ALASKA WORKERS' COMPENSATION BOARD

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

VIRGIL ADAMS, Employee, Claimant, v. MICHAEL HEATH d/b/a O&M ENTERPRISES, and MICHAEL A. HEATH TRUST, Employers, and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201113128 AWCB Decision No. 17-0065 Filed with AWCB Anchorage, Alaska on June 6, 2017

Virgil Adams' (Employee) September 21, 2011 claim and September 24, 2012 amended claim were heard on March 15, 2017 in Anchorage, Alaska. The hearing date was selected on December 8, 2016. Employee appeared and testified. Attorney Charles Coe appeared and represented Employee. Michael Heath represents himself and also O&M Enterprises and the Michael A. Heath Trust (Employer). Assistant Attorney General Siobhan McIntyre appeared and represented the Alaska Workers' Compensation Benefits Guaranty Fund and its adjusters, Wilton Adjustment Service, Inc. (Wilton). Joanne Pride appeared in person and represented Wilton. Velma Thomas appeared telephonically and testified as Fund administrator. Assistant Attorney General Judy Kuipers appeared telephonically and testified to the Medicaid lien asserted by the state. Jeanette Adams appeared and testified for Employee. The record was left open at the

conclusion of the hearing for additional briefing and attorney's fees affidavits. The record closed on April 6, 2017.

ISSUES

Employer did not appear, and efforts to contact Employer were unsuccessful. After attempting to call Employer and confirming notice of the hearing was sent to Employer's address of record and not returned by the postal service, an oral order issued to proceed with the hearing in Employer's absence.

1) **Was the oral order to proceed in Employer's absence correct?**

Employee contends he was injured on August 18, 2011 when scaffolding he was working on collapsed, causing him to fall and sustain a permanent spinal cord injury. Employee seeks temporary total disability (TTD) benefits from the date of the injury through November 14, 2016, and permanent total disability (PTD) benefits from November 14, 2016 onward. The Fund does not dispute Employee is owed TTD from the date of the injury until November 14, 2016, and then PTD benefits from November 14, 2016 onward.

Since Employer did not appear for the hearing or file a brief, its position is unknown. It will be presumed for all issues Employer opposes Employee's claims.

2) **Is Employee entitled to TTD?**
3) **Is Employee entitled to PTD?**

Employee was assigned a 41 percent permanent partial impairment (PPI) rating. Employee contends he is entitled to payment for this amount. The Fund does not dispute this rating. However, the Fund contends no payment for PPI is due because the Act allows payment for PPI only if the impairment does not result in permanent total disability.

4) **Is Employee entitled to PPI?**

Employee seeks payment of past and future medical and related transportation expenses. The Fund does not dispute Employee is owed medical benefits related to the work injury, but contends certain medical expenses, such as monthly health club membership dues, are not work-

related. The Fund contends certain future medical benefits, such as placement of a spinal cord stimulator, are premature. The Fund contends Employee may submit future medical and travel expenses to Employer and to the Fund for reimbursement. The Fund contends it reserves the right to controvert those benefits.

5) Is Employee entitled to medical and related transportation costs?

Employee contends he is owed penalty and interest on all amounts. Employee concedes the Fund is not liable for penalties on compensation or benefits owed. Employee contends the correct interest rate is the current statutory rate of 4.25 percent. The Fund contends the correct interest rate is the one in effect at the time the benefits or compensation were due.

6) Is Employee entitled to interest and penalties?

Employee contends Employer and the Fund resisted paying benefits, and his claim was controverted or denied throughout litigation. Employee contends he is entitled to attorney's fees and costs. The Fund does not dispute Employee is entitled to attorney's fees and costs where he has prevailed on his claim. However, the Fund objects to certain attorney's fees and costs, such as time incurred meeting with the Special Investigations Unit (SIU) or for proceedings before the Alaska Workers' Compensation Appeals Commission (Commission).

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

The Fund and Employee agree Employer is entitled to a Social Security offset on TTD and PTD benefits awarded. The Fund contends applying the offset results in a weekly benefit amount of $337.68 from February 1, 2012 through December 31, 2016, and $321.80 from January 1, 2017 onwards. Employee contends the offset should not be applied until issuance of a final decision awarding benefits. Employee contends this would result in weekly benefit amount of $498.66.

8) Is Employer entitled to a Social Security offset?

SUMMARY OF DECISIONS

On August 8, 2014, *Adams v. O&M Enterprises and Michael A. Heath Trust*, AWCB Decision 14-0109 (August 8, 2014) (*Adams I*) ordered a continuance of the August 6, 2014 hearing because the Michael A. Heath Trust had not received notice. A representative of the Trust was ordered to file an appearance.

On October 9, 2014, *Adams v. O&M Enterprises and Michael A. Heath Trust*, AWCB Decision 14-0136 (October 9, 2014) (*Adams II*) granted in part and denied in part the Trust's November 8, 2013 petition to quash notice of records deposition and subpoena duces tecum and for a protective order. *Adams II* ordered the Trust to produce the trust, all filed tax documents, and all records concerning any interest in real property held or operated by the Trust. *Adams II* also ordered the Trust produce any records concerning payroll, employment taxes, and any information concerning any and all employees it has or had directly or through businesses owned or operated by the Trust.

On April 6, 2015, *Adams v. O&M Enterprises and Michael A. Heath Trust,* AWCB Decision 15-0039 (April 6, 2015) (*Adams III*) ordered hearing issues bifurcated before a hearing on the merits of Employee's claim could be held. The issues of whether the alleged employers were "employers" under the Act, whether Virgil Adams was an employee, and whether intoxication was the proximate cause of his injuries was set to be heard in a single hearing, prior to a hearing on the merits.

On August 31, 2015, *Adams v. O&M Enterprises and Michael A. Heath Trust*, AWCB Decision 15-0094 (August 31, 2015) (*Adams IV*) found Virgil Adams was an employee of Michael Heath doing business as O&M Enterprises at the time he was injured on August 18, 2011. *Adams IV* found intoxication was not the proximate cause of Employee's injury.

On October 27, 2015, *Adams v. O&M Enterprises and Michael A. Heath Trust*, AWCB Decision 15-0127 (October 27, 2015) (*Adams V*) ordered reconsideration and modification of *Adams IV* in part, to wit: Incorporating the findings of fact from *Adams IV*, the "business or industry" of Michael Heath doing business as O&M Enterprises at the time Claimant was allegedly injured

was the buying, managing, and selling of real estate. In all other respects, *Adams IV* remained the same.

