ALASKA WORKERS' COMPENSATION BOARD

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

KIRBY SILVEUS, Employee, Claimant, v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, Employer, and ALASKA NATIONAL INSURANCE CO., Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201304926 AWCB Decision No. 15-0107 Filed with AWCB Anchorage, Alaska on August 27, 2015

Kirby Silveus's (Employee) March 5, 2015 request for a permanent total disability (PTD) order without deduction or offset until further board order was heard on July 21, 2015 in Anchorage, Alaska, a date selected on April 2, 2015. Attorney Chancy Croft appeared and represented Employee. Attorney Theresa Hennemann appeared and represented Alaska Native Tribal Health Consortium and Alaska National Insurance (Employer). Employee appeared telephonically and testified. Tammi Lindsey appeared and Tamie Banahan appeared telephonically; both testified for Employer. The record closed at the hearing's conclusion on July 21, 2015, but was reopened on August 5, 2015, to allow Employee to respond to Employer's objections, submitted at hearing, to Employee's attorney fees affidavit. The record closed on August 14, 2015.

ISSUES

Relying on *Underwater Construction, Inc. v. Shirley*, 884 P.2d 156 (Alaska 1994), Employee contends he is entitled to a board order awarding him PTD benefits without deduction or offset

until further board order, to ensure Employer cannot unilaterally controvert or reduce his benefits. Employee acknowledges that circumstances may change, but contends the Alaska Workers' Compensation Act (Act) and regulations provide procedures to protect Employer's right to alter Employee's benefits as appropriate.

Employer contends it voluntarily agreed to pay PTD benefits to reflect the fact Employee is expected to be disabled the rest of his life; however, Employer contends the request to convert voluntary to involuntary PTD payments lacks a sufficient legal or factual basis to be warranted. Employer further contends it should not be denied its statutory right to future offsets or reductions in compensation rate. Employer contends *Shirley* does not control this case, because Employee (1) is not medically stable, and therefore not entitled to PTD benefits; (2) is protected from frivolous or unfair controversion by *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352 (Alaska 1992); and (3) Employer has committed to continued payments of PTD benefits unless and until the disabling infection is cured, or death occurs.

1) Is Employee entitled to an award of PTD benefits, without deductions or offsets, until further board order?

Employee contends he is entitled to fees and costs as stated in his Affidavit of Fees and First Supplemental Affidavit of Fees, less one hour mistakenly billed. Employer contends a large number of line items should be disallowed because the time claimed was not itemized, was duplicative billing, was related to issues not in dispute, was unnecessarily incurred, or was related to procedural issues on which Employee did not prevail.

2) Should attorney's fees and costs be awarded and, if so, in what amount?

FINDINGS OF FACT

A review of the entire record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

1) On May 23, 2014, *Silveus v. Alaska Native Tribal Health Consortium*, AWCB Decision No. 14-0068 (*Silveus I*) decided Employee's November 25, 2013 workers' compensation claim for reinstatement of compensation at the Alaska resident rate, penalty, interest, and attorney's fees and costs. *Silveus I* ruled Employee was entitled to temporary total disability (TTD) benefits at

the $1,070.70 Alaska resident rate, penalty, interest, and attorney's fees and costs. The decision stated: "If at some future point tertiary medical care is no longer indicated, and Employee receives medical or rehabilitation services in Oregon that are reasonably available in Alaska, Employer would be entitled to apply COLA under AS 23.30.175(b)(1). However currently Employee is entitled to TTD at the Alaska resident rate." (*Silveus I.*)

2) On October 10, 2014, Employee filed a claim seeking (a) PTD benefits from September 15, 2014 and continuing "until it is determined by his treating physician, Dr. Robert Skala, that he [is] either able to participate in vocational rehabilitation or return to work"; (b) to have vocational rehabilitation be put on hold until it is determined by Dr. Robert Skala that "he is able to participate"; and (c) attorney's fees and costs. (Claim, September 18, 2014.)

3) On November 3, 2014, Employer answered, stating "The Act does not allow for prospective benefits. It provides employers the right to be presented with requests for payments due and an opportunity to accept or deny those benefits when due." Employer denied "prospective payment" of PTD benefits and stated Employee's claim lacked a factual and legal basis and therefore was "currently frivolous." (Answer, November 3, 2014.)

