presumption of compensability. *Burgess*. No physician has stated Employee's strenuous activity, work injuries or workplace exposures are the substantial cause of any medical treatment, other than ocular irritation which Employer does not dispute is compensable, and the dust-exposure related respiratory treatment for which Employer has already paid. Therefore, no medical evidence exists in the record adequate to raise the presumption on these disputed issues. AS 23.30.010; *Tolbert*.

Employee's lay opinion also fails to raise the presumption of compensability on the complex medical issues of whether: 1) the March 2012 dust and asbestos exposure caused respiratory, eye, ear, nose, throat, floaters, and PVD conditions and symptoms other than ocular irritation which Employer does not dispute is compensable, and the dust-exposure related respiratory treatment for which Employer has already paid, 2) the March 2012 exposure caused her July 13, 2012 shortness of breath or other respiratory or heart conditions and symptoms, 3) cream cheese bread, haloacetic acid, shower water, airborne contaminates, laundry soap, or the March 2012 dust and asbestos exposure caused her allergic reactions on September 6, 2012 and September 8, 2012 involving her left eye, right arm, chest, back, face and legs, 4) the March 2012 and September 2012 exposures, continuous exposure to toxins, or strenuous activity caused her blurry vision and right eye floaters on November 17, 2012, 5) strenuous activity, allergic reaction after exposure to cleaning

chemicals, the March 2012 exposure, her September 8, 2012 and November 17, 2012 exposures, and continuous exposure to toxins caused her January 29, 2013 allergic reaction and other symptoms and conditions including PVD, right eye hemorrhage, bilateral eye irritation and light flashes, blurred vision, chest pain, shortness of breath, and anxiety, and 6) strenuous activity or any workplace exposure to asbestos, dust, haloacetic acid, cleaning chemicals, or any other contaminants caused, aggravated, accelerated, or combined with any condition to cause, any of Employee's ongoing, numerous, complex and diffuse symptoms and conditions. Thus, Employee failed to raise the presumption of compensability on her disputed claims. She must prove all elements of each claim by a preponderance of the evidence. *Tolbert*; *Burgess*.

Alternately, had Employee raised the presumption on any of these disputed issues, Employer rebutted it through Dr. Bardana's report. Dr. Bardana opined Employee's March 27, 2012 work-related exposure contributed to some initial respiratory symptoms, but stated such symptoms would have been transient, would not have lasted beyond 72 hours, and required no ongoing medical treatment. Dr. Bardana opined the work-related exposure was not the substantial cause of Employee's ongoing need for medical treatment, stating the causes of her need for medical treatment were non-work related untreated hypertension, possible obstructive sleep apnea, probable valvular heart disease, pre-diabetes mellitus Type II, and probable gastroesophageal reflux disease. Employer also rebutted it as to any eye issues with Dr. Zollman's opinion Employee's workplace exposures were the substantial cause of her ocular irritation, but not any other eye conditions.

Because Employee failed to raise the presumption of compensability, she must prove all elements of her claim by a preponderance of the evidence. *Runstrom*.

A) Respiratory symptoms including ears, nose, and throat.

There is no dispute Employee was injured while working for Employer on March 27, 2012, and this injury resulted in some need for respiratory treatment. Employee's treating physicians and Employer's EME physician agree work-related dust exposure caused some initial respiratory symptoms and gave rise to some work-related need for medical treatment. Employer paid Employee for her dust exposure-related respiratory medical benefits until it controverted them on September 26, 2012, based on Dr. Bardana's opinion. There is no medical evidence supporting the

need for any further medical care for Employee's March 27, 2012 respiratory injury, which was extremely minor. AS 23.30.095. Employee's lay opinion to the contrary is given little weight. AS 23.30.122. Because she lacks any medical support for any further treatment for her minor, dust-related exposure, or for treatment to her ears, nose or throat, her claim for continuing medical care and related transportation expenses for her respiratory symptoms, including her ears, nose and throat, will be denied.

B) Eyes, including ocular irritation, PVD and floaters.

