ALASKA WORKERS' COMPENSATION BOARD

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

ANTHONY P. SALVADOR, Employee, Claimant, v. DITOMASO, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201326270 AWCB Decision No. 15-0024 Filed with AWCB Anchorage, Alaska on March 26, 2015

Anthony Salvador's (Employee) September 16, 2014 claim was heard on February 24, 2015, in Anchorage, Alaska. The hearing date was selected on January 14, 2015. Employee appeared and testified through a Tagalog interpreter. Attorney Elliott Dennis appeared and represented Employee. Attorney Aaron Sandone appeared and represented DiTomaso, Inc. and its insurer Liberty Northwest Insurance Corporation (Employer). Other witnesses included David Richey, D.C., and Princess Salvador, both testifying for Employee. The record remained open at the conclusion of the hearing to allow Employee to submit a supplemental attorney's fees and costs affidavit and Employer to respond. The record closed on March 2, 2015.

ISSUES

Employee contends he is entitled to unpaid temporary total disability (TTD) benefits from May 19, 2014 through October 16, 2014. Employee contends TTD benefits during this period were wrongfully withheld because Employee was not medically stable or able to return to work. Employee contends he received no notification TTD payments would be terminated; payments simply stopped.

Employer contends Employee is not entitled to additional TTD benefits, and all indemnity benefits were timely and properly paid. Employer contends it satisfied its duty to notify Employee his TTD payments were being terminated when it electronically filed a compensation report which, Employer contends, was to be forwarded to Employee by the Workers' Compensation Division (Division).

1) **Is Employee entitled to TTD from May 19, 2014 through October 16, 2014?**

Employee contends Employer relied on Employee's 2011 earnings when calculating his TTD rate, when it should have instead relied on 2012 earnings. Employee contends the proper compensation rate for the entire time he was receiving TTD benefits is $742.22, rather than the $649.07 amount Employer previously paid. Therefore, Employee contends, despite Employer's December 26, 2014 compensation rate adjustment, he is entitled to additional past TTD benefits not satisfied by Employer's $1,209.04 lump sum payment.

Employer made a wage calculation adjustment on December 26, 2014, which resulted in a $93.15 weekly increase in Employee's TTD payments. An adjustment payment of $1,309.04 was made to Employee. Employer contends based on its calculations, Employee has been paid all TTD benefits owed at the updated compensation rate of $742.22. Therefore, Employer contends no additional, unpaid TTD is warranted at this time.

2) **Is Employee entitled to any past TTD benefits for the period prior to the December 26, 2014 compensation rate adjustment?**

Employee contends he is entitled to a 25% penalty in the amount of $4,239.25. Employee contends he is also owed also interest on unpaid TTD.

Employer has agreed to pay a penalty on the compensation rate adjustment and will pay Employee a penalty of $327.49. Employer contends no additional penalty or interest is due.

3) Is Employee entitled to a penalty and interest on unpaid TTD?

Employee contends he retained an attorney to prosecute his claim which, if successful, will significantly benefit Employee. Employee also incurred the cost of preparing and presenting an expert medical witness. Employee contends he is entitled to attorney's fees and costs in the event he prevails.

Employer contends no unpaid TTD, penalty, or interest on unpaid benefits is due. Employer seeks an order denying attorney's fees and costs.

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

FINDINGS OF FACT

The following relevant facts and factual conclusions are either undisputed or are established by a preponderance of the evidence:

1) On November 8, 2013, Employee was injured while driving a delivery truck for Employer when he was struck from behind by another vehicle, whose driver had fallen asleep at the wheel. Employee's job title was "warehouseman/truck driver." (Report of Injury, December 26, 2013; Workers' Compensation Claim, September 16, 2014).

2) Employee finished his shift, but called in sick the following Monday due to left shoulder pain. Employee returned to work the following Tuesday and worked the remainder of that week. (Employee).

3) On November 18, 2013, Employee injured his left shoulder while using a pallet jack to unload a truck while working for Employer. (Employee).

4) On November 19, 2013, Employer began paying TTD benefits. The weekly rate was listed as $649.07 in the January 20, 2014 compensation report. (Compensation Report, December 3, 2013; Compensation Report, January 20, 2014).

5) Also on November 19, 2013, Employee began treating his left shoulder, back, and spine with David Richey, D.C. at Accident & Injury Center of Alaska. (Accident & Injury Center Intake Form, November 19, 2013). Dr. Richey testified Employee's treatment plan was initially conservative, and included a combination of physical therapy, muscle and fascia manipulation, muscle stimulation, and ultrasound therapy. (Richey).

6) On November 26, 2013, a Report of Injury was filed for the November 18, 2013 pallet jack injury to the shoulder, and AWCB case number 201325083 was assigned. (First Report of Injury, December 2, 2013).

