ALASKA WORKERS' COMPENSATION BOARD

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

SOYOUNG TURNER, Employee, Claimant, v. ALOHA BBQ GRILL, Employer, and ALASKA WORKERS' COMPENSATION BENEFIT GUARANTY FUND, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201307972 AWCB Decision No. 16-0031 Filed with AWCB Fairbanks, Alaska on April 19, 2016

Soyoung Turner's (Employee) September 22, 2014 workers' compensation claim was heard on March 17, 2016, in Fairbanks, Alaska, a date selected on February 2, 2016. Attorney John Franich appeared and represented Employee, who appeared by telephone and testified. Non-attorney representative Jeff Yong Yi appeared, represented Aloha BBQ Grill (Employer) and testified. Velma Thomas and Joanne Pride appeared by telephone, represented the Alaska Workers' Compensation Benefit Guaranty Fund (the fund), and Pride testified for the fund. Gary Turner appeared by telephone and testified for Employee. The record closed at the hearing's conclusion on March 17, 2016.

ISSUES

Employee contends she incurred medical and transportation expenses treating her work injury with Employer. She contends not all these bills have been paid, though she concedes not all medical records and associated bills have been obtained, filed and served on Employer and the fund. Employee seeks an order finding her injury compensable and holding Employer liable for all injury-related medical bills and related transportation expenses.

Employer contends it paid all medical bills related to Employee's work injury. Employer further contends Employee is a liar and subsequently injured her left "pinky" finger elsewhere, as Employer contends the work injury was limited to only her left ring finger.

The fund contends Employer may have paid some medical bills related to Employee's work injury. The fund further contends it received few injury-related medical records and billings, and Employee identified additional providers at the March 17, 2016 hearing. The fund requests an order resolving Employer's liability.

1) **Is Employer liable for Employee's injury-related medical expenses and associated transportation costs?**

Employee contends she is entitled to temporary total disability (TTD) benefits from June 22, 2013, and "continuing." She contends the "end date" for her TTD claim is not an issue for this decision and need not be decided now.

Employer did not express a position on Employee's TTD claim. However, Employer contends it offered Employee an unspecified position after her work injury but Employee did not accept. Employer contends Employee lied about "everything."

The fund contends Employee's TTD claim against Employer should be limited to the date Employee became medically stable. The fund contends, at the latest, Employee's TTD claim ended when its employer's medical evaluator (EME) stated Employee was medically stable.

2) **Is Employee entitled to TTD benefits?**

Employee contends she is entitled to permanent partial impairment (PPI) benefits for her work injury. However, Employee contends she has not yet been rated by her physician. Therefore, Employee contends this decision need not reach the PPI issue.

Employer did not express a position on Employee's PPI claim.

The fund contends Employee raised the PPI issue and it is ripe for decision. Since the fund's EME provided the only PPI rating in this case, and it is zero percent, the fund contends Employee's PPI claim should be denied.

3) Is Employee entitled to PPI benefits?

Employee contends her case should be referred to the rehabilitation benefits administrator (RBA) so the RBA-designee can determine if Employee is entitled to an eligibility evaluation for retraining benefits. Employee contends she raised this issue to preserve her retraining benefits.

Employer did not express a position on Employee's reemployment referral request.

The fund contends its EME physician determined Employee had no PPI rating and could return to her normal duties as a chef. Therefore, the fund contends Employee should not be entitled to reemployment benefits.

4) Should Employee's case be referred to the RBA for an eligibility evaluation?

Employee contends her earnings in the two years prior to her work injury did not fairly and accurately reflect her earning capacity and lost earnings during her post-injury disability. She contends her TTD compensation rate should be adjusted and based upon her earnings at the time she was injured while working for Employer.

Employer did not express a position on Employee's TTD compensation rate adjustment claim, though it contends Employee's job was intended to be long term but paid at minimum wage.

The fund contends Employee's hourly wages while working for Employer were $15 per hour. The fund concurs with Employee's contention her TTD rate should be calculated based upon her hourly wages at the time she was injured.

5) Is Employee entitled to a compensation rate adjustment?

Employee contends her lawyer is entitled to attorney's fees and costs incurred while successfully representing her in this claim. She requests attorney's fees and costs pursuant to her lawyer's itemized attorney's fee affidavit as supplemented at hearing.

Employer did not express a position on Employee's request for attorney's fees and costs.

The fund did not express a position on Employee's request for attorney's fees and costs.

6) Is Employee entitled to an attorney's fee and cost award?

FINDINGS OF FACT

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

1) On June 21, 2013, Employee was Employer's "employee" and it was her "employer." (Parties' hearing stipulation).

2) On June 21, 2013, Employee's status was married with no dependent children. (Turner).

3) On June 21, 2013, while working for Employer and carrying a 50 pound bag of rice, Employee was attempting to climb a wooden ladder, which had one leg sawed off to fit level sideways on basement stairs, when she fell. (Turner photographs, undated; Employee).

4) On June 21, 2013, Employee presented to Tanana Valley Clinic where she saw Eric Schneider, D.O., for an "Urgent Care" visit. Employee presented with "pain in limb" and "back pain" she experienced after "climbing steep stairs while carrying a 50 lb. bag of rice" and she fell. Employee told Dr. Schneider her wedding ring popped off her finger and she was unable to locate the ring. Employee had symptoms in her fourth finger on the left hand, her right shoulder and her right lower back and gluteal region. Employee told the nurse she had fallen down stairs approximately three hours earlier. The clinic x-rayed Employee's left hand, right shoulder and right hip region. On examination, Employee was positive for weakness and numbness in

extremities and joint pain and swelling. Employee is slightly over five feet tall and weighs 135 pounds. Dr. Schneider found Employee's "[d]istress appropriate to apparent condition." Subjectively, Employee had tenderness to her left ring finger at the MCP and PIP joints with objective erythema and swelling. With regard to Employee's right shoulder, Dr. Schneider found significant subjective motion limitation with virtually no motion or strength. He objectively observed a "very large ecchymosis/swelling posterior aspect of the shoulder/scapula." As for Employee's low back area, subjectively she was able to walk but with difficulty. Objectively, Dr. Schneider noted a "large ecchymosis/swelling/tenderness right proximal gluteal and iliac crest region." Dr. Schneider diagnosed right shoulder pain after blunt trauma, "a fall from the stairs today," with a negative x-ray for fracture. He recommended an overnight sling and gentle range of motion as tolerated and prescribed Percocet for severe pain and Tylenol or Ibuprofen as needed for pain. Dr. Schneider removed Employee from work until seen again. As for her hip region, Dr. Schneider diagnosed right "gluteal/iliac" crest and hip "pain/tenderness" but doubted any acute bony process. Her x-ray was normal and Dr. Schneider recommended the same treatment as for her shoulder. Dr. Schneider initially suspected a fractured left ring finger, but interpreted the x-ray as showing only soft tissue swelling. He recommended treating her finger pain the same as her shoulder. (Tanana Valley Clinic report, June 21, 2013).

5) On June 23, 2013, Employee returned to Dr. Schneider. Her right shoulder pain was better and her motion and strength were improving. Numbness involving her arm, hand and fingers persisted but with some improvement. Employee's right lower back and hip pain were improving but she still had "pain and disability." Employee's left ring finger continued to have "significant pain and weakness." Employee had a migraine and vomiting a day prior, which Dr. Schneider opined may have been exacerbated by pain, poor sleep and medications. A nurse fitted Employee with a fourth finger "#3 stack splint." The nurse explained splint use and care to Employee and told her an orthopedic referral would be made the next day. On physical examination, Dr. Schneider noted "large bruising with swelling posterior shoulder" and Employee had improved right shoulder motion, with tenderness. He again noted a large bruise and swelling in the right low back and hip region. Employee had significant tenderness to even light palpation on her left ring finger. Dr. Schneider noted a "mallet finger deformity" with continued swelling in the PIP joint with bruising, redness and minimal global swelling. Dr.

Schneider diagnosed "mallet finger" on the left ring finger, a condition which was not as visible at her last visit. He prescribed a mallet finger splint and an orthopedic consultation. Dr. Schneider expected Employee's right gluteal and hip contusion to resolve in a few weeks. Given tenderness and swelling in her right shoulder, Dr. Schneider was unable to fully assess Employee's rotator cuff strength and integrity. Her neurological symptoms in the right upper extremity raised concern for a nerve injury. Dr. Schneider opined the above issues "are the result of a workplace injury sustained two days ago." He also noted care coordination may be complicated because Employee and her spouse wanted to travel to California soon. (Tanana Valley Clinic report, June 23, 2013).

6) On June 27, 2013, on referral from Dr. Schneider, Employee saw Dwayne Frampton, PA-C, at Sports Medicine Fairbanks. Employee told PA-C Frampton she injured her left ring finger, right shoulder, low back, right forearm and right knee when she fell on stairs while carrying a 50 pound bag of rice up steps. Her most significant pain initially was her finger but her low back and sacral region and right scapula, right knee and right forearm area were also troublesome. Overall, Employee thought she was improving. On physical examination, PA-C Frampton noted "a significant contusion with ecchymosis to the scapular region" near the right shoulder. Employee's right forearm revealed mild ecchymosis and minimal tenderness. Her right sacroiliac region showed a significant contusion that extended superior to the iliac crest. Employee's right knee also had a mild area of ecchymosis inferior to the patella. PA-C Frampton reviewed the original x-rays and agreed they showed no obvious acute bony abnormalities. However, upon repeating three views of the left ring finger, PA-C Frampton found a distal phalanx fracture that was intra articular and nondisplaced. PA-C Frampton diagnosed a nondisplaced left ring finger distal phalanx intra articular fracture; a contusion to the right scapula; a contusion to the right sacral region; and a mild contusion to the right forearm and right proximal tibia. He placed Employee in a "STAX" splint and advised her to keep her left ring finger in extension as she had not only a fracture but "also a tendon injury." PA-C Frampton told Employee she had to keep her finger in extension and could not remove the splint for any reason for a at least six to eight weeks. He recommended therapy for her other work-related injuries. PA-C Frampton restricted Employee to "sit-down work only with no lifting, pushing, or pulling with the left hand." (Sportsmedicine Fairbanks Report, June 27, 2013).