Employee's eye claims are vague and hard to follow. Employer accepted Employee's ocular irritation claim as compensable. There is no medical evidence suggesting the need for medical treatment for other eye conditions such as PVD and resultant symptoms like flashing lights in Employee's vision fields, and floaters, are connected in any way to Employee's various work injuries. AS 23.30.095. Little weight is given to Employee's lay opinions and greater weight is given to Dr. Zollman, and Employee's attending physicians, who are all medical specialists. AS 23.30.122. They either say these symptoms and conditions are not work-related or they fail to state they are. Employee points to Dr. Bardana's statement, "She has had some angioedema and swelling periorbitally" as support for her contention ongoing medical treatment is related to her workplace exposure. Employee misconstrues Dr. Bardana's statement. This statement appears in Dr. Bardana's list of Employee's past medical history and is part of his functional inquiry. He does not opine Employee's angioedema relates to any workplace exposure. He merely lists this condition in the section of his report where he identifies whether Employee has or has not had certain conditions and symptoms during her life. Dr. Bardana's statement does not support Employee's claims.

Employee contends she has not received the ocular irritation medical treatment Dr. Zollman recommended and implies Employer is responsible for this delay. Dr. Zollman recommended Employee treat her work-related ocular irritation with hot compresses and artificial tears. He stated silicone punctal plugs may be helpful to promote healing and also recommended a course of anti-inflammatory eye drops to help reduce irritation. Employee acknowledged Employer has not controverted the recommended medical treatment for her ocular irritation condition. Employee also testified the reason she has not obtained further medical treatment for this condition is because she

did not want to take time off work for treatment. She further testified she received anti-inflammatory eye drops as well as prescription goggles to wear at work. The evidence shows Employee has received treatment for her compensable eye condition. The cause of any delay or failure to obtain additional treatment is because Employee has not followed up with or otherwise pursued the recommended treatment.

Because she lacks medical support for any work-related treatment for PVD, floaters, angioedema and swelling periorbitally, Employee's claim for continuing medical care and related transportation expenses for her PVD, floaters, angioedema and swelling periorbitally will be denied. Employee can use hot compresses at no cost to Employer by applying a wet washcloth to her eyes when needed. She already obtained the anti-inflammatory eye drops. However, as Employer has not controverted artificial tears or silicone punctal plugs, Employee is free to pursue those treatments if the need for them still exists.

C) Heart.

Employee's contentions as to her heart conditions and symptoms are even harder to follow. Although Employee sought medical treatment for many conditions after September 2012, no physician has stated the work injuries are the substantial cause of the additional medical treatment, other than ocular irritation which Employer does not dispute is compensable. There is no medical evidence supporting the need for any medical care relating to Employee's heart. AS 23.30.095. No physician has opined Employee has a "work-related" need for any heart medical treatment or opined Employee has any work-related heart conditions or symptoms. Employee believes her heart symptoms and conditions were caused by her workplace exposures, but little weight is given to Employee's lay testimony on these complex medical issues. AS 23.30.122. Greater weight is given to Employee's attending physicians, all of whom are medical specialists and either said her need for heart medical treatment is not work-related, or did not make any work-related connection. Because she lacks medical support for any work-related heart medical treatment, Employee's claim for continuing medical care and related transportation expenses for her heart will be denied.

Employee alleges a $300.00 echocardiogram bill from Dr. Anthes has never been paid. No physician has said Employee's September 10, 2012 echocardiogram is work-related. AS 23.30.122. Dr. Bardana said it was not. No physician has linked this echocardiogram or any heart condition to Employee's employment with Employer. Little weight is given to Employee's lay testimony on this complex medical issue and great weight is given to Dr. Bardana's opinion Employee's echocardiogram was unrelated to her workplace exposure. AS 23.30.122. Employee does not meet her burden of proving her claim for payment of Dr. Anthes' bill by a preponderance of the evidence. Employee's claim for payment of this bill will be denied on this basis.

Additionally, Employee conceded she never filed or served a copy of Dr. Anthes' bill. Employee gave no reason why she could not have filed and served a copy of this bill during the past year and a half and the agency file contains no such evidence. Jurisdiction may not be retained over this issue to allow Employee to file this evidence post-hearing. 8 AAC 45.120; *Failla*. Because Employee never filed or served evidence of this outstanding medical bill and provided no reason for this failure, payment of this bill would have been denied on this basis, even if the bill had been found to be compensable.

D) Chest, right arm, back, face, legs.

Employee claims a rash or some other allergic reaction to these body parts resulted from one or more work exposures, referenced above. Alternately, she implies her March 27, 2012 exposure made her hypersensitive to other exposures such as water from Employer-provided showers. Cream cheese bread was also briefly referenced as one possible cause of Employee's various conditions. No physician has stated the work injuries are the substantial cause of the need for medical treatment for Employee's chest, right arm, back, face or legs. No physician has opined Employee has a "work-related" need for any chest, right arm, back, face or leg medical treatment. Employee believes these ongoing symptoms and conditions were caused by her workplace exposures, but little weight is given to Employee's lay testimony on these complex medical issues. AS 23.30.122. Because she lacks any medical support for treatment to her chest, right arm, back, face or legs, Employee's claim for medical treatment and related transportation expenses for her chest, right arm, back, face and legs will be denied.