FINDINGS OF FACT

All findings of fact from *Adams I*, *Adams II*, *Adams III*, *Adams IV*, and *Adams V* are incorporated. The following additional facts are established by a preponderance of evidence:

1) On August 18, 2011, Employee was injured while doing roofing and construction work. Employee fell from a ladder supported by cribbing and was unable to move after the fall. Co-workers at the site called paramedics. The Providence Alaska Emergency Department chart note states:

> [Employee] stated the ladder lost its footing and he fell backwards off the roof of a house where he was trying to find a leak around the chimney. He did not lose consciousness but noted immediate change in the feeling in his legs and was unable to move. When he arrived in the ER he had no sensation distally and has actually regained some of that. . . .
>
> Assessment: Severe T12 burst fx [sic] with spinal stenosis and cord compression with incomplete spinal cord lesion. . . .
>
> Plan: The recommendation is that he go to the operating room tonight for emergent laminectomy and posterior spinal stabilization. . . . (PAMC Emergency Department Chart, Susanne Fix, M.D., August 18, 2011).

2) On September 20, 2011, Employee filed a claim for TTD, temporary partial disability (TPD), PTD, a PPI rating and benefit, medical and related transportation costs, penalty, and interest. The claim names the employer as "Michael Heath O&M Enterprises." The claim states Michael Heath was uninsured at the time of the injury, and sought to join the Fund as a party. (Workers' Compensation Claim, September 20, 2011).

3) On November 13, 2013, Steven Johnson, M.D., performed a temporary trial spinal cord stimulator (SCS) implant. (Johnson Chart Note, November 13, 2013).

4) On November 20, 2013, Dr. Johnson performed a follow-up exam on the implant trial. Dr. Johnson noted stimulation therapy had a clinically significant reduction in Employee's pain. Dr. Johnson rated the overall pain reduction at 60 percent, resulting in Employee having decreased reliance on pain medication. Employee could stand 10 percent longer, walk 20 percent farther, and sleep 20 percent longer. (Johnson Chart Note, November 20, 2013).

5) On April 9, 2014, Employee told Dr. Johnson during a follow-up visit he would like to proceed with a permanent SCS implant. (Johnson Chart Note, April 9, 2014).

6) On March 17, 2014, psychiatrist Joseph Bablonka, Ph.D, evaluated Employee's candidacy for placement of a permanent SCS. After performing a psychiatric evaluation, Dr. Bablonka concludes:

> The observed sudden and quick physical movements of this patient, noted by this clinician and others associated with his care, i.e., his physical responses as a reaction to pain or stress, suggests that this individual is not a viable candidate for a spinal cord stimulator at this time. (Bablonka Report, March 17, 2014).

7) On November 20, 2014, Dr. Bablonka performed a follow-up psychiatric evaluation. Dr. Bablonka concludes Employee was now a viable candidate for either a permanent SCS implant or intrathecal pain pump. (Bablonka Report, November 20, 2014).

8) On April 28, 2016, physical medicine and rehabilitation specialist Dennis Chong, M.D., and orthopedic surgeon David Bauer, M.D., completed an employer's medical evaluation (EME) report. Drs. Bauer and Chong diagnosed:

1. T12 burst fracture with cord compression, [work] related.
2. Post thoracic laminectomies, T10 to L1, with posterior spinal instrumentation from T9 to L2 and arthrodesis, T9 to L2, related.
3. ASIA D neurological level of injury.
4. Neurogenic bladder dysfunction.
5. Neurogenic bowel dysfunction.
6. Neuropathic skin ulcerations of bilateral legs and ankles.
7. Probable cognitive decline from prior diagnosis of traumatic brain injuries from motorcycle crash and assaults.
8. Possibility of Employee's current and prescribed opiate therapy as a substitution for prior chronic substance use and abuse.
9. Right knee complaints without objective supporting findings, unrelated to work injury.

Drs. Bauer and Chong opined: All medical treatment so far has been medically necessary and reasonable. Employee reached medical stability after the work injury in August of 2014, though he did have complications with neuropathic ankle and leg ulcers subsequent to that date, which required treatment. Drs. Bauer and Chong recommend against implanting a spinal cord stimulator, based in part on Employee's history of chronic substance abuse and the current high doses of narcotic pain medications, which they feel would very likely increase complications from this procedure. Applying the AMA *Guides*, 6th Edition, Drs. Bauer and Chong assigned a whole person permanent impairment of 26 percent. Regarding whether Employee can return to his occupation at the time of the injury, Drs. Bauer and Chong opined:

> Mr. Adams does not have the physical capacity nor the lower limb dexterity to perform the duties of a roofer/carpenter. Yes he can certainly work. All individuals with an ASIA D L3 neurological level of injury are capable of gainful employment on a full-time basis should they choose to do so. Restrictions would be related to lower limb function, and these would be no climbing, unprotected heights, or moving platforms, no kneeling, squatting, or crawling. These would be permanent. (Bauer and Chong EME Report, April 28, 2016).

9) On July 27, 2016, vocational rehabilitation specialist Alizon White sent a letter to Reemployment Benefits Administrator (RBA) designee Deborah Torgerson predicting Employee will not have the permanent physical capacities to return to any jobs held in the ten years prior to the August 18, 2011 work injury, and recommending Employee be found eligible for reemployment benefits. (Letter, July 27, 2016).

10) On November 14, 2016, orthopedic surgeon Jon Scarpino, M.D., performed a second independent medical examination (SIME). Dr. Scarpino diagnosed:

> 1. T12 burst fracture with cord compression and neurologic dysfunction.
>
> 2. Status post-surgical treatment with decompression of the spinal cord reduction of canal compromise and internal fixation in spinal fusion, T9 to L2.
>
> 3. Persistent neurologic dysfunction, ASIA D, with at least half of key muscle functions below L1 having a muscle grade greater than 3.
>
> 4. Neurogenic bladder dysfunction.
>
> 5. Neurogenic bowel dysfunction.

