ALASKA WORKERS' COMPENSATION BOARD

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

GE VUE, Employee, Claimant, v. WALMART ASSOCIATES, INC., Employer, and NEW HAMPSHIRE INSURANCE CO., Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201601904 AWCB Decision No. 18-0037 Filed with AWCB Anchorage, Alaska on April 12, 2018

Ge Vue's (Employee) May 8, 2017 claim was heard on March 6, 2018 in Anchorage, Alaska. The hearing date was selected on December 14, 2017. Employee appeared telephonically and testified. Attorney J.C. Croft appeared and represented Employee. Attorney Vicki Paddock appeared and represented Walmart Associates, Inc. (Employer). Virginia Henley testified for Employer. Heath McAnally, M.D., appeared telephonically and testified for Employee. There were no other witnesses. The record closed on March 13, 2018 to allow Employer to respond to Employee's affidavit of attorney's fees and costs.

ISSUES

Employee contends he was injured while working for Employer when a fleeing shoplifter shot him with a BB gun. Although he concedes he has returned to full time work, Employee contends he still suffers from physical pain and symptoms related to post traumatic stress disorder (PTSD) caused by the shooting incident, which his current employer accommodates through regular breaks and time off his normal shift. Employee contends he is entitled to temporary total

disability (TTD) benefits from the date of the injury through July 17, 2017. Employee seeks an order awarding these benefits and stating Employee experienced a compensable workplace injury and is disabled as a result.

Employer contends Employee's TTD benefits ceased being paid when Employee was released to work. Employer points out Employee has returned to full time work, and contends there are no medical opinions supporting his claim for continued TTD.

1) **Is Employee entitled to TTD?**

Employee seeks medical benefits in the form of pulsed neuromodulation therapy and Lyrica prescription medication, both used to control pain. Employee concedes these are the only medical benefits which have been controverted.

Employer does not dispute Employee experienced a compensable work injury. Employer relies on the opinion of its employer's medical examiner (EME) that pulsed neuromodulation therapy is not widely accepted as a treatment for Employee's condition. Employer also relies on the opinion of its EME that use of Lyrica is not reasonable or necessary in Employee's case.

2) **Is Employee entitled to medical and related transportation benefits?**

Employee contends the controversions filed by Employer did not adequately state which benefits were denied. Employee contends the controversions were vague and used boilerplate language, which he and his attorney were unable to decipher in determining which benefits were denied, and upon what grounds. Employee contends medical benefits may have been refused to be paid by providers, due to the vague language of the controversion notices. Employee seeks an order stating Employer unfairly or frivolously controverted benefits and a penalty on those benefits.

Employer contends only specific benefits were denied: TTD from the date Employee was released to work, Lyrica pain medication, and pulsed modulation therapy. Employer contends all other benefits have remained open, and any denials of benefits were based on substantial evidence and reliance on the opinion of the EME physicians as stated in the notices of controversion. Employer contends there is no basis upon which to award a penalty.

3) **Did Employer unfairly or frivolously controvert Employee's claims?**

4) Is Employee entitled to a penalty?

Employee contends Employer resisted paying benefits, and his claim was controverted or denied throughout litigation. Employee contends he is entitled to attorney's fees and costs.

Employer contends all benefits owed have been timely paid or remain open, and there is no basis for an award of attorney's fees and costs. In the event benefits are awarded, Employer contends many of Employees' itemized attorney's fees entries are duplicative, improper, or unrelated to the issues at hearing.

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

FINDINGS OF FACT

The following is established by a preponderance of the evidence:

1) On February 3, 2016, Employee was shot in the eye and face with a BB gun when he attempted to apprehend a shoplifter while working for Employer as a loss protection manager. (First Report of Occupational Injury or Illness, February 5, 2016). Employee was seen in the emergency room at Alaska Regional Hospital. An x-ray and CT scan of the head interpreted by Greg Davenport, M.D., revealed a "metallic foreign body posterior to the globe and inferomedial to the optic nerve within the right orbit." (Davenport, February 3, 2016).

2) On February 4, 2016, Employee was seen by ophthalmologist Carl Rosen, M.D., who noted:

> CT scan shows lower posterior infer orbit between the nerve and infer rectus muscle. Indirect direct traumatic optic neuropathy. Probable copper pellet. Discussed concerns and urgency of having this removed soon due to being copper. Recommended he get a tetanus shot today and continue course of Augmentin he is taking. Recommended removing tomorrow. . . . (Rosen, February 4, 2016).

3) On February 5, 2016, Dr. Rosen performed orbitotomy surgery with exploration and an attempt to remove the foreign body. Dr. Rosen's post-operative report notes, "Unfortunately, I was not able to do this without, in my opinion, jeopardizing the patient's vision. (Rosen, February 5, 2016).

4) On February 10, 2016, Employee was seen by Dr. Rosen for follow-up. Employee stated he feels pressure from the back of his eye where the BB is lodged, feels more pain and pressure

when he tries to look right or left, and therefore must keep his gaze as straight as possible. Employee reported double vision when both eyes were open. Dr. Rosen noted although surgical removal was unsuccessful, the foreign body may migrate with time, making removal easier. (Rosen, February 10, 2016).

5) On April 7, 2016, Employee was seen by Richard Blake, P-AC for pain and mental distress related to the shooting incident. PA-C Blake assessed post-traumatic stress disorder and chronic pain, and referred Employee to a mental health counselor. (Blake, April 7, 2017).

6) On April 20, 2016 Dr. Rosen responded to a questionnaire sent by Employer's nurse case manager. Dr. Rosen opined Employee had the physical capacities to return to work with Employer as an asset protection manager. (Rosen, April 20, 2016).

7) On April 27, 2016, Employee told Dr. Rosen he was in constant pain, for which he was taking Tylenol with codeine every five to six hours. Employee stated sleeping upright helps relieve pain, but this has led to neck trouble and poor sleep. (Rosen, April 27, 2016).

8) On May 5, 2016, Employee was seen by ophthalmologist Shu-Hong Chang, M.D., at the University of Washington, Department of Ophthalmology. Dr. Chang noted:

> Patient has signs of optic neuropathy, unclear if progressive. He has debilitating chronic R orbital pain… managed suboptimally by narcotics. This is a difficult case. Informed patient that, due to location of pellet, surgical extraction would be very difficult with significant risk of complete blindness.
>
> Even if surgery was successful, I cannot guarantee pain will be eliminated because the sensory pathways in the orbit are not predictable. My recommendation is to defer surgery as a last resort option. . . .

While recommending surgery be deferred, Dr. Chang opined there was a neuropathic component to Employee's pain. Dr. Chang stated "medications like Lyrica and Neurontin have been effective to treat other types of chronic ocular neuropathic type pain." If there was evidence of additional or progressive vision loss, Dr. Chang opined it may tip the balance towards surgery. (Chang, May 5, 2016).

9) On May 25, 2016, Employee was seen by Darcy Logan, MSCP, LPC, at Alaska Vocational and Counseling Services in Palmer. Ms. Logan diagnosed conditions she felt were consistent with PTSD. (Logan, May 25, 2016).

10) On June 8, 2016, Employee was seen by Ms. Logan, who noted Employee was "Not doing well – self report. He feels very sad and hopeless about his future. Suicidal thoughts – with not [sic] intent to follow through. . . He said he would not harm himself as he could not do that do his son – leave him without a father. He said it was not an option." (Logan, July 1, 2016).

11) On July 13, 2016, attorney Eric Croft filed his appearance on behalf of Employee. (Entry of Appearance, July 13, 2016).

12) On August 9, 2016, Employee was seen by ophthalmologist William Baer, M.D., for an employer's medical evaluation (EME). Dr. Baer opined:

> Mr. Vue's disability arises from pain and diminished visual acuity in his right eye, as well as his binocular diplopia. There also appear to be psychological issues, which are beyond the scope of ophthalmologic review.
>
> Mr. Vue has not reached medical stability, as his condition continues to worsen. He is planning to have further surgery on August 24, 2016. Depending on the results of that surgery, he may reach medical stability thereafter. Assessment of mental health is beyond the scope of an ophthalmologic examination.
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> Were Mr. Vue my patient, I would refer him to another ophthalmologist with subspecialty training in orbital surgery and orbital disease. Dr. Rosen is just such a subspecialist. Dr. Rosen has shown excellent judgment in seeking outside supportive opinion from others similarly qualified to himself. I agree with his treatment thus far and concur in his decision to undertake further surgery. (Baer, August 9, 2016).

13) On August 10, 2016, Employee was seen by psychologist Donna Wicher, Ph.D., for a psychiatric EME, who diagnosed "Adjustment Disorder with Mixed Anxiety and Depressed Mood," as well as chronic pain. Dr. Wicher opined:

> Although Mr. Vue has been diagnosed with PTSD, he did not clearly meet the full diagnostic criteria for this condition. While frightening and traumatic, the injury was not life-threatening, which indicates that it would not qualify as a triggering event for PTSD. Even if it did, he did not clearly meet the other diagnostic criteria required for this diagnosis. . . .
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> . . . [I]t it is also of concern that his symptoms have reportedly not diminished over
> time. According to the DSM 5, even in individuals who develop PTSD, approximately 50 percent of them recover within three months of exposure to the trauma and others recover more slowly. The fact that he has not experienced improvement suggests that other factors are playing a greater role than the initial

> trauma and the fact that his symptoms of depression and anxiety have similarly not improved also suggests the contribution of other factors. . . .
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> . . . [T]he the uncertainty of his vocational and financial future is almost certainly contributing to his continued distress and he appears to have continued distress from having been fired and feeling betrayed by his employer.
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> Mr. Vue's employment has been the substantial cause of his current and ongoing disability and need for treatment since the time of the injury. . .
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> Mr. Vue is not yet medically stable with regard to his Adjustment Disorder. He will not reach medical stability until his physical conditions have reached a state of medical stability and he knows what his residual effects will be. (Wicher, August 10, 2016).

14) On August 25, 2016, Employee was seen by Dr. Chang for surgery. Dr. Chang notes, "The patient was repeatedly cautioned about 50% chance of blindness and 50% chance of inability to identify/remove foreign body, but cited his intractable orbital pain as the reasons he was willing to accept the risks and proceed. . ." The surgical team performed orbital endoscopy, but could not locate the foreign body. The decision was then made to proceed with a transnasal approach, which was also unsuccessful. The procedure was aborted after various approaches and maneuvers were attempted, when the team determined the foreign body could not be extracted. (Chang *et al*., August 25, 2016).

15) On October 6, 2016, Dr. Chang responded to a questionnaire sent by Employer's nurse case manager regarding Employee's status after the surgery and his ability to return to work. Dr. Chang stated, "He is legally blind in right eye and still healing from surgery. Prognosis for return to work unclear yet." (Chang, October 6, 2016).

16) Employee began treating with anesthesiologist and pain management specialist Heath McAnally, M.D., for right eye pain. (Record). On October 12, 2016, Dr. McAnally responded to a letter from Employer's nurse case manager regarding the use of Lyrica to control pain:

> Neuropathic pain in this country is primarily treated by membrane-stabilizing agents in the gabapentin family, and as such we initiated treatment with gabapentin for him. However, he had prohibitively adverse effects including significant amnesia, confusion and also depression. We trialed Lyrica in its place, and I gave him some samples for this. He reported excellent benefit in terms of analgesia and none of the side effects that he had previously been experiencing

> with gabapentin. We find this quite commonly with the switch from gabapentin to Lyrica, probably due to its increased efficacy/greater oral bioavailability, etc.
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> The use of membrane-stabilizers to treat neuropathic pain is indeed off-label in this country, and will probably remain so. Please provide this medically necessary treatment for this young man injured in the line of duty. (McAnally, October 12, 2016).

17) On October 24, 2016, Employee was seen by Shelly Jacobs, LPA, at Providence Behavioral Medicine Group, who diagnosed "post traumatic stress" and "anxiety secondary to trauma." (Jacobs, October 24, 2016).

18) On December 19, 2016, Employee was seen by Dr. McAnally for pain management, who noted, "Given his endorsement of significant benefit and if anything, reduced depression and suicidality – and also help with opioid cessation – since beginning Lyrica, we will continue cautious therapy with this agent." (McAnally, December 19, 2016).

19) On January 4, 2017, Employee was seen by LPA Jacobs, who noted finances and situational factors are strong stressors negatively impacting Employee's mood. Employee continued to struggle with anxiety secondary to the traumatic experience. Suicidal ideation was noted, but LPA Jacobs opined there was lack of intent. (Jacobs, January 4, 2017). Employee continued to be seen by LPA Jacobs for mental health issues several more times around this period. (Record).

20) On January 5, 2017, Employee was seen by ophthalmologist Courtney Francis, M.D., at the University of Washington, Department of Ophthalmology for follow-up on the August 25, 2016 surgery. Dr. Francis stated, "No vision limitations on return to work." Dr. Francis also checked a box which stated, "May return to work with no restrictions on. . . 1/6/17." (Francis, January 5, 2017). Filed on the same medical summary was a handwritten note from Dr. Chang which stated Employee has reached medical stability from a surgical aspect. (Chang, January 5, 2017).

21) On February 14, 2017, Employee was seen by Dr. McAnally, who recommended continuing to use Lyrica for pain, and noting concerns over depression, amnesia, and cognitive defects. Dr. McAnally administered an infraorbital nerve block injection, with Employee reporting substantial improvement in his pain within minutes. (McAnally, February 14, 2017).

22) On February 23, 2017, Employee was seen by psychiatrist Jane Larouche, D.O., who diagnosed "moderate single current episode of major depressive disorder," anxiety, insomnia, nightmares, and PTSD. Dr. Larouche noted Employee stays up at night and sleeps poorly, in two

to three hour increments. His energy and appetite is poor, and becoming worse. Employee has recurring thoughts that "something bad is going to happen to him." Employee's pain was "very severe" and he was becoming increasingly tolerant of his Lyrica dose. (Larouche, February 23, 2017).

23) On February 28, 2017, Employee was seen by Dr. Baer for an EME, who noted Employee's visual field in the right eye was more constricted, compared to the August 9, 2016 examination. Dr. Baer opined Employee was medically stable and released to work as to his physical condition, but it was not appropriate for him to consider stability of Employee's mental condition. Dr. Baer stated:

> Were Mr. Vue my patient, I would give him a vacation from efforts to deal with his right eye and concentrate on him getting back to work. If the emotional and cognitive effects of his injury can be dealt with and relegated to the past, I would be very surprised if his visual acuity and visual fields did not improve. The physical signs supporting his acuity and field limitations are simply not present. I am also not convinced that his diplopia is intractable. . .

In response to the question whether medications such as Lyrica, Escitalopram, and Prazosin were within the realm of acceptable medical options under the particular facts of this case, Dr. Baer states:

> These medications and their use fall outside the scope of ophthalmologic practice. I do not feel competent to remark on their utility or appropriate use and defer to Dr. Wicher's opinion as the best informed. . .

In response to the question whether the February 3, 2016 work injury is the substantial cause of the need for the above prescriptions, Dr. Baer states:

> Again, the use of these medications falls outside the scope of ophthalmologic practice. I defer to Dr. Wicher's opinion. (Baer, February 28, 2017).

24) On March 1, 2017, Employee was seen by Dr. Wicher for a psychiatric EME, who noted Employee reported sensations of hot, burning, and pins and needles on the right side of his nose, extending to the back of his orbit. He has a sense of biting down on aluminum foil towards the back of his eye. At times, he has pain in his head accompanied by a hot flashing sensation. Headache pain is constant, with migraines and nausea daily. Employee reported poor appetite and having lost a few pounds. With regards to his mental state, Dr. Wicher noted:

> Mr. Vue reported that he feels depressed all the time and finds it difficult to focus on things. He stated that his thoughts rush back and forth. At times, he feels weak and unmotivated. At times, he does not feel safe at home. He worries that the people with whom he had dealt with in the past will hurt him. He believes that these people will hurt him if they see him. He is afraid that they might come find his home and hurt him there. He began having these fears a few months ago. At times, even going to doctors' appointments triggers these fears. He stated that he cannot get the faces of the perpetrators out of his mind. He stated that he worries all of the time. His anxiety has worsened over time. When he goes places, he plans an escape route. When he comes home, he always looks for the quickest way out. He fears that someone will come through the door. He stated that his mind wants to be one step ahead. He feels guilty for being the way he is. He noted that he is unable to take care of his family because he fears that someone will come out of the bushes and harm him. He stated that he thinks about suicide at times. He feels exhausted. He stated that he is tired of thinking all of the time. . .
>
> He stated that he feels quite disconnected from his wife and son. He has told his wife to go to live with her parents in China. He has moved his bed away from the window. When he reads, he closes his right eye. He wears glasses. He stated that his vision is still blurred at some places. He stated that he does not want his wife and son to see him like this anymore and noted that he does not want his wife to be in this "predicament." He stated that she deserves better.

Dr. Wicher diagnosed "Adjustment Disorder with Mixed Anxiety and Depressed Mood," "Somatic Symptom Disorder," and chronic pain. Dr. Wicher opined Employee was not yet medically stable, but will reach medical stability when his symptoms of depression and anxiety resolve. Further psychological treatment would be reasonable and necessary, and within the realm of acceptable medical options. In response to the question whether medications such as Lyrica, Escitalopram, and Prazosin were reasonable and necessary medical treatment, Dr. Wicher stated a medical doctor would need to address this question. (Wicher, March 1, 2017).

25) On March 7, 2017, Employee was seen by Dr. McAnally, and reported no thoughts of self-harm, but physical pain at a level of 7/10. Employee experienced about three hours of pain relief after the February 14, 2017 nerve block injection, but expressed interest in pulsed neuromodulation of the nerve. Employee complained he was possibly developing a tolerance to Lyrica, and wished to increase the dosage, instead of resorting to narcotics. Dr. McAnally recommended a Lyrica dosage of 75 mg three times per day, and ordered pulsed neuromodulation be scheduled. (McAnally, March 7, 2017). Employee continued to be seen by LPA Jacobs for mental health issues around this period. (Record).

26) On March 21, 2017, Dr. McAnally wrote a letter to Employer's insurance adjuster which stated, "Given his chronic and severe pain condition, and the associated dysfunction both physically and psychologically that stem from this, I feel it is medically necessary to proceed with neuromodulation." (McAnally, March 21, 2017).

27) On April 3, 2017, Dr. Baer issued an addendum EME, after reviewing recent records of Drs. Chang, Francis, Wicher, and McAnally, and stated:

> Mr. Vue uses Lyrica, escitalopram, and prazosin. The last of these is used as a treatment for hypertensive cardiovascular disease. Whether that is reasonable and necessary is beyond my specific area of expertise. Hypertensive cardiovascular disease is, however, not claimed as a condition related to his workplace injury, but is a constitutional condition.
>
> Lyrica is used for control of pain. It is not clear at all how much pain Mr. Vue endures. It would be most unusual for pain from a retained orbital foreign object to persist for more than a year post-injury and in the absence of inflammatory reaction. In my judgement, its use is unnecessary. . .
>
> Dr. McAnally recommended "pulsed neuromodulation" therapy for relief of pain. This treatment involves the placement of an electrode in the form of a needle close to the nerve which carries pain impulses to be blocked. . . [Pulsed neuromodulation] is not widely accepted as a treatment modality. This question also could be referred to a physician experienced in pain management. Medical literature suggests that it may be useful in certain cases. It has also been described as a treatment seeking a disease. It is not a standard treatment. Dr. McAnally performed a temporary nerve
> block with reported relief of symptoms. There are available accepted treatment modalities for longer term or permanent block. I do not support the recommended treatment plan. . . As an experimental procedure, it may be an "acceptable" option but is not generally accepted as useful or effective. It is not regarded as a preferred primary treatment. . . .

Dr. Baer opined Employee may be motivated by secondary gain in his continued claim of symptoms, and questioned the validity of the symptoms and his reporting of them. (Baer, April 3, 2017).

28) On April 7, 2017, Dr. McAnally responded to a letter from Employee's attorney requesting his opinion. In response to what additional medical treatment is needed, Dr. McAnally recommended pulsed neuromodulation, treatment for PTSD, and "whatever ophthalmology recommends." Dr. McAnally stated the February 3, 2016 work injury was the substantial cause of the current need for treatment. Relying on attached job descriptions of asset protection

associate/manager and also security guard, he opined Employee is unable to return to work in these positions because of eye pain, vision, and physical limitations. Regarding the ability to return to work, Dr. McAnally added a handwritten note, "I defer this to ophthalmology, however." (McAnally, April 7, 2017). The letter was filed on a medical summary and served on Employer's attorney on May 8, 2017. (Record).

29) On April 21, 2017, Employer denied specific medical benefits, including Lyrica medication and pulsed neuromodulation therapy. The notice of controversion states Employer relies on the April 3, 2017 EME opinion of Dr. Baer that Lyrica is unreasonable and unnecessary, and that pulsed neuromodulation therapy for relief of pain is not widely accepted as a medical modality and is not regarded as a preferred primary treatment. (Notice of Controversion, April 21, 2017).

30) On April 24, 2017, Dr. McAnally wrote a letter to Employer's attorney, which stated:

> I am writing this letter in rebuttal of the non-ophthalmologic components of Dr. William B. Baer's IME assessment of 3 Apr 2017. While I certainly defer all things ophthalmologic to Dr. Baer, I would also advise him to familiarize himself with the current use of Prazosin in PTSD treatment before rendering an opinion on the matter of its prescription in Mr. Vue's case. It is not being prescribed for hypertension.
>
> I have what I suspect is considerably more experience in treating infraorbital neuralgia and trigeminal neuralgias in general, and if he does not think that a projectile entering the orbit essentially in the immediate vicinity of the infraorbital foramen where the nerve exits can cause severe neuropathic pain, I am beyond perplexed. Temporary resolution of symptoms by diagnostic nerve block has long been held to be the gold standard in diagnosing these peripheral neuralgias, and Mr. Vue's response to infraorbital nerve block (which, by the way I provided free of charge to both the patient and York Risk Services) is sufficient corroboration.
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> This unfortunate man (who has sustained significant physical, psychological and financial adverse sequelae of his assault while attempting to intervene on a robbery of the store that wound up firing him) deserves far better treatment than he has received. Regarding Dr. Baer's assertion that "there are available accepted treatment modalities for longer term or permanent block" I would welcome his education on the matter, as he evidently possesses interventional pain management expertise in excess of my own. . .
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> . . .I will provide Mr. Vue pulsed neuromodulation of the infraorbital nerve *pro bono*, if York Services believes that the opinion of a board-certified anesthesiologist and interventional pain physician carries less weight in pain management issues than that of an ophthalmologist. Controverting his Lyrica prescription however on the opinion of a non-pain specialist who not only admits

> that "pain is a subjective symptom not measurable by objective means" but then further goes on essentially to suggest secondary gain motives of Mr. Vue is unconscionable as far as I am concerned, and this is noted in the medical record. (McAnally, April 24, 2017).

31) On May 8, 2017, Employee filed a claim for temporary total disability (TTD) from April 2016 "until stable," a permanent partial impairment (PPI) rating and benefit, penalty, interest, and attorney's fees and costs. (Claim, May 8, 2017).

32) On May 16, 2017, Employer denied specific TTD, specific medical benefits, penalties, interest, and attorney's fees and costs. The notice of controversion states:

> Employer and adjuster rely upon employee's treating physician, Dr. Chang and Dr. Vincent, and their work status report dated January 5, 2017, opining Employee reached medical stability on that date. Employer and adjuster rely upon the IME physicians, Dr. Baer and his reports dates 2/28/17 and 4/3/17, in which he opined Employee is medically stable and that continued use of Lyrica is unreasonable and unnecessary. Dr. Baer further opines that pulsed neuromodulation therapy for relief of pain is not widely accepted as a medical modality and is not regarded as a preferred primary treatment. Dr. Baer opines the workplace injury is not the substantial cause of need for treatment by this method.

The notice states Employee was paid TTD benefits from February 20, 2016 through April 19, 2016 and again from August 25, 2016 through January 26, 2017. Employee received "full wage continuance" from February 3, 2016 through February 19, 2016. Mileage reimbursement was paid on January 11, 2017 for the period of July 6, 2016 through January 6, 2017, and again on February 27, 2017 for the period of February 27, 2017 through March 2, 2017. The notice states Employee has not submitted any additional mileage reimbursement requests. (Notice of Controversion, May 16, 2017).

33) On May 22, 2017, Dr. Baer issued an addendum EME after reviewing August 24, 2016 CT scan imaging, and stated he continues to believe Employee's symptoms are disproportionate to his injury and he has been less than candid in his responses to examination. Dr. Baer states:

> [H]is claim of extinguished color vision is inconsistent with the absence of evidence of optic atrophy. His measured visual acuity on my examination also is inconsistent with extinguished color vision. Adding to my conviction that Mr. Vue was not cooperating on examination is the information that Dr. Francis found his corrected visual acuity to be 20/20. These inconsistencies strongly suggest to me that Mr. Vue was not fully cooperative. . .

> His visual acuity is clearly better than he is willing to respond. His visual field studies are inconsistent with optic nerve appearance and lack of a relative afferent pupillary defect. His diplopia is said to be constant, but he does not close one eye to suppress it. . .
>
> For these reasons, I have come to doubt whether Mr. Vue has ratable permanent partial disability. If he does have disability, it cannot be rated because of his lack of candor. . . . (Baer EME Report, May 22, 2017).

34) On July 17, 2017, Employee began working for O'Reilly Auto Parts in Wisconsin as a store manager on a full-time basis. (Vue Deposition, p. 42, January 29, 2018). Employee has not missed time from work in this job because of mental or physical conditions related to the February 3, 2016 work injury. (*Id.* at 45). The use of Lyrica medication helped control his pain and prevented flare-ups, enabling him to function. (*Id.* at 50). Employee prefers Lyrica to narcotic medications, because they prevented him from driving, left him feeling dizzy, and gave him headaches and constipation. Lyrica had no such negative side-effects. (*Id.* at 51).

35) On the date of the injury, Employee was working as an asset protection manager when he attempted to apprehend three individuals suspected of theft. As suspects began shooting, Employee was fearful for his life, and the incident continues to be hard for him to discuss. Since then, he has continued to have nightmares, flashbacks, and sleep disruptions. He has been severely depressed for a long time, and does not feel safe in large crowds. These feelings are especially triggered by cold weather and faces or places familiar to the incident. He did not experience mental symptoms until about a week after the incident. He does not feel he can return to work in loss prevention, due to anxiety and paranoia. He currently works as a manager at an auto parts store, where his employer lets him take breaks during shifts when he experiences episodes of flashbacks, anxiety, or PTSD. These episodes can last from ten minutes to an hour. He has missed a few days from his current job because of physical pain related to the work injury. He currently works full-time, five days a week. The Lyrica medication helped ease the nerve pain in the back of his eye socket, helped him sleep, and enabled him to function. Pulsed neuromodulation therapy helped a lot and prevented his nerves from flaring up for three to four months after the treatment. Partly because of mental distress relating to the shooting incident, he relocated with his family to Wisconsin in June 2017. The only medications he is currently taking for pain is Tylenol and ibuprofen, but he does not recall what exactly the notices of controversion denied. He currently gets between four and six hours of sleep per night. Employee

applied for unemployment benefits in 2016, but was denied "because of his workers' comp case." Employee also believes he was denied unemployment because, to be eligible, he must be "able" to return to work. (Employee).

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

37) Virginia Henley is the claims adjuster on Employee's file. All medical benefits remain open, with the exception of Lyrica medication and pulsed neuromodulation therapy. (Henley).

38) Dr. McAnally currently practices exclusively in the field of pain management. He has treated many patients with foreign bodies such as bullets and bullet fragments. Employee has had chronic pain related to the initial injury, as well as persistent interorbital neuralgia. Pain cannot be objectively measured; it is entirely subjective. There is more to assessing pain than just biologic issues, such as cultural or personal factors. Lyrica is typically prescribed as an anticonvulsive and antiseizure medication but it is also FDA-approved for treatment of pain. Lyrica is scheduled as a class V drug on the federal controlled substances list, which means there is some potential for abuse, although Dr. McAnally is unaware of any such instances in his experience. Because of the subjective and individual nature of pain management, probably 90% of what is done in the field is considered "off label" treatment. In discussions with psychiatrists, many have told him Lyrica is superior for anxiolysis, or the reduction or inhibition of anxiety, and is effective as a mood stabilizer. In Employee's case, depression and suicide were important issues to be considered. In some cases, untreated pain itself can become a risk factor for suicide. Lyrica also allowed Employee to get off of narcotics. Continued use of Lyrica in Employee's case is both reasonable and necessary. In his time spent treating Employee, Dr. McAnally did not perceive he was amplifying or exaggerating his pain for secondary gain, although he would defer this assessment to mental health professionals. It is normal in his practice to rely on a patient's own reporting as to which combination of medications or treatments are effective in a particular case. (McAnally).

39) Although it is not his practice specialty, Dr. McAnally is familiar with PTSD, based on his experience in civilian practice, but also as a military doctor for three years on active duty in the Air Force, with seven years in reserve. (*Id.*).

40) Pulsed neuromodulation therapy employs a device which delivers radio frequency pulses to "stun" a nerve. This disrupts a nerve's ability to be painful. Pulsed neuromodulation therapy in

Employee's case is both reasonable and necessary, if he continues to experience symptoms. Dr. McAnally takes issue with Dr. Baer's opinions, as he considers them more "high risk" options. (*Id*.).

41) Dr. McAnally is credible. (Experience, judgment, observations, and inferences from all of the above).

42) On February 18, 2018, *Vue v. Walmart Associates, Inc.*, AWCB Decision No. 18-022 (February 18, 2018) (*Vue I*) denied Employer's February 16, 2018 petition to continue the March 6, 2018 merits hearing and for an order requiring the parties attend mediation. (*Vue I*).

43) On March 2, 2018, Employee filed an affidavit and itemization of attorney's fees and costs listing a total of $17,142.00 in attorney's fees and $874.27 in costs. Employee lists the sums of the hourly services by the following individuals:

J.C. Croft Hours	32.50	6,432.50
Eric Croft Hours	14.50	5,800.00
Patty Jones Hours	27.60	4,692.00
Courtney Carroll Hours	2.90	217.50
Total		**17,142.00**

(Statement of Fees and Costs and Affidavit of J.C. Croft, March 2, 2018).

44) Employee's attorney's hourly rates are $170.00 per hour for paralegal time, $400.00 per hour for attorney Eric Croft, and $225.00 per hour for attorney J.C. Croft. (*Id*.).

45) J.C. Croft was admitted to the bar on November 8, 2017. Eric Croft was admitted on June 1, 1994. (Administrative Notice, Alaska Bar Association member directory, https://alaskabar.org/member-services/member-directories/, Accessed April 12, 2018).

46) Employee's attorney and paralegal time hourly rates are reasonable, considering the experience and years practicing in this specialized field of law, and the nature and complexity of the services provided. (Experience, judgment, observations, and inferences from all of the above).

47) On March 7, 2018, Employee filed a supplemental affidavit and itemization of attorney's fees and costs listing an additional $5,281.10 in attorney's fees, with the sums of the hourly services by the following individuals as follows:

J.C. Croft Hours	22.70	5,107.60
Patty Jones Hours	.60	136.00

Courtney Carroll Hours	.4	37.50
Total		**5,281.10**

The sum of all fees and costs sought by Employee's attorney through March 7, 2018 is $23,297.37. (Statement of Fees and Costs and Affidavit of J.C. Croft, March 7, 2018).

48) On March 13, 2018, Employer filed an objection to Employee's attorney's fees and costs, stating a number of objections to the entries on Employee's March 7, 2018 affidavit and itemization. Employer's objection specifically lists 11 time entries it does not agree with, and states reasons for each objection. (Objection, March 13, 2018).

49) On March 23, 2018, Employee filed a supplemental affidavit and itemization, listing a total of $25,377.37 in attorney's fees and costs. (Statement of Fees and Costs and Affidavit of J.C. Croft, March 23, 2018). Employee also filed an answer to Employer's March 13, 2018 objection. (Answer, March 23, 2018).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment

> and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .
>
> **AS 23.30.095. 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, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

An employer shall furnish an employee injured at work any medical treatment which the nature of the injury or process of recovery requires within the first two years of the injury. *Phillip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999). The medical treatment must be reasonable and necessitated by the work-related injury. When the Board reviews a claim for medical treatment made within two years of an injury which is undisputedly work-related, its review is limited to whether the treatment sought is reasonable and necessary. *Id.*

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter . . . .

Under AS 23.30.120(a), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914

P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a claim. At the first step, the claimant need only adduce some minimal relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach the presumption of compensability varies, depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471, 473-74 (Alaska 1991) (*quoting Smallwood* at 316. To rebut the presumption, an employer must present substantial evidence that either 1) something other than work was the substantial cause of the disability or need for medical treatment or 2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his case by a

preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

The presumption of compensability analysis applies when an employer controverts TTD already awarded. *Olson v. AIC/Martin J.V.*, 818 P.2d 669 (Alaska 1991). To overcome this presumption, an employer must introduce substantial evidence to the contrary. *Bauder v. Alaska Airlines, Inc.*, 52 P.3d 166 (Alaska 2002).

> **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.

Even where there is conflicting evidence, the Board's decision will be upheld if it is supported by substantial evidence. *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000).

If the Board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, and elects to rely upon one opinion rather than the other, the Supreme Court will affirm the Board's decision. *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013). The Supreme Court cautioned against considering the workers' compensation process "a game of 'say the magic word,' in which the rights of injured workers should depend on whether a witness happens to choose a form of words prescribed by a court or legislature." *Id.* at 194.

The Supreme Court has upheld a Board decision to give less weight to a treating physician's testimony because he was not an expert in toxicology, where substantial evidence supported finding the employee did not establish a compensable claim. *Apone v. Fred Meyer, Inc.*, 226 P.3d 1021 (Alaska 2010).

> **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 they become 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. . . .

The Alaska Workers' Compensation Appeals Commission has held the presumption of AS 23.30.120 does not apply to the issue of attorney's fees under AS 23.30.145. Moreover, there is no presumption that the fees requested are reasonable. The express language in AS 23.30.145(a) requires the Board to determine the reasonableness of each request for fees by taking "into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." The claimant bears the burden of producing evidence to support the claim for fees and must persuade the Board of the reasonableness of the request. The Board is obligated to review any request for attorney fees using the above criteria. Any award of fees is at the discretion of the Board. An award of attorney fees will be upheld unless it is manifestly unreasonable. *Dockter v. Southeast Alaska Regional Health Consortium*, AWCAC Decision No. 246 at 30-31 (March 29, 2018).

> **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. . . .

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

The Alaska Supreme Court has held the purpose of AS 23.30.155 is clear: "It is an incentive to employers to make prompt and timely compensation owing to employees. The importance to the worker, whose means of support is more often than not composed mainly of his wages, of receiving compensation without delay cannot be overemphasized. The injured worker, depending on his circumstances, typically cannot afford time away from the job without periodic and prompt compensation." *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1191 (Alaska 1984).

For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits. *Harp v. ARCO*, 831 P.2d 352 (Alaska 1992).

> **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.

The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264, 267 (Alaska 1974) (*See also Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978)). The ultimate finding of decrease in earning

capacity must be based upon findings of fact which related to inability to earn wages, as evidenced by the proof of disparity between wages earned before and after the injury. *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896 (Alaska 1973) (*See also Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 594 (Alaska 1979) (A claimant's demonstrated earning capacity cannot be ignored in determining the extent of his disability)).

> **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. . . .

> **8 AAC 45.084. Medical travel expenses.** (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.
>
> (b) Transportation expenses include
>
> (1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;
>
> (2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and
>
> (3) ambulance service or other special means of transportation if substantiated by competent medical evidence or by agreement of the parties.
>
> (c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. . .
>
> (d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or

more have accumulated, or upon completion of medical care, whichever occurs first.

(e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.

8 AAC 45.120. Evidence.

. . . .

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. . . .

8 AAC 45.180. Costs and attorney's fees.

. . . .

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

. . . .

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

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit

> in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
>
> (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:

> (1) costs incurred in making a witness available for cross-examination;
>
> (2) court reporter fees and costs of obtaining deposition transcripts;
>
> (3) costs of obtaining medical reports;
>
> (4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;
>
> (5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;
>
> (6) costs for telephonic participation in a hearing;
>
> (7) costs incurred in securing the services and testimony, if necessary, of vocational rehabilitation experts;
>
> (8) costs incurred in obtaining the in-person testimony of physicians at a scheduled hearing;
>
> (9) expert witness fees, if the board finds the expert's testimony to be relevant to the claim;

> (10) long-distance telephone calls, if the board finds the call to be relevant to the claim;
>
> (11) the costs of a licensed investigator, if the board finds the investigator's services to be relevant and necessary;
>
> (12) reasonable costs incurred in serving subpoenas issued by the board, if the board finds the subpoenas to be necessary;
>
> (13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;
>
> (14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk
>
> (A) is employed by an attorney licensed in this or another state;
>
> (B) performed the work under the supervision of a licensed attorney;
>
> (C) performed work that is not clerical in nature;
>
> (D) files an affidavit itemizing the services performed and the time spent in performing each service; and
>
> (E) does not duplicate work for which an attorney's fee was awarded;
>
> (15) duplication fees at 10 cents per page, unless justification warranting awarding a higher fee is presented;
>
> (16) government sales taxes on legal services;
>
> (17) other costs as determined by the board. . . .

The Supreme Court has held the objective of the fees provision under the Act is to make attorney fee awards both fully compensatory and reasonable so that competent counsel will be available to furnish legal services to injured workers. *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 973 (Alaska 1986), (*See also Bouse v. Fireman's Fund Insurance Co.*, 932 P.2d 222 (Alaska 1997); *Childs v. Copper Valley Electric Association*, 860 P.2d 1184 (Alaska 1993)). Without counsel, an injured worker's chance of success on a workers' compensation claim may be decreased. *Bustamante v. Alaska Workers' Compensation Board*, 59 P.3d 270, 274 (Alaska 2002). Considering the contingent nature of workers' compensation cases when awarding fees to the injured worker's attorney, the Board must consider the nature, length, and complexity of

services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney's fees for the successful prosecution of a claim. *Bignell* at 973-75.

The Supreme Court has discussed the difference between an award of fees under AS 23.30.145(a) and subsection (b): A controversion (actual or in fact) is required for an award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 152 (Alaska 2007). Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, "reasonable fees" may be awarded. *Id*. at 152-53.

Where an employer resists payment of workers' compensation benefits, thus creating claimant's need for legal assistance, the employer is required to pay attorney fees relating to unsuccessfully controverted portion of claim. Claimants are entitled to full attorney fees only for issues on which they succeed. *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 241 (Alaska 1997) (*See also Adamson v. University of Alaska*, 819 P.2d 886 (Alaska 1991) (Worker must be successful on the claim itself, not on a collateral issue, in order to recover attorney fees under AS 23.30.145(b)). The Supreme Court has held the Board acted within its discretion in awarding only one-half of actual attorney fees to an injured workers' attorney, since he prevailed on only some of his claims. *Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002).

ANALYSIS

1) Is Employee entitled to TTD?

Employee seeks TTD benefits from February 3, 2016 through July 17, 2017. Employer contends all time loss benefits owed have been paid, Employee has returned to full time work, and there are no medical opinions supporting Employee's claim for additional TTD. This raises a factual dispute to which the presumption analysis applies. AS 23.30.010(a); AS 23.30.120(1); *Bauder*; *Olson*; *Meek*; *Saxton*; *Huit*.

Employee raises the presumption he is entitled to time loss benefits with the April 7, 2017 opinion of Dr. McAnally that Employee is unable to return to work as an asset protection associate/manager and security guard because of eye pain, vision, and physical limitations. *McGahuey*; *Smith*; *Cheeks.* Employee also raises the presumption with his testimony that he does not feel he can return to work in loss prevention due to anxiety and paranoia. *Wolfer*. Because Employee raised the presumption he is entitled to TTD benefits, Employer has the burden to overcome the presumption with substantial evidence. *Kramer*; *Smallwood.*

Employee's TTD benefits were paid until terminated on April 20, 2016, when Dr. Rosen opined Employee had the physical capacities to return to work with Employer as an asset protection manager. TTD benefits were resumed on August 25, 2016, when Employee again underwent surgery in attempt to extract the foreign body. On January 5, 2017, Dr. Francis examined Employee for follow-up on the August 25, 2016 surgery. Dr. Francis released Employee to work, and TTD was terminated on January 26, 2017. On February 28, 2017, Dr. Baer opined Employee was medically stable and released to work as to his physical condition, although Dr. Baer stated it was not appropriate for him to consider stability of Employee's mental condition. While Dr. Wicher's March 1, 2017 psychiatric EME opines Employee has not reached medical stability with respect to his mental condition, Dr. Wicher does not state whether Employee can return to work. The opinions of Drs. Francis and Baer, who are both ophthalmologists, concur Employee could return to work after recovering from the August 25, 2017 surgery. AS 23.30.395(16), (28). Their opinions are substantial evidence adequate to support the conclusion Employee could return to work without restrictions. *Tolbert.* Because Employer rebutted the presumption, Employee must prove his claim for TTD by a preponderance of the evidence. *Koons.* At this step of the analysis, evidence is weighed, inferences drawn, and credibility considered. *Saxton.*

Dr. McAnally's April 7, 2017 letter notes Employee has work restrictions, with the caveat he ultimately defers this question to the opinion of a specialist in ophthalmology. Dr. McAnally's April 7, 2017 opinion as to Employee's ability to return to work is therefore given less weight when weighed against the opinions of Drs. Francis and Baer