7) On February 15, 2014, orthopedic surgeon Charles Craven, M.D., performed an Employer's Medical Evaluation (EME). Dr. Craven's report states:

> In the examiner's medical opinion, the November 8, 2013 incident with DiTomaso would be the substantial cause of the cervical, thoracic, and lumbar soft tissues strains which would have reasonably resolved within six to eight weeks following the described incident. The examiner notes that the examinee continued working from November 8 through November 18, 2013 after this injury. The examinee's examination today is colored by pain behaviors in this regard, and current examination findings are significantly out of proportion to the identified mechanism of injury. . . .
>
> With regard to the examinee's left shoulder, further treatment is recommended. The examinee has an identified abnormality in the superior labrum of his left shoulder. . . The examiner would recommend a focused course of physical therapy for six to eight weeks with specific regard to the examinee's left shoulder to increase range of motion and improve function. It is reasonable also, for the examinee to be examined by an orthopedic surgeon for further treatment of his left shoulder SLAP tear. If the examinee's left shoulder symptomatology does not resolve after a guided six-week course of physical therapy, then surgical intervention could be entertained. . .
>
> The substantial cause of the need for recommended medical treatment with regard to the left shoulder is the November 18, 2013 injury under study. (Craven EME Report, February 15, 2014).

8) On March 3, 2014, Employer filed two controversions. The first controversion states:

> All Benefits Controverted (Denied). Employee has not provided a written authorization to obtain medical and rehabilitation records in accordance with AS Sec 23.30.107 & AS Sec 23.30.108(a).

The second notice controverted specific benefits, and states:

> Specific Benefits Controverted (Denied). TTD, TPD, Vocational Rehabilitation, PPI in excess of 0%, and ongoing medical treatment as a result of the 11/8/2013 work injury.
>
> Per the IME on 2/15/2014 by Dr. Charles Craven, Mr. Salvador is medically stable in regards to the 2/15/2014 [sic] work injury. No further treatment regarding the cervical spine, thoracic, or lumbar spine is indicated as it relates to the 2/25/2014 [sic] work injury. (Controversion Notices, March 3, 2014).

9) On March 13, 2014, Liberty Mutual case manager Angie Farnworth sent Dr. Richey a copy of Dr. Craven's February 15, 2014 EME report. Ms. Farnworth requested Dr. Richey review the report, and determine whether he concurred with Dr. Craven's opinions. (Farnworth Letter, March 13, 2014).

10) On March 18, 2014, Dr. Richey responded to Ms. Farnworth's March 13, 2014 letter:

> As per your request to answer your question as posed: no, I do not concur with Dr. Craven's recommendations/evaluation in its entirety as written. . . it is my opinion that substantial cause of Mr. Salvador's left shoulder injury is the high speed MVC of 11/8/2013. Anthony was gripping the steering wheel at the moment of impact in the MVC such that the sudden and unexpected 100-120 millisecond pulse forward of the truck, sufficient enough to bend the exhaust pipe [of the truck] from its vertical position, snapped at the biceps tendon at its attachment into the labrum of his left shoulder tearing the superior labrum anterior to posterior at the insertion of the left biceps tendon. That was the mechanism of injury hence the substantial cause. He did suffer other injuries of sprains of the spine from the collision of facet joints and the shearing forces of this rear impact crash. The sudden change in velocity of this MVC was the substantial cause of his cervical, thoracic, lumbar and shoulder sprain and strain injuries. Therefore, the DOI is not 11/18/2013 from pushing/pulling a pallet of product as there was nothing unusual at that time except for the fact his labrum was already torn such that he was unable to perform this otherwise normal activity. **For all Mr. Salvador's presenting and current injuries, the MVC of 11/8/2013 is the substantial cause**. . . .
>
> **It is my professional opinion, Mr. Salvador is not at maximum medical benefit nor is his condition in any way nearing pre-injury status**. . . .
>
> The anterolateral rib or intercostal pain may or may not resolve with physical therapy and/or surgery. That issue may need to be addressed at some time as it is yet to be clearly understood. Until such time**, I do not recommend Mr. Salvador return to work in any capacity as his injuries from the MVC remain serious and complicated at this time.** (Richey Report, March 18, 2014) (emphasis added).

11) On April 5, 2014, Dr. Craven performed an addendum EME records review, and reported:

> With regard to your current question, "In the examiner's medical opinion is Mr. Salvador able to complete a modified workday to consist of six to eight hours per day driving a delivery truck, with someone with hi m at all times to do any lifting, pushing, pulling, as well as loading/unloading?" In my professional medical opinion, there is no objective reason that the examinee cannot perform this modified duty. Specifically, the presence of a superior labrum anterior to posterior tear is not a contraindication to driving. Finally, a review of the aforementioned medication records does not alter my diagnoses, conclusions, or opinions in this case. (Craven EME Report, April 5, 2014).