6. Chronic pain syndrome of neuropathic origin.

7. Drug dependence secondary to prolonged narcotic usage.

8. History of long-standing substance abuse.

9. Right knee pain related to neuropathic medical dysesthetic knee pain and abnormal gait.

10. Hernia.

Dr. Scarpino opined: The substantial cause of Employee's condition and ongoing need for medical treatment was the August 18, 2011 work injury for Employer. Were it not for this injury, Employee would not have needed spine surgery, rehabilitation, physical therapy, treatment for bowel and bladder dysfunction, treatment for muscular weakness, treatment for dysesthetic pain, and loss of sexual function. Employee was medically stable as of that date, November 14, 2016. Employee has chronic pain syndrome, which will require medical management for the remainder of his life. He is a candidate for a dorsal spinal column stimulator in order to reduce pain and limit reliance on pain medication. Employee will experience no further neurologic recovery. Any additional treatment will not reduce Employee's permanent impairment. Dr. Scarpino opined all treatments up to that date following the work injury have been necessary and medically reasonable in order to address the residual neurologic dysfunction and chronic pain syndrome. It is "doubtful" Employee will ever be able to return to work. Employee is severely limited in his ability to walk and he falls intermittently. He would not be able to get from transportation to job site without a wheelchair. Employee has difficulty sitting for prolonged periods of time because of chronic pain spasms, which cause him to cry out in pain. Employee's bowel and bladder dysfunction are also another factor complicating any return to work around people. Dr. Scarpino opined Employee reached medical stability as of November 14, 2016. Applying the AMA *Guides*, 6th Edition, Dr. Scarpino assigned a whole person permanent impairment of 41 percent. (Scarpino SIME Report, November 14, 2016).

11) In response to a Board question regarding future treatment, Dr. Scarpino opines Employee is a candidate for a dorsal column stimulator to try and reduce pain complaints and need for medication. In response to an Employee question on whether his condition, pain, or spasms would be improved by a nerve stimulator or similar device, Dr. Scarpino states:

> As indicated above, Mr. Adams pain and could be improved with a neural stimulator or similar device. He has been considered for a Medtronic stimulator in the past.
>
> There is a new type of stimulator that has recently been discussed in *Lippincott's Bone and Joint Newsletter*, which has been found to be very effective for both back pain and dysesthetic leg pain. The newer type of stimulator could also be considered. (*Id.*).

Dr. Scarpino's responses to the Fund's questions concerning future treatment and possibility of a spinal cord stimulator are similar to the above. (*Id.*).

12) On February 10, 2017, notice of the hearing was mailed to Employer at its address of record. The notice was not returned by the postal service. (Record).

13) On February 17, 2017, vocational rehabilitation specialist Douglas Saltzman sent a letter to the RBA designee. Mr. Saltzman noted during vocational aptitude testing Employee had bouts of pain seizing him, making it difficult to complete the test. Mr. Saltzman adopts the findings of Dr. Scarpino's November 14, 2016 SIME report and recommends Employee will not reach employability under the Act. (Letter, February 17, 2017).

14) On March 15, 2017, prior to starting the hearing, the designated chair called Employer at its last phone number of record and a woman answered and stated it was the wrong number. The hearing panel deliberated, waited several minutes, and issued an oral order to proceed with the hearing in Employer's absence. (Record).

15) Judy Kuipers testified: Her regular duties include collecting Medicaid liens on behalf of the state. Ms. Kuipers has calculated the lien for Employee's medical benefits to be $19,256.15 as of June 13, 2014. (Kuipers).

16) Jeanette Adams testified: She is Employee's mother and Employee has lived with her since his August 18, 2011 injury. At the time of his injury, Employee had no medical insurance. She paid Employee's out of pocket costs for medical treatments, medication, and apparatus until he started receiving public aid in late 2011. Until then, Ms. Adams paid by using up her personal savings and later credit cards until they reached their credit limit. Ms. Adams purchased an adjustable bed from a general furniture store, because Employee had great difficulty moving in and out of bed and sitting up. The bed was not medically prescribed, but was recommended by hospital staff. Without the bed, Employee was physically unable to sit up and rise without her

assistance. Employee is generally unable to cook for himself, since he cannot stand very long at a kitchen counter without support from one arm, and so Ms. Adams prepares most of his meals. Ms. Adams' home had to have a wheelchair ramp installed after the work injury for Employee's use. She continues to care for and assist Employee every day, including driving him to appointments. Ms. Adams testified Employee occasionally drives himself to his medical appointments. (Adams).

17) Ms. Adams is credible. (Experience, judgment).

18) Employee testified: Prior to the August 18, 2011 work injury, he was a journeyman carpenter by trade. Because of his injuries, whenever he walks, he must use two canes for support. Employee uses special footwear, which stabilizes his toes while walking. Employee regularly has ongoing pain in his feet, which he compares to the sensation of his feet being soaked in scalding water. Other medical problems related to the original work injury Employee has experienced include bowel and bladder dysfunction, sexual dysfunction, a need for surgery of the Achilles' tendon, recurring pressure ulcers and skin infections, and regular, recurring pain seizures and spasms. Employee had a trial spinal column stimulator implanted, which he believes gave him some relief of the pain. Employee has discussed future treatment options with his physician, and would like a permanent stimulator implanted. Employee testified the adjustable bed enables him to sit up and get out of bed without assistance, which he would otherwise need. Employee testified he occasionally drives himself to medical appointments. Since he is unable to work, he occupies his time with woodworking and crafts. (Employee).

19) Employee is credible. (Experience, judgment).

20) Employee filed itemized statements of medical treatment costs incurred to date in the amount of $456,409.22. Employee itemized $788.12 for medical travel expenses. In addition to medical treatment, Employee itemized $7,072.77 in medication costs paid out of pocket. Employee filed an additional ledger of expenses titled "Out of Pocket Expenses," which he contends were miscellaneous costs he paid for co-pays or treatments not covered by Medicare or Medicaid, in the amount of $17,856.64. This ledger lists the purchase of the adjustable bed for $3,594.98 from Sadler's furniture store. (Employee's Hearing Exhibit).

21) Employee's attorney argued Employee and the Fund agree on the compensation rate. $526.30, based on an average weekly wage of $801.20. Employee and the Fund disagree as to the amount of Social Security offset to which Employer would be entitled. Employee's attorney

contends Employee currently receives $1,380.00 per month in Social Security benefits. Under Employee's reading of *Darrow v. Alaska Airlines Inc.*, AWCAC Decision No. 218 (October 13, 2015) Employee contends the correct weekly benefit amount after the offset is $482.74. (Employee's Hearing Argument).

22) The Fund's attorney argued the Fund does not dispute TTD from August 8, 2011 through November 14, 2016. The Fund does not dispute PTD is owed after November 14, 2016. The Fund agrees with Employee the correct PTD weekly rate is $526.30. The Fund also does not dispute the 41 percent PPI rating assigned by Dr. Scarpino in his November 14, 2016 SIME. The Fund's attorney does not dispute Employee's medical or transportation expenses incurred to date, with the following exceptions: The Fund disputes $1,988.44 in fees to the Alaska Club health club, and the purchase of the adjustable bed form Sadler's furniture store. The Fund concedes a permanent SCS implant may be medically indicated in the future, but is premature as of this date. (Fund's Hearing Argument).