E) Anxiety.

Lastly, Employee makes a claim for treatment for anxiety. No physician stated the work injuries are the substantial cause of the need for medical treatment for Employee's anxiety. No physician has opined Employee has a "work-related" need for any treatments to address anxiety. Employee is anxious because she believes her eyesight is deteriorating due to delayed treatment. As discussed above, the cause of any delay or failure to obtain additional work-related eye treatment is because Employee has not followed up with or otherwise pursued the recommended treatment. Little weight is given to Employee's lay testimony on causation of any anxiety she may now experience. Anxiety is a complex medical and psychological condition. Because she lacks any medical support for anxiety treatment, Employee's claim for medical treatment and related transportation expenses for anxiety will be denied.

In short, with the limited exception of the accepted claims for respiratory and ocular irritation, addressed above, Employee's other claims for medical care and related transportation expenses will be denied for failure to prove them by a preponderance of the evidence. *Runstrom*.

2) Is Employee entitled to additional TTD for the periods March 29, 2012 to May 13, 2012, July 13, 2012 to July 14, 2012, and January 30, 2013 to February 24, 2013?

Employee contends she is entitled to TTD for the periods March 29, 2012 to May 13, 2012, July 13, 2012 to July 14, 2012, and January 30, 2013 to February 24, 2013. AS 23.30.150 provides TTD may not be allowed for the first three days of the disability, unless the injury results in disability of more than 28 days.

As discussed in section one, Employee's claims are based on highly technical medical considerations. *Burgess*. Employee seeks TTD based on her complex medical claims. Medical evidence is necessary under the facts of this case to raise the presumption of compensability. No physician has opined any work-related condition or symptom is the substantial cause of any disability after May 3, 2012. Employee's lay opinion her medical conditions and symptoms were caused by her employment with Employer and resulted in disability fails to raise the presumption of compensability as to any period after May 3, 2012.

Had Employee raised the presumption, Employer rebutted it through Dr. Snyder's opinion and Dr. Bardana's EME report. Following the March 2012 workplace exposure, Employee's treating physician Dr. Snyder opined on April 4, 2012, "Symptoms better almost resolved. She will not need further follow-up for this problem." Dr. Snyder released Employee to return to her regular work beginning April 6, 2012. Dr. Bardana opined Employee was able to return to her original work on the date Dr. Snyder stated she could return. Employer would also have rebutted it with Dr. Zollman's opinion Employee's workplace exposures and resulting ocular irritation condition are not a substantial cause of any disability.

Employee must prove all elements of her TTD claim by a preponderance of the evidence. There is no dispute Employee was injured on March 27, 2012, while working for Employer and this injury resulted in some disability. Employee's treating physician Dr. Snyder restricted Employee from working from March 29, 2012 to April 6, 2012, because of her work-related dust exposure. Dr. Snyder released Employee to return to her regular work beginning April 6, 2012. Another treating physician, Dr. Pankow, restricted Employee from working from April 29, 2012 to May 4, 2012, because of her work-related dust exposure. Dr. Pankow released Employee to return to her regular work beginning May 4, 2012. No physician has opined workplace exposure, or any other work-related injury, caused any disability after May 3, 2012. Employee's lay testimony on this complex medical issue is given little weight. AS 23.30.122. Greater weight is given to the opinions of Drs. Snyder and Pankow.

The number of days Employee's treating physicians opined she was unable to work because of her work injuries total 14. Employer paid Employee TTD for these periods, after excluding Employee's first three days of disability under AS 23.30.150, because Employee's injury did not result in more than 28 days of disability. Employer paid the disability benefits Employee's treating physicians opined were work-related. Employee has not met her burden of proving her TTD claim by a preponderance of the evidence. The preponderance of the evidence shows Employee's workplace dust exposure on March 27, 2012 resulted in two short disability periods, for which Employee has already been paid. Consequently, Employee's request for additional TTD will be denied.

3) Is Employee entitled to PPI benefits?