12) Dr. Richey testified he disagrees with Dr. Craven's opinion Employee would experience symptom improvement within six to eight weeks. In Dr. Richey's professional experience, he is not aware of any studies indicating a SLAP tear such as Employee's would resolve with only six to eight weeks physical therapy. Dr. Richey takes exception with Dr. Craven's opinion Employee was less than credible in describing his symptoms and pain. Dr. Richey believes Employee is credible, speaks truthfully when describing his symptoms, and has a low pain tolerance. (Richey).

13) On April 19, 2014, Employee saw physical therapist Paul Carlson, P.T., at the Accident & Injury Center, who reported, "Examination elicited severe muscle spasms, severe restricted motion, severe level of weakness, painful mobility, and severe tenderness in the right shoulder." Mr. Carlson noted Employee is not medically stable and is not released to work. (Carlson Report, April 19, 2014).

14) On April 25, 2014, Dr. Richey referred Employee to orthopedic surgeon Michael McNamara, M.D., for evaluation and treatment. Dr. Richey's referral letter states:

> He has responded favorably to conservative care yet continues to suffer significantly with the left shoulder SLAP tear and does not seem to be making any further progress in the shoulder with physical therapy. I wish to refer Mr. Anthony Salvador to you for evaluation and treatment. . . . (Richey Referral Letter, April 25, 2014).

15) On April 29, 2014, Dr. Richey referred Employee to orthopedic surgeon Chris Manion, M.D., for surgical evaluation. The referral letter to Dr. Manion was similar to the letter to Dr. McNamara. (Richey Referral Letter, April 29, 2014).

16) On May 7, 2014, Dr. Manion examined Employee, and reported, "The patient's symptomatology is not in line with what I would normally see with a superior labral anterior posterior tear." Dr. Manion recommended an MRI of Employee's cervical spine. (Manion Report, May 7, 2014).

17) On June 5, 2014, Dr. Manion completed a "return to work" form for Employer's insurer. Dr. Manion noted, "Patient's symptoms not consistent with SLAP tear. . . Needs a long course of PT prior to consider [sic] diagnostic scope." Dr. Manion assessed medical stability as of May 19, 2014, but anticipated Employee may have some permanent partial impairment as a result of the work-related injury. Importantly, the form lists an injury date of November 18, 2013, the date of Employee's pallet jack injury, and not the date of the motor vehicle accident, which occurred on November 8, 2013. (Letter to Liberty Mutual, June 5, 2014).

18) Employee testified: Dr. Manion spent between "five to fifteen minutes" with him during the initial exam, and subsequently saw Employee on three occasions. Dr. Manion saw Employee only once before he released Employee to work. Employee only discovered he was released to work by Dr. Manion when he received a letter from his private insurance company some time later. When he discovered Dr. Manion had released him to work, Employee did not believe he could resume the position held with Employer at the time of his injury, because his shoulder was still painful. (Employee).

19) On June 26, 2014, Employer electronically filed a compensation report showing Employee's TTD benefits after May 19, 2014 were terminated. The report was not served on Employee by Employer or the Division. (Compensation Report, June 26, 2014, AWCB Case No. 201325083).

20) On July 16, 2014, Employee was seen by Duane Heald, P.A.-C, at Orthopedic Physicians Anchorage. Mr. Heald assessed, "Left shoulder pain with questionable superior labral tear" and "adhesive capsulitis. . . ." (Heald Report, July 16, 2014).

21) On August 12, 2014, Dr. Richey sent a letter to the nurse case manager assigned to Employee through Liberty Mutual. Dr. Richey testified he sent the letter in response to a request by Employee and his sister-in-law informing Dr. Richey Employee's TTD benefits were unexpectedly terminated. (Richey). The letter states:

> Anthony Salvador has been under my care and remains under my care as his treating physician. It has recently come to my attention that there has apparently

> been a misunderstanding or miscommunication as to his work status. This letter is to reverse this error.
>
> As the treating physician, I have yet to release Mr. Salvador to work status. Granted, his condition is unique. His injured left upper extremity is still too painful for him to operate safely as a driver and his right upper extremity is weak from a history of polio such that it is not strong enough to use it for lifting and other strenuous work duties. He is not sleeping well at night and is fatigued often.
>
> As I understand it, somewhere about 3 months ago, there was a return to work notice given through the referred doctor's, Dr. Manion's, office resulting in Anthony not receiving his Workmans' Compensation benefits for 3+ months. Again, as the treating doctor of record in the case of Mr. Salvador, this was never my intent nor was I aware of the miscommunication until recently.
>
> Mr. Salvador has had injections and is currently still under conservative physical therapy with Sharon Frost, PT in an attempt to avoid surgical repair of this MRI arthrogram documented left shoulder SLAP (superior labrum anterior posterior) as a direct result of the rear-end MVC of November 8, 2013. His injuries have not healed to where he would have been expected to return to work. Hence, it is my opinion, he has been eligible for benefits all along and should be paid to him retroactively and immediately.
>
> At this time, I do not recommend Mr. Salvador return to work in any capacity as his injuries from the MVC remain serious and complicated at this time. (Richey Letter, August 12, 2014).