23) On March 9, 2017, Employee filed an affidavit and ledger of attorney's fees and costs listing a total of $71,887.50 in attorney's fees and $2,102.60 in costs incurred to date at an hourly rate of $375.00. The ledger lists several entries for time spent preparing for and meeting with an SIU investigator. (Charles Coe Affidavit of Attorney's Fees and Costs, March 9, 2017).

24) On March 20, 2017, Employee filed a supplemental affidavit and ledger of attorney's fees and costs listing a total of $78,112.50 in attorney's fees and $2,102.60 in costs incurred to date at an hourly rate of $375.00. These amounts include fees incurred before the Commission in the amount of $6,900.00. Employee's attorney argued his attorney's fees do not charge for paralegal time. Employee's attorney contends Employee will likely be calling his office for assistance with his claim for years to come. Employee's attorney seeks ongoing statutory attorney's fees on future benefits paid. (Charles Coe Supplemental Affidavit of Attorney's Fees and Costs, March 20, 2017; Employee's Hearing Argument).

25) Employee's attorney's fees and costs incurred in connection with this decision are reasonable, considering the nature, complexity, and length of the case. Employee's attorney fee hourly rate is reasonable, considering the attorney's experience, geographic location, and practice area. (Experience, judgment).

26) On April 4, 2017, the Social Security Administration sent Employee a benefits explanation letter showing that, beginning December 2016, Employee's regular monthly Social Security

disability payment is $1,380.00. The past amounts were $1,311.00 in 2012; $1,333.00 in 2013; $1,376.00 in 2014; and $1,376.00 in 2015. (Letter, April 4, 2017).

27) On April 6, 2017, the Fund and Employee filed a document titled "Claimant's and Fund's Summary of Benefit Calculations." The summary states it is not a stipulation, but rather a joint summary of the parties' respective benefit calculations. The Fund and Employee agree the amounts owed to medical providers under the Act is $456,409.22, with the Fund only disputing $1,988.44 of this amount, reflecting the contested health club membership. The Fund and Employee agree Employee is owed $24,911.78 in out-of-pocket expenses, and $788.12 in transportation costs. The Fund and Employee agree the Medicaid lien for Employee's medical benefits in connection with this case is $19,256.15 (Claimant's and Fund's Summary, April 6, 2017).

28) According to the Alaska Court System website, and applicable statutes, the relevant statutory interest rates in this case are:

Year	Interest Rate
2011	3.75%
2012	3.75%
2013	3.75%
2014	3.75%
2015	3.75%
2016	4%
2017	4.25%

(http://www.courtrecords.alaska.gov/webdocs/forms/adm-505.pdf, Accessed May 25, 2017).

ANALYSIS

1) Was the oral order to proceed in Employer's absence correct?

Where a party does not appear at hearing, but was served with notice, the first option under 8 AAC 45.070(f) in order of priority is to proceed with the hearing in the party's absence. The hearing notice was mailed to Employer on February 10, 2017 at its address of record and was not returned. The designated chair telephoned Employer just prior to beginning the hearing, and was told it was the wrong number. Employer has never contacted the Board to notify of any change

in contact information. The decision to proceed with the hearing in Employer's absence was correct. AS 23.30.135; 8 AAC 45.070; *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528 (Alaska 1987).

2) Is Employee entitled to TTD?

Employee claims TTD from August 18, 2011 through November 14, 2016. The Fund does not dispute Employee is owed TTD for these dates. Employer did not appear for the hearing and did not file a brief or evidence challenging Employee's claims. Employee and the Fund agree on the compensation rate of $526.30. It is presumed Employer opposes Employee's claim for TTD.

In case of total but temporary disability, 80 percent of an injured worker's spendable weekly wages shall be paid to the employee by the employer during continuance of the disability under the Act. AS 23.30.185. TTD benefits may not be paid for any period of disability after the date of medical stability. *Id.*

Under AS 23.30.120(a)(1), benefits sought by an employee are presumed to be compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, an employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption is attached, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). Where there is no competing cause, the Board is to evaluate the relative contribution of difference causes when assessing work-relatedness. *Id.* at 919. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Cowen v. Wal-Mart*, 93 P.3d 420, 424 (Alaska 2004) (*quoting Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 456 (Alaska 1997)). As the employer's evidence is not weighed against the employee's evidence, credibility is not examined at this stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the employer's evidence is sufficient to rebut the presumption, the presumption drops out and the employee must prove his case by a preponderance of the evidence. *Runstrom v. Alaska Native*

Medical Center, AWCAC Decision No. 150 at 8 (March 25, 2011) (*reversed on other grounds, Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016)). This means the employee must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn, and credibility is considered. *Id*.

Employee raises the presumption he is entitled to TTD with his own testimony about the severity of the injury and the limits it imposed on his ability to work. Employee also raises the presumption with the April 28, 2016 EME report of Drs. Bauer and Chong and the November 14, 2016 SIME report of Dr. Scarpino. Drs. Bauer and Chong opined Employee suffered a serious spinal injury on August 18, 2011 while working for Employer, from which neurological recovery did not occur and is not expected. Dr. Scarpino believes since the work injury, Employee has been severely limited in his ability to walk and he falls intermittently. Dr. Scarpino opined Employee was medically stable as of November 14, 2016. Although Drs. Bauer and Chong believe Employee would be able to return to some type of work, the work injury caused him to lose the physical capacity to perform the duties of a roofer or carpenter. Neither the Fund nor Employer has produced medical evidence opposing Employee's claim for TTD. Employee's raised presumption he is entitled to TTD has not been rebutted. AS 23.30.010; AS 23.30.120; *Meek*; *Saxton*; *Huit.* Employee will be awarded TTD benefits from the date of the injury through November 14, 2016. AS 23.30.185.

3) Is Employee entitled to PTD?

Employee seeks PTD from November 14, 2016. The Fund does not dispute Employee is owed PTD after this date. The Fund and Employee agree the correct PTD weekly rate is $526.30. It is presumed Employer opposes Employee's claim for PTD.

In cases where an employee becomes permanently and total disabled, 80 percent of the employee's spendable weekly wages shall be paid to the employee by the employer during the continuance of the total disability under the Act. AS 23.30.180. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof

to the contrary, constitutes permanent total disability. *Id*. In all other cases, permanent total disability is determined in accordance with the facts. *Id*.

The term "permanent," as applied to AS 23.30.180, refers to a condition that, according to available medical opinion, will not improve during the employee's lifetime. *Alaska International Constructors v. Kinter*, 755 P.2d 1103, 1105 (Alaska 1988). If the condition's duration is merely uncertain, it cannot be found to be permanent. *Id.* "Total disability" as used in the Act means inability because of injuries to perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. It does not necessarily mean a state of abject helplessness. *J.B. Warrack Co. v. Roan*, 418 P.2d 986 (Alaska 1966). An award of PTD must be supported by a finding a work injury resulted in a compensable disability which will decrease an employee's earning capacity. *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264 (Alaska 1974).

As above, Employee's claim for PTD raises factual issues to which the presumption of compensability test is applied. AS 23.30.010; AS 23.30.120; *Meek*; *Saxton*; *Huit*. Employee raises the presumption he is entitled to PTD with the concurring opinions of Drs. Bauer and Chong, as well as Dr. Scarpino, that Employee suffered a T12 burst fracture with cord compression and permanent neurologic dysfunction in the August 18, 2011 work injury. All three doctors concur Employee's neurological condition will not improve during his lifetime. *Roan*.

The presumption Employee is entitled to PTD is rebutted by the opinion of Drs. Bauer and Chong that individuals with Employee's level of neurological injury are capable of gainful employment on a full-time basis, subject to restrictions. AS 23.30.010; AS 23.30.120; *Meek*; *Saxton*; *Huit.* Because the presumption has been rebutted, Employee must prove, by a preponderance of the evidence, work for Employer was the substantial cause of his permanent and total disability entitling him to PTD benefits under the Act. AS 23.30.120; *Runstrom*; *Huit*; *Saxton*. At this step, evidence is weighed, inferences are drawn, and credibility is considered. *Id.*

Employee establishes he is entitled to PTD with his own credible testimony, and with the credible testimony of his mother concerning the physical limitations caused by the August 18, 2011 work injury. Employee and his mother testified Employee's physical condition is disabling to the point that ordinary daily tasks, such as meal preparation or rising from bed, are nearly impossible without assistance. Vocational rehabilitation specialist Douglas Saltzman's February 17, 2017 letter to the RBA adopted the findings of Dr. Scarpino's SIME and recommended Employee will not reach employability under the Act. Because Mr. Saltzman's specialty is to focus on an injured worker's employability with consideration given to the requirement of the available job market, his opinion concerning PTD is given considerable weight. *Rogers & Babler*. The weight of the evidence shows by a preponderance Employee's August 18, 2011 injury resulted in a permanent compensable disability which will severely decrease his earning capacity. AS 23.30.135; *Vetter*. Employee will be awarded PTD benefits for the period after November 14, 2016 and continuing. AS 23.30.180; *Kinter*; *Roan*.

4) Is Employee entitled to PPI?

Dr. Scrapino deemed Employee medically stable as of November 14, 2016 and assigned a 41 percent permanent impairment rating under the AMA *Guides*. The Fund does not dispute the 41 percent PPI rating is correct but contends Employee is not entitled to payment in connection with this rating because it contends PPI is only payable if the impairment does not result in permanent total disability. It is presumed Employer opposes Employee's claims for PPI.

AS 23.30.190 provides "[i]n 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 impairment of the whole person." 8 AAC 45.134(c) provides "[f]or purposes of. . . AS 23.30.180, permanent partial disability benefits includes permanent partial impairment benefits paid under AS 23.30.190."

The presumption analysis does not apply to every possible issue in a workers' compensation case. *Burke v. Houston NANA, LLC*, 222 P.3d 851, 861 (Alaska 2010) (*See also Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005)). Because the Fund does not dispute Dr. Scarpino's 41 percent impairment rating, or that Employee's August 18, 2011 injury is

covered by the Act, the presumption analysis will not be applied to this question of law. *Id.*; AS 23.30.120.

An employee may be paid PPI benefits under the Act where the impairment does not result in permanent total disability. AS 23.30.190(a). Because this decision finds Employee's August 18, 2011 work injury resulted in permanent and total disability for which he will be awarded PTD benefits, he is not eligible for a PPI benefit under the Act. AS 23.30.190; 8 AAC 45.134. Employee's claim for PPI will be denied.

5) Is Employee entitled to medical and related transportation costs?

Employee seeks payment of past and future medical and related transportation costs. The Fund does not dispute the majority of Employee's medical and transportation costs, notable exceptions being the purchase of an adjustable bed, the possibility of a permanent spinal cord stimulator implant, and health club membership dues. It is presumed Employer opposes Employee's claim for medical and related transportation expenses.

The Act requires an employer to furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medication, and apparatus for the period which the nature of the injury or recovery requires, not exceeding two years from the date of the injury. AS 23.30.095. If continued treatment or care beyond that two-year period is indicated, the injured employee has the right to review by the Board, which may authorize continued treatment or care, or both, as the process of recovery may require. *Id.* The employer's obligation to furnish medical treatment under AS 23.30.095 extends only to medical services furnished by providers, unless otherwise ordered after a hearing or consented to by the employer. 8 AAC 45.082. The Alaska Supreme Court has held the term "process of recovery" language of AS 23.30.095(a) authorizing award of continuing care beyond two years after date of injury as is necessary for process of recovery does not preclude award for purely palliative care where evidence establishes that such care promotes an employee's recovery from individual attacks caused by chronic condition. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665 (Alaska 1991).

a. Medical expenses

Because the presumption under AS 23.30.120 covers medical care, the presumption of compensability test will be applied. AS 23.30.010; *Meek*; *Saxton*; *Huit*. Employee raises the presumption he is entitled to past medical and transportation costs with his own testimony and the April 28, 2016 EME report of Drs. Bauer and Chong. Employee also raises the presumption with the November 14, 2016 SIME report of Dr. Scarpino. Dr. Scarpino's SIME report as well as the EME report of Drs. Bauer and Chong state all treatments up to that date following the work injury have been medically necessary and reasonable in order to address the residual neurologic dysfunction, chronic pain syndrome, and related conditions. The Fund does not dispute nearly all of Employee's medical and transportation expenses incurred to date are compensable under the Act. Neither the Fund nor Employer have presented medical evidence opposing payment of past medical expenses. Employee's raised presumption on past medical expenses has not been rebutted. AS 23.30.010; *Meek*; *Saxton*; *Huit*. Employee's August 18, 2011 injury arose out of an in the course of work for Employer. AS 23.30.010. Employer will be ordered to reimburse Employee for medical expenses incurred to date in connection with the August 18, 2011 work injury, subject to liens asserted by third parties, if any.