The presumption of compensability applies to this factual dispute. AS 23.30.120. Employee has failed to raise the presumption of compensability for PPI benefits for her respiratory, eyes, ears, nose, throat, ocular irritation, floaters, PVD, heart, right arm, chest, back, face, legs, and anxiety symptoms and conditions. No physician opined Employee incurred any work-related PPI for these symptoms and conditions. Dr. Bardana opined Employee's respiratory issues resolved without permanent impairment. Employee has not obtained any other PPI rating for these accepted conditions and symptoms. A PPI rating is necessary for obtaining an award of PPI benefits. *Stonebridge Hospitality Associates, LLC v. Settje*, Alaska Workers' Comp. App. Comm'n Dec. No. 153 at 10-13 (June 14, 2011). The only work-related conditions are the respiratory illness and the ocular irritation, and Employee has not provided a PPI rating for either. The respiratory condition is resolved and Dr. Bardana said Employee has no permanent impairment. Her PPI claims will be denied for all conditions except the ocular irritation as discussed below.

Employer's EME Dr. Zollman opined Employee's ocular irritation condition is not yet medically stable and further treatment has been recommended. Dr. Zollman declined to provide a PPI rating for Employee's ocular irritation for this reason. A PPI rating for Employee's ocular irritation condition is premature and will be held in abeyance until it is timely. *Egemo*. Jurisdiction over ocular irritation PPI benefits will be retained.

4) Is Employee entitled to a compensation rate adjustment?

This issue involves factual disputes to which the statutory presumption of compensability applies. Employee did not specify a reason or a rate for her requested compensation rate increase. Employee failed to raise the presumption of compensability because she provided no evidence or testimony supporting her claim for a rate increase. AS 23.30.120. Employee filed her 2010 and 2011 W-2s but these show 2010 gross earnings of $41,867.48 and 2011 gross earnings of $44,469.82. Using her higher 2011 gross earnings would result in a gross weekly earning rate of $889.40 and a TTD rate of $614.59. Even if Employee had attached the presumption, Employer would have rebutted it with a compensation report showing the gross weekly earnings rate at which Employer paid Employee is $995.64, resulting in a TTD rate of

$681.88, because Employer's rate calculation includes Employee's PERS and SBS earnings. Employee's evidence supports a lower rate, not a higher one. Employee is not entitled to a compensation rate increase based on the preponderance of the evidence, and her rate adjustment claim will be denied.

5) Is Employee entitled to reemployment benefits?

Alaska law gives the reemployment benefits administrator (RBA) the right to decide initially if an employee is entitled to an eligibility evaluation and if the employee is eligible for reemployment and retraining benefits. AS 23.30.041. No such RBA determination has been made in this case. If Employee wishes to pursue reemployment benefits, she may contact the RBA and make the appropriate request. Employer may raise any appropriate defenses. Consequently, Employee's entitlement to reemployment benefits, if any, is deferred to the RBA.

6) Is Employee entitled to interest?

This is a legal question and there are no factual disputes. The statutory presumption of compensability analysis does not apply. Interest on late-paid indemnity benefits is mandatory. AS 23.30.155(p); 8 AAC 45.142. Employer has never disputed Employee's entitlement to TTD for the periods March 29, 2012 to April 6, 2012 and April 29, 2012 to May 4, 2012.

Under AS 23.30.155(b), compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On April 27, 2012, Employer received Dr. Snyder's return to work slip and on that date had knowledge of Employee's March 29, 2012 to April 6, 2012 work-related disability. On May 3, 2012, Employer received Dr. Pankow's return to work slip via fax and on that date had knowledge of Employee's April 29, 2012 to May 4, 2012 work-related disability. Consequently, TTD for the March 29, 2012 to April 6, 2012 disability period was due May 11, 2012, and TTD for the April 29, 2012 to May 4, 2012 disability period was due May 17, 2012. Employer did not pay any of these TTD benefits until June 4, 2012. Employee is entitled to interest on her late-paid TTD at the statutory rate, calculated from the date each benefit was due through the date it was paid. Employee's interest claim will be granted.

7) Is Employee entitled to a penalty award?

This is a legal question and there are no factual disputes. The statutory presumption of compensability analysis does not apply. As discussed above, the disability benefits triggered by Drs. Snyder and Pankow's return to work slips were due May 11, 2012 and May 17, 2012, respectively. Under AS 23.30.155(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. To avoid this penalty, Employer was required to pay or controvert the first disability period by May 18, 2012, and the second by May 24, 2012.

Employer did not controvert any benefits until June 15, 2012. Employer did not pay Employee any TTD benefits until June 4, 2012. On that date, it paid Employee for the first TTD period plus a 25 percent penalty for late payment. On June 21, 2012, it paid Employee for the second TTD period, but did not pay Employee any penalty for late payment.