22) On September 16, 2014, Employee filed a claim for TTD from June 16, 2014 ongoing, permanent partial impairment (PPI), unspecified medical costs, unspecified transportation costs, compensation rate adjustment, unspecified penalty, unspecified interest, and attorney's fees and costs. The claim attached three W-2 tax forms for 2012. The 2012 W-2 forms show Employee's total 2012 earnings were $46,132.49. (Workers' Compensation Claim, September 16, 2014).

23) At the time of the November 8, 2013 work injury with Employer, Employee was married with three dependent children. (Employee).

24) On October 27, 2014, Employer reinstated Employee's TTD benefits at the weekly rate of $742.22. (Compensation Report, December 3, 2014, AWCB Case No. 201325083).

25) On October 28, 2014, Dr. Manion performed surgery. The procedures to be performed were left shoulder diagnostic arthroscopy, open biceps tenodesis, subacromial decompression with acromioplasty, and limited debridement glenohumeral joint. Dr. Manion's operative report states:

> It was very obvious at this point [Employee] sustained a superior labrum anterior and posterior tear involving the entire biceps anchor from the entire top portion of his glenoid which detaching [sic] the labrum. This was a complex tear. There were multiple small fragments. Based on his age and the location and the complex nature of the tear, it was not felt that the superior labrum anterior posterior repair was in the patient's best interest and it felt that the biceps tenodesis was warranted. (Manion Operative Report, October 28, 2014).

26) On November 4, 2014, Employer controverted specific benefits. The controversion notice states:

> Specific Benefits Controverted (Denied). TTD benefits from June 11, 2014 through October 26, 2014. . . .
>
> On June 11, 2014, the employee's treating physician released him to work. Therefore, no TTD benefits are owed during this period. On October 27, 2014, the employee underwent left shoulder surgery and TTD benefits were restarted…. (Controversion Notice, November 4, 2014).

27) At a November 10, 2014 prehearing conference in case 201325083, the parties stipulated to administratively join cases 201325083 and 201326270 under master case number 201326270M. (Prehearing Conference Summary, November 10, 2014, AWCB No. 201325083).

28) Employee's hearing exhibit provides the following calculations:

> May 19, 2014 through October 26, 2014 = 22 weeks, 6 days
> Weekly rate: $742.22
> Daily rate: $106.03
>
> Unpaid TTD: 22 weeks x $742.22 = $16,320.84
> 6 days x $106.03 = $636.18
>
> Total TTD: $16,957.02
>
> 25% penalty: $4,239.25
>
> Total of interest and penalty: $21,196.27

(Employee's Hearing Exhibit 2).

29) Employee's calculations contain a mathematical error, to wit: the exhibit erroneously computes TTD: 22 weeks x $742.22 = $16,320.84. The corrected product of 22 x $742.22 is $16,328.84. (Observations).

30) Dr. Richey testified Employee has not reached medical stability, nor is Employee physically capable of returning to work as a delivery driver for Employer performing his job duties at the time of the November 8, 2013 work injury. (Richey).

31) Employee is credible. (Experience, judgment, observations, and inferences from all of the above).

32) On February 17, 2015, Employee filed affidavits of attorney's fees and costs executed and signed by attorney Elliott Dennis and paralegal Marsha Fowler, respectively. Employee's billing timesheets itemize 57 hours of attorney time at $330 per hour, and 37.9 hours paralegal time at $160 per hour, with costs itemized at $233.08, totaling $25,107.08. (Affidavit of Elliott Dennis, February 17, 2015; Affidavit of Marsha Fowler, February 17, 2015; Statement of Attorney's Fees, February 17, 2015; Statement of Paralegal Fees and Costs, February 17, 2015).

33) On February 25, 2015, Employee filed a supplemental affidavit of attorney's fees and costs. Employee's billing timesheets itemize an additional 15.4 hours of attorney time at $330 per hour and .5 hours paralegal time at $160 per hour, totaling $5,162 since February 17, 2015. Employee itemizes $1,700 costs for Dr. Richey's services preparing and presenting testimony. (Affidavit of Elliott Dennis, February 25, 2015; Liberty Mutual Claim Form, February 24, 2015). The total amount of attorney's fees and costs sought by Employee is $31,969.08. (*Id*.).

34) Employer did not file an objection or opposition to Employee's attorney fees or costs. (Record).

35) The requested hourly rate and itemized hours for Employee's attorney fees and costs are reasonable based on the amount of work done, the geographic location and relevant legal market, and complexity of the issues. (Experience, judgment, observations).

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 so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. . . .