4) On February 25, 2015, Employer converted Employee's benefits from TTD to PTD, noting it "appears more and more likely that the infection will be ongoing and that disability from the infection will be ongoing." Employer stated it would be filing an amended answer that would agree with Employee's September 18, 2014 claim. (Hennemann letter, February 25, 2015.)

5) Employer's February 26, 2015 Amended Answer stated: "[Employer] considers [Employee's] condition to be PTD based upon the longstanding infection apparently sustained in connection with shoulder surgery in Alaska." (Amended Answer, February 26, 2015.)

6) On March 5, 2015, Employee responded to Employer's amended answer with a request, based on *Shirley*'s authority, for the board to:

> (1) Order the Employer and the Insurance Carrier to pay Permanent Total Disability (PTD) compensation at the rate of $1,070 a week effective September 15, 2014; and
>
> (2) . . . [C]ontinue payment every two weeks without deduction or offset until further order of the Board.
>
> (Response to Employer's Amended Answer, March 5, 2015.)

7) On March 16, 2015, Employer sent Employee a proposed stipulation stating Employer:

> intends to continue to pay PTD benefits until and unless there is a documented, substantial change in the osteomyletis and infection conditions. At this point, such a substantial change is not anticipated; hence, the conversion to payment of PTD benefits.
>
> [Employer] intends to pay PTD benefits to the employee at his regular rate of $1,070.00 per week while he resides in Oregon and treats there for disabling osteomyletis and infection conditions. [Employer] reserves its right to take a COLA adjustment in other circumstances. Further, [Employer] reserves its right to make other adjustments or take other offsets in accord with the Act.
> (Unsigned and undated proposed stipulation.)

8) At hearing on March 26, 2015, an oral order continued, on procedural grounds and over Employee's objection, a hearing on the merits of Employee's PTD claim. (*Silveus v. Alaska Native Tribal Health Consortium,* AWCB Decision No. 15-0038 (March 27, 2015) (*Silveus II*).)

9) On April 7, 2015, Employer wrote Employee:

> My clients' intentions are to continue to pay PTD benefits unless there is successful treatment of the infection that has settled into his upper extremity. From medical records, it does not appear to be a likely outcome and, from a practical perspective, my clients anticipate continuing to pay PTD benefits. We understand that [Employee] wishes to turn these intentions into a guarantee of continued payment under the Act, no injured employee is entitled to guaranteed payments. We can understand his desire for such certainty but my clients are not in a position to treat him differently from other injured employees.
> (Hennemann letter, April 7, 2015.)

10) At hearing on April 15, 2015, an oral order again ruled, on procedural grounds and over Employee's objection, that the merits of Employee's PTD claim would not be decided that day. (*Silveus v. Alaska Native Tribal Health Consortium,* AWCB Decision No. 15-0049 (April 30, 2015) (*Silveus III*).)

11) On May 20, 2015, Employer asked Employee to sign Social Security Administration releases to the Franco Signor law firm: "We know we had [Employee] sign Social Security releases already, but Alaska National Insurance Company would like this independent agency to obtain the records from the Social Security Administration." (Letter, Many 20, 2015.)

12) On May 27, 2015, Employee petitioned for a protective order from release of Social Security information to Franco Signor, who Employee stated Employer's insurer contracts "to work on set-aside proposals for review by CMS." Employee stated he had not authorized a Medicare set-

aside, nor had the parties reached any preliminary settlement agreement. (Petition for Prehearing and Protective Order, May 27, 2015.)

13) At a prehearing conference on June 3, 2015, the issues for the July 21, 2015 hearing were set as:

> EE's 3/5/2015 request for PTD order --
> 1. Shall the Board order the Employer and the Insurance Carrier to pay Permanent Total Disability (PTD) compensation at the rate of $1,070 a week effective September 15, 2014?
>
> 2. Shall the Board order to [sic] continue payment every two weeks without deduction or offset until further order of the Board?
>
> 3. If so, what protection should be afforded ANTHC from a potential overpayment of PTD benefits?
>
> 4. Attorney's fees and costs

The board designee also denied Employee's May 27, 2015 petition for a protective order. (Prehearing conference summary, June 4, 2015.)

14) On June 10, 2015, Employee petitioned for reconsideration of the June 3, 2015 denial of his request for a protective order. (Petition for Reconsideration of Employee's Request for Protective Order, June 10, 2015.)