b. Spinal cord stimulator implant

Employee raised the presumption of the need for a permanent SCS implant with his own testimony the trial SCS implant produced a significant reduction in his pain and symptoms. Employee also raises the presumption with Dr. Johnson's opinion that the trial SCS implant produced a significant palliative care benefit to Employee's ability to reduce reliance on narcotics and improve his quality of life. AS 23.30.095; *Rogers & Babler*; *Carter.*

The presumption of the need for a permanent SCS implant is rebutted by the April 28, 2016 EME report of Drs. Bauer and Chong, which recommends against a spinal cord stimulator, based in part on Employee's history of chronic substance abuse and then-current high doses of narcotic pain medications, which they felt would likely increase complications from this procedure. AS 23.30.010; AS 23.30.120; *Meek*; *Saxton*; *Huit.* Because the presumption has been rebutted, Employee must prove, by a preponderance of the evidence, work for Employer was the

substantial cause of his need for a permanent SCS implant. AS 23.30.120; *Runstrom*; *Huit*; *Saxton*. At this step, evidence is weighed, inferences are drawn, and credibility is considered. *Id.*

Employee establishes the need for a permanent SCS implant with his own credible testimony how the trial implant by Dr. Johnson reduced his pain levels. While Dr. Bablonka's March 17, 2014 report opined Employee was not a viable candidate for a spinal cord stimulator at that time, Dr. Bablonka's November 20, 2014 follow-up psychiatric evaluation concluded Employee was now a viable candidate for either a permanent SCS implant or intrathecal pain pump. Dr. Johnson's November 20, 2013 follow-up exam on the implant trial notes it had a clinically significant reduction in Employee's pain. Dr. Johnson rated the overall pain reduction at 60 percent, resulting in Employee having decreased reliance on pain medication. Dr. Johnson opined with the trial SCS implant, Employee could stand 10 percent longer, walk 20 percent farther, and sleep 20 percent longer. This is a very significant benefit to Employee. 8 AAC 45.082; *Carter*; *Rogers & Babler*. Dr. Scarpino's November 14, 2016 SIME specifically answered the parties' questions concerning the medical necessity of a permanent SCS. Dr. Scarpino opined Employee is a viable candidate for a such a device in order to reduce pain complaints and need for medication. Neither Employer nor the Fund have presented sufficient medical evidence challenging these opinions. The weight of the evidence shows Employee's August 18, 2011 injury is the substantial cause of the need for a permanent SCS implant. AS 23.30.095; AS 23.30.135; 8 AAC 45.082; *Carter.* Employer will be ordered to pay the cost of a permanent SCS implant, in accord with Employee's physicians' treatment plan. *Id.*

c. Adjustable bed

Employee raises the presumption the adjustable bed was necessary for him to be able to sit up and rise unassisted due to the work injury with his own testimony. AS 23.30.010; AS 23.30.120; *Meek*; *Saxton*; *Huit*; *Carter*. Employee also raises the presumption with the testimony of his mother, which provided the same justification. *Id.* Noteworthy, alternatively to purchasing a bed from a general furniture store, Employee may be able to obtain a medical opinion supporting the need for an adjustable bed designed for people with limited mobility. Such a bed purchased from a medical supply company would likely cost several thousand dollars, rather than the $3,594.98 amount Employee has claimed. *Rogers & Babler.* Neither the Fund nor Employer have presented

medical evidence opposing the need for an adjustable bed. Employee's raised presumption on the medical need for the adjustable bed has not been rebutted. AS 23.30.010; AS 23.30.120; *Meek*; *Saxton*; *Huit*. Employer will be ordered to reimburse Employee $3,594.98 for the adjustable bed. AS 23.30.095. AS 23.30.135; 8 AAC 45.082; *Carter*.

d. Alaska Club membership

Employee requests reimbursement of $1,988.44 in member dues for a health club membership. The Fund disputes this membership is related to the August 18, 2011 work injury for Employer. Employee has not produced evidence supporting the need for a health club membership to aid in the process of recovery from his work injury. Because Employee did not raise the presumption work for Employer is the substantial cause of his need for a health club membership, his claim for reimbursement for this expense will be denied. AS 23.30.010; AS 23.30.120; *Meek*; *Saxton*; *Huit*. In the event Employee's physician opines such a membership is necessary and related to the August 18, 2011 work injury, Employee may file a claim.

e. Transportation expenses

Employee has provided a ledger listing mileage by year and itemizing $788.12 in transportation expenses in connection with medical treatment for the August 18, 2011 work injury. Employee's mother testified those expenses were incurred in connection with Employee's medical treatment. The Fund does not dispute Employee is entitled reimbursement for this amount. This decision finds the medical expenses incurred to date have been reasonable and necessary, subject to the exceptions above. Neither the Fund nor Employer demonstrated Employee failed to use the most reasonable and efficient means of transportation under the circumstances. 8 AAC 45.084. Employer will be ordered to reimburse Employee for transportation expenses incurred to date. *Id.*; AS 23.30.095.

This decision finds Employee's August 18, 2011 injury arose out of and in the course of work for Employer. The weight of the evidence supports the conclusion Employee's injury is likely permanent, and he will likely incur future transportation expenses in connection with treatment. Employee may submit future transportation expenses to Employer as those expenses are incurred, which Employer may controvert, if appropriate. 8 AAC 45.084.

6) Is Employee entitled to interest and penalties?

Employee seeks an order awarding penalties and interest. The Fund does not oppose interest on past benefits, but contends it is not liable for penalties, which Employee concedes. The parties disagree as to which is the correct interest rate: the statutory rate in effect at the time the benefits or compensation were due, or the rate currently in effect.

a. Interest

Interest is mandatory. AS 23.30.155; 8 AAC 45.142. Interest awards recognize the time value of money, and they give an incentive to employers to release money due. *Moretz v. O'Neill Investigations,* 783 P.2d 764 (Alaska 1989). The court consistently directs interest awards to injured workers for the time value of money. *Childs v. Copper Valley Electric Assn.*, 860 P.2d 1184 at 1191 (Alaska 1993) (*quoting Moretz* 783 P.2d 764, 765-766 (Alaska 1989)). Under AS 23.30.155, interest accrues from the date a benefit should have been paid. *Land & Marine Rental Company v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984). Interest on late-paid time loss compensation is paid to the injured employee. 8 AAC 45.142. Interest on late-paid medical benefits is paid to the employee if the employee has paid the provider or has paid for the medical benefits. *Id.* Interest on late-paid medical benefits is paid to the provider if the medical benefits have not been paid by anyone. *Id.* Interest paid on late-paid medical benefits paid by an "insurer, trust, organization, or government agency," is paid to the party paying the medical benefits. *Id.*

Interest awarded in this decision is "pre-judgment" interest. The purpose of interest is to compensate a person entitled to money for the loss of use of that money over time. *Moretz*. The correct interest rate on benefits owed is the rate in effect at the time those benefits were due. *Id.*; AS 23.30.155; 8 AAC 45.142; *Contreras-Mendoza v. Qdoba Mexican Grill*, AWCB Decision No. 13-0112 (September 13, 2013).

Here, Employee is entitled to TTD from August 18, 2011 through November 14, 2016, and PTD benefits from November 14, 2016 onward. Employee lost the use of this money from August 18, 2011 to the present. Employer will have to calculate the interest on each installment of TTD and

PTD from the date it was due to the present, pursuant to AS 23.30.155. This decision will not calculate the interest for the parties.

As the TTD and PTD awards span seven calendar years, the interest rates may be different and Employer will be directed to use the appropriate interest rate for each year. *Contreras-Mendoza.* As for the benefits paid to medical providers or third parties who have paid, Employer will be directed to calculate interest on those payments or reimbursements from the date of service to the date paid, according to the statutory interest rate for the year in which the services are rendered as set forth in the findings of fact, above.

b. Penalties

AS 23.30.155 imposes a penalty on employers who fail to "pay or controvert," within certain time limits, an employee's workers' compensation claim "payable without an award." *Id*; *Rawls*; *Harp v. ARCO*, 831 P.2d 352 (Alaska 1992). Although the Fund may be liable for interest and attorney fees, it is not liable for penalties assessed against the employer. *Workers' Comp. Benefits Guaranty Fund v. West*, AWCAC Decision No. 145 (Jan. 20, 2011).

Employer did not pay Employee medical or time loss benefits, and did not file a notice of controversion. Under the Act's "pay or controvert," provision, Employer will be ordered to pay a 25 percent penalty on all past benefits and compensation awarded by this decision. AS 23.30.155; *Harp*; *Rawls*.

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

Employee's March 20, 2017 supplemental affidavit of attorney's fees and costs lists a total of $78,112.50 in attorney's fees and $2,102.60 in costs incurred to date at an hourly rate of $375.00. The Fund only disputes fees incurred before the Commission, and for meeting with the SIU. Employee's attorney also seeks an award of ongoing statutory attorney's fees on future benefits. It is presumed Employer opposes Employee's attorney's fees and costs.

The Act requires an employer to pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully

prosecutes his claim. AS 23.30.145; *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007). Factors to be considered when determining whether a fee amount is reasonable include the nature, length, and complexity of the services performed, the contingent nature of the work, and the benefits from those services. *Wien Air Alaska v. Arant*, 592 P.2d 352 (Alaska 1979) (*See also Wise Mechanical Contractors v. Bignell*, 718 P.2d 971 (Alaska 1986). A notice of controversion by the employer is not required for an award of attorney's fees under AS 23.30.145(a). *Id.* Although the Alaska Supreme Court has held fees under subsections (a) and (b) are distinct, the Court has noted that the subsections are not mutually exclusive. *Circle De Lumber Co. v. Humphries*, 130 P.3d 941, 952 (Alaska 2006).

An award of attorney's fees depends on an employee's attorney succeeding on the claim itself, and not a collateral issue. *Childs v. Copper Valley Elec. Ass'n.*, 860 P.2d 1184. *Shastiko v. MTI, Inc.*, AWCB Decision No. 15-099 (August 19, 2015) considered the question of whether the Fund should be required to pay attorney's fees awarded for proceedings before the Commission and decided this issue falls squarely within the exclusive authority of the Commission, rather than the Board. *Id.* at 10.

In *Szepanski v. University of Alaska- Fairbanks*, AWCB Decision No. 07-0004 (January 5, 2007), the employee was awarded reasonable attorney fees and costs under AS 23.30.145(b). The claimed reasonable fee amount was close to the amount required as statutory minimum attorney fees under AS 23.30.145(a). The employee requested an award of itemized attorney fees as an advance on statutory minimum attorney fees due under AS 23.30.145(a) on all indemnity and medical benefits awarded. The Board found AS 23.30.145(a) sets forth the minimum fees to be awarded in the successful prosecution of an employee's controverted claim. Accordingly, the employer was ordered to pay statutory minimum attorney fees under AS 23.30.145(a) when, and if, based on the payment of past and future medical, indemnity, and all other benefits related to the employee's compensable disability and medical benefits, the statutory minimum amount exceeded the attorney fee awarded under AS 23.30.145(b). (*See also, Chesser v. Tire Distribution Systems, Inc.*, AWCB Decision No. 07-0345 (November 16, 2007); *Schriber v. State of Alaska, DOT*, AWCB Decision No. 07-0230 (August 7, 2007);

Fleming v. Municipality of Anchorage, AWCB Decision No. 98-0226 (September 2, 1998); *Gertler v. H&H contracting*, AWCB Decision No. 97-0105 (May 12, 1996)).

This case involves a serious, permanent work injury with complex medical issues, and substantial litigation over the course of nearly six years, resulting in six Board decisions. *Moore*; *Arant*; *Bignell*; *Rogers & Babler.* This decision awards controverted compensation and medical benefits to Employee. Employee is entitled to an award of attorney's fees and costs in connection with those benefits. AS 23.30.145; *Id*. Because this case concerns a likely permanent condition, for which Employee will be treating for years to come, disputes may arise between the parties for which Employee may need to consult with his attorney. *Rogers & Babler.* Employee's attorney will be awarded statutory attorney's fees and costs on future benefits paid. AS 23.30.145; *Humphries*; *Szepanski*.

This decision is without authority to award attorney's fees for proceedings before the Commission. *Shastiko.* Employee is not entitled to attorney's fees for time spent with the SIU, because it is an unrelated proceeding not concerning compensation awarded to Employee under the Act. AS 23.30.135; *Childs*.

8) Is Employer entitled to a Social Security offset?

The Fund contends it and Employer are entitled to a Social Security offset under AS 23.30.225(b). The Fund contends the offset amount is $337.68 from February 2012 through December 2016, and $321.80 from January 2017 onward. Employee does not dispute the Fund and Employer are entitled to an offset, but contends the offset should not begin until a final decision issues, since Employee was never awarded benefits in this case. Employee contends the correct offset amount should be $302.54, which equals $498.66 in weekly compensation.

The Act allows an employer to reduce an employee's compensation benefit payments if the employee's combined state worker's compensation and federal Social Security disability benefits exceed 80 percent of employee's average weekly wages. AS 23.30.225**.** "Average weekly wages" as used in AS 23.30.225 refers to measure of historical earning capacity used to calculate workers' compensation, and is the same as "gross weekly earnings" in statute used to calculate

compensation; it does not refer to the higher of state historical earning capacity or "average current earnings" as defined in federal statute. *Underwater Construction, Inc. v. Shirley*, 884 P.2d 150, 154 (Alaska 1994). The offset amount is calculated based on the employee's initial entitlement, excluding any cost of living adjustments. 8 AAC 45.225(b)(2).

In *Darrow v. Alaska Airlines Inc.*, AWCAC Decision No. 218 (October 13, 2015), the parties agreed the employee's gross weekly earnings should be calculated based on imputed "earnings during the period of disability" under AS 23.30.220(a)(10), rather than historical earning capacity at the time of injury, under AS 23.30.220(a)(4). *Darrow* compared alternative Social Security offset calculations, and held the net effect of the Board's calculation was not to offset the employee's benefit under the Act with benefits received under the Social Security Act, leaving her in the same position that she would have been in absent any Social Security benefits, but rather to reduce the combined benefit to less than what she would have otherwise received under the Act. *Darrow* held the Board incorrectly calculated the offset under AS 23.30.225(b) and permitted the employer to withhold 20 percent of future installments of the employee's compensation.

Stanley v. Wright-Harbor, AWCB Decision No. 82-0039 (February 19, 1982) (*aff'd*, 3AN-82-2170 Civil (Alaska Superior Ct. May 19, 1983)) established guidelines for calculating an employer's Social Security offset under AS 23.30.225(b). That section provides 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 shall be offset by an amount by which the sum of (1) weekly benefits to which employee is entitled under 42 U.S.C. 401 - .433, and (2) weekly disability benefits to which the employee would otherwise be entitled under the Act, exceeds 80 percent of the employee's average weekly wages at the time of injury. *See also Donovan v. VECO, Inc.*, AWCB Decision No. 08-0116 (June 20, 2008) (discussing and calculating Social Security offset). Social Security offsets are calculated as follows:

A.	Gross weekly earnings (GWE)
B.	Compensation rate
C.	Weekly Social Security benefit multiplied by 12 and divided by 52
D.	Weekly compensation rate + weekly Social Security benefit [B + C]
E.	80% of GWE
F.	Calculate SS Offset [D-E]
G.	Compensation rate after offset

Applying the above formula for the initial entitlement year Employee received Social Security disability benefits, 2012, based on a compensation rate of $526.30, the offset is calculated as follows:

A.	Gross weekly earnings	$800.32
B.	Compensation rate	$526.30
C.	Weekly Social Security benefit [$1,311.00] multiplied by 12 and divided by 52 ($1,311.00 x 12 / 52)	$302.53
D.	Weekly compensation rate in B + weekly Social Security benefit in C ($526.30 + $302.53)	$828.83
E.	80% of GWE ($800.32 x .80)	$640.26
F.	Calculate SS Offset [D-E] ($828.83 - $640.26)	$188.57
G.	Compensation rate after offset [B-F] ($526.30 - $188.57)	**$337.72**

Because the Social Security offset in this case is calculated based on the amount of the initial entitlement in 2012, Employee's contention the offset calculation period is not triggered until benefits are awarded is without merit. 8 AAC 45.225(b)(2). Employee's reliance on *Darrow* is misplaced, because that case concerned a PTD rate calculated under AS 23.30.220(a)(10) and a disagreement as to which formula used to arrive at the final result, which the employee in

Darrow contended was improper under prior cases. Here, the parties have agreed to Employee's compensation rate under AS 23.30.220(a)(4). The Fund is correct in its contention *Darrow* did not create a new formula for calculating Social Security offsets; rather, the Commission held that when AS 23.30.220(a)(10) is used to calculate a PTD rate, that rate should be used to calculate the Social Security offset under AS 23.30.225(b). This is distinguishable from the instant case where the parties have determined Employee's correct compensation rate under AS 23.30.220(a)(4). The correct compensation rate after calculating the Social Security offset is $337.72. Employer and the Fund are entitled to a offset in accord with this decision on TTD and PTD benefits.

CONCLUSIONS OF LAW

1) The oral order to proceed in Employer's absence was correct.
2) Employee is entitled to TTD.
3) Employee is entitled to PTD.
4) Employee is not entitled to PPI.
5) Employee is entitled to medical and related transportation costs.
6) Employee is entitled to interest and penalties.
7) Employee entitled to attorney's fees and costs.
8) Employer is entitled to a Social Security offset.

ORDER

1) Employer is ordered to pay Employee TTD beginning August 18, 2011 through November 14, 2016.
2) Employer is ordered to pay Employee PTD beginning November 14, 2016.
3) Employer is ordered to pay Employee's past medical costs and related transportation expenses related to the August 18, 2011 work injury, and shall pay past and future medical costs and related transportation expenses in accord with this decision.
4) Employer is ordered to pay for a permanent spinal cord stimulator implant, in accord with Employee's physicians' treatment plan as related to the August 18, 2011 work injury.
5) Employer is ordered to reimburse Employee $3,594.98 for the adjustable bed.
6) Employer is ordered to pay Employee and his medical providers interest on all past benefits awarded, in accord with this decision.

7) Employer is ordered to pay Employee a 25 percent penalty on all past benefits awarded, in accord with this decision.

8) Employee's attorney is awarded $78,112.50 in reasonable attorney's fees and costs, minus any attorney's fees or costs incurred in connection with proceedings before the Commission, or for time spent meeting with the SIU.

Dated in Anchorage, Alaska on June 6, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Donna Phillips, 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 VIRGIL ADAMS, employee / claimant; v. MICHAEL HEATH d/b/a O & M ENTERPRISES & MICHAEL A. HEATH TRUST, employer; and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, / defendants; Case No. 201113128; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on June 6, 2017.

/s/
Nenita Farmer, Office Assistant