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.
>
> **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, including medical benefits. *Carter*, 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v.*

O'Neill Investigations, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between her injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). In making its preliminary link determination, the board need not concern itself with the witnesses' credibility. 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. *Id*.

For injuries occurring after the 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence, which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 7 (March 25, 2011). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility 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 his 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. *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. *Id.*

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

The board's credibility finding "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.*, AWCAC Decision No. 087 at 11 (August 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. . . .

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

> proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

AS 23.30.145(b) requires an employer to pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. *Harnish Group, Inc.*, 160 P.3d at 150-51. Alaska Statute 23.30.145(b) also requires an attorney fee award be reasonable. In workers' compensation cases, "the objective is to make attorney fee awards both fully compensatory and reasonable so that competent counsel will be available to furnish legal services to injured workers." *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 973 (Alaska 1986). In *Judith Lewis-Walunga and William J. Soule v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009), the Alaska Workers' Compensation Appeals Commission stated:

> The commission recognizes that promoting the availability of counsel for injured workers is a legitimate legislative goal of the attorney fee statute. This goal is served in the current statute by provision of a statutory minimum fee that may result in disproportionate fees in some cases, a mandate to examine the complexity of services provided, and a barring of most fee awards against injured workers when the employer prevails. Thus, a small value claim that involves a novel application of the law or an injured worker's claim that succeeds against heavy opposition, may result in fee awards that recognize the particular complexity or difficulty of the case.
> . . . .
>
> The legislature's choice represents a balance between assuring the injured worker access to representation and freedom to file claims without fear of financial consequences on one hand and avoiding unnecessary litigation of doubtful claims and unreasonable costs to the public and employers on the other. The commission will not disturb the balance struck by the legislature. *Id.* at 13-15.

> **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. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating
>
> (1) that the right of the employee to compensation is controverted;
>
> (2) the name of the employee;
>
> (3) the name of the employer;

(4) the date of the alleged injury or death; and

(5) the type of compensation and all grounds upon which the right to compensation is controverted.

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.

(c) The insurer or adjuster shall notify the division and the employee on a form prescribed by the director that the payment of compensation has begun or has been increased, decreased, suspended, terminated, resumed, or changed in type. An initial report shall be filed with the division and sent to the employee within 28 days after the date of issuing the first payment of compensation. If at any time 21 days or more pass and no compensation payment is issued, a report notifying the division and the employee of the termination or suspension of compensation shall be filed with the division and sent to the employee within 28 days after the date the last compensation payment was issued. A report shall also be filed with the division and sent to the employee within 28 days after the date of issuing a payment increasing, decreasing, resuming, or changing the type of compensation paid. If the division and the employee are not notified within the 28 days prescribed by this subsection for reporting, the insurer or adjuster shall pay a civil penalty of $100 for the first day plus $10 for each day after the first day that the notice was not given. Total penalties under this subsection may not exceed $1,000 for a failure to file a required report. Penalties assessed under this subsection are eligible for reduction under (m) of this section. A penalty assessed under this subsection after penalties have been reduced under (m) of this section shall be increased by 25 percent and shall bear interest at the rate established under AS 45.45.010.

(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. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest

> at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid. . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at a rate specified in AS 09.30.070(a) that is in effect on the date compensation is due. . . .

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "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* at 358; citing *Kerley v. Workmen's Comp. App. Bd.*, 481 P.2d 200, 205 (Cal. 1971). The evidence which the employer possessed "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Harp* at 358. If none of the reasons given for a controversion is supported by sufficient evidence to warrant a Board decision the employee is not entitled to benefits, the controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155. *Id*. at 359.

In *Strickland v. Unisea, Inc.*, AWCB No. 10-0194 (December 1, 2010), an employer's post-controversion resumption of TTD and other benefits operated as an "implicit withdrawal" of the previous notice of controversion. *Strickland* held if the employer wished to terminate benefits after controverting those benefits, it was required to file a new controversion. *Id*. at 33, 35.

> **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.

Lowe's v. Anderson, AWCAC Decision No. 130 (March 17, 2010) explained to obtain TTD benefits an injured worker must establish: (1) she is disabled as defined by the Act; (2) her disability is total; (3) her disability is temporary; and (4) she has not reached the date of medical stability as defined in the Act. *Id*. at 13-14.

> **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:
> **. . . .**
>
> (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. . . .
>
> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (16) 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .
>
> (28) 'medical stability' means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence. . . .

An employer may rebut the continuing presumption of compensability and disability, and gain a "counter-presumption," by producing substantial evidence that the date of medical stability has been reached. *Lowe's v. Anderson*, AWCAC Decision No. 130 (March 17, 2010) at 8. Once an employer produces substantial evidence to overcome the presumption in favor of TTD, the employee must prove all elements of the TTD claim by a preponderance of the evidence.