Employer provided no reason to excuse it from paying a 25 percent penalty on the late-paid April 29, 2012 to May 4, 2012 TTD. Because Employer neither timely controverted Employee's right to these benefits nor paid them in a timely manner, Employee is entitled to a 25 percent penalty on the late-paid April 29, 2012 to May 4, 2012 TTD. AS 23.30.155(e). Employer will be ordered to pay this penalty to Employee.

8) Is Employee entitled to a finding of unfair or frivolous controversion?

Employee's request for an order finding Employer made frivolous or unfair controversions is difficult to follow but it appears Employee is dissatisfied with the physicians' opinions in this case, including those of her treating physicians. She also contends Employer unfairly or frivolously controverted benefits based on Dr. Bardana's statements relating to industrial hygiene surveys and dust exposure in the forward lounge. Employer did not address this issue in its hearing brief or at hearing, but it is presumed Employer opposes this request. Employer filed the following controversions:

- June 15, 2012, controverting disability benefits relating to Employee's March 27, 2012 work injury, based on Dr. Snyder's opinion Employee could return to her regular work as of April 6, 2012;
- September 26, 2012, controverting all benefits relating to Employee's March 27, 2012 workplace exposure, based on Dr. Bardana's EME report;
- November 29, 2012, controverting all benefits relating to Employee's November 17, 2012 work injury, based on lack of any medical evidence to support a work-related injury occurred on November 17, 2012, or lack of causal link to employment;
- March 8, 2013, controverting all benefits relating to Employee's January 29, 2013 work injury, based on lack of any medical evidence to support a work-related injury occurred on January 29, 2013, or lack of causal link to employment;
- May 23, 2013, controverting all benefits relating to Employee's September 8, 2012 work injury, based on lack of any medical evidence to support a work-related injury occurred on September 8, 2012, or lack of causal link to employment and also based on Employee's failure to give Employer timely notice of injury under AS 23.30.100;
- August 1, 2013, controverting all benefits relating to Employee's March 27, 2012 work injury except ocular irritation medical benefits, based on Dr. Zollman's May 24, 2013 EME report; and
- August 1, 2013, controverting all benefits relating to Employee's September 8, 2012 work injury, except ocular irritation medical benefits, based on Dr. Zollman's May 24, 2013 EME report.

Employer's June 15, 2012 controversion was based Employee's treating physician's opinion Employee could return to her regular work as of April 6, 2012. Its September 26, 2012 controversion was based on Dr. Bardana's EME report and its August 1, 2013 controversions were based on Dr. Zollman's EME report. To the extent Employer controverted benefits based upon Dr. Snyder's opinion and Drs. Bardana and Zollman's EME reports, its controversion were not in bad faith, unfair or frivolous. *Harp*.

Employee points to Dr. Bardana's statements no comprehensive industrial hygiene surveys were conducted in the forward lounge and his statements, "It is impossible to know how much

nonspecific dust exposure played a part in [Employee's] symptomatology" and "It is possible that nonspecific dust contributed to the induction of some or all of her respiratory symptoms. It is not possible to make a precise judgment on this since there are no industrial hygiene data that actually measure nonspecific particulate, either respirable or otherwise, in the lounge area at the time of the incident" as evidence Employer unfairly or frivolously controverted benefits. When read in context, these statements show Dr. Bardana questioned Dr. Snyder's opinion dust exposure caused Employee's initial respiratory symptoms and resultant need for medical treatment. He stated Employee's initial respiratory symptoms could have been caused by a common cold. However, Dr. Bardana went on to state since there was no industrial hygiene data that actually measured nonspecific particulate in the lounge area at the time of the incident, he consequently agreed with Dr. Snyder's opinion Employee's March 27, 2012 work injury contributed to her initial respiratory symptoms. Dr. Bardana further opined any such symptoms would have been transient, and would not have lasted beyond 72 hours. He stated, "As indicated, if in fact it is assumed that dust played some role, it would not have caused symptoms that went beyond 72 hours." Dr. Bardana's statements do not support Employee's claim for a finding of unfair or frivolous controversion.

Employee also contends Dr. Bardana's statement, "[Numerous, relevant medical records and Employee's recent thyroid, heart and pulmonary function studies] are lacking and it becomes impossible to compare the studies which I was able to obtain over a few hours of examination against anything that was done either in the distant past or in the recent past in answers to questions where you require precise and definitive opinions" is evidence Employer unfairly or frivolously controverted benefits. Dr. Bardana provided a definitive statement Employee's work with Employer did not cause any ongoing need for medical treatment or disability, based on the studies he conducted and the information he had at the time of the examination. His statement regarding missing records referred to questions where his opinion was based on comparison of the records he had to those he lacked. Read in context, all Dr. Bardana is saying is he could not compare and contrast his testing results with testing results he does not have, but that he still has enough expertise and records to come to a definitive opinion on the substantial cause of Employee's disability and need for medical treatment.

Employer's November 29, 2012, March 8, 2013, and May 23, 2013 controversions were based on a lack of any medical evidence linking causation of Employee's January 29, 2013, November 17, 2012, or September 8, 2012 work injuries or resulting conditions to her employment with Employer. For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the fact-finders would find the claimant is not entitled to benefits. *Harp*. That is what occurred here. No physician has stated Employee's strenuous activity, work injuries or workplace exposures are the substantial cause of any disability or need for medical treatment, other than the dust-exposure related respiratory treatment for which Employer has already paid and the ocular irritation, which Employer does not dispute is compensable. As discussed in the sections above, Employee failed to raise the presumption and also failed to then prove her claims by a preponderance of the evidence. At the time of each controversion, Employer possessed sufficient, stand-alone evidence to find Employee was not entitled to additional benefits. Its controversions were filed in good faith. Accordingly, Employer's controversions were neither unfair nor frivolous. Employee's requested finding will be denied.

CONCLUSIONS OF LAW

1) Employee is entitled to medical and related transportation expenses for her ocular irritation in accordance with this decision. Employee is not entitled to medical and related transportation expenses for her respiratory symptoms, eyes, ears, nose, throat, floaters, PVD, heart, right arm, chest, back, face, legs and anxiety.

2) Employee is not entitled to additional TTD for the periods March 29, 2012 to May 13, 2012, July 13, 2012 to July 14, 2012, and January 30, 2013 to February 24, 2013.

3) Employee is not entitled to PPI benefits for any condition addressed in this decision, with exception of her ocular irritation, for which PPI, if any, is held in abeyance.

4) Employee is not entitled to a compensation rate increase.

5) Employee's entitlement to reemployment benefits, if any, is deferred to the RBA.

6) Employee is entitled to interest on her late-paid TTD benefits.

7) Employee is entitled to a penalty award on her late-paid TTD benefits.

8) Employee is not entitled to a finding of unfair or frivolous controversion.

ORDER

1) Other than ocular irritation, which Employer does not dispute is compensable, Employee's claim for additional medical and related transportation expenses for her respiratory symptoms, eyes, ears, nose, throat, floaters, PVD, heart, right arm, chest, back, face, legs, and anxiety is denied.

2) Employee's claim for additional TTD for the periods March 29, 2012 to May 13, 2012, July 13, 2012 to July 14, 2012, and January 30, 2013 to February 24, 2013 is denied.

3) With the exception of ocular irritation, Employee's claim for PPI benefits for her respiratory, eyes, ears, nose, throat, floaters, PVD, heart, right arm, chest, back, face, legs, and anxiety symptoms and conditions is denied. Employee is not medically stable with regard to her ocular irritation condition and thus a determination on ocular irritation PPI benefits is premature. Jurisdiction over ocular irritation PPI benefits is retained.

4) Employee's claim for a compensation rate increase is denied.

5) Employee's entitlement to reemployment benefits, if any, is deferred to the RBA should Employee make an appropriate request to the RBA.

6) Employee's request for interest is granted. Employer is ordered to pay Employee interest on all late-paid TTD at the statutory rate, calculated from the date each benefit was due through the date it was paid.

7) Employee's request for a penalty award is granted. Employer is ordered to pay Employee a 25 percent penalty on the late-paid April 29, 2012 to May 4, 2012 TTD.

8) Employee's request for a finding of unfair or frivolous controversion is denied.

Dated in Juneau, Alaska, on May , 2014.

ALASKA WORKERS' COMPENSATION BOARD

Marie Y. Marx, Designated Chair

Bradley S. Austin, Member

Charles M. Collins, Member

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 LEAH C. IBALE, employee / claimant v. STATE OF ALASKA, self-insured employer; Case Nos. 201204120, 201209804, 201218806, 201301046, and 201214174; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties on May , 2014.

Sue Reishus-O'Brien, Workers' Compensation Officer