15) On June 24, 2015, Employer petitioned to compel execution of the Franco Signor release, as ordered at the June 3, 2015 prehearing conference, or alternatively, to dismiss the claim. (Petition to Compel, June 24, 2015.)

16) On June 24, 2015, Employer also petitioned for a continuance of the July 21, 2015 hearing, contending the discovery issue regarding Social Security benefits and a potential Social Security offset should be addressed before the hearing on the merits of the PTD claim. (Petition for Hearing Continuance.)

17) At a prehearing conference on July 10, 2015, Employee provided executed copies of the Franco Signor release, whereupon Employer withdrew its June 24, 2015 Petition to Compel and Petition for Hearing Continuance. Noting that Employee's time to reconsider his June 3, 2015 discovery decision had expired, the board designee set Employee's June 10, 2015 Petition for Reconsideration as a preliminary issue at the July 21, 2015 hearing. (Prehearing conference summary, July 10, 2015.)

18) On July 14, 2015, Employee filed an affidavit itemizing $30,472.00 in attorney's fees and $499.51 in costs, for a total of $30,971.51. (Affidavit of Fees, July 14, 2015.)

19) On July 16, 2015, Employee withdrew his appeal of the prehearing officer's June 3, 2015 discovery ruling. (Withdrawal of Appeal of Prehearing Officer's Ruling, July 16, 2015.)

20) At hearing on July 21, 2015, Employee testified: He could not "do anything with" his arm and had a bandage that needed to be changed twice a day because he has a hole in his arm that goes clear to the bone, won't heal, and doctors said may be there the rest of his life. The previous day Employee had seen a physician who was "kind of gloomy" and "figured that they're going to have to take my arm." The Oregon Health & Science University (OHSU) doctors had told him "they'll never catch [the infection] . . . they've already cut enough of my arm and muscle away that they cannot repair it" and "there's nothing they can do to improve what use I have of my arm at all. . . . They're not very optimistic about catching this thing . . . I expect it to kill me." Referring to the infection contracted during surgery for his work injury, "they haven't been able to saw away enough bone yet to get rid of it." He can use his right hand a little bit, such as spearing his food, but needs to use his left hand to pick the food up to eat it. "I will continue to lose ground, it sounds like." He has no significant use of his right arm, and that condition is permanent. No doctor has said the infection is curable; on the contrary, Employee has been told the infection is incurable. No doctor has told him he could return to work now, soon or ever in any capacity. They have all told him that he will continue to lose ground, and will never go back to work. Given that scenario, he wants to know he has what security he can have, that he will receive a constant income without "battling other things" besides his arm. Employer's insurer has "done a good job taking care of" him and he appreciates everything they'd done, with the exception of a settlement offer he was offended by and considered "so far off-base" that he consulted an attorney, and the COLA dispute resolved in *Silveus I*; however he needs the stability of knowing the board has ensured he will continue to receive income to pay his bills. Employee applied for Social Security Disability about a month ago, and will notify the board immediately if and when benefits commence: "I want everybody to know what's going on." He is not receiving Social Security retirement benefits and has not participated in a pension or profit sharing plan. He is not yet eligible for Medicare. He is not involved in any third-party litigation related to the injury. He reiterated that none of his physicians has talked about medical stability or predicted when it would happen; rather, they're

just hoping they can "catch" the infection, and so far have not been able to do so. He has a "permanently nonfunctional" right arm. No doctor has told him s/he thinks the infection can be cured; his doctors have all predicted the opposite, that they cannot cure the infection, and it is life-threatening. (Silveus.)

21) On July 21, 2015, Tammi Lindsey, Vice President Claims of Alaska National Insurance Company, testified: Her company was voluntarily paying PTD benefits at the rate of $1,070.70 weekly, but was unwilling to voluntarily give up its right to offset that amount in the future. She knew of no medical report stating that Employee was ever going to recover from the infection, and her company had set reserves based on the current PTD rate for the rest of Employee's life expectancy. She knew of no evidence Employee would ever be able to return to work. She agreed Employee cannot currently pursue gainful employment, and at this time there is no evidence he will be able to do so in the future. (Lindsey.)

22) On July 21, 2015, Tamie Banahan, Claims Supervisor at Alaska National Insurance Company, testified: She was the Senior Claims Examiner who closely monitored Employee's case. Her company has never missed a payment to Employee. The benefits, including penalty and interest, ordered payable by *Silveus I* amounted to approximately one percent of the total benefits paid to Employee to date. Because of Employee's "very serious condition," she took the unusual steps of giving her cell phone number to Employee's wife, contacting him after work hours, and agreeing to allow him to seek a second medical opinion without considering that to be a change of physician. She denied her company had ever done anything to compound his personal and medical condition from the work injury. If a PTD award is ordered, Ms. Banahan would continue to talk to, cooperate with and help Employee in any way she could. (Banahan.)

23) At the July 21, 2015 hearing, Employer submitted written objections to Employee's July 14, 2015 Affidavit of Fees, in the event Employee prevailed. Employer disputed: (1) 30.45 hours paralegal time by Patty Jones; Employer contended only 27.55 hours were itemized; (2) 1 hour attorney time alleged to have been double-billed; (3) Legal services from May 27, 2014 through September 18, 2014, and on October 7, 2014; Employer contended no benefits were in dispute during that period; (4) Time spent preparing a stipulation of PTD status; Employer contended this was unnecessarily incurred; (5) Time spent in connection with *Silveus II* and *Silveus III*; Employer contended these items should be disallowed because Employee did not prevail on the procedural issues at those hearings; and (6) Time spent resisting signing a release to the Franco

Signor law firm; Employer contended 6 hours of attorney time ($2,400.00) and 3.5 hours of legal clerk time ($560.00) should be disallowed because Employee did not prevail on the discovery dispute, and instead withdrew his appeal of the board designee's ruling. (Objections to Attorney Fees Claimed by Counsel for Employee, July 21, 2015.)

24) At hearing Employee submitted an affidavit itemizing $5,128.00 in supplemental attorney's fees, bringing the total fees and costs requested to $36,099.51. (First Supplemental Affidavit of Fees, July 21, 2015.)

25) On July 29, 2015, Employee petitioned to allow a responsive pleading to Employer's objection to his Affidavit of Fees. (Petition to Allow Responsive Pleading to Insurance Company's Objections to Attorney Fees, July 29, 2015.)

26) On August 5, 2015, the board, on its own motion, reopened the hearing record until August 14, 2015, to allow Employee to respond to Employer's July 21, 2015 Objections to Attorney Fees Claimed. This rendered moot Employee's July 29, 2015 Petition to Allow Responsive Pleading. (Letter to counsel, August 5, 2015.)

27) On August 13, 2015, Employee responded to Employer's objections to his Affidavit of Fees, asserting: (1) His fee affidavit fully accounted for the 30.45 hours paralegal time by Patty Jones; (2) There was one duplicative entry in the fee itemization, and the total amount claimed should therefore be reduced by $400.00; (3) Fees should be awarded for legal services from May 27, 2014 through September 18, 2014, and on October 7, 2014, because they represented time spent in preparation of a PTD claim, in anticipation of litigation that ultimately came to pass, and in providing Employee valuable legal services regarding his medical treatment; (4) Fees should be awarded for time spent preparing a stipulation of PTD status, as it was a good faith effort to resolve the dispute without having to take the matter to hearing; (5) Fees related to *Silveus II* and *Silveus III* should be awarded, because Employee had all along been seeking a hearing on the merits of his PTD claim, but was twice thwarted by procedural issues raised by Employer; and (6) Employee is entitled to fees for resistance to the Franco Signor release because, even though Employee ultimately withdrew his appeal of the prehearing officer's order to sign the release, Employee did so in the interest of expediting resolution of the PTD issue. Employee therefore concluded if he prevailed at the July 21, 2015 merits hearing on the PTD claim, he should be awarded fees in the amount of $35,200.00, plus $499.51 in costs, for a total of $35,699.51.

(Response to Insurance Company's Objections to [Employee's] Attorney Fees, August 13, 2015.)

28) Employee's July 14, 2015 Affidavit of Fees itemizes 30.45 hours paralegal time by Patty Jones. (Observation.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > 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 . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board**.
> . . .
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> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.130. Modification of awards.**
> (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases or decreases the compensation, or award compensation.

A "change in condition" for purposes of modification under AS 23.30.130 necessarily implies a change from something previously existing. It must refer to a change from the condition at the time of the award from which modification is sought. *Fischback & Moore of Alaska, Inc. v. Lynn*, 453 P.2d 478 (Alaska 1969). An employer or insurer seeking "to modify or terminate payments made under a Board order must first seek the approval of the Board" by petitioning for a rehearing or modification of the order on the basis of a change in conditions. *Shirley* at 161.