However, if the employer raised the medical stability counter-presumption, "the claimant must first produce clear and convincing evidence" he has not reached medical stability. *Id*. at 9. One way an Employee rebuts the counter-presumption with clear and convincing evidence is by asking his treating physician to offer an opinion on "whether or not further objectively measurable improvement is expected." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1246 (Alaska 1992). The 45 day provision in AS 23.30.395(27) merely signals "when that proof is necessary." *Id.*

In *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249 (Alaska 2007), the Alaska Supreme Court further explained this concept. Thoeni had a knee injury and her insurer discontinued TTD benefits based on its claim she was medically stable. The TTD period in dispute was from November 2, 2002 through January 25, 2001. At hearing in September 2002, the board found she was medically stable based upon one physician who predicted no expected "major changes in the next 45 days" and on another who predicted the employee's knee was "capable of improvement with a diligent exercise program." *Id*. at 1255-56. By the time the board heard Thoeni's claim in 2002, it knew the first two physicians' predictions "proved incorrect," because the employee's knee got worse and did not improve with exercise. The board also knew a third physician had recommended additional knee surgery, which Thoeni had in April 2001. *Id*. at 1256. *Thoeni* held the first two physicians' predictions, which proved to be incorrect, "were not substantial evidence upon which the board could reasonably conclude Thoeni had achieved medical stability." Accordingly, *Thoeni* reversed the board's medical stability determination. *Id*.

> **8 AAC 45.136. Notice of payment or modification of compensation.** (a) When the employer or carrier begins, increases, reduces, terminates, suspends or otherwise modifies compensation payments to the employee, the employer or carrier shall notify the board and the employee of the nature and substance of the commencement or change within 28 days after the commencement or change by filing form 07-6104. The original of form 07-6104 must be filed with the employee and a copy filed with the board.
>
> (b) For purposes of this section and AS 23.30.155(c), "filed" means deposited in the mail or personally delivered
> . . . .

(e) The form prescribed by the board for the annual report is form 07-6115, if the employer does not pay benefits through use of a computer. If an employer uses a computer in paying benefits, then the form prescribed is computer automated media, excluding computer printed reports, in the format of 07-6115 and must be accompanied by an affidavit stating the information contained in the computer automated media is true and correct.

(f) Penalties assessed under AS 23.30.155(c) are due after application of AS 23.30.155(m) and (d) of this section. The commissioner will notify the employer or carrier of the amount of penalties due, if penalties are not paid within 30 days after notification by the commissioner of the amount due, the employer or carrier shall pay

(1) an additional 25 percent of the penalties due under AS 23.30.155(m); and

(2) interest on the penalties at the rate established by AS 45.45.010 until the penalties are paid.

8 AAC 45.180. Costs and attorney's fees.

. . . .

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

(c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed. . . .

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

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work

> performed. . . . Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
>
> (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.
> . . . .
>
> (f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs were incurred in connection with the claim. . . .

ANALYSIS

1) Is Employee entitled to TTD from May 19, 2014 through October 16, 2014?

Employer paid TTD benefits beginning November 19, 2013 through May 19, 2014, and then resumed payments from October 27, 2014 through the present. It controverted Employee's right to additional TTD based upon Dr. Manion's May 7, 2014 report and June 5, 2014 return to work form. Employee contends he is entitled to additional, unpaid TTD for his left shoulder for the period of May 19, 2014 through October 26, 2014, in connection with the November 8, 2013 motor vehicle accident based upon his own testimony and the testimony and medical reports of his treating physician, Dr. Richey. AS 23.30.185. This raises a factual dispute to which the presumption of compensability applies. AS 23.30.120.

Employee raises the presumption on his TTD claim for his left shoulder with his testimony and the testimony and medical reports of Dr. Richey, who is very familiar with Employee's history. *Meek*; *Tolbert*; *Wolfer*. Employer rebuts the presumption with Dr. Craven's EME report, which opines the substantial cause of the need for medical treatment for the left shoulder is the November 18, 2013 pallet jack injury, rather than the November 8, 2013 motor vehicle accident.

Employer also rebuts the presumption with Dr. Manion's May 7, 2014 report and June 5, 2014 return to work form. *Runstrom*. Therefore, the presumption drops out and Employee must prove his claim for additional TTD for his left shoulder by a preponderance of the evidence. *Id*. However, because the reports of Drs. Craven and Manion rebutted the presumption of continuing TTD by raising the counter-presumption of medical stability, Employee must first rebut the counter-presumption of medical stability with "clear and convincing evidence" he was not medically stable. If successful, Employee must then prove his TTD claim by a preponderance of the evidence. *Anderson*; *Leigh*.

Rebutting the counter-presumption is simple. *Id*. On August 12, 2014, Employee's treating physician, Dr. Richey, sent a letter to the nurse case manager, which explained in detail Dr. Richey's opinion Employee was still quite far from medical stability, was not released to work, and had not healed from the November 8, 2013 motor vehicle accident. Dr. Richey emphatically disagreed with Dr. Manion's findings of medical stability, and specifically the decision to terminate Employee's workers' compensation benefits. As the treating physician who personally saw Employee dozens of times over the course of Employee's treatment, Dr. Richey's opinion is given greater weight than Dr. Manion's and Dr. Craven's. This medical opinion, combined with Employee's testimony he was unable to return to the position held at the time of the injury, is adequate to rebut the counter-presumption of medical stability and is clear and convincing evidence that objectively measurable improvement from the effects of Employee's compensable injury was reasonably expected to result from additional medical care and treatment. *Leigh*.

A) Whether Employee was disabled.

Disability is defined as "incapacity because of injury to earn the wages" which an employee was receiving at the time of injury in the same or any other employment. AS 23.30.395(16). Employee credibly testified he was not able to work at full capacity after his injury, nor was he able to work during the May 19, 2014 through October 26, 2014 period in question. Dr. Richey confirmed this when he recommended Employee take time off of the position he held when injured in order to begin the recovery process. AS 23.30.122. Therefore, Employee was disabled after his work injury of November 8, 2013, as defined in the Act. AS 23.30.395(16); *Rogers*.

B) Whether and when Employee reached medical stability.

Once an employee is disabled, the disability is presumed to continue until the employer produces substantial evidence to the contrary. *Sarmiento-Mendoza*. Such evidence could include a medical opinion releasing Employee to full duty work without restrictions, or a medical opinion stating Employee was medically stable from the injury's effects. Two physicians, Drs. Manion and Craven, opined the November 8, 2013 work injury did not result in lasting disability or impairment. However, less weight is again given to their opinions, for the reasons set forth above. Additionally, Dr. Craven's EME report was made prior to Employee's October 28, 2014 shoulder surgery, which may have affected Employee's progress towards medical stability. Thus, they are not substantial evidence as to when Employee's "work-related" disability ended. *Thoeni*. Given Dr. Richey's opinions, combined with Employee's credible testimony, Employee continued to be disabled by his work injury with Employer from May 19, 2014 through October 26, 2014. *Rogers*. Therefore, Employee is entitled to TTD benefits from Employer from May 19, 2014 through October 26, 2014, or a period of 22 weeks and 6 days.

2) Is Employee entitled to any past TTD benefits for the period prior to the December 26, 2014 compensation rate adjustment?

Employee provided wage information for two years prior to the November 8, 2013 work injury. At the time of the injury, Employee was married with three dependent children. Employer made a compensation rate adjustment on December 26, 2014, which resulted in a $93.15 increase in Employee's compensation rate; his compensation rate was adjusted from $649.07 to $742.22. An adjustment payment of $1,309.04 was made to Employee, which accounts for a 14 week underpayment. It is difficult to determine from review of the electronically filed compensation reports what TTD has been paid and at what amount; it is impossible to arrive at a dollar amount of TTD compensation still owing for the period prior to December 26, 2014, if any. Therefore, while Employee may be entitled to additional TTD based upon Employer's December 26, 2014 compensation rate adjustment, determination of this issue is not possible on this record. The parties will be directed to perform an audit of Employee's TTD benefit payments prior to and including the December 26, 2014 adjustment. If, after an audit is performed, the parties continue to disagree regarding the past due TTD amount owed Employee, they should request a prehearing to set a hearing. AS 23.30.220. The board will retain jurisdiction over this issue.

3) Is Employee entitled to a penalty and interest on unpaid TTD?

The Act and regulations are clear on the requirements of a controversion. AS 23.30.155(a). Employers have a duty to notify employees when benefits have begun, have been increased, reduced, terminated, suspended, or otherwise modified. AS 23.30.155(c); 8 AAC 45.136(a). If an employer controverts the right to compensation after payment has begun, the employer shall file with the division *and* send to the employee a written notice of controversion within seven days after an installment of compensation payable without an award is payable. AS 23.30.155(d). In other words, once compensation has begun, an employer must either "pay or controvert," or face possible penalties.

Here, Employer did not notify Employee it was terminating TTD benefits; payments simply stopped. Employer did not file a controversion notice until November 4, 2014, over five months after Employee stopped receiving TTD benefits. While Employer filed controversions on March 3, 2014, TTD benefits continued to be paid after that time. Continuing to pay a benefit after that specific benefit has been controverted constitutes a withdrawal of that portion of the controversion. *Strickland.* An opposite result would allow an employer to file a controversion while paying benefits, and then subsequently terminate benefits capriciously or arbitrarily. A claimant in such a case would have no notice when his benefits would be cut off, and possibly his only source of financial support ended. If Employer wished to terminate benefits after continuing to pay those benefits, it was required to file a new controversion. *Id.* Alternately, Employer argues in its brief, "As the employee was found medically stable and released to work by his own treating physician, the employer did not file a controversion, as the opinion of his treating physician ended his entitlement to compensation under AS 23.30.155(a)." Employer's Hearing Brief, p. 9. However, this is a misreading of that section of the Act, which clearly states, "To controvert a claim, the employer must file a notice, on a form prescribed by the director. . ." By the plainest reading of that section, a medical report or doctor's opinion of medical stability and release to work does not satisfy this requirement and is not a substitution for written notice of controversion being filed with the Division and served on the employee by the employer. *Id.*

Employer's argument it satisfied the filing requirement of AS 23.30.155 and 8 AAC 45.136 through the electronic filing of a compensation report is without merit. Even if the compensation

report Employer electronically filed had been sent to Employee, this fact would not have superseded Employer's statutory and regulatory obligation to file and serve on Employee a written notice of controversion. Employer did not file and serve a written controversion notice when it stopped Employee's TTD benefits after May 19, 2014. Therefore, Employee is entitled to a 25% penalty on unpaid TTD. AS 23.30.155; 8 AAC 45.136; *Harp*.

Interest is mandatory. AS 23.30.155(p). Employee's interest request will be granted, and Employer will be ordered to pay interest on all benefits awarded to Employee. Interest is owed on the period this decision is awarding unpaid TTD benefits, May 19, 2014 through October 26, 2014. If an audit of TTD payments made prior to the December 26, 2014 compensation rate adjustment reveals an underpayment for that period, interest is mandatory on those unpaid benefits also. *Id*.

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

Employer resisted paying benefits in this case, so fees and costs under AS 23.30.145(b) may be awarded. *Harnish*. Employee retained an attorney who was successful in prosecuting the central issue set for hearing. This decision finding Employee is entitled to unpaid TTD is a significant benefit to Employee because it concerns a relatively large time period, for which Employee would not have received benefits but for his attorney's involvement. Therefore, Employee is entitled to attorney's fees and costs. AS 23.30.145(b); 8 AAC 45.180; *Id*.

Employee's billing timesheets itemize 57 hours of attorney time at $330 per hour and 37.9 hours of paralegal time at $160 per hour, with costs at $233.08, totaling $25,107.08. Employee's billing timesheets itemize an additional 15.4 hours of attorney time at $330 per hour and .5 hours of paralegal time at $160 per hour, totaling $5,162 since February 17, 2015. Employee itemizes $1,700 for preparing and presenting witness testimony. Considering the claim's nature, length, and complexity, and the services performed, Employer's resistance, and the benefits resulting to Employee from attorney services obtained, Employee is awarded $31,969.08 in reasonable attorney's fees and costs. AS 23.30.145(b); 8 AAC 45.180.

CONCLUSIONS OF LAW

1) Employee is entitled to additional TTD benefits from Employer from May 19, 2014 through October 26, 2014, a period of 22 weeks and 6 days.

2) Employee may be entitled to past due TTD for benefits paid prior to Employer's December 26, 2014 compensation rate adjustment. The exact amount owed, if any, cannot be determined on this record.

3) Employee is entitled to a penalty and interest on unpaid TTD.

4) Employee is entitled to attorney's fees and costs.

ORDER

1) Employee's September 16, 2014 claim is granted in part.

2) Employer is ordered to pay Employee TTD benefits from May 19, 2014 through October 26, 2014, or a period of 22 weeks and 6 days, at a compensation rate of $742.22.

3) Based on the wage information provided, at the weekly rate of $742.22, the total TTD to which Employee is entitled from May 19, 2014 through October 26, 2014 is **$16,965.02** (22 weeks x $742.22 = $16,328.84) + (6 days x $106.03 = $636.18) = $16,965.02.

4) Employer is ordered to pay a 25% penalty on unpaid TTD benefits for the period of May 19, 2014 through October 26, 2014, in the amount of **$4,241.25** ($16,965.02 x .25 = $4,241.25).

5) Interest is owed on the period this decision is awarding unpaid TTD benefits, May 19, 2014 through October 26, 2014.

6) The parties are directed to perform an audit of Employee's TTD benefit payments prior to and including the December 26, 2014 compensation rate adjustment. If, after an audit is performed, the parties continue to dispute the past due TTD amount owed Employee, a prehearing to set a hearing should be requested. The board will retain jurisdiction over this issue.

7) Employee's claim for an award of attorney's fees and costs is granted. Employee is awarded **$31,969.08** in reasonable attorney's fees and costs.

Dated in Anchorage, Alaska on March 26, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
Matthew Slodowy, Designated Chair

_____
Amy Steele, Member

_____
Stacy Allen, 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 ANTHONY P. SALVADOR, employee / claimant; v. DITOMASO, INC., employer; LIBERTY NORTHWEST INSURANCE CORPORATION, insurer / defendants; Case No. 201326270; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 26, 2015.

_____

Sertram Harris, Office Assistant II