ALASKA WORKERS' COMPENSATION BOARD

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

DARYL WILLIAMS, Employee, Claimant, v. ARCTIC TERRA, LLC, Employer, and UMIALIK INSURANCE COMPANY, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201403502 AWCB Decision No. 16-0095 Filed with AWCB Anchorage, Alaska on October 26, 2016

Daryl Williams' (Employee) January 22, 2016 claim and May 5, 2016, June 30, 2016 and July 7, 2016 amended claims appealing the Rehabilitation Benefits Administrator's designee's (RBA-designee) January 12, 2016 decision, requesting a late payment penalty and interest on temporary total disability (TTD), and seeking a frivolous or unfair controversion finding, attorney fees and costs were heard on September 28, 2016, in Anchorage, Alaska, a date selected on August 16, 2016. Attorney Keenan Powell appeared and represented Employee who appeared and testified. Attorney Michael Budzinski appeared and represented Arctic Terra, LLC (Employer). Vocational expert Doug Saltzman appeared and testified for Employee, and adjuster Robbie Sullivan appeared and testified for Employer. Employee requested an order amending his claims to add "modification" of the RBA-designee's decision as an issue at hearing. Employer had no objection and an oral order granted the request. The record remained open until October 8, 2016,

for Employee's supplemental attorney fee and cost affidavit and closed on October 17, 2016, after Employer had a chance to respond.

ISSUES

Employee contends the RBA-designee erred by finding him not eligible for vocational reemployment benefits, because his physical condition has deteriorated post-surgery. He seeks an order vacating and remanding the decision and requiring a functional capacity evaluation (FCE).

Employer contends the RBA-designee did not err by finding Employee ineligible for reemployment benefits. It contends remanding the decision is premature because Employee produced no evidence showing the prediction upon which the denial was based was wrong or has changed. Employer seeks an order denying Employee's requested relief and affirming the RBA-designee's decision.

1) Should the RBA-designee's decision finding Employee ineligible for reemployment benefits be affirmed?

Employee contends Employer failed to mail a replacement TTD check timely. He requests a penalty on the tardy payment, as was awarded on unpaid permanent partial impairment (PPI) in *Williams v. Arctic Terra, LLC*, AWCB Decision No. 15-0116 (September 17, 2015) (*Williams I*).

Employer contends all TTD checks were timely mailed to Employee's correct address and an issue between Employee and the United States Postal Service (USPS) caused any delays. Employer contends there is no basis for a penalty and it should be denied.

2) Is Employee entitled to a late payment penalty?

Employee contends his TTD check was not paid when due. He requests an interest award.

Employer contends all TTD checks were timely mailed under the circumstances. Therefore, it contends interest should be denied.

3) Is Employee entitled to interest?

Employee contends Employer had no justification for delaying a second replacement TTD check when the original and replacement checks never arrived. He requests a finding stating Employer frivolously or unfairly controverted his right to the second replacement check and he seeks a referral to the commissioner for further referral to the insurance division for investigation.

Employer contends the original check and two replacements were mailed timely and any issue with Employee not receiving the checks was a matter between him and the USPS. It contends Employee's request for a finding of frivolous or unfair controversion and a referral to the director and the insurance commission should be denied.

4) Did Employer frivolously or unfairly controvert compensation due?

Employee contends he is entitled to an attorney fee and cost award. He contends if he prevails on the RBA-designee evaluation issue his fees should be deferred but if he prevails on the penalty issue he should be awarded attorney fees and costs presently.

Employer contends Employee is entitled to no relief. Therefore, it contends his claim for attorney fees and costs should be denied.

5) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On December 20, 2015, Mark Flanum, M.D., answered questions from a rehabilitation specialist in respect to job descriptions for Employee, including "Supervisor, Landscape" and "Flagger." Dr. Flanum predicted once Employee had "completed treatment and recovery" for his work injury he will have permanent physical capacities equal to the physical demands for both "Supervisor, Landscape" and "Flagger." (Flanum reports, December 20, 2015).

2) By the time Dr. Flanum received and answered the specialist's above-referenced questions, Employee had already been scheduled for lumbar fusion surgery. (Employee).

3) On December 23, 2015, the assigned rehabilitation specialist sent an eligibility evaluation in Employee's case to the RBA-designee. In relevant part, the specialist relied upon Dr. Flanum's

opinion stating Employee could return to work as a "Flagger," a job Employee held in the 10 years prior to his work injury. The rehabilitation specialist recommended he be found not eligible. (White letter, December 23, 2015).

4) On December 31, 2015, Dr. Flanum performed lumbar fusion surgery on Employee for his work injury. (Operative Report, December 31, 2016).

5) On January 12, 2016, the RBA-designee sent Employee a letter stating he was not eligible for reemployment benefits because Employee's attending physician predicted he will have the permanent physical capacities to work as a "Flagger." (Helgeson letter, January 12, 2016).

6) On January 22, 2016, Employee timely appealed the RBA-designee's January 12, 2016 decision. (Workers' Compensation Claim, January 22, 2016).

7) On May 5, 2016, Employee amended his January 22, 2016 claim to add issues not relevant to this decision and reiterated his appeal from the RBA-designee's decision. (Workers' Compensation Claim, May 5, 2016).

8) On May 16, 2016, Sullivan's office timely mailed a routine $908.88 TTD check to Employee at his correct, address-of-record, which was at that time and still is on Wright Street, in Anchorage, Alaska. (Sullivan; photocopy of May 16, 2016 check viewed at hearing).

9) Employee never received the May 16, 2016 TTD check, it was never cashed and the USPS did not return it to the adjuster. (Employee; Sullivan).

10) On May 19, 2016, in response to attorney Powell's inquiry about the May 16, 2016 TTD check, attorney Budzinski said the adjuster confirmed a TTD check was mailed to Employee on May 16, 2016, to cover disability between May 4, 2016 and May 17, 2016. (Employee's Hearing Brief, September 21, 2016; Budzinski email to Powell, May 19, 2016, Exhibit 8 page 1).

11) On May 19, 2016, Employer knew Employee had not received the May 16, 2016 TTD check. (Inferences from the above).

12) On May 27, 2016, Employer stopped payment on the May 16, 2016 check. (Sullivan).

13) On June 1, 2016, Sullivan's office sent Employee the first replacement check for the missing May 16, 2016 check. (*Id*.).

14) Employee never received the June 1, 2016 first replacement TTD check, it was never cashed and the USPS did not return it to the adjuster. (Employee; Sullivan).

15) On June 8, 2016, attorney Powell told attorney Budzinski her client "still hasn't received replacement check," and asked him to verify the mailing address. (Employee's Hearing Brief, September 21, 2016; Powell to Budzinski email, June 8, 2016, Exhibit 8 page 1).

16) On June 8, 2016, Employer knew Employee had not received the May 16, 2016 check or the June 1, 2016 first replacement check. (Inferences from the above).

17) On June 9, 2016, attorney Budzinski said the adjuster was looking into the replacement check and would advise when it was issued and if it was cashed. The adjuster confirmed she used Employee's Wright Street address and, since Employee had received a routine TTD check sent "after the replacement check, it is apparent the correct address is being used." (Employee's Hearing Brief, September 21, 2016; Budzinski to Powell email, June 9, 2016, Exhibit 8 page 1).

18) On June 27, 2016, the insurer sent Employee a routine, bi-weekly TTD check to his Wright Street address. (Hearing Brief of Employer and Carrier, September 22, 2016, Exhibit B page 8).

19) On June 30, 2016, Sullivan received the June 27, 2016 TTD check back from the USPS with a "FORWARD TIME EXP[IRED]" and "R[E]T[UR]N To SEND[ER]" sticker affixed. The sticker stated Employee's former "Peck Ave" address was no longer valid. (*Id.* at 9).

20) On June 30, 2016, Sullivan put the June 27, 2016 TTD check in a new envelope and mailed it back to Employee at his Wright Street address. The USPS did not return the re-sent June 27, 2016 check to the adjuster, and Employee received it. (Sullivan; Employee).

21) On June 30, 2016, Employee amended his May 5, 2016 claim to add unpaid TTD from May 4, 2016 through May 17, 2016, and a related penalty, stating "ER failure to pay TTD due 5/18/16," and reiterated his appeal. (Workers' Compensation Claim, June 30, 2016).

22) On July 7, 2016, Employee amended his June 30, 2016 claim to add unpaid TTD from June 16, 2016 through June 29, 2016, and related penalty, and reiterated his appeal. (Workers' Compensation Claim, July 7, 2016).

23) Employee's July 7, 2016 amended claim added a penalty on the June 27, 2016 check. Employee eventually received the re-sent June 27, 2016 check and dropped his penalty claim on this check. (Inferences drawn from the above; Employee; Hearing Brief of Employer and Carrier, September 22, 2016, Powell to Budzinski email, July 15, 2016, Exhibit B page 11).

24) On July 11, 2016, attorney Budzinski told attorney Powell the adjuster was sending Employee's "next check to his same address in the absence of any other information." He hoped Employee had "worked things out with the Post Office," and promised to advise attorney Powell

"soon on the status of his prior TTD payments." (Hearing Brief of Employer and Carrier, September 22, 2016, Budzinski to Powell email, July 11, 2016, Exhibit B page 10).

25) On July 15, 2016, attorney Powell told attorney Budzinski she was dropping a penalty claim on the "late paid June check" but stated "the May check is still missing" and a penalty request would be added at a prehearing conference. (Hearing Brief of Employer and Carrier, September 22, 2016, Powell to Budzinski email, July 15, 2016, Exhibit B page 11).

26) On July 15, 2016, Employer knew Employee had still not received the May 16, 2016 check or the June 1, 2016 first replacement check. (Inferences from the above).

27) On July 21, 2016, Employer answered Employee's June 30, 2016 and July 7, 2016 claims and unqualifiedly admitted it owed Employee TTD benefits from May 4, 2016 through May 17, 2016. However, Employer also denied liability for "Penalties and/or Interest." (Answer to Employee's 06/30/16 and 07/07/16 Workers' Compensation Claims, July 21, 2016).

28) By denying Employee's claim for penalties and interest and by not voluntarily paying those benefits, Employer "otherwise resist[ed]" paying compensation. (Experience, judgment).

29) On August 12, 2016, Sullivan stopped payment on the June 1, 2016 first replacement check and mailed an August 12, 2016 second replacement check to Employee at his Wright Street address, which he received on August 13, 2016. (Sullivan; Employee).

30) There are 64 days between June 9, 2016 and August 12, 2016. (Official notice).

31) Employer never filed a controversion notice denying Employee's right to TTD benefits represented by the May 16, 2016 check or the replacement checks, or a controversion notice denying Employee's right to a penalty or interest on these checks. (ICERS agency record).

32) On September 21, 2016, Employee filed a lengthy brief with over 150 medical records attached. These records, among other things, document Employee's post-surgical symptoms. The fact-finders reviewed all these records even though this decision does not summarize each report. (Employee's Hearing Brief, September 21, 2016; observations).

33) Douglas Saltzman is a reemployment specialist and was the RBA for over 18 years. He reviewed Employee's eligibility evaluation and "Flagger" job descriptions. "Flaggers" stand anywhere from 10 hours to 18 hours per day. In Saltzman's opinion, since a drug screen is required, a person on opioid medicine and using a cane would probably not qualify, or be able to perform, as a "Flagger." Saltzman's opinion is based on his understanding Employee's physical condition has deteriorated and he is using opioid medication. (Saltzman).

34) Employee's pain became and remains worse following his December 31, 2015 surgery. He understands there is a new herniated disc in his lumbar spine post-surgery, and he takes 40 milligrams Oxycodone per day along with Gabapentin and "another medication" for muscle spasms. Employee continues on TTD and is still attending physical therapy. He used a cane before surgery and currently uses a cane when leaving home. At home, Employee uses a walker. He gets about 25 minutes per week exercise while "mall walking." Employee cannot stand or walk 12 to 14 hours per day. He never received the May 16, 2016 TTD check for the period May 4, 2016 through May 17, 2016. (Employee).

35) Dr. Flanum remains Employee's attending physician whom he expected to see on October 5, 2016. Dr. Flanum previously said nothing surgical can improve Employee's situation and Estrada Bernard, M.D., reviewed his medical records and agreed. Employee planned to ask Dr. Flanum in person if his prior prediction Employee can return to work as a "Flagger" was still valid. No other medical provider offered treatment to improve Employee's condition. (*Id.*).

36) Employee denied he had any problem with the USPS delivering mail to his home. At hearing, Employee examined a copy of the unrelated, routine June 27, 2016 TTD check along with the envelope in which the USPS returned it to the insurer. Though he previously lived at the Peck Avenue address shown on the USPS return-to-sender sticker, he had not lived there for months and did not know why the USPS would affix a return-to-sender sticker on the June 27, 2016 TTD check envelope and reference his old address. Employee said he received other mail at his correct, Wright Street mailing address without issues. Upon his inquiry, the USPS told Employee any issue with his mailing address was between him and the adjuster. (*Id.*).

37) Robbie Sullivan is the adjuster on Employee's case. She tracks TTD checks by entering them into her claims system and uses "Positive Pay," which tracks checks through the insurer's bank. Sullivan's office also photocopies checks before they are mailed. Claim assistants obtain the printed checks, put them in envelopes and mail them the same day they are printed. "Positive Pay" verified a TTD check was sent to Employee on May 16, 2016, and further confirmed it was never cashed. Sullivan does not investigate whether a check was delivered or cashed unless someone complains. By May 19, 2016, Sullivan knew Employee claimed he never received the May 16, 2016 check. The returned June 27, 2016 check alerted Sullivan to a "problem" with Employee's address when she saw a USPS forward-time-expired, return-to-sender sticker using the Peck Avenue address Employee used before he moved to his current, Wright Street address.

Sullivan never received an address change from Employee. She assumes if she mails checks to an injured worker's address-of-record the USPS will deliver them. (Sullivan).

38) When asked why she waited 64 days from June 9, 2016 until August 12, 2016 to issue a second replacement TTD check, Sullivan said after the first two checks had never been received, cashed or returned to her office, she was not sure how long she should wait before issuing a third check. She wanted to make sure checks were being properly received at Employee's address-of-record before sending a third check. (Sullivan).

39) The insurer does not have a policy with a timeline for stopping payment on a missing check and issuing a replacement. Sullivan said they "follow the statute" for payments. The only policy is once a check is reported missing or is returned, the mailing address is verified. (*Id*.).

40) On the RBA-designee issue, Employee contends the fact-finders will "commit plain error" if they do not consider the new medical evidence. In his view, Dr. Flanum does not have "godlike power" to make all decisions especially since, in Employee's opinion, Dr. Flanum is the one who performed the surgery that made him worse. Further, Employee contends Dr. Flanum does not respond to his attorney's letters or deposition requests, and appears to be "Employer-friendly." Employee contends he will be harmed if he waits to file a modification request until after his TTD stops because he may end up homeless if it takes "a year and a half" to litigate the modification petition. Employee contends there is no "sliding-scale" regarding substantial evidence depending upon whether a person is represented by an attorney. Employee contends he should not have to go back to the doctor who "screwed up" his surgery to request an opinion contrary to the surgeon's best interests. Employee requests an FCE to assess his current functioning. As for a penalty on the replacement TTD check, Employee contends the adjuster did not have a good answer to why she waited so long to ultimately replace the check. He contends a 64 day delay is not timely under the statute. When asked when the replacement check for the missing May 16, 2016 TTD check became "due," Employee contended Employer knew on June 9, 2016, that the May 16, 2016 check and June 1, 2016 first replacement check had not arrived, making a second replacement check "due" 14 days later on June 23, 2016, and late if not mailed by seven days later on June 30, 2016. When asked what makes the second replacement check "due" on June 23, 2016, Employee said there was no statute, regulation or case law on point and opined this may be a "case of first impression." (Employee's hearing arguments).

41) On the RBA-designee issue, Employer agreed the "window was wide open" for Employee to seek modification in the future, up to one year after his TTD payments end, should it turn out he cannot return to work as a "Flagger." Employer contends the fact-finders should not assess medical records and draw their own medical conclusions. Rather, it contends the attending physician should assess the medical evidence and decide whether to change a previously expressed prediction. Employer contends the fact-finders in *Dittman v. Ray's Childcare*, AWCB Decision No. 03-0039 (February 20, 2003) were "overreaching to some degree." It contends Employee is asking the fact-finders to order an FCE to "short-circuit the process" rather than asking the attending physician's opinion. Further, Employer contends Employee's modification petition is "premature," pending medical evidence changing Dr. Flanum's original prediction stating Employee will be able to return to work as a "Flagger." Employer contends there must be equal and adequate medical evidence rebutting the medical prediction upon which the RBA-designee relied, to justify the fact-finders "stepping into the reemployment process." In Employer's view, when attorneys are involved, it is not asking too much to require the moving party to obtain actual medical evidence showing the prior prediction turned out to be incorrect. Employer contends the fact-finders should rely on medical evidence and opinions as required by the statutes and regulations. As for the May 16, 2016 TTD check, Employer contends adjusters only respond to missing checks when someone complains. Adjusters rely on the injured worker's address-of-record. Employer contends there is "no standard" regarding how and when an adjuster responds to an injured worker's complaint that his check has not been received. When asked what a "reasonable time" is for replacing a missing check, Employer contended "14 days" would be reasonable, while conceding the question is "tough" with "no easy answer." When asked how the fact-finders would determine whether what the adjuster did was legally correct, Employer contended a "reasonableness standard" must be adopted as there is no statute or regulation addressing the issue. Employer relies on *American International Group v. Carriere*, 2 P.3d 1222 (Alaska 2000), which states the 14 day period for issuing a replacement check begins to run once a "stop payment" on a missing check has been made. Employer contends the fact-finders must take into account two checks have never been delivered or returned, a fact it contends Employee overlooks. Employer contends it "just doesn't seem fair" to find the adjuster was not reasonable and fair in this case. (Employer's hearing arguments).

42) At hearing, Employee's lawyer said she was only claiming two hours attorney time on the penalty issue. Attorney Powell requested 10 days to supplement her attorney fee and cost bill. Employer requested seven days to respond to the attorney fees and costs. An oral order granted the requests and left the record open until October 17, 2016, for this purpose. (Record).

43) On October 7, 2016, attorney Powell filed a supplemental attorney fees and costs affidavit and itemization. She requested $400 per hour attorney time and made inconsistent requests for both $180 (in the affidavit) and $185 (in the itemization) an hour for the attorney performing paralegal duties. Attorney Powell used block billing in her itemization, making it difficult to determine how much time was spent on each issue in this case. (Supplemental Affidavit of Counsel regarding Fees and Costs, October 7, 2016; observations).

44) On October 12, 2016, Employer opposed attorney Powell's fees and objected to her requested $400 per hour rate and the hours incurred. Based on decisions surveying hourly attorney fee rates for experienced workers' compensation attorneys, Employer contends Employee's lawyer should get no more than $325 per hour given her experience representing injured workers before the board. (Opposition to Affidavit of Counsel for Attorney's Fees and Costs, October 12, 2016).

45) Attorney Powell has previously presented 19 cases at hearing before the board in the 11 years she has practiced in this field. The cases in which attorney fees and paralegal costs were awarded, with or without objection from the employer, and the hourly rates awarded include:

Table I

Claimant's Name	**Decision Number**	**Hourly Rate Awarded (attorney/paralegal)**
Hubbard	08-0245	$300
Torres-Soria	11-0008	$295/$95
Guinard	13-0017	$325/$150
Carter	13-0050	$325
King	13-0110	$325/$160

46) Attorney Powell represented other injured workers before the board and resolved numerous cases through settlements. (Official notice; ICERS electronic filing database).

47) According to Westlaw, the board's ICERS electronic filing record and the division's legal research database, at least $400 per hour attorney fees (or in attorney Constantino's case, a

comparable $395 per hour) have been awarded, after hearing, to attorneys with varying experience handling workers' compensation cases. These attorneys' approximate board caseloads, based on appearances entered in a case, may be compared visually to attorney Powell's approximate board caseload based on her appearances as follows:

Table II

Attorney's Name	Clients Represented	Years' WC Experience
Chancy Croft	2,168	40+
Joseph Kalamarides	1,491	40+
Robert Rehbock	1,341	30+
Michael Patterson	973	30+
Michael Jensen	316	30+
John Franich	300	30+
Robert Beconovich	148	16+
Steve Constantino	153	18+
Keenan Powell	121	11+
Eric Croft	93	6+

48) Attorney Powell has similar experience as other claimant attorneys on the lower experience continuum who have been awarded at least $400 per hour in attorney fees. (Observation).

49) The issues addressed in this hearing were not complex, difficult or time consuming, though the replacement check issue was somewhat novel. (Experience, judgment, observations and inferences from the above).

50) Attorney Powell's attorney fees in this case are contingent. (*Id*.).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > (1) this chapter be interested . . . 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, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

In *Egemo v. Egemo Construction Co*., 998 P.2d 434, 441 (Alaska 2000), the Alaska Supreme Court addressed a case in which the injured worker prematurely filed a claim for benefits before the two-year limitation statute had begun to run. The Alaska Supreme Court noted:

> In our view, when a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice that it may be refiled when it becomes timely.

In *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1256 (Alaska 2007), the employer tried to show Thoeni had reached medical stability and was thus not entitled to further benefits. Thoeni argued she should not have been declared medically stable because she "not only failed to improve but suffer[ed] deterioration and additional injury." The board found Thoeni was medically stable based on two physicians' reports, one which predicted no "major changes in the next 45 days" and the other which said Thoeni's knee would improve with a diligent exercise regime. But ultimately, the doctors' predictions "proved incorrect." *Thoeni* noted:

> By the time the board determined medical stability, it knew [the two predictions] . . . were incorrect. It also knew that another knee surgery to improve the knee was recommended on January 25, 2001. . . . Indeed, another surgery to improve the knee was . . . performed in April 2001. Thus, the board knew [the two doctors'] . . . predictions proved incorrect.

In *Thoeni*, the Alaska Supreme Court held the incorrect predictions were not substantial evidence upon which to reasonably conclude Thoeni had achieved medical stability, and reversed.

In *Smith v. CSK Auto, Inc*., 204 P.3d 1001 (Alaska 2009), the Alaska Supreme Court criticized the board's approval of a settlement agreement absent testimony from the injured worker particularly because the board "had incomplete medical records before it when it approved the agreement." This, in conjunction with boilerplate assertions stating the settlement was "in the

employee's best interest," was "inadequate" to prove the settlement was in the employee's best interest. *Smith* held such actions constituted an "abuse of discretion." (*Id*. at 1013).

In *Fred Meyer, Inc. v. Updike*, AWCAC Decision No. 120 (October 29, 2009), the board denied the injured worker's request for additional right knee treatment "at this time," citing competing medical records with different opinions. To clarify the medical evidence, the board ordered a second independent medical evaluation (SIME). *Updike* said (1) if the record was complete, the board "plainly erred" because it did not weigh the evidence; (2) the board erred by "conditionally deciding" the employee's claim and denying it pending a board-ordered medical examination; and (3) the board erred by "failing to review the complete board record." On this last point, *Updike* faulted the appeal record for lacking basic documents and medical records. *Updike* held these were "manifest or plain errors," vacated the decision and ordered a rehearing. (*Id*. at 4-5).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
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> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.
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> (e) An Employee shall be eligible for benefits under this section upon the Employee's written request and by having a physician predict that the Employee will have permanent physical capacities that are less than the physical demands of the Employee's job as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles' for:
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> (2) other jobs that exist in the labor market that the Employee has held or received training for within 10 years before the injury or that the Employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles'. . . .

Several "abuse of discretion" definitions appear in Alaska law but none in the Act. The Alaska Supreme Court stated "abuse of discretion" includes "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). An agency's failure to properly apply controlling law may also be an abuse of discretion. *Manthey v. Collier* 367 P.2d 884 (Alaska 1962).

In *Dittman v. Ray's Childcare*, AWCB Decision No. 03-0039 (February 20, 2003), the injured worker obtained new records showing her medical condition resulting from her work injury had deteriorated. She was not able to provide the RBA-designee with this information before the designee found her not eligible. Without much analysis, *Dittman* held under circumstances where surgery caused the employee's physical condition to deteriorate, the ineligibility decision should be remanded to the RBA-designee to consider the new medical evidence.

Peifer v. Sunshine School, AWCB Decision No. 10-0114 (June 23, 2010), vacated and remanded the RBA-designee's ineligibility decision as lacking substantial evidence when an employer's medical evaluator (EME) offered a prediction stating the injured worker was no longer capable of performing the job duties on which the ineligibility decision was based.

Murphy v. Fred Meyer Stores, Inc., AWCB Decision No. 11-0028 (March 23, 2011), primarily held the RBA-designee erred by selecting an inappropriate job description for the injured employee's work in the previous 10 years. Since the attending physician reviewed the wrong job description, *Murphy* held the RBA-designee's decision relying upon the doctor's incorrect job description was not supported by substantial evidence. *Murphy* also directed the RBA-designee on remand to examine medical records from the injured worker's third lumbar surgery, which were not available prior to the RBA-designee's initial ineligibility determination.

Polak v. Fred Meyer Stores, Inc., AWCB Decision No. 11-0168 (November 25, 2011), held the RBA-designee erred by considering an attending physician's opinions about job descriptions when the reemployment specialist had been directed to first obtain a physical capacity evaluation for the injured worker before the attending physician reviewed the job descriptions and offered a prediction about the employee's ability to perform relevant jobs. This constituted "an abuse of discretion."

Polak also held a decision reviewing the RBA-designee's eligibility determination must be based on "a complete record." In *Polak*, the attending physician made a "contingent" prediction the injured worker would be able to return to a particular job if surgery was performed and if it was successful. The RBA-designee decided Polak was ineligible for retraining benefits before the surgery had occurred. *Polak* stated this and a failure to obtain opinions from other physicians for different body parts constituted error, and on an incomplete record, was a lack of substantial evidence supporting the ineligibility decision. The decision was vacated and remanded to the RBA-designee to complete the record and have the attending physicians reconsider the applicable job descriptions.

> **AS 23.0.095. Medical treatments, services, and examinations.** (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change. . . .
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> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter. . . .

Under AS 23.30.120(a)(1) benefits sought by an injured worker are presumed to be compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, an injured employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption is attached, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). As the employer's evidence is not weighed against the employee's evidence, credibility is not examined here. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011) (reversed on other grounds, *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016)). This means the employee must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences drawn and credibility considered. *Wolfer*. If there are no factual disputes, the presumption analysis need not be applied. *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.

Credibility findings are binding. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001 (Alaska 2009).

> **AS 23.30.130. Modification of awards.** (a) upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions . . . or because of mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.185 . . . AS 23.30.190 . . . whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect to all claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .
>
> **AS 23.30.145. Attorney Fees**. . . .
>
> (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.

Wise Mechanical Contractors v. Bignell, 718 P.2d 971, 974 n. 7 (Alaska 1986), a controverted case, addressed fees under AS 23.30.145(c) and applied factors from the Alaska Code of Professional Responsibility in determining a "reasonable fee" as follows:

> The factors are:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.

In expanding this holding to all workers' compensation fees, *Bignell* said, "We see no reason to exclude that factor [contingent fee] from the reasonableness determination to be made in worker's compensation cases." (*Id*. at 974-75). *Bignell* further noted:

> In this case, as in many worker's compensation cases, the only fee arrangement between the claimant and counsel is that counsel will be paid whatever fee is approved by the board or the court, and payment of any fee is contingent upon success (footnote omitted). A contingency arrangement is ordinarily necessary because most injured claimants lack the financial resources to pay an attorney an hourly fee. If an attorney who represents claimants makes nothing on his unsuccessful cases and no more than a normal hourly fee in his successful cases, he is in a poor business. He would be better off moving to the defense side of the compensation hearing room where attorneys receive an hourly fee, win or lose, or pursuing any of the other various law practice areas where a steady hourly fee is available. (*Id*. at 975).

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers can have competent counsel available. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . . .
>
> (d) . . . If the employer controverts compensation after payment has begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
>
> (f) If compensation payable under the terms of an award is not paid within 14 days after becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment. . . . The additional amount shall be paid directly to the recipient to whom the unpaid compensation was to be paid.
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

In *American International Group v. Carriere*, 2 P.3d 1222 (Alaska 2000), the Alaska Supreme Court addressed a case where an injured worker did not get his settlement check on time. On November 9, 1994, the board approved a settlement agreement. On November 15, 1994, the adjuster mailed the employee's settlement check. On November 30, 1994, the employee's attorney called the adjuster and said the employee had not received the check and suspected someone had been tampering with his mail. The adjuster agreed to stop payment on the check and to issue a new one. On December 1, 1994, the insurer called the bank to stop payment. On December 19, 1994, the insurer overnight-mailed the replacement check to the employee, who received it on December 20, 1994. The worker filed a claim requesting a 25 percent penalty on the late settlement check under AS 23.30.155(f). The employee primarily argued the statute's 14-day period "restarted" after the stop payment order became effective on December 1, 1994. The adjuster argued he satisfied the statute when he mailed the November 15, 1994 check.

The board denied the penalty claim and held "payment is made when the check is mailed to the person entitled to it," the adjuster timely mailed the check on November 15, 1994, and therefore, "the insurer complied with the fourteen-day requirement of AS 23.30.155(f)." (*Id*. at 1223). The employee appealed to the superior court, which found the 14-day statutory clock restarted on December 2, 1994, the day after the stop payment became effective. Because the insurer did not mail the check until December 19, 1994, payment was not timely. The superior court reversed and remanded for a penalty award. The insurer appealed.

Carriere held the board's "bright line," "date of mailing" rule, which says an insurer complies with the statute if a check is mailed before the 14-day period expires, while a "reasonable interpretation," does not apply in this situation. *Carriere* noted the board lacks discretion under AS 23.30.155(f) to excuse "faultless delays," and insurers cannot rely on "appeals to fairness and justice" to save them from a penalty. (*Id*. at 1224). Rather, *Carriere* held the stop payment on the initial check at the employee's request "reinstated the payment obligation, imposing a new fourteen-day deadline." The parties in *Carriere* agreed the adjuster would stop payment on the

original check and issue a replacement. *Carriere* found the parties "essentially agreed to start over." Once the adjuster stopped payment on the original check, there was no longer a negotiable instrument in existence to satisfy the board-approved settlement. *Carriere* held the "statute is best read" to mean once the original check became non-negotiable on December 1, 1994, the replacement settlement payment became "due on that date," the obligations in AS 23.30.155(f) were reimposed "and the clock restarted." (*Id*. at 1225).

The insurer argued it waited a "commercially reasonable time" before issuing the second settlement check. *Carriere* noted the statute does not "permit payment within a 'commercially reasonable' time; it mandates payment within fourteen days." (*Id*.). The insurer further argued it had to wait until the bank confirmed its stop payment order in writing before the insurer's obligation to pay was revived. *Carriere* stated an "injured employee should not have to bear the burden of the insurer's internal accounting procedures. . . ." (*Id*.). Because the payment obligation restarts when a check becomes non-negotiable, even if it was timely mailed, there is no discretion to excuse a late payment penalty, "no matter how blameless the insurer may be." *Carriere* affirmed the superior court's ruling awarding the penalty. (*Id*. at 1225-26).

On appeal to the Alaska Worker's Compensation Appeals Commission and the courts, decisions reviewing RBA-designee determinations are subject to reversal under the "abuse of discretion" standard incorporating the "substantial evidence test." A reviewer "may not reweigh the evidence or draw its own inferences from the evidence. If there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion "the order . . . must be upheld." *Miller v. ITT Arctic Services*, 367 P.2d 884, 889 (Alaska 1962). After allowing parties to offer admissible evidence, all evidence is reviewed to see if the RBA-designee's decision was supported by substantial evidence. If the RBA-designee's decision is not supported by substantial evidence, she abused her discretion and the case will be remanded for further action. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69 (Alaska 1993).

> **8 AAC 45.060. Service**. . . .
> . . . .
>
> (f) Immediately upon a change of address for service, a party or a party's representative must file with the board and serve on the opposing party a written

notice of the change. Until a party or the board receives written notice of a change of address, documents must be served upon a party at the party's last known address.

8 AAC 45.063. Computation of time. (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. . . .

8 AAC 45.082. Medical treatment. . . .

. . . .

(b) a physician may be changed as follows:

. . . .

(3) Except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury. . . .

. . . .

(4) regardless of an employee's date of injury, the following is not a change of an attending physician:

. . . .

(B) the attending physician . . . refuses to provide services to the employee; the first physician providing services . . . thereafter is a substitution of physicians and not a change of attending physicians. . . .

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in . . . AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. . . .

(b) The employer shall pay the interest

(1) on late-paid time-loss compensation to the employee. . . .

8 AAC 45.150. Rehearings and modification of board orders. . . .

. . . .

(f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

ANALYSIS

1) Should the RBA designee's decision finding Employee ineligible for reemployment benefits be affirmed?

a) Employee's appeal from the RBA-designee's decision.

The RBA-designee found Employee not eligible for reemployment benefits based on the rehabilitation specialist's report and Dr. Flanum's prediction Employee would have permanent physical capacities to be a "Flagger," a job he held prior to his injury. Employee timely appealed the RBA-designee's decision, which must be upheld except for "abuse of discretion on the administrator's part." AS 23.30.041(d). Employee raised no concerns under AS 23.30.041 except for the physical capacities issue. He does not contend the January 12, 2016 RBA-designee decision was arbitrary, capricious, manifestly unreasonable, or stemmed from an improper motive. *Sheehan.* He does not contend the RBA-designee failed to properly apply the law. *Manthey*. Employee's appeal is based solely on his deteriorating physical condition and increased symptoms following surgery, which took place after the RBA-designee found him ineligible, and on Employee's opinion he cannot perform the "Flagger" job. AS 23.30.041(e)(2); *Rogers & Babler.*

This decision may not reweigh or draw its own inferences from the evidence upon which the RBA-designee relied in her January 12, 2016 denial letter. *Miller*. If, after reviewing and considering admissible evidence on appeal, the reviewers find the RBA-designee's decision is supported by substantial evidence, it must be affirmed. *Yahara*.

Employee contends his recent medical records and testimony show his condition and symptoms have deteriorated since the RBA-designee's ineligibility decision. Employer contends Dr. Flanum has never changed his physical capacities prediction upon which the ineligibility determination was based. These positions raise a factual dispute to which the compensability presumption applies. AS 23.30.120(a)(1); *Meek*. Employee raises the presumption with his testimony and medical records documenting he had surgery and his physical condition deteriorated. *Tolbert*. Employer rebuts the presumption with Dr. Flanum's December 20, 2015 prediction stating Employee will, once he has completed treatment and recovery from his work

injury, have permanent physical capacities equal to a "Flagger." *Huit*. Credibility is not weighed at either the first or second presumption analysis stages. *Wolfer*. Since Employer rebutted the presumption, Employee must prove his appeal "by a preponderance of the evidence" and must demonstrate his asserted facts are "probably true." *Runstrom*; *Saxton*.

The panel carefully considered the evidence upon which the RBA-designee based her decision, and considered Employee's hearing brief, testimony, arguments, and post-January 12, 2016 medical records. 8 AAC 45.150(f). Dr. Flanum is Employee's surgeon who made a prediction about Employee's physical capacities knowing he would soon have surgery. As a reasonable mind might rely on Dr. Flanum's pre-surgical December 20, 2015 "Flagger" prediction to support an ineligibility finding, the RBA-designee's January 12, 2016 determination was supported by substantial evidence. AS 23.30.041(d). But, Employee's subsequent surgery and physical deterioration could demonstrate the RBA-designee's initial decision is no longer supported by substantial evidence. Employee relies on several Alaska Supreme Court and administrative decisions to support this theory.

Thoeni does not support Employee's position because the fact proving the two physicians' predictions in *Thoeni* were wrong also provided the evidence disproving the matter at issue, medical stability. One physician predicted no significant changes in 45 days while the other said the employee would improve with exercise. But after these predictions the injured worker had additional surgery for her work injury, which proved the medical stability predictions were wrong since improvement was expected to result from the surgery. Here, Employee's credible testimony and his more recent medical records show his condition deteriorated post-surgery and his symptoms increased. AS 23.30.122; *Smith*. But neither fact proves Dr. Flanum's prediction Employee could return to work as a "Flagger" once his medical care and recovery are complete was incorrect, because his medical care and recovery are not yet complete. Though Dr. Flanum or another authorized physician could, before his treatment and recovery are complete, predict Employee no longer has permanent physical capacities equal to a "Flagger," none has done so.

Smith is not an RBA-designee appeal and does not support Employee's position. *Smith* states it may be error for fact-finders to approve a settlement agreement absent a complete medical

record. By contrast, the fact-finders in Employee's case have carefully reviewed all medical records upon which Employee relies, and his testimony.

Updike was an SIME appeal. The commission said the fact-finders committed "plain error" by failing to review a complete record. *Updike* does not support Employee's position because the fact-finders have reviewed and considered Employee's medical records and his testimony.

Peifer, an appeal from the RBA-designee's ineligibility decision is distinguishable. After the injured worker was found not eligible, an EME predicted she would not have permanent physical capacities equal to the physical demands of the job upon which her ineligibility was based. Employee has yet to produce a physician's opinion stating Dr. Flanum's prediction vis-à-vis Employee's ability to work as a "Flagger" has changed or was incorrect.

Murphy resulted in a remand to the RBA-designee primarily because the attending physician had reviewed an incorrect job description for a job the injured worker held in the 10 years before his injury. As an aside, *Murphy* directed the RBA-designee to review additional medical records not available when the ineligibility decision had been rendered. But the primary basis for remand in *Murphy* is not present in Employee's case and *Murphy* does not support his position.

Polak was another appeal from an RBA-designee ineligibility determination. *Polak* is distinguishable because the injured worker had several injured body parts and an attending physician opined only in respect to one. These facts are not present in Employee's case.

The closest case upon which Employee relies is *Dittman*. The facts in *Dittman* are similar to Employee's situation. The RBA-designee denied reemployment benefits because the injured worker's doctor predicted she would have permanent physical capacities equal to a job she held in the 10 years prior to her work injury. The worker appealed and submitted a note from another physician stating he could not comment on the injured worker's ability to work, as she was not medically stable, required more treatment and needed an FCE. Like Employee, the injured worker in *Dittman* testified her surgery deteriorated her condition and argued the physician's prediction proved to be incorrect and was thus not "substantial evidence." The employer in

Dittman argued the RBA-designee's decision was supported by substantial evidence, notwithstanding the subsequent uncertain opinion from another physician. The only analysis in *Dittman* stated "there was new information" from the second physician which showed "a marked deterioration" in the employee's "medical condition" after she was found not eligible for retraining benefits. Without much analysis, *Dittman* said given the "employee's change of condition" and more recent evidence not previously evaluated by the RBA-designee, "the matter should be remanded . . . to consider this new evidence."

Employee contends *Dittman* has sound reasoning while Employer contends *Dittman* "overreached." Employer's argument is more persuasive. Absent legal analysis showing on what statute, regulation or decisional law it relied, *Dittman* failed to explain how it determined the original physician's prediction ultimately changed or was otherwise proved incorrect. Dr. Flanum is still treating Employee, who may or may not improve. The evidence upon which Employee relies fails to show Dr. Flanum's prediction is now, or will become, incorrect.

Lastly, Employee requested an order requiring Employer to pay for an FCE to better assess his current working capacity. He is free to seek a referral from his attending physician to an FCE. Employee cited no statute, regulation or case law to support his FCE request in an RBA-designee appeal context. His request for an order requiring an FCE will be denied.

In summary, the RBA-designee did not abuse her discretion because a reasonable mind could rely on Dr. Flanum's December 20, 2015 physical capacity prediction. AS 23.30.041(d). Therefore, since Employee's predicted physical capacity to be a "Flagger" was the only issue appealed, and the RBA-designee's decision was supported by substantial evidence, and Employee's subsequent testimony and medical records do not have "a physician predict" his expected physical capacities are different than Dr. Flanum's December 20, 2015 prediction, the RBA-designee's decision will be affirmed. AS 23.30.041(d); *Sheehan*; *Manthey*.

b) Employee's request for modification.

Employee also requested modification under AS 23.30.130(a). The same presumption analysis applied above is incorporated here by reference. AS 23.30.120(a)(1); *Smith*. Employee wants

the fact-finders to review the medical records created after the RBA-designee made her decision, and infer from those records that Dr. Flanum's December 20, 2015 prediction about Employee returning to work as a "Flagger" is no longer valid. 8 AAC 45.150(f). Employee pointed to no medical record stating Dr. Flanum changed his prediction, or averring his prediction ultimately proved incorrect. The law plainly states eligibility is based on "having a physician predict" Employee will have permanent physical capacities less than the demands of, in this case, a "Flagger." AS 23.30.041(e)(2). As the medical evidence currently stands, the only prediction is from Dr. Flanum who says Employee will have physical capacities to work as a "Flagger," once his treatment and recovery are completed.

Employer contends Employee's modification petition is premature. Employee correctly contends he has the right to file a petition for modification at any time, including within one year from the date the RBA-designee found him ineligible for reemployment benefits. AS 23.30.130(a). His lawyer contends Dr. Flanum will not respond to her inquiries. If Employee retains a right to lawfully change physicians, or if Dr. Flanum "refuses to provide services," Employee may change his physician or obtain a "substitution of physician." AS 23.30.095(a); 8 AAC 45.082(b)(2); 8 AAC 45.082(b)(4)(B). This decision offers no opinion on whether Employee retains his right to change physicians or is justified in obtaining a substitution physician. To succeed on a modification petition, Employee still needs to have "a physician predict" he will not have permanent physical capacities to be a "Flagger." AS 23.30.041(e)(2). Without this medical evidence, Employee's petition is premature. *Egemo*.

Employer agreed Employee has one year from the date his ongoing TTD payments cease, to seek modification of the RBA-designee's January 12, 2016 decision. AS 23.30.130(a). Employer is correct. While procedurally within his right, Employee prematurely brought a modification petition based on an unfulfilled prediction when Employee is not yet medically stable, is still being treated, and a physician has not commented on whether Dr. Flanum's initial prediction remains correct or, through subsequent events, is now incorrect. Employee and his attorney have ample time and ways to obtain the required medical opinion. Once obtaining it, Employee can move a ripe modification issue to hearing promptly to avoid hardship. *Rogers & Babler*.

Therefore, Employee's premature petition for modification will be dismissed with notice it may be refiled when it becomes timely. *Egemo*.

2) Is Employee entitled to a late payment penalty?

Employee contends he did not timely receive one TTD check. For analytical simplicity, the missing TTD at issue is called the "May 16, 2016" check. The parties agree, and the evidence shows, the adjuster mailed all TTD checks and replacement checks to Employee's correct, Wright Street address, his "address of record." There are no factual disputes concerning the May 16, 2016 check and the parties' subsequent actions concerning it, so the presumption analysis does not apply. *Rockney*. This is a legal question. The dates are clarified graphically:

Table III

Date	Action	Result
May 16, 2016	Adjuster timely mails May 16, 2016 TTD check to Employee	Check not received, cashed or returned
May 19, 2016	Adjuster knows check not received	Adjuster confirms check was sent
May 27, 2016	Adjuster stops payment on May 16, 2016 check	May 16, 2016 check non-negotiable
June 1, 2016	Adjuster mails first replacement TTD check to Employee	Check not received, cashed or returned
June 8, 2016	Powell tells Budzinski Employee has still not received the check	Budzinski tells adjuster
June 9, 2016	Adjuster knows Employee has not received the replacement check	Adjuster looks into it and confirms Employee's correct address was used
June 27, 2016	Adjuster sends unrelated, routine TTD check to Employee at correct address	Employee does not receive it when expected
June 30, 2016	USPS returns the June 27, 2016 check to adjuster as undeliverable to Employee's old address	Adjuster re-sends the same check back to the correct address and Employee receives the check
July 11, 2006	Budzinski tells Powell the adjuster will continue to use Employee's correct address for future checks	Adjuster continues to use Employee's correct address
July 15, 2016	Powell tells Budzinski the check is still missing	Adjuster knows Employee has still not received either the stopped-paid May 16, 2016 check or the June 1, 2016 first replacement TTD check
August 12, 2016	Adjuster stops payment on June 1, 2016 first replacement check and mails the second replacement check to Employee's correct address	Employee receives the second replacement check the next day

Compensation paid under the Act "shall be paid periodically, promptly, and directly to the person entitled to it, without an award. . . ." AS 23.30.155(a). Compensation is paid and thus "due" in 14-day installments thereafter. AS 23.30.155(b). If compensation is not paid within seven days after it becomes "due," a 25 percent non-discretionary penalty "shall" be added unless the nonpayment is excused after Employer shows conditions over which it had "no control" prevented timely payment. AS 23.30.155(e). Employee contends he is entitled to a penalty because the compensation paid in the May 16, 2016 check was not timely paid when "due," once Employer and its agents knew the May 16, 2016 check and June 1, 2016 first replacement check were never received, cashed or returned. Employer contends it has no policy for determining when a replacement check must be mailed, but "follows the statute." It contends given the confusion when the USPS returned the unrelated, routine July 27, 2016 check, its actions were "reasonable" and it would not be fair to order a penalty under these circumstances. The parties disagree on what Employer should have done and when it should have taken action.

Employee focuses his penalty claim on the June 1, 2016 first replacement check. The first task is to decide when the second replacement check was "due." This date is the basis for determining if it was "not paid within seven days after" it became due. AS 23.30.155(b), (e). Employee cites no statute, regulation or decisional law directly on point and contends this might be a "first impression" issue. Employer relies on the "stop payment" rule discussed in *Carriere*. But *Carriere* is distinguishable on its facts and issue. In *Carriere*, the parties agreed to "stop payment" on a missing settlement check and to "start over." *Carriere* held once the adjuster stopped payment on the settlement check, the replacement check became "due on that date." Unlike AS 23.30.155(e) at issue here, the statute controlling *Carriere* does not give a seven day grace period before a payment was late. Since the replacement settlement check was not mailed within 14 days of its due date, the late-payment penalty under AS 23.30.155(f) was owed. But as Employee correctly noted, *Carriere* addresses only the stop-payment issue and does not cover every scenario concerning a missing disability check. *Carriere* does not address what an insurer must do once it knows an injured worker has not received or cashed a check, and the check has not been returned. *Carriere* states a "reasonable interpretation" argument did not apply because the penalty assessed under AS 23.30.155(f) is nondiscretionary, the statute does not excuse "faultless delays," and insurers cannot rely on "appeals to fairness and justice" to save them from

a penalty. *Carriere* says an adjuster waiting a "commercially reasonable time" before issuing a replacement settlement check is not permissible under the statute and an injured worker should not bear the burden "of the insurer's internal accounting procedures."

Penalties under AS 23.30.155(e) are nondiscretionary unless Employer can show "owing to conditions over which" it had "no control," the check could not be paid within the prescribed period and the penalty is thus "excused." But something has to trigger a restart of the 14 day payment period, or Employer would have no incentive to reissue a TTD check once it learned the check had never been received, cashed or returned. *Rogers & Babler*. Considering the Act's "quick, efficient, fair and predictable" intent, notice a check has not been received triggers the 14-day payment period, which gives Employer an opportunity to investigate the missing check and timely issue a replacement. AS 23.30.001(1); AS 23.30.155(a), (e).

On June 8, 2016, Attorney Powell emailed attorney Budzinski and advised Employee had received neither the May 16, 2016 check nor the June 1, 2016 first replacement check. While Employer correctly implies it has no duty to follow up on every check, on June 8, 2016 Employer's lawyer knew the May 16, 2016 check and June 1, 2016 first replacement check had not been received. On June 9, 2016, the adjuster knew it too. On July 15, 2016, 38 days later, attorney Powell again told attorney Budzinski the check had still not been received. On June 9 and July 15, 2016, Employer could have used "Positive Pay" to see whether the checks had been cashed. On either date, Employer could have stopped payment on the June 1, 2016 check and issued the second replacement check. These options were totally in Employer's "control." In computing time, the June 8, 2016 notice day is not counted. 8 AAC 45.063(a). Thus, on June 9, 2016, the 14-day payment clock restarted, and it restarted again on July 16, 2016.

Unlike the parties in *Carriere*, the parties here had no stop-payment or "start over" agreement. There is no evidence Employee changed his mailing address or redirected his mail. The law required Employer to send Employee's checks to his address-of-record. 8 AAC 45.060(f). The fact the USPS returned an unrelated June 27, 2016 check is irrelevant as the USPS has no control over the adjuster's ability to stop payment on one check and mail a replacement. Sullivan was uncertain what to do when the USPS returned the June 27, 2016 check. But contrary to

Sullivan's testimony, she did not "follow the statute." The statute requires checks to be issued every 14 days. AS 23.30.155(b). There is no reason why this provision would not apply to a missing check as well, especially when the ability to render the check nonnegotiable and issue a new one lies solely within the adjuster's control. *Carriere*. Sullivan had 14 days to investigate the missing checks and seven days to post-mark the second replacement check.

Thus, at the earliest the 14-day payment clock started again on June 9, 2016, following Employer's notice the May 16, 2016 check and the June 1, 2016 first replacement check had never been received. The adjuster had the ability to determine if they were cashed or returned. AS 23.30.155(a). The second replacement check was "due" by June 23, 2016. It was late if it was not paid within seven days after it became "due," or by June 30, 2016. AS 23.30.155(e). There is no evidence "owing to conditions over which" Employer had "no control" the second replacement check could not have been paid within the prescribed period. AS 23.30.155(e). By contrast, Employer had complete control over the payment situation. The adjuster inexplicably waited until August 12, 2016, to stop payment and to issue the second replacement check. Employer's second replacement check's postmark extended well beyond the 14 day period and the seven day grace period following notice on June 8, 2016 and July 15, 2016.

Furthermore, Employer had an obligation to either pay or controvert the penalty and interest claims. AS 23.30.155(a), (d), (e). It did neither. Under both analyses, Employee's request for a penalty will be granted. It is undisputed the tardy TTD check's value was $908.88. Employer will be ordered to pay Employee a $227.22 penalty under AS 23.30.155(e).

3) Is Employee entitled to interest?

Interest on compensation not paid when "due" is mandatory. AS 23.30.155(p); 8 AAC 45.142(b)(1). The second replacement check was "due" on June 23, 2016. Employer will be ordered to pay interest on $908.88 calculated from June 23, 2016 through August 12, 2016.

4) Did Employer frivolously or unfairly controvert compensation due?

Employee seeks a finding Employer "frivolously or unfairly controverted compensation due." AS 23.30.155(o). It is undisputed Employer never formally controverted Employee's right to the

May 16, 2016 check or any replacement check, and did not controvert the penalty or interest claims. Unlike the situation in *Williams I* where Employer controverted its own EME's one percent PPI rating, there is no formal controversion in the record denying the tardy TTD benefit. Employee has not provided any authority supporting a "frivolously or unfairly controverted" finding absent a formal controversion. In its answer to Employee's penalty claims, Employer unqualifiedly accepted liability for the TTD in question. The parties did not address whether Employer made a "controversion-in-fact" or whether a "controversion-in-fact" can trigger a referral under AS 23.30.155(o). Accordingly, this decision will not reach those issues. Employee's request for a finding under AS 23.30.155(o) will be denied.

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

The primary issue decided here is Employee's appeal from the RBA-designee's ineligibility decision, and his request for modification. His appeal will be denied and his petition for modification will be dismissed as premature. AS 23.30.041(d); *Egemo*. No attorney fees or costs may be awarded on the appeal because Employee lost on this issue. Similarly, as the modification petition will be dismissed as premature, it is premature to award any attorney fees. However, Employee prevailed on his penalty and interest claims. Employer never filed a controversion notice on either the TTD benefits in question or on the penalty and interest claims. However, in its answer Employer denied Employee was entitled to a penalty or interest and resisted paying this compensation. "Reasonable attorney fees" are awardable. AS 23.30.145(b).

Employer objected to both the attorney's hourly rate and the hours billed and contends attorney Powell should receive no more than $385 per hour based on her experience and awards in other cases. The penalty and interest awarded in this decision result in relatively minimal benefit to Employee. *Rogers & Babler*. At hearing, Employee's attorney allocated approximately two hours to the penalty issue. Her "block billing" makes it difficult to attribute time solely to penalty and interest claims. As the parties dispute the proper hourly rate, a reasonable fee must be determined. The issues decided here are not complex, difficult or time consuming. The replacement check issue is novel. Attorney Powell's fees are contingent. Given her hearing preparation, travel and attendance, three hours is a reasonable attorney's fee award for the penalty and interest issues. *Rogers & Babler*. Though she is at the lower experience level when

compared to other attorneys, attorney Powell has more experience handling workers' compensation claims than at least one lawyer who was recently awarded fees at the $400 per hour rate. *Cortay*. Considering all factors relevant to "reasonable attorney fees," Employer will be ordered to pay Employee's attorney $1,200 in attorney fees for the two issues on which he succeeded (2 hours + 1 hour = 3 hours x $400 = $1,200). *Bignell*. It cannot be determined from Employee's itemization how much in costs were spent on these two successful issues. Therefore, Employee's claim for costs on the penalty and interest issues will be denied. No costs are awardable on the appeal and modification issues as Employee has not prevailed.

CONCLUSIONS OF LAW

1) The RBA-designee's decision finding Employee ineligible for reemployment benefits will be affirmed.
2) Employee is entitled to a late payment penalty.
3) Employee is entitled to interest.
4) Employer did not frivolously or unfairly controvert compensation due.
5) Employee is entitled to attorney fees but not costs.

ORDER

1) The RBA-designee's decision finding Employee not eligible for reemployment benefits is affirmed.
2) Employee's appeal from the RBA-designee's decision is denied.
3) Employee's petition to modify the RBA-designee's decision is dismissed as premature. Employee may refile his petition in accordance with AS 23.30.130 and 8 AAC 45.150.
4) Employer is ordered to pay Employee a $227.22 penalty under AS 23.30.155(e).
5) Employer is ordered to pay Employee statutory interest on $908.88 calculated from June 23, 2016 through August 12, 2016.
6) Employee's request for a finding under AS 23.30.155(o) is denied.
7) Employer is ordered to pay Employee's attorney $1,200 in attorney fees for the two issues on which he succeeded.
8) Employee's cost claim is denied.

Dated in Anchorage, Alaska on October 26, 2016.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
William Soule, Designated Chair

_____/s/_____
Amy Steele, Member

_____/s/_____
Mark Talbert, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of Daryl Williams, employee / claimant v. Arctic Terra, LLC, employer; Umialik Insurance Company, insurer / defendants; Case No. 201403502; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on October 26, 2016.

/s/
Charlotte Corriveau, Office Assistant