> **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 . . . 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 a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.
> . . .

The Alaska Supreme Court has repeatedly and consistently recognized the importance of providing attorney's fees to injured workers' attorneys. *Rose v. Alaskan Village, Inc.*, 412 P.2d 503 (Alaska 1966) explained:

> AS 23.30.145(a) of the Alaska Workmen's Compensation Act enjoins the Board, in determining the amount of legal fees that are to be awarded, to
>
> > take into consideration the nature, length and complexity of the services performed. . . .
>
> In the instance where an employer fails to pay compensation or otherwise resists the payment of compensation, AS 23.30.145(b) provides:
>
> > (I)f the claimant has employed an attorney in the successful prosecution of his claim, the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation ordered. . . .

> We construe AS 23.30.145 in its entirety as reflecting the legislature's intent that attorneys in compensation proceedings should be reasonably compensated for services rendered to a compensation claimant. . . .

In *Johns v. State, Dept. of Highways*, 431 P.2d 148 (Alaska 1967), the court reiterated, "We construe AS 23.30.145 in its entirety as reflecting the legislature's intent that attorney's [sic] in compensation proceedings should be reasonably compensated for services rendered to a compensation claimant" (footnote omitted; *id*. at 154). Likewise, in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 973 (Alaska 1986) the court observed the objective in workers' compensation cases "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" (emphasis in original).

Bouse v. Fireman's Fund Insurance Co., 932 P.2d 222, 241 (Alaska 1997) held that claimed fees could be reduced to account for issues on which the injured worker did not prevail. *Williams v. Abood*, 53 P.3d 134, 147-148 (Alaska 2002) likewise upheld an award of one-half of actual attorney's fees because the employee did not prevail on all his claims. On the other hand, fees for a *de minimis* amount of time spent litigating unsuccessful claims should not be disallowed if the employee prevails on the primary issues at hearing. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 at 14-16 (May 11, 2011).

> **AS 23.30.155. Payment of compensation.**
> (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating
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> (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.
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> . . .
> (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 it. This 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.
> . . .
> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.
> . . .

The Act permits controversion at any time after payments are made without an award. A controversion notice must be filed in good faith to protect an employer from a penalty for nonpayment of benefits. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *Id.* at 358, quoting *Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37 (Alaska 1974).

An employer's exclusive remedy to recoup overpayment to a claimant is to withhold a portion of the overpayment from future payments under AS 23.30.155(j). *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991).

> **AS 23.30.180. Permanent total disability.**
> (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . . [P]ermanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
>
> (1) area of residence;
>
> (2) area of last employment;
>
> (3) the state of residence; and
>
> (4) the State of Alaska.

> (b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not, by itself, constitute permanent total disability.

The Supreme Court adopted Professor Larson's definition of "permanent" as logical and in comportment with common usage: "Permanent means lasting the rest of claimant's life. . . . [a] condition that, according to available medical opinion, will not improve during the claimant's lifetime is deemed a permanent one. If its duration is merely uncertain, it cannot be found to be permanent." *Alaska International Constructors v. Kinter*, 755 P.2d 1103, 1105 (Alaska 1988), *citing* 2 A. Larson, *The Law of Workmen's Compensation* § 57.13, at 10–42 to 10-43 (1986).

In *Shirley* the claimant's physician indicated he was medically stable and unable to pursue gainful employment; "[g]iven these conclusions, Shirley was entitled to have his status changed at that time from TTD to PTD." *Shirley* at 159. After the insurance company voluntarily converted his TTD to PTD benefits, the claimant sought "an award of PTD benefits until further board order." *Id.* at 158. The Supreme Court found:

> The Board erred in concluding that an employer or insurer has the unilateral authority to modify or terminate an employee's benefits, or to change an injured worker's status. Further, the Board erred in refusing to make an express award of PTD benefits to Shirley. Contrary to the Board's view, such an award was important to Shirley because it would have made it more difficult for [Employer's insurer] to change his status at a later time. *Id.* at 161.

> **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.

> **AS 23.30.215. Compensation for death.**
> (a) If the injury causes death, the compensation is known as a death benefit and is payable in the following amounts to or for the benefit of the following persons:
> (1) reasonable and necessary funeral expenses not exceeding $10,000:
>
> (2) if there is a widow or widower or a child or children of the deceased, the following percentages of the spendable weekly wages of the deceased:
>
> (A) 80 percent for the widow or widower with no children;
> . . .

(f) Except as provided in (g) of this section, the death benefit payable to a widow or widower shall terminate 12 years following death of the deceased employee.

(g) The provisions of (f) of this section do not apply to a widow or widower who at the time of death of the deceased worker is permanently and totally disabled. The death benefits payable to a widow or widower are not subject to reduction under (f) of this section after the widow or widower has attained the age of 52 years.

. . .

AS 23.30.225. Social security and pension or profit sharing plan offsets.
(a) When periodic retirement or survivors' benefits are payable under 42 U.S.C. 401-433 (Title II, Social Security Act), the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.

(b) When it is determined that, in accordance with 42 U.S.C. 401 - 433, periodic disability benefits are payable to an employee or the employee's dependents for an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 - 433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury.

(c) If employer contributions to a qualified pension or profit sharing plan have been included in the determination of gross earnings and the employee is receiving pension or profit sharing payments, weekly compensation benefits payable under this chapter shall be reduced by the amount paid or payable to the injured worker under the plan for any week or weeks during which compensation benefits are also payable. The amount of the reduction may not in any week exceed the increase in weekly compensation benefits brought about by the inclusion of employer contributions to a qualified pension or profit sharing plan in the determination of gross earnings.

AS 23.30.395. Definitions. In this chapter,
. . .
"medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;
. . .

8 AAC 45.050. Pleadings.

. . .

(f) Stipulations.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

8 AAC 45.180. Costs and attorney's fees.

. . .

(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.

. . .

(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.

8 AAC 45.225. Social security and pension or profit sharing plan offsets.

(a) An employer may reduce an employee's or beneficiary's weekly compensation under AS 23.30.225(a) by

(1) getting a copy of the Social Security Administration's award letter showing the

(A) employee or beneficiary is being paid retirement or survivor's benefits;

(B) amount, month, and year of the initial entitlement; and

(C) amount, month, and year of each dependent's initial entitlement;

(2) computing the reduction using the employee's or beneficiary's initial Social Security entitlement, and excluding any cost-of-living adjustments; and

(3) completing, filing with the board, and serving upon the employee or beneficiary a Compensation Report form showing the reduction and how it was computed, together with a copy of the Social Security Administration's award letter.

(b) An employer may reduce an employee's weekly compensation under AS 23.30.225(b) by

(1) getting a copy of the Social Security Administration's award showing the

(A) employee is being paid disability benefits;

(B) disability for which the benefits are paid;

(C) amount, month, and year of the employee's initial entitlement; and

(D) amount, month, and year of each dependent's initial entitlement;

(2) computing the reduction using the employee or beneficiary's initial entitlement, excluding any cost-of-living adjustments;

> (3) completing, filing with the board, and serving upon the employee a petition requesting a board determination that the Social Security Administration is paying benefits as a result of the on-the-job injury; the petition must show how the reduction will be computed and be filed together with a copy of the Social Security Administration's award letter;
>
> (4) filing an affidavit of readiness for hearing in accordance with 8 AAC 45.070(b); and
>
> (5) after a hearing and an order by the board granting the reduction, completing a Compensation Report form showing the reduction, filing a copy with the board, and serving it upon the employee.
>
> (c) An employer may reduce benefits under AS 23.30.225(c) by
> (1) getting documentation of the pension or profit sharing payments;
>
> (2) computing the reduction in accordance with AS 23.30.225(c); and
>
> (3) completing a Compensation Report form showing how the reduction was computed, filing a copy with the board, and serving it upon the employee or beneficiary; the Compensation Report form must be filed together with a copy of the pension or profit sharing payment documents and wage documents showing that the employer's contributions to a qualified pension or profit sharing plan were included in the gross weekly earnings determination.
>
> (d) An employee or beneficiary who is receiving weekly compensation benefits shall
> (1) send the employer a copy of the award letter from the Social Security Administration or a copy of the first payment documents from a pension or profit sharing plan; and
>
> (2) upon the employer's request, sign a release for the employer to get information from the Social Security Administration or the pension or profit sharing plan.