7) On June 28, 2013, Employee timely completed and filed an injury report consistent with her previous historical accounts. (Report of Occupational Injury or Illness, June 28, 2013).

8) On July 2, 2013, Employee returned to Sportsmedicine Fairbanks for evaluation. Overall, Employee had improved since her last visit but was having some back and finger pain and her right shoulder was still slightly stiff. She had not gone to physical therapy and had not filled the prescription PA-C Frampton gave her for Naproxen. Employee's gait had improved and the ecchymosis was resolving though Employee still had tenderness in the superior pelvis and right low back region. Ecchymosis along the scapular and shoulder region was also improving. Employee's ring finger splint was intact. Although he did not remove the splint for examination, PA-C Frampton thought the PIP joint swelling was resolving. A repeat left ring finger x-ray revealed the fracture was in satisfactory alignment. Employee advised she was leaving the state the following day. PA-C Frampton emphasized it was important for her to begin taking Naproxen and begin therapy as soon as possible upon arriving in Washington on her way to California. Employee said she would follow-up with an orthopedist. PA-C Frampton noted it was essential for Employee to obtain a finger x-ray and shoulder and low back evaluations with a new provider. (Sportsmedicine Fairbanks report; x-ray report, July 2, 2013).

9) On September 10, 2013, Employee saw Chin Kim, M.D., sports medicine and pain management specialist in California. Employee told a nurse at Dr. Kim's office she injured her left ring finger, right shoulder and right lower-back "after falling backward from a ladder at work in Alaska on 6/21/13." Dr. Kim diagnosed a left fourth and fifth PIP joint crush injury and ankylosis, lumbago and right shoulder tendinitis. Dr. Kim prescribed Norco for pain relief, medical leave for three months for treatment regarding the finger injuries and physical therapy twice a week for three months. (Kim report, September 10, 2013).

10) On October 30, 2013, Dr. Kim said Employee was under his care for her left fourth and fifth PIP joint "crush injuries," joint ankylosis, lumbago and right shoulder tendinitis. Though she had shown some improvement, Employee still had limited motion in her fingers and reduced mobility and weakness in her left hand. In Dr. Kim's opinion, the medical findings prevented Employee from any hand-involving activities, including working, cooking and recreational activities, for an unspecified time. (Kim letter, October 30, 2013).

11) On September 24, 2014, Employee through counsel filed a claim requesting: TTD from "June 21, 2013" through "present"; PPI; medical costs; transportation costs; referral to the RBA-

designee for an eligibility evaluation; compensation rate adjustment; penalty; interest; attorney's fees and costs; and an order joining the fund as a party. Employee attached a June 23, 2013 payroll check stub and her 2011 and 2012 federal income tax returns to the claim. (Workers' Compensation Claim, September 22, 2014).

12) On October 10, 2014, the fund answered Employee's claim and raised two issues: (1) it was unclear whether there was an employer-employee relationship between the principal parties; and (2) there was no order finding the claim compensable and no default by the putative employer invoking the fund's obligation to make any payments. The fund did not object to joinder. (Answer to Employee's Claim for Benefits from the Workers' Compensation Benefits Guaranty Fund, October 7, 2014).

13) Employer never answered Employee's claim. (Agency record).

14) On September 30, 2015, at the fund's request, EME James Tasto, M.D., reviewed Employee's medical records for her work-related injury through Dr. Kim's September 10, 2013 report. (Tasto report, September 30, 2015).

15) On October 15, 2015, Dr. Tasto examined Employee who gave a consistent history. Employee still had pain and limitation in her left fourth finger PIP joint with some grip strength and coordination loss. She had pain in the trapezial and para-scapular region in her right shoulder with some weakness. Employee had right buttock and sacroiliac joint pain without radiation into her legs, and pain with sitting, bending, stooping and lifting. On examination, Employee had slight motion limitation in her left ring finger PIP joint but no pain on flexion or extension. The finger lacked about 10° active extension. There was tenderness over the PIP joint and about 7° flexion loss compared to the opposite hand. Employee's right shoulder had some discomfort but no significant strength deficit. Orthopedic tests for rotator cuff and similar injuries were negative. Employee's low back examination was essentially normal. Dr. Tasto diagnosed a healed left ring finger fracture in the distal phalanx, proximal portion with a mild mallet deformity; PIP joint pain and mild arthrofibrosis in the finger; shoulder and parascapular contusion with residual pain; and right gluteal and sacroiliac pain without neurological deficit. As to causation, Dr. Tasto opined, "The patient's injuries and current findings and complaints are as a result of the industrial accident described of June 21, 2013." (Tasto EME report, October 15, 2015).

16) In Dr. Tasto's opinion, the "June 21, 2013, work injury is the substantial cause of the patient's above listed conditions." The work injury was also the substantial cause in the need for medical treatment to Employee's shoulder, gluteal region and hand to rule out fracture, dislocation or other conditions. In Dr. Tasto's view, Employee's treatment "to date" had been within the realm of medically reasonable options. Her treatment had been completed and she was medically stable without any ratable impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment*, Sixth Edition. Dr. Tasto opined Employee was probably not able to work at her profession for six weeks following the injury but at least by October 15, 2015, had the ability to return to her previous occupation as a chef without restriction. (Tasto EME report, October 15, 2015).

17) On October 22, 2015, Employer filed a pleading explaining its position on Employee's claim. Attached to this document were exhibits including Employee's written statement made in a wage and hour claim; a Sprint customer statement for Joey Ito; a June 23, 2013 payroll check stub from Employer to Employee; various annotated photographs; a business check from Employer to Employee; and various annotated letters, receipts and statements from medical providers regarding Employee. There is no proof these documents were served on Employee, her lawyer or the fund. (Statements About Soyoung Turner's Deeds, October 16, 2015).

18) On March 14, 2016, Employee's lawyer filed and served on all parties two affidavits itemizing attorney's fees and paralegal costs. Attorney Franich billed 6.7 attorney hours at $400 per hour for services provided to Employee in this case, totaling $2,680. Paralegal Heidi Wilson billed 10.3 paralegal hours at $210 per hour for services provided to Employee in this case, totaling $2,163. (Affidavit of Attorney's Fees; Affidavit of Paralegal Fees, March 14, 2016).

19) At hearing on March 17, 2016, Employer admitted it never served its October 16, 2015 pleading or the attachments on any other party. (Yi).

20) At hearing on March 17, 2016, Employee reviewed her September 22, 2014 claim and through counsel clarified it as follows: (1) her claim for "medical costs" and related "transportation costs" is a request to find the injury compensable and order Employer to pay Employee's work-related medical bills and transportation costs; (2) TTD from June 22, 2013, and continuing; (3) PPI when rated; (4) her request for "Review of Reemployment Benefits Decision" and "Other" was premature and Employee seeks only a referral to the RBA if her claim is compensable; (5) a compensation rate adjustment based upon the *Gilmore* Alaska

Supreme Court decision; (6) her penalty claim is withdrawn; (7) her interest claim is withdrawn; and (8) actual attorney's fees and costs. Employee contended since Employer never answered her claim, all facts set forth in her claim were deemed admitted. Similarly, as the fund answered but raised only one defense, *i.e.*, questioning whether there was a "employer-employee" relationship, Employee's claims in respect to the fund should also be deemed admitted. Employee suggested a subsequent hearing if Employer defaults. Employee contended she filed a timely June 28, 2013 injury report for her broken left ring finger and injuries to her hip, shoulder and legs. She contended Employer made no payments to her for her work injury. Employee contended she came to Alaska from California where she earned relatively low reported wages and received pay totaling $3,500 per month. She contends her income tax returns are incorrect. Since her wages were higher while working for Employer than what is reported on the prior two years' income tax returns, Employee contended her actual wages when injured should be the basis for her compensation rate because her historical, reported earnings did not reflect her lost earnings during her disability from the work injury. (Employee's opening statement).

21) Employer contended Employee worked only one day, June 21, 2013. Employer disputed Employee's factual account of how she came to work for Employer and contended she was already on her way to Alaska from Seattle. Employer contended Employee volunteered on the injury date to go to the basement and carry a heavy rice bag up the ladder. Employee's supervisor Yi did not tell her to get the rice. Employer contended Yi did not have time to stop Employee from attempting to carry the rice. While ultimately agreeing the injury occurred as Employee stated, Employer contended no one saw the accident and Yi's wife saw only a small bruise on Employee's left ring finger. Employer contended Employee took a hot shower to make bruising appear more quickly. Employer contended it paid for Employee's medical care for the work injury and "everything." Employer contended once she relocated to California, Employee suddenly had two fingers injured on her left hand, not just one. Employer contended Employee is "lying about everything." (Employer's opening statement).