Under 8 AAC 45.225(b), an employer is required to secure an order from the board before it is entitled to offset its compensation liability against an employee's Social Security disability benefits. Board regulations carefully delineate the procedure the employer must follow before its petition for a Social Security offset will be considered by the board. *Applebee v. United Airlines Corp.*, AWCB Decision No. 13-0042 (April 24, 2013); *Burch v. Alaska Fresh Seafoods, Inc*. AWCB Decision No. 08-0211 (November 12, 2008).

ANALYSIS

1) Is Employee entitled to an award of PTD benefits, without deductions or offsets, until further board order?

In February, 2015, the parties agreed Employee's condition was PTD, and Employer began paying Employee PTD benefits. However since then, Employer has disputed whether Employee is actually entitled to those benefits. The parties disagree as to whether Employer should be compelled to convert voluntary into involuntary disability payments, and to forego its right to change the benefit amount without a further board order.

Employer's argument that medical stability is a requisite for entitlement to PTD benefits is unpersuasive. In *Shirley* the Court merely indicated the claimant was entitled to PTD status given his treating physician's conclusions he was medically stable and unable to pursue gainful employment. *Shirley* at 159. Had the Court intended to establish controlling legal precedent that a claimant could *not* be found permanently and totally disabled unless s/he had attained medical stability, the Court would have explicitly and specifically stated so, in a discussion more comprehensive than two sentences out of a six-page decision. AS 23.30.180 states PTD is determined in accordance with the facts, but makes no reference to medical stability as a factor to be considered. Construing *Shirley* as a judicial redefinition of the requirements for PTD status beyond those set out in AS 23.30.180 is an overbroad and overreaching conclusion.

In the alternative, even if Employer's contention that medical stability is a requisite for PTD status were accepted, the evidence overwhelmingly indicates Employee falls within the Act's definition of medical stability. Under AS 23.30.395, Employee is presumed to be medically stable in the absence of objectively measurable improvement for a period of 45 days. Employer failed to produce any evidence, much less clear and convincing evidence, to rebut this presumption. On the contrary, Employer acknowledged it knew of no medical evidence indicating Employee was ever going to recover from his infection, and therefore its insurer had set reserves based on the current PTD rate for the rest of Employee's life expectancy. Moreover, Employee's condition clearly falls under the *Kinter* definition of "permanent": according to

available medical opinion, not only is he not expected to improve in his lifetime, but his infection is life-threatening.

Employer's other two assertions as to why *Shirley* is inapposite are also unpersuasive. The fact Employee, unlike Shirley, can avail himself of the *Harp* protections against frivolous or unfair controversion is irrelevant. The issue here is whether Employee is entitled to a PTD award, not whether he has adequate recourse, after the fact, if Employer were to unilaterally alter or cut off his benefits. Likewise irrelevant is Employer's averred commitment to continue PTD payments until Employee's disabling infection is cured or kills him. Absent a board order, there is nothing to prevent Employer from changing its mind and backing away from that commitment. *Shirley* clearly and unambiguously stated the claimant was entitled to an express PTD award until further board order, to prevent the employer or insurer from unilaterally modifying or terminating his benefits. *Shirley* at 161. The same authority to convert voluntary payment into an award will be exercised here: Employer will be ordered to pay PTD benefits at the rate of $1,070.70 weekly, without deductions or offsets, until further board order.

The issue of offsets and deductions is unripe, as currently there is no evidence Employer is entitled to any. Nonetheless, Employer's statutory right, should conditions change, to alter Employee's PTD payments in the future will be protected. Employee will be ordered to notify Employer immediately of any and all future circumstances that might result in a reduction of his compensation rate. These include, but are not limited to, out-of-state receipt of medical or rehabilitation services that are reasonably available in Alaska, pursuant to *Silveus I*, and Social Security benefits, pursuant to AS 23.30.225 and 8 AAC 45.225. If the parties agree an offset is warranted, they may file a stipulation so stating, and this stipulation will have the effect of a board order under 8 AAC 45.050(f)(3); if they disagree, Employer may petition for a modification based on a change in conditions under AS 23.30.130(a). If Employee dies as a result of the work injury, compensation will be converted to death benefits under AS 23.30.215. If at a future hearing Employer is found to have overpaid Employee, relief may be invoked under AS 23.30.155(j). *Pan Alaska Trucking.*

Should attorney's fees and costs be awarded and, if so, in what amount?

Employer's objections to Employee's claimed attorney's fees fall into six categories:

(1) Paralegal time

Employer claimed Employee billed for 30.45 hours paralegal time, but only 27.55 hours were itemized. Examination of the July 14, 2015 Affidavit of Fees indicates that 30.45 hours were itemized, and no fee deduction is appropriate. *Rogers & Babler.*

(2) Double-billed time

On review, Employee acknowledged his Affidavit mistakenly included a duplicate entry for one hour attorney time. Employee's fees will consequently be reduced by $400.00.

(3) Legal services related to issues not in dispute

Employer's contention legal services provided from May 27, 2014 through September 18, 2014 should be disallowed because no benefits were then in dispute is unconvincing. Since the May 23, 2014 resolution of the COLA dispute in *Silveus I*, Employee's counsel has steadfastly focused on a single main issue: Employee's disability status. Gathering evidence, determining whether Employee was entitled to PTD status, and preparing his September 18, 2014 claim were necessary steps leading to the instant PTD award. No fee deduction is appropriate for that time period.

On October 7, 2014, Employee billed 0.5 hours attorney time and 0.2 hours paralegal time regarding releases and obtaining a second treatment opinion. This is a *de minimis* amount of time, and Employee prevailed on the primary issue at hearing. Employee's fee award will not be reduced for time billed on this date. *Porteleki*.

(4) Time spent preparing a PTD stipulation

This was time spent in a good faith effort to resolve the PTD claim without going to hearing. The fact Employer rejected the proposed stipulation is irrelevant, because Employee ultimately prevailed at hearing. No fee deduction is appropriate.

(5)Time spent in conjunction with Silveus II and Silveus III

Employee contended the merits of his PTD claim should be argued at hearings on both March 26, 2015, and April 15, 2015, and was fully prepared to do so. On both occasions, oral orders ruled, on procedural grounds, that the hearing on the merits would not proceed that day. In essence, Employee lost the *Silveus II* and *Silveus III* battles, but won the war in the instant case, when he secured the desired PTD order. Employee is entitled to attorney's fees for time spent in conjunction with *Silveus II* and *Silveus III.*

(6) Time spent resisting the Franco Signor release

Employee billed a total of $2,960.00 in attorney and paralegal fees for time spent resisting a release of Social Security records to the Franco Signor law firm. Prior to the July 21, 2015 hearing, Employee signed and delivered the releases, and withdrew his appeal of the prehearing officer's discovery order, effectively conceding the issue. At more than eight percent of the $35,200.00 total attorney's fees claimed, $2,960.00 is not a *de minimis* amount to be awarded under *Porteleki*. Employee did not prevail on the release issue, and his fee award will accordingly be reduced by $2,960.00 to $32,240.00. *Bouse; Williams.*

In summary, Employee's claim was vigorously litigated by a highly experienced and competent attorney. Employee prevailed on the primary issue (a PTD award) but abandoned, and thereby conceded, a secondary issue (the discovery dispute). Considering the actual work performed and the nature, length and complexity of the legal services, as well as the benefits resulting to Employee, and the overall benefits involved, Employee's attorney is entitled to $32,240.00 in fees plus $499.51 in costs, for a total of $32,739.51. AS 23.30.145(b); 8 AAC 45.180(d)(2).

CONCLUSIONS OF LAW

1) Employee is entitled to an award of PTD benefits, without deductions or offsets, until further board order.
2) Attorney's fees and costs should be awarded in the amount of $32,739.51.

ORDER

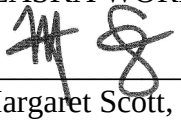
1) Employer is ordered to pay Employee PTD benefits in the amount of $1070.70 weekly until further board order.

2) Employer is ordered to pay $32,739.51 in attorney's fees and costs.

3) Employee is ordered to notify Employer immediately of any and all future circumstances that might result in a reduction of his compensation rate. These include, but are not limited to, out-of-state receipt of medical or rehabilitation services that are reasonably available in Alaska, pursuant to *Silveus I*, and Social Security benefits, pursuant to AS 23.30.225 and 8 AAC 45.225.

Dated in Anchorage, Alaska on August 27, 2015.

ALASKA WORKERS' COMPENSATION BOARD



Margaret Scott, Designated Chair

Ron Nalikak, Member

Mark Talbert, 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 KIRBY SILVEUS, employee / claimant; v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, employer; ALASKA NATIONAL INSURANCE CO., insurer / defendants; Case No. 201304926; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 27, 2015.

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Vera James, Office Assistant