22) At hearing, Yi testified his wife owns the restaurant business. Yi agreed he paid Employee by check for 14 hours work at $15 per hour. Had Employee not been injured, Yi expected her to work "long-term" and 10 hours per day five to six days per week, though Yi claimed he was going to pay her "minimum wage." Employee sued Employer in court for the injury, and Yi understood the case was dismissed because the court did not believe Employee's account. (Yi).

23) Yi's testimony about how he paid Employee was confusing. Yi admitted he wrote Employee a check paying her $15 per hour for her work, but said he did so because she wanted workers' compensation benefits for her injury. Yi said Employee told him if he paid her $15 per hour for the time she worked she would not file a workers' compensation claim against him. Yi said, while he wrote the payroll check, he actually paid Employee $192.50 in cash. (*Id.*).

24) Yi admitted Employee also filed an Alaska wage and hour claim against him, which resulted in Employer paying Employee some additional wages. (*Id.*).

25) Yi contended Employee fell down only one step, based on where rice landed on the floor. Yi admitted Employee told him she hurt her back, shoulder and finger the same day the accident happened. Yi said he found Employee's wedding ring in the basement under an unspecified object about a month after the incident. Yi questioned why Employee's ring would be under an object rather than on top. After the injury, Yi contended he called Employee to come back to work but she never did. Rather, in Yi's view, Employee quit her job and left Alaska. (*Id.*).

26) Yi admitted Employee saw and responded to a job advertisement he posted in a Korean language newspaper in California. This job posting is what prompted Employee to apply. However, Yi denied the advertisement was for a "chef." Yi insisted the job posting sought only a "kitchen worker." To summarize, Yi ardently stated in respect to Employee's account, "A to Z, everything lie." (*Id.*).

27) While living in California, Employee saw Employer's job advertisement in a California Korean language newspaper. She called Yi on several occasions. The first discussion occurred while she was still in California. Employee and Yi discussed the job, and Yi hired her as a chef. Employee told Yi she could fly or drive to Alaska depending upon how soon she was needed. Yi said driving was fine, so Employee drove. When she left California, Employee thought she had a job with Employer in Fairbanks as a kitchen chef. Employee's previous job in California was as a chef at a restaurant, IOTA Group, Inc., where she made $3,500 per month as a chef. In one of the telephone conversations, Yi told Employee he would pay her $4,000 per month for working six days per week. Employee's 2011 and 2012 income tax returns showed W-2 earnings from IOTA Group, Inc., totaled only $3,000 and $1,500, respectively. Arriving in Fairbanks, Employee expected to earn $4,000 per month as Employer's chef. Employee arrived in Fairbanks on June 18, 2013. She worked one full day and part of another day for Employer. Employee testified she worked 11 hours the first day and six hours the second day for a total of

17 hours. Employee agreed she filed a state wage and hour claim against Employer who, as a result, had to pay her additional wages. Employee said Yi's wife bought pain medication for her and Yi somehow deducted the medicine's cost from her pay. Employee denied she received any cash wages from Employer, but conceded she received a paycheck. Employee's testimony about the paycheck was also confusing and unclear. (Employee; observations).

28) Employee said no Fairbanks doctor released her to return to work. Yi fired her on June 22, 2013, because she was injured. This is why Employee left Fairbanks. (Employee).

29) Upon leaving Alaska, Employee sought medical care at Living Well Pain Center in Bainbridge, Washington. This included physical therapy, massage and medical treatment. (*Id.*).

30) Records from this facility are not in the agency file. (Agency record).

31) Employee then returned to California where she saw Dr. Kim for her work injury with Employer. (Employee).

32) Employee says she still has trouble with her finger, shoulder and lower back. Her prior physician refused to see her any further for reasons not made clear from her testimony. She is now covered by Medi-Cal effective about four months ago. (*Id.*).

33) Employee's husband Gary Turner took pictures depicting some of her injured body parts and Employer's ladder and stair arrangement the day after the injury, when he was in the basement looking for her missing wedding ring. (*Id.*).

34) On cross-examination, Employee conceded she called many places in Alaska before and after she called Employer. She selected Employer for whom to work because it offered her higher pay than other jobs she considered. Employee could not recall how long she discussed pay with Yi during the telephone calls. However, Yi knew Employee was not a sushi chef but had worked at a Hawaiian restaurant, which is why he hired her. (*Id.*).

35) Employee's physicians restricted her work as a chef because, for example, she could not grab a pot with her left hand. She still has difficulty bending her left fingers. Employee, through her attorney, admitted not all medical bills and records had been obtained and provided to Employer or to the fund because the fund defended on grounds there might not be an employer-employee relationship. Employee said she did not work for anyone after her work injury until 2015, when she tried to work but quit because this work injury made it too difficult. (*Id.*).

36) Employee's testimony about her medical treatment in California was confusing. Employee initially testified she had no additional medical care since October 30, 2013, because she was not

working, and implied she had no funds with which to pay a provider. However, Employee may have seen providers at Tri-City Clinic in Oceanside, California for her work injury. (*Id*.).

37) English is a second language for both Yi and Employee. Consequently, at times their hearing testimony was difficult to understand. (Observations).

38) Employee's husband, Gary Turner confirmed he took worksite photographs while looking for Employee's wedding ring the day following her work injury with Employer, and photographed his wife's right arm and left hand. Turner confirmed his wife never returned to work for Employer after her work injury. Her first attempt at returning to work was in La Jolla, California in April 2015. She also tried returning to work at Shabu Shabu, but on every occasion according to Turner, Employee had difficulty standing and using her left hand, so she ceased working. Employee went to Tri-City emergency room for her work injury. Employee also tried acupuncture in Koreatown, a Korean culture enclave in Los Angeles, California. (Turner).

39) On cross-examination, Yi questioned Turner about his telephone conversations following his wife's work injury. After the designated chair's clarification, the evidence showed telephone records to which Yi had repeatedly referred during the hearing as Employee's "phone records" were actually documenting telephone calls charged to Turner's step-son Joey Ito's telephone. (*Id*.; inferences drawn from the above).

40) The Joey Ito telephone records to which Yi referred during the hearing were attached to Employer's October 16, 2015 pleading as Exhibit B. Employer never served these documents on any party. (Statements About Soyoung Turner's Deeds, October 16, 2015, Exhibit B; Yi).

41) As she had never seen the telephone records, Employee objected to Employer's October 16, 2015 pleading and attached exhibits, as it had never been served on Employee's attorney. Employee further objected to this document and its attachments on relevance grounds. (Employee's hearing objections).

42) Adjuster Joanne Pride testified she had not received any medical bills and was unaware of any change in Employee's attending physician. (Pride).

43) In her closing argument, Employee contended no controversions had been filed by any party in this case. She noted the fund had only raised two grounds in its answer: (1) the "employer-employee" question, to which the parties stipulated at hearing and which was no longer an issue; and (2) the fact the fund owed nothing until Employer defaulted on paying benefits ordered. Employee agreed with the fund's second assertion. She contended her TTD

rate should be based upon her actual earnings while working for Employer, $15 per hour working 50 to 60 hours per week. Employee contended Employer never offered her lighter duty work and she remained disabled unless and until she reached medical stability. Employee contended because no benefits were controverted, it was unnecessary for the decision to determine a TTD end date. She contended the end date was not raised as an issue for the hearing, and the end date was "open." In her view, only a controversion notice would make the TTD end date relevant. Alternately, only if Employer failed to pay anything would the TTD end date become relevant. As for PPI, Employee said it was not necessary for this decision to reach the PPI issue as there was no controversion. The rehabilitation eligibility request was "thrown in" to preserve the issue for the RBA-designee to assess, since a review should have occurred automatically on the 91st day after Employee's injury. Employee sought an order stating Employer should pay Employee's work-related medical bills but conceded not all medical records and related billings had been obtained, filed and served. Employee expressly withdrew her penalty and interest claims. Employee's attorney supplemented his previously filed attorney's fee and cost affidavit and added 1.5 hours preparation for the hearing and 3.0 hours attending, totaling $1,800, without objection from any party. (Employee's closing argument).

44) In its closing argument, Employer contended Employee "lied about everything." Employer said it had spent over $20,000 on lawyers even though Employee worked for him for only one day. It contended Employee hurt only her left ring finger while working for him, but by the time she got to California she had two injured fingers. Employer contended Employee must have injured her hand again elsewhere. Further, Employer contended it only made $4,000 to $5,000 per month and it was unreasonable to believe it would have hired Employee as "kitchen help" and paid her $4,000 per month. Employer contended it had already won the court case Employee filed against it because Employer understood the court dismissed Employee's lawsuit and already determined Employee was "lying." (Employer's closing argument).

45) In its closing argument, the fund contended the parties had a hearing to determine the claim's merits. In the fund's view, based on the medical evidence presented, Employer's arguments to some extent are supported. For example, initial medical records only documented a left ring finger injury and suddenly the left pinky finger was also involved. The fund contended its EME physician determined Employee was medically stable and had a zero percent PPI rating referable to her work injury. The fund contended this rating should be considered as the only

rating in this case, and Employee's PPI claim should be denied. The fund conceded $15 per hour appears to have been Employee's pay rate, and agreed this should be the basis for her TTD rate. The fund contended the TTD claim should end either in March 2014, or on the date the fund's EME said Employee reached medical stability, October 15, 2015. The fund agreed there were newly discovered medical providers from which no party had received any records or billings. In respect to Employee's request for an eligibility evaluation, the fund contended EME Dr. Tasto said Employee could return to her normal profession as a chef. It had no position on Employee's attorney's fees and cost request. (The fund's closing argument).

46) With all parties' consent, the panel left the record open until 5:00 PM on March 17, 2016, so Employee could submit Gary Turner's color photographs and file the superior court's stipulation and order, to which Yi repeatedly referred at hearing. (Record).

47) All parties agreed they had a fair opportunity to present their arguments and evidence at hearing. (Parties' hearing statements).

48) On March 17, 2016, Employee timely filed post-hearing court documents. A stipulation, approved by Douglas Blankenship, Superior Court Judge, stated the parties agreed Employee's civil lawsuit against Employer for her work injury would be dismissed "without prejudice" with each party to bear its own attorney's fees and costs, because Employee would be pursuing her remedies before the board. (Stipulation for Dismissal Without Prejudice; Order, June 26, 2014).

49) The above-referenced court stipulation and order made no findings regarding Employee's civil lawsuit against Employer. (Experience, judgment and inferences drawn from the above).

50) On March 17, 2016, Employee also filed Gary Turner's color photographs, referenced at hearing. Turner's photographs show a dangerous ladder and stair arrangement from which Employee fell while carrying the rice. Employee's left hand and fingers show discoloration on both front and back views. The pictures reveal bluish-green bruising under both the left ring and pinky fingers, red discoloration primarily on the left ring finger and back of Employee's hand and a small abrasion on the ring finger near where a wedding ring is usually worn. (Gary Turner photographs, taken June 22, 2013; experience, judgment and inferences drawn from the above).

51) There are no formal controversions filed in this case, but Employer resisted the claim and controverted-in-fact by paying Employee no benefits and claiming she lied about "everything." (Agency record; Yi).

52) Employee's injuries are not medically complex. (Experience, judgment and inferences drawn from the above).

53) If Employee worked for Employer 50 hours per week at $15 per hour, the first 40 hours would be paid at regular time and anything over 40 hours would be paid at least at time-and-a-half, or $22.50 per hour. Had Employee continued to work for Employer during her work-related disability period, she would have earned $600 per week regular time ($15 x 40 = $600) and at least $225 overtime (10 x $22.50 = $225) equaling $825 total gross weekly earnings. Using $825 as gross weekly earnings, the division's online "Benefit Calculator" for a married person with two dependents (her husband and herself) results in a $701.79 spendable weekly wage and a $561.43 weekly TTD benefit rate. (Experience, judgment; Workers' Compensation Division online Benefit Calculator, accessed April 4, 2016).

54) But for her injury, employee would have continued working for employer at least through December 10, 2013. (Experience, judgment and inferences drawn from the above).

55) Employee filed no hearing brief and it is difficult to discern from her attorney's fee and cost affidavits how much time was spent on each issue. (Agency record; 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 . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

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

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) The department shall adopt rules for all panels . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

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 the need for medical treatment of an employee if the disability . . . 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 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 the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . 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 . . . 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 the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

AS 23.30.041. Rehabilitation of Injured Workers. . . .
. . . .

(f) An employee is not eligible for reemployment benefits if
. . . .

(4) at the time of medical stability, no permanent impairment is identified or expected. . . .

AS 23.30.095. Medical treatments, services, and examinations. (a) the employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires. . . .

AS 23.30.097. Fees for medical treatment and services. . . .
. . . .

(d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later.
. . . .

(f) An employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter. . . .

> **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. . . .

The presumption of compensability is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption analysis involves three steps. To attach the presumption, an injured worker must first establish a "preliminary link" between his injury and his employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the Act's 2005 amendments, if an injured worker establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence demonstrating 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 (March 25, 2011). Because the board considers the employer's evidence by itself, 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 to rebut the presumption, it drops out and the injured worker must prove his case by a preponderance of the evidence. He must prove that in relation to other causes, employment was "the substantial cause" of his disability or need for medical treatment. *Runstrom*, AWCAC Decision No. 150 at 8. This means the injured worker must "induce a belief" in the fact-finders' minds that the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

In the third step, evidence is weighed, inferences are drawn and credibility is considered. Neutral evidence is not adequate to rebut the raised presumption. *Harp v. ARCO, Alaska, Inc*., 831 P.2d 352 (Alaska 1992). Where the presumption is raised and not rebutted, the claimant need not produce further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

> **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 findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.145. 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. . . .

In *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011) the appeals commission addressed the employer's claim the board erred by awarding attorney's fees under both §§145(a) and (b). Though the commission vacated the board's decision on other grounds, it discussed attorney's fee awards anticipating the issue would arise again, and stated:

> The board awarded reasonable fees under AS 23.30.145(b), but concluded 'the employee is entitled to mandatory statutory minimum attorney fees under AS 23.30.145(a) when, and if, the statutory minimum amount based on the payment of past and future medical, indemnity, and all other benefits exceeds the attorney fee awarded under AS 23.30.145(b)' (footnote omitted). Although the Supreme Court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (footnote omitted).

> Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (footnote omitted). Subsection (b) may apply to fee awards in controverted claims, (footnote omitted) in cases in which the employer does not controvert but otherwise resists, (footnote omitted) and in other circumstances (footnote omitted). It is undisputed that Uresco controverted Porteleki's claim. Thus, we see no reason his attorney could not seek fees under either AS 23.30.145(a) or (b) and find no error in the board's decision to award fees under the higher of (a) or (b).

> **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, assuming no presumptions apply, 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 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
>
> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment. . . .

In *Stonebridge Hospitality Associates v. Settje*, AWCAC decision No. 10-017 (June 14, 2011), a self-represented injured worker filed a claim for PPI benefits. The injured worker reiterated her PPI request at a prehearing conference and said she understood "the concept of a PPI rating" and said she wanted to assert her right to PPI "when and if a rating became appropriate." An EME performed an examination and said the injured worker had not suffered a work-related injury and therefore, a PPI rating was "not applicable." The injured worker reiterated her PPI claim thereafter, and the employer controverted based upon its EME report. A board-ordered second independent medical evaluation (SIME) opined the injured worker had not sustained any PPI

from her work injury. At a subsequent prehearing conference, the injured worker stated there was no PPI rating but believed "there should be."

Settje's claim went to hearing and she presented no medical evidence demonstrating a PPI rating greater than zero percent. The board held the legal issue whether Settje was entitled to PPI benefits was not ripe for decision because the law accorded her a rating from her physician, which she had not yet obtained. The commission disagreed and noted the parties repeatedly identified PPI benefits as an issue for hearing. In the commission's view, the PPI issue was ready to be decided at hearing. Settje said she understood she needed a PPI rating and two doctors, an EME and an SIME, stated she had no ratable PPI attributable to her work injury. The commission determined the board's decision to not decide the PPI issue created a "hardship" for the employer who had continued exposure for PPI and related reemployment benefits and had incurred attorney's fees and costs addressing these issues. In short, the commission decided the PPI issue was not a "hypothetical claim," was ripe for adjudication and Settje needed a PPI rating to obtain a PPI benefit award. (*Id*. at 13). *Settje* further held if, on remand, the board decided the injured worker had a zero percent PPI rating, she would also not be entitled to an eligibility evaluation since a PPI rating had to at least be predicted for her to be eligible for retraining benefits. *Settje* further stated, "If she is not eligible for reemployment benefits, then there is no point in the RBA conducting a reemployment eligibility evaluation." (*Id*.).

The 1982 average weekly wage and compensation rate statute stated in part:

> **AS 23.30.220. Determination of average weekly wage**. Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation, and is determined as follows;
>
> . . . .
>
> (2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury;
>
> (3) if the board determines that the wage at the time of the injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship to the employee, the wage for calculating

> compensation shall be the usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board. . . .

In *Johnson RCA/OMS*, 681 P.2d 905 (Alaska 1984), the Alaska Supreme Court construed the 1982 statute, but did not decide the case on constitutional grounds. *Johnson* held the board was required to use an alternate §220 sub-section in cases where an injured worker's wages from prior years had no relationship to his earnings at the time he was injured. Though it did not decide the case on constitutional grounds, *Johnson* held for the first time:

> The objective of AS 23.30.220 is to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid. Normally the formula in subsection (2) will yield a fair approximation of this figure. However, sometimes it will not, and in those cases subsection (3) of the statute is to be used. (*Id*. at 907).

Since *Johnson*, the Alaska Supreme Court has often repeated this objective, which it derived from Professor Larson's workers' compensation treatise in which he said:

> The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of the impact of probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis. (*Id*. at 907; citing 2 A. Larson, *The Law of Workmen's Compensation* §60.11(d), at 10-564 (1983) (footnote omitted)).

AS 23.30.220 was amended in 1983 to read in part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury.
>
> (2) if the board determines that the gross weekly earnings at the time of the injury cannot be fairly calculated under (1) of this subsection, the board may

> determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history. . . .

AS 23.30.220 was amended again in 1988 to take into account workers who were "absent from the labor market" for a time. This version stated in part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury;
>
> (2) if the employee was absent from the labor market for 18 months or more of the two calendar years preceding the injury, the board shall determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history, but compensation may not exceed the employee's gross weekly earnings at the time of injury. . . .

The seminal case resulting from this §220 iteration is *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). *Gilmore* struck down §220 for the first time on equal protection grounds. Gilmore claimed he was entitled to an alternative wage calculation because he was off work in a vocational reemployment training plan. *Id*. at 924-25. The board rejected Gilmore's claim and he appealed. The Alaska Supreme Court asked for further briefing on whether §220 could pass constitutional muster. Subsequently, the court ruled it could not and struck down §220 "as applied" to the case. *Gilmore* held legislative intent could be gleaned from session laws stating, "It is the intent of the legislature that AS 23.30 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 AS 23.30." *Id*. *Gilmore* found these goals were "legitimate purposes" but also found, reflecting on *Johnson*:

> The overall purpose of AS 23.30.220(a) . . . is 'to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid' (footnote omitted). *Johnson*, 681 P.2d at 907. This 'fair approximation' is an essential component of the basic compromise underlying the Workers' Compensation Act -- the worker's sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation. (*Id.*).

Most notably, *Gilmore* found:

> We nevertheless conclude that no substantial relationship exists between calculating a worker's weekly wage by dividing the worker's earnings over the last two calendar years by 100 regardless of whether the number reached reflects the worker's actual losses and the goals of fairly approximating a worker's probable future earning capacity and achieving a 'quick, efficient, fair, and predictable delivery of indemnity and medical benefits.'
>
> The benefit levels among injured workers based on section 220(a) bear no more than a coincidental relationship to the goal of compensating injured workers based on their actual losses. In any of the many situations in which a worker's past wage and time of employment do not accurately reflect the circumstances existing at the time of the injury, the formula will misrepresent the losses (footnote omitted). The means chosen for determining an injured worker's gross weekly wage therefore do not bear a substantial relationship to that goal. (*Id.* at 928).

The employer in *Gilmore* argued former §220 is constitutional as applied because its application would lead to "quick, efficient results," but the court declared:

> This efficiency is gained, however, at the sacrifice of fairness in result. The purpose of the Act, as expressed by the legislature, is to provide a 'quick, efficient, *fair*, and predictable delivery of indemnity and medical benefits.' The facts of the present case amply demonstrate the potential unfairness of a rigid application of the mechanical formula (footnote omitted). Under the section 220(a)(1) formula as applied by the Board, Gilmore received only the statutory minimum amount of compensation, despite his earning over seven and one-half times more per week at the time of injury.
>
> Efficiency in this area does not require unfairness. A quick, efficient, and predictable scheme for determining a worker's gross weekly earnings could be formulated without denying workers like Gilmore benefits commensurate with their actual losses. (*Id.* at 928; emphasis in original).

Gilmore concluded Alaska was the only state that did not provide an option to take into account such factors as unemployment in rate calculations. *Id.* Consequently *Gilmore* held:

> The gross weekly wage determination method of AS 23.30.220(a) creates large differences in compensation between similarly situated injured workers, bears no relationship to the goal of accurately calculating an injured employee's lost wages for purposes of determining his or her compensation, is unfair to workers whose past history does not accurately reflect their future earning capacity, and is unnecessary to achieve quickness, efficiency, or predictability. Therefore, the formula expressed in AS 23.30.220(a) is not substantially related to the purposes

> of the Act. It cannot survive scrutiny on even the lowest end of our sliding scale and is therefore an unconstitutional infringement on the equal protection clause of the Alaska Constitution. Art. I, §1. (*Id*. at 929).

Gilmore noted in some cases the statute might work well and "may roughly approximate the employee's lost wages when the employee worked full time during the entire two year period at the same job held at the time of injury" or "when the employee has consistently worked only at seasonal occupations," but it does not "account for any upward or downward change in the employee's earning capacity and punishes workers who have newly committed to full time employment." *Gilmore* further stated the "formula also fails entirely to take account of any change in . . . earning capacity that occurred during the year of injury." *Gilmore* at 932 n. 6. *Gilmore* provided a "model statute," which the court said would probably not be struck down:

> Section 19. Determination of Average Weekly Wage. Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute the compensation and shall be determined as follows:
> . . . .
>
> (d)(1) If at the time of the injury the wages are fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the fifty-two weeks immediately preceding the injury.
>
> (2) If the employee has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed under the foregoing paragraph, taking the wages (not including overtime or premium pay) for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. . . . (*Id*. at 932 n. 15; citing the Council of State Governments' Draft Workmen's Compensation and Rehabilitation Law, quoted in 2 Arthur Larson, *The Law of Workmen's Compensation* §60.11(a)(1), at 10.606 n. 77 (1993)).

Following *Gilmore*, Alaska's legislature amended §220 in 1995 and incorporated many provisions from the "model statute." The "model" §220(a) included a method to account for variations in work histories, predict earnings and compensate injured workers for actual losses during their disability. Effective 1995, §220 said in part:

> **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
>
> > (A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing by 13 the employee's earnings, including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;
> >
> > (B) employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding (1)-(3) of this subsection and (A) of the paragraph, the employee's gross weekly earnings are computed by determining the amount that the employee would have earned, including overtime or premium pay, had the employee been employed by the employer for 13 calendar weeks immediately preceding the injury and dividing this sum by 13. . . .

Only two Alaska Supreme Court cases addressed this §220(a) version. In *Flowline of Alaska v. Brennan*, 129 P.3d 881 (Alaska 2006), the court affirmed the board's decision to use §220(a)(4)(A) because it was the most appropriate formula for calculating the injured worker's rate, based on the facts in a 1999 case. *Brennan* again referenced *Gilmore* and stated:

> As we pointed out in *Gilmore,* a fair approximation of a claimant's future earning capacity lost due to the injury is the 'essential component of the basic compromise underlying the Workers' Compensation Act -- the worker's sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation' (footnote omitted). Despite subsequent amendments to the statute aimed at increasing the efficiency and predictability of the compensation process, this compromise, and the fairness requirements it engenders, provide the context for interpreting the Workers' Compensation Act. (*Brennan*, 129 P.3d 882-83).

In *Thompson v. United Parcel Service*, 975 P.2d 684 (Alaska 1999), the Alaska Supreme Court said the 1995 §220 version did not apply to the Thompson's case because her injury happened a month before the amended statute's effective date. *Thompson* instead construed an earlier §220 iteration and further explained *Gilmore*. The court declined to accept a "broad" view requiring

the board to calculate TTD rates by determining what "was fair" to both parties. *Thompson* said, citing *Gilmore*, "We noted that 'section 220(a) may be applied constitutionally in a number of circumstances, for example, where an injured worker has had the same occupation for all of the past two calendar years.'" *Id.* at 689. Thus, the first question under *Gilmore* is not whether an award calculated according to AS 23.30.220(a)(1) is "fair." Rather, "it is whether a worker's past employment history is an accurate predictor of losses due to injury." *Id.* At the time Thompson was injured, AS 23.30.220 read in relevant part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury. . . .

Thompson noted:

> In fact, a primary purpose of our workers' compensation laws is to predict accurately what wages would have been but for a worker's injury. In *Johnson v. RCA-OMS, Inc.* (footnote omitted) we explained that under past versions of the statute at issue here, the 'entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity' (footnote omitted). We reiterated this theme in *Gilmore* with regard to the 1988 version of the statute involved in this case when we quoted *Johnson* with approval (footnote omitted). (*Id*. at 689-90).

Thompson also said "'intentions as to [future] employment . . . are relevant to [determine] future earning capacity' in determining proper compensatory awards." *Id*. at 690; (citation omitted).

In *Dougan v. Aurora Electric, Inc*., 50 P.3d 789, 797 (Alaska 2002), the Alaska Supreme Court stated, after the legislature adopted the "model law" suggested in *Gilmore*, the *Gilmore* test was no longer applicable. *Dougan* held the law in effect at the time of Dougan's injury provided for a variety of methods to calculate a TTD rate, while *Gilmore's* version of §220 relied exclusively on the average wage earned during a period of over a year without providing an alternate approach if the result was unfair.

In *Circle De Lumber Company v. Humphrey*, 130 P.3d 941 (Alaska 2006), the Alaska Supreme Court, in a case based on 1993 law, approved a departure from the standard TTD rate calculation method. The board calculated Humphrey's weekly earnings by multiplying his hourly wage at the time of injury ($14.00) with his estimated yearly work period (50 hours per week and six months per year), to derive his gross weekly earnings and his TTD rate. *Humphrey* held the board's employment estimations used for the TTD calculation based on Humphrey's work history and future earning potential were supported by substantial evidence.

AS 23.30.220 was amended in 2005 to its present form, which states:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
>
> (1) if at the time of injury the employee's earnings are calculated by the week, the weekly amount is the employee's gross weekly earnings;
>
> (2) if at the time of injury the employee's earnings are calculated by the month, the employee's gross weekly earnings are the monthly earnings multiplied by 12 and divided by 52;
>
> (3) if at the time of injury the employee's earnings are calculated by the year, the employee's gross weekly earnings are the yearly earnings divided by 52;
>
> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;
>
> (5) if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees;
>
> (6) if at the time of injury the employee's earnings are calculated by the week under (1) of this subsection or by the month under (2) of this subsection and the employment is exclusively seasonal or temporary, then the gross weekly earnings are 1/50 of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury;

> (7) when the employee is working under concurrent contracts with two or more employers, the employee's earnings from all employers is considered as if earned from the employer liable for compensation;
>
> (8) if an employee when injured is a minor, an apprentice, or a trainee in a formalized training program, as determined by the board, whose wages under normal conditions would increase during the period of disability, the projected increase may be considered by the board in computing the gross weekly earnings of the employee; if the minor, apprentice, or trainee would have likely continued that training program, then the compensation shall be the average weekly wage at the time of injury rather than that based on the individual's prior earnings;
>
> (9) if the employee is injured while performing duties as a volunteer ambulance attendant, volunteer police officer, or volunteer firefighter, then, notwithstanding (1)-(6) of this subsection, the gross weekly earnings for calculating compensation shall be the minimum gross weekly earnings paid a full-time ambulance attendant, police officer, or firefighter employed in the political subdivision where the injury occurred, or, if the political subdivision has no full-time ambulance attendants, police officers, or firefighters, at a reasonable figure previously set by the political subdivision to make this determination, but in no case may the gross weekly earnings for calculating compensation be less than the minimum wage computed on the basis of 40 hours work per week;
>
> (10) if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of the employee's gross weekly earnings under (1)-(7) of this subsection does not fairly reflect the employee's earnings during the period of disability, the board shall determine gross weekly earnings by considering the nature of the employee's work, work history, and resulting disability, but compensation calculated under this paragraph may not exceed the employee's gross weekly earnings at the time of injury. . . .

In *Wilson v. Eastside Carpet Co.*, AWCAC Decision No. 106 (May 4, 2009), the Alaska Workers' Compensation Appeals Commission, in a case arising under the current (2005) statute, held an employer may presume that for an hourly worker, AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the employee's wages at the time of injury in most cases. The hourly employee has the burden to challenge the compensation rate established under §220(a) if it does not represent the equivalent wages at the time of the injury, in Wilson's case from prior self-employment. The board "must look at the evidence and decide the facts in each case" when determining the spendable weekly wage. (*Id*. at 4). In *Wilson*, the commission found the board could not have ascertained the wage equivalent from Wilson's small self-

employment record, and therefore was required to use a different §220(a) subsection to fit these circumstances. *Wilson* further held though tax records may be used to prove reported income, the board is not limited to federal tax returns as proof of an employee's earnings. (*Id.*). Once an injured worker files a claim requesting a compensation rate adjustment, "the board must conduct a broader inquiry" to obtain evidence sufficient to determine the spendable weekly wage. (*Id.*).

> **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 disability presumption and gain a "counter-presumption" by producing substantial evidence proving medical stability has been reached. *Anderson*, AWCAC Decision No. 130 at 8. Once an employer produces substantial evidence to overcome the injured worker's presumption, 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" that 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.*).

> **8 AAC 45.082. Medical treatment**. (a) The employer's obligation to furnish medical treatment under AS 23.30.095 extends only to medical and dental

> services furnished by providers, unless otherwise ordered by the board after a hearing or consented to by the employer. . . .
> . . . .
>
> (d) Medical bills for an employee's treatment are due and payable within 30 days after the date the employer received the medical provider's bill and a completed report on form 07-6102. Unless the employer controverts the prescription charges or transportation expenses, an employer shall reimburse an employee's prescription charges or transportation expenses for medical treatment within 30 days after the employer received the medical provider's completed report on form 07-6102 and an itemization of the prescription numbers or an itemization of the dates of travel, destination, and transportation expenses for each date of travel. If the employer controverts
>
> **8 AAC 45.120. Evidence**. . . .
> . . . .
>
> (f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision. . . .
>
> **8 AAC 45.525. Reemployment benefits eligibility evaluation**. . . .
>
> . . . .
>
> (i) The employer shall pay costs associated with the employee's physician's review of documents submitted under this section, in compliance with AS 23.30.097.

ANALYSIS

Ordinarily, such questions as whether there was an employer-employee relationship and whether the injury happened as Employee stated would raise factual disputes to which the presumption of compensability would apply. AS 23.30.120(a)(1); *Meek.* However, the parties stipulated to the employer-employee relationship and neither Employer nor the fund contended the injury never happened or Employee was not injured. Therefore, the presumption analysis need not be applied to these questions and Employee's undisputed work injury will be found compensable. *Rockney*.

1) Is Employer liable for Employee's injury-related medical expenses and associated transportation costs?

Employee made a claim for medical benefits. AS 23.30.095(a). This is not a medically complex injury. *Wolfer*; *Rogers & Babler*. The only known contributing cause to Employee's need for medical treatment and related transportation costs for a broken left ring finger, injured left hand, and injured back and hip area is the work injury she described at Employer's restaurant. The only resistance Employer mounted to Employee's medical claim was Yi's assertion Employee must have subsequently injured her left pinky finger elsewhere, as this was not originally documented as an injured body part. This raises a factual dispute to which the presumption of compensability applies. AS 23.30.120(a)(1); *Meek*. Employee raised the presumption with her testimony about how the injury occurred and how she injured her left hand and with Dr. Kim's medical report. *Tolbert*. Employer provided no affirmative medical or other evidence to support its assertion there must have been a subsequent hand injury and merely speculates about an ensuing injury. Employer relies upon the absence of an earlier medical record referencing the left pinky finger. This is "neutral" evidence, inadequate to rebut the raised presumption. *Harp*. Employer cannot rebut the raised presumption. Therefore, Employee prevails on the raised but unrebutted presumption. *Williams*.

Even had Employer rebutted the presumption, Gary Turner's color photographs taken the day following the injury clearly demonstrate discoloration at the base of Employee's left ring and pinky fingers supporting the notion she injured both fingers on June 21, 2013, when she fell off the ladder. One picture shows an obvious abrasion where Employee's wedding ring would normally be found, suggesting significant trauma as the ring came off her finger when she fell. Further, while early x-rays did not disclose a fractured ring finger, subsequent x-rays read by a different provider did. Similarly, Dr. Kim could have observed a fifth finger injury overlooked by prior providers. In short, the color photographs show Employee's left hand largely banged up. Thus, even under the presumption analysis, Employee would prevail. *Saxton*.

Because Employee was the only witness to the injury, there are no contrary medical records or other credible or relevant evidence to refute her testimony, and she is credible, Employee prevails on the raised but unrebutted presumption. AS 23.30.122; *Smith*; *Williams*. The unrefuted evidence shows Employee broke her left ring finger and hurt her left pinky finger, left hand, right forearm, back and hip region when she fell down the ladder and stairs while working for Employer as she stated. The June 21, 2013 work injury with Employer was, therefore, the substantial cause of her need for

medical treatment for her left hand including her ring and pinky fingers, right forearm, right shoulder area and right lower back and gluteal region. AS 23.30.010(a).

Employer contends it has already paid numerous medical bills related to the work injury. Employee is uncertain whether this is true. The fund believes Employer may have paid some bills. Employer admittedly never served its October 16, 2015 pleading with attachments on any party. Therefore, even though the attachments include information purportedly proving Employer paid at least some of Employee's work-related medical bills, this material was not properly served on all parties and will not be considered as evidence for this decision. 8 AAC 45.120(f).

Nevertheless, it is certain Employee has not yet obtained, filed and served all work-related medical records and associated bills. The record is not clear as to which additional work-related medical bills have yet to be processed for payment. However, all the relevant medical records presented to date, including Dr. Tasto's EME report, suggest all medical care Employee received to date has been reasonable, necessary and necessitated by the June 21, 2013 work injury with Employer. Therefore, to make this process as summary and simple as possible, this decision will find Employer liable for any and all work-related medical bills incurred as a result of the June 21, 2013 work injury through Dr. Kim's October 30, 2013 report. AS 23.30.005(h). The parties will be directed to obtain, file and serve any and all work-injury related medical reports and associated billings. Employer will be directed to pay these bills to the providers pursuant to AS 23.30.097(d) and 8 AAC 45.082(d). As for injury-related treatment Employee incurred after October 30, 2013, the parties will be directed to obtain, file and serve these records along with associated billings. Employer and the fund retain their rights to review and controvert these additional medical services pursuant to the Act.

Employee also made a claim for medically related transportation costs. However, Employee neither provided a transportation log documenting these costs nor testified about them at hearing. Therefore, Employee has failed to prove entitlement to this benefit and it will be denied. *Settje*. Employee retains the right to file evidence supporting any transportation expenses incurred from this date forward. Employer and the fund retain their right to controvert.

2) Is Employee entitled to TTD benefits?

Employee claims entitlement to TTD benefits beginning June 22, 2013 and continuing. AS 23.30.185. Employee contended it was not necessary for this decision to determine an "end date" for her TTD claim. While Employer did not take a position on an end date for the TTD claim, the fund disagreed with Employee's position. Employer further suggested it had offered Employee suitable employment and she had refused, quit her job and left the state. Employee said Employer fired her after her injury, so she left the state. This causes a factual dispute regarding disability to which the presumption must be applied. AS 23.30.120(a)(1); *Meek*.

Employee raises the presumption with her testimony she was unable to work, her medical reports indicating she could not work and her testimony Employer fired her. *Tolbert*. Employer rebuts the presumption with Yi's testimony he offered Employee a job following her injury, but she quit and left the state, and with Dr. Tasto's EME opinion stating Employee could have returned to her regular duties by August 2, 2013, and his opinion she was "medically stable," but without specifying a date. *Runstrom*. This shifts the burden of production to Employee, and Dr. Tasto's medical stability opinion establishes a counter-presumption Employee was medically stable from her work injury with Employer as early as August 2, 2013, and at least by October 15, 2015. Dr. Tasto's opinion implies Employee was medically stable six weeks following her injury because he stated she could have returned to work at the six-week point post-injury. *Saxton*; *Anderson*.

To be entitled to TTD benefits, Employee must demonstrate she was both disabled by her work injury with Employer and not yet medically stable. Given Dr. Tasto's opinion, Employee must produce "clear and convincing evidence" she was not medically stable by August 2, 2013. *Anderson*. The available medical record shows Dr. Schneider removed Employee from work on June 21, 2013, and on June 23, 2013, said the work injury had caused the disability. On June 27, 2013, PA-C Frampton splinted Employee's left ring finger and said she could not extend the finger or remove the splint for any reason for at least six to eight weeks. PA-C Frampton restricted Employee to "sit-down" work only with no "lifting, pushing, or pulling with the left hand." This treatment was designed to allow her finger fracture to heal. *Rogers & Babler*.

By July 2, 2013, Employee still had back, shoulder and hand pain arising from her work injury with Employer. Bruising was still visible and documented. PA-C Frampton told Employee it was important for her to begin taking Naproxen and begin physical therapy as soon as she arrived in Washington and established care with a new medical provider. Physical therapy, which Employee received in Washington, was intended to improve her physical condition. *Rogers & Babler*. This undisputed medical evidence and testimony shows Employee remained under a work-related disability and was not yet medically stable. AS 23.30.395(16), (28).

Upon arriving in California in September 2013, Employee saw Dr. Kim who diagnosed the injury to the left fifth, or "pinky" finger. Dr. Kim recommended medical leave for three months and physical therapy twice a week for three months to address the work injury. In October 2013, Dr. Kim concluded the medical findings prevented Employee from any hand-involving activities including working, cooking and recreational activities for an unspecified time. Nearly two years later on October 15, 2015, EME Dr. Tasto saw Employee and stated she was medically stable, but did not offer a specific medical stability date. Dr. Tasto also opined Employee was not able to work for six weeks following her injury, or until August 2, 2013, but by at least October 15, 2015, had the ability to return to her previous occupation as a chef without restrictions.

Employee's medical records including Drs. Schneider's, Kim's and Tasto's reports, demonstrate Employee became disabled from her work injury beginning June 22, 2013. Contrary to Employee's assertion, however, it is important to establish an end date for her disability, as TTD ends when a person is either no longer disabled or is medically stable. AS 23.30.185; *Leigh*. Given Dr. Kim's recommendation for three months more treatment for her hand injury, Employee was not medically stable six weeks post-injury as Dr. Tasto implied. At hearing, Employee testified she still had symptoms related to her work injury, and while she had tried returning to work several times beginning in 2015, she was largely unsuccessful. Absent interim medical records documenting her continued symptoms, treatment and any related disability, Employee's hearing testimony on this point is given less weight. AS 23.30.122; *Smith*.

However, clear and convincing medical evidence suggests Employee continued to be disabled from her work injury until December 10, 2013. This date is three months from September 10,

2013, when Dr. Kim opined Employee should be on medical leave for three months to treat her finger injuries. Though in October 2013, Dr. Kim said Employee was prevented from working for an unspecified time, there are no further medical records in the agency file until Dr. Tasto's EME report nearly two years later. Employee provided no medical evidence demonstrating a significant shoulder, back or hip injury. Her main physical restriction was her fractured left ring finger. Given this medical evidence, it is reasonable to conclude that by December 10, 2013, Employee's fractured finger had fully healed and she had recovered adequately from her work injury with Employer to return to work as a chef. *Rogers & Babler*. Once Employee was physically capable of returning to work, she was no longer under a work-related "disability" as defined in the Act and no longer entitled to TTD benefits. AS 23.30.395(16). Employer will be ordered to pay Employee TTD benefits from June 22, 2013 through December 10, 2013.

3) Is Employee entitled to PPI benefits?

Employee made a claim for PPI benefits. AS 23.30.190. Employee contends it is unnecessary for this decision to reach the PPI issue, as Employee has not yet had a PPI rating from her own physician. Employer expressed no position on Employee's contention, but the fund disagreed. The fund contends because Employee claimed PPI, it hired an EME who gave Employee a zero percent PPI rating, which constitutes a rating. As this is the only PPI rating in evidence, the fund contends Employee's PPI claim should be denied.

While logic, the statutes and at least one regulation suggest Employee is entitled to a PPI rating performed by her physician at the liable Employer's expense rather than at her own, the Alaska Workers' Compensation Appeals Commission ruled otherwise in a similar situation. AS 23.30.095(a); AS 23.30.097(d), (f); 8 AAC 45.525(i). The commission held if an injured worker makes a claim for PPI benefits and another party obtains a zero percent PPI rating, the injured worker must produce evidence at hearing demonstrating a PPI rating higher than zero percent to prevail on her PPI claim. *Settje*. Unlike other issues in her claim, Employee did not withdraw her PPI issue. But the fund hired a physician who examined Employee and found she had a zero percent PPI rating attributable to her work injury with Employer. Employee claimed entitlement to PPI benefits, and this was not a hypothetical claim. Because Employee presented no PPI rating higher than zero percent, her PPI claim will be denied. *Settje*.

4) Should Employee's case be referred to the RBA for an eligibility evaluation?

Employee is not eligible for reemployment benefits if, at the time of medical stability, no permanent impairment is identified or expected. AS 23.30.041(f)(4). EME Dr. Tasto opined Employee was medically stable no later than October 15, 2015. While in most cases, the RBA-designee has the right to determine whether a person is entitled to an eligibility evaluation in the first instance, since this decision determined Employee is medically stable and has no ratable PPI for her work injury with Employer, she cannot be found eligible for reemployment benefits and "there is no point in the RBA conducting a reemployment eligibility evaluation." *Settje*. Therefore, Employee's request for an order directing the RBA-designee to review this case and determine if she is entitled to an eligibility evaluation will be denied.

5) Is Employee entitled to a compensation rate adjustment?

Employee requested a TTD compensation rate adjustment. AS 23.30.220(a); *Gilmore*. It is undisputed Employee was paid hourly while working for Employer, though the parties disagree on the hourly rate. Employee contends, under the *Gilmore* rationale, the standard method for determining her spendable weekly wage under AS 23.30.220(a)(4) as an hourly worker is not an "accurate predictor of losses due to injury." *Thompson*. This decision determined Employee is entitled to TTD benefits from June 22, 2013 through December 10, 2013. Therefore, this 171 day disability period, totaling 24.43 weeks, is the relevant period for determining Employee's lost future earning capacity. *Johnson*.

First, there may be a factual dispute about Employee's earnings in the two calendar years prior to her work injury with Employer. However, the possible dispute is not between Employer and Employee, but is between Employee's hearing testimony and her income tax records. It is not clear how the presumption of compensability would apply to this dispute. Therefore, it will not be applied. *Rockney*. Employee's 2011 and 2012 federal income tax returns show Employee's W-2 earnings at only $3,000 and $1,500 per year, respectively. At hearing, Employee testified she made $3,500 per month while working for her last employer in California. Employee may have mis-remembered her earnings, may have earned this amount in 2013 before coming to Alaska, may have earned $3,500 per month in California in 2012 and was paid in cash, or for

some other reason may not have reported all her earnings on her 2011 and 2012 federal income tax returns. The record on this is not clear.

Regardless, the fact-finders are not limited to only income tax returns for an injured worker's wage and earning information. *Wilson*. However, in this case greater weight will be given to Employee's 2011 and 2012 federal income tax returns. AS 23.30.122; *Smith*. Under AS 23.30.220(a)(4), using Employee's higher 2011 earnings totaling $3,000, her gross weekly earnings would be only $60 per week ($3,000 / 50 = $60). This would result in a less than a minimum weekly TTD rate. *Rogers & Babler*.

There is a factual dispute between the principal parties about Employee's hourly pay rate while working for Employer, to which the presumption of compensability must be applied. *Meek*. Employee raises the presumption she was paid $15 per hour through her testimony and Employer's payroll check stub showing a $15 hourly pay rate. *Tolbert*. Employer rebuts the presumption with Yi's testimony he only intended to pay Employee "minimum wage," and only paid her $15 per hour at her request in exchange for a promise she would not file a workers' compensation claim against Employer. *Runstrom*. Employee must prove she was paid $15 per hour while working for Employer and would have continued at that rate for at least 24.43 weeks after her injury. *Saxton*; *Johnson*.

It is unlikely Employee would have agreed to drive from California to Fairbanks to accept a minimum wage job as a kitchen helper. *Rogers & Babler*. By contrast, it is not surprising Employee would have accepted a $15 per hour job as a chef working for Employer 50 to 60 hours per week. In this regard, Employee's testimony is credible. AS 23.30.122; *Smith*. Furthermore, greater weight is given to Employer's payroll check stub, which shows it paid Employee $15 per hour, than is given to Yi's hearing testimony stating he was only going to pay Employee minimum wage. In other words, what Employer actually paid her before she filed a claim is weighted more heavily than what Employer now says it was going to pay her after Employee filed a claim. The credible evidence shows the parties agreed Employer would pay Employee $15 per hour for her work as a chef. AS 23.30.122; *Smith*. There is no dispute about Employee's work duration but for her injury. It is unlikely Employee would have driven from

California to Fairbanks for short-term, temporary position. *Rogers & Babler*. Furthermore, Yi conceded he hired Employee for a long term position at 50 to 60 hours per week. Therefore, Employee's evidence, including Yi's admissions, demonstrates she would have continued working for Employer as a chef through at least December 10, 2013. *Johnson*.

A basic premise in Alaska workers' compensation law, and the "entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity" when calculating a TTD rate. *Johnson*; *Gilmore*; 2A Larson, *The Law of Workmen's Compensation* §60.11(d), at 10-564 (1983). The Alaska Supreme Court in *Gilmore* also relied upon legislative intent, now codified in the Act. This legislative intent was for the Act to 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 employers who are subject to the provisions" of the act. *Gilmore* 882 P.2d at 927. This exact intent currently appears as the first statute in the Act, and is the law applicable to Employee's injury date. AS 23.30.001(1).

But in amendments to §220(a) subsequent to *Gilmore* but before the current law, the legislature adopted the "model law" recommended in *Gilmore*. This amendment provided alternative methods for calculating gross weekly earnings when the "standard" method used for hourly employees did not accurately reflect an injured worker's lost earnings during the disability period. Thus, for a time and for injuries arising under the amended "model" statute, the *Gilmore* test was no longer applicable. *Dougan*.

While the "model" statute was in effect, cases still arose under then-current and former §220 versions and some were decided by the Alaska Supreme Court. For example, in *Brennan*, the court quoted *Gilmore* and reiterated that "a fair approximation of a claimant's future earning capacity lost due to the injury" is the "essential component" of the basic compromise underlying workers' compensation law. Despite amendments aimed at increasing efficiency and predictability, this compromise and "the fairness requirements it engenders," provide the context for interpreting the Act. *Brennan*. In 2006, the court in a case arising under 1993 law approved a departure from the standard TTD rate calculation method and approved estimates the factfinders had made to support a compensation rate adjustment. *Humphrey*.

There were few compensation rate adjustment claims litigated while the "model statute" §220 remained in effect. *Rogers & Babler*. However, in 2005 the legislature amended §220 to its current form, which bears a striking resemblance to §220 as it existed when *Gilmore* was decided. Under this version, Employer has the right to assume AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the injured worker's wages at the time of injury. *Wilson*. Since the law reverted back to a similar statutory scheme in effect when *Gilmore* was decided, *i.e.*, a spendable weekly wage statute that does not take into account higher earnings at a new job, and a legislative mandate to ensure the Act is "fair," there is no reason to suppose *Gilmore* and its relevant progeny do not apply to Employee's claim. No party objected to Employee's rate adjustment claim. The legislative history guiding *Gilmore* is now the first statute in the Act. *Gilmore* will be applied but Employee bears the burden to show AS 23.30.220(a)(4) is not "an accurate predictor of losses due to injury." *Wilson*; *Thompson*. Since Employee filed a rate adjustment claim, the factfinders "must conduct a broader inquiry" to obtain evidence to determine her spendable weekly wage and her associated TTD rate. *Wilson.*

Employee credibly stated when she left her home in California to drive to Fairbanks she thought she had a long-term job as a chef with Employer, working 50 to 60 hours per week. AS 23.30.122; *Smith*. Employee intended to continue working for Employer but for her work injury, and Employer conceded it hired her for the long-term. *Thompson*. The credible evidence shows Employee would have worked for Employer at least 50 hours per week at $15 per hour, base rate. Under Alaska law, the first 40 hours are paid at regular time and work over 40 hours is generally paid at time-and-a-half, or in this instance $22.50 per hour. *Rogers & Babler*. Therefore, but for her June 21, 2013 work injury, Employee would have continued working for Employer and would have earned at least $600 per week regular time ($15 x 40 = $600) and an additional $225 overtime ($22.50 x 10 = $225) equaling $825 total gross weekly earnings. Using $825 as Employee's gross weekly earnings and applying this number to the division's online "Benefit Calculator," Employee's spendable weekly wage would have been $701.79 and her weekly TTD benefit rate $561.43. Employee's gross weekly earnings while working for Employer are approximately $765 more per week than Employee's gross weekly earnings based upon the higher of her two prior year's income tax returns ($825 - $60 = $765). Employee's

gross weekly earnings were over 12 times greater when she was injured while working for Employer, than her earnings reflected in her 2011 income tax return. No other factual variable brings her situation under any other §220 subsection. But applying AS 23.30.220(a)(4) and using her 2011 earnings as a basis for calculating her gross weekly wages, spendable weekly wage and TTD rate would result in a TTD rate calculation bearing no relationship whatsoever to her lost earnings during the period she was disabled from her work injury with Employer.

Given the above analysis, Employee has met her burden and has shown the compensation rate established under §220(a)(4) does not represent her equivalent wages when she was injured. *Wilson*. Therefore, Employee's hourly earnings when injured while working for Employer will be used to calculate her TTD rate and her request for a compensation rate adjustment will be granted. *Gilmore*. As calculated above, her spendable weekly wage will be $701.79 and her weekly TTD benefit rate $561.43. Employee is entitled to $13,715.74 in TTD benefits from Employer from June 22, 2013 through December 10, 2013 ($561.43 x 24.43 = $13,715.74).

6) Is Employee entitled to an attorney's fee and cost award?

A successful claimant is entitled to an attorney's fee and cost award. AS 23.30.145(a), (b); *Porteleki*. Employee has not specified under which sub-section she claims attorney's fees. Employee did not file a hearing brief. She has been partly successful with her claim. Issues not withdrawn at hearing included medical expenses, related transportation costs, TTD benefits, PPI benefits, referral to the RBA for an eligibility assessment, and a compensation rate adjustment. Employee has succeeded on her claim for medical expenses, TTD benefits to a limited extent and a compensation rate adjustment. She has not been successful on her claim for transportation costs, TTD benefits continuing without an end date, PPI benefits, or a referral to the RBA to see if she is entitled to an eligibility evaluation.

It is difficult to discern from Employee's attorney's fee affidavit how much time was spent on the issues on which Employee did not prevail. Employee presented no evidence addressing her PPI or medical transportation claims. But, because she had a zero percent PPI rating, she is not entitled to an eligibility evaluation for retraining benefits. On the other hand, Employee's attorney successfully obtained payment for her injury-related medical bills, some of which

Employer may have already paid, though the amount is not reflected in any admissible evidence. Her attorney also successfully obtained $13,715.74 in TTD benefits for Employee, which is a relatively substantial sum.

While there are no formal controversions filed in this case, Employer resisted Employee's claim, contending she was "lying about everything," and effectively controverted-in-fact by failing to pay her any workers' compensation benefits. The fund gave relatively mild opposition to Employee's claims. The case was not particularly difficult, lengthy or complex. The results were modest, and far less significant than they would have been had Employee succeeded on all issues raised. Given this analysis, attorney's fees may be awarded. *Porteleki*. However, it would not be fair to Employer to assess full attorney's fees and costs against it where Employee did not prevail on all issues in her claim. Therefore, Employee's requested attorney's fees and costs will be reduced by 20 percent to account for those issues on which she did not prevail. Employee requested $6,643 in attorney's fees and costs ($2,680 in fees + $1,800 in fees + $2,163 in paralegal costs = $6,643). She will be awarded $5,314.40 in attorney's fees and costs under AS 23.30.145(a) ($6,643 x 80 percent = $5,314.40).

CONCLUSIONS OF LAW

1) Employer is liable for Employee's work-related medical expenses but not her associated past transportation costs.
2) Employee is entitled to TTD benefits.
3) Employee is not entitled to PPI benefits.
4) Employee's case will not be referred to the RBA for an eligibility evaluation.
5) Employee is entitled to a compensation rate adjustment.
6) Employee is entitled to an attorney's fee and cost award.

ORDER

1) Employer is ordered to pay Employee's past medical expenses for her work injury to her left ring and pinky fingers, left hand, right forearm, back and hip region, through Dr. Kim's October 30, 2013 visit, pursuant to AS 23.30.095(a) and AS 23.30.097(f).

2) The parties are ordered to obtain, file and serve any and all work-injury related medical reports and associated billings for treatment incurred through October 30, 2013.

3) Employer is ordered to pay these bills directly to the providers pursuant to AS 23.30.097(d) and 8 AAC 45.082(d).

4) The parties are ordered to obtain, file and serve any and all work-injury related medical reports and associated billings for treatment Employee incurred after October 30, 2013.

5) Employer and the fund retain their rights to review and controvert any medical treatment Employee claims is work-related, which she incurred after October 30, 2013.

6) Employee's claim for past-incurred medically related transportation costs is denied.

7) Employee may pursue transportation expenses related to any work-injury related medical care incurred after this decision's date.

8) Employee is entitled to 24.43 weeks TTD benefits from June 23, 2013 through October 10, 2013, totaling $13,715.74.

9) Employee's claim for TTD benefits after October 10, 2013 is denied.

10) Employee's claim for PPI benefits is denied.

11) Employee's request for a referral to the RBA for an eligibility evaluation assessment is denied.

12) Employee's request for a TTD compensation rate adjustment is granted.

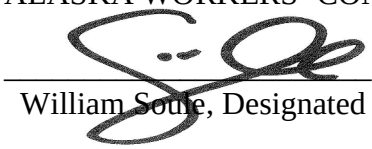
13) Employee's spendable weekly wage for this injury is $701.79 and her weekly TTD benefit rate is $561.43.

14) Employee's request for attorney's fees and costs is granted.

15) Employer is ordered to pay Employee's attorney directly $5,314.40 in attorney's fees and costs.

Dated in Fairbanks, Alaska on April 19, 2016.

ALASKA WORKERS' COMPENSATION BOARD



William Soule, Designated Chair

Julie Duquette, Member

Lake Williams, 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 Soyoung Turner, employee / claimant v. Aloha BBQ Grill, employer; Alaska Workers' Compensation Benefit Guaranty Fund, insurer / defendants; Case No. 201307972; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on April 19, 2016.

_____

Jennifer Desrosiers, Office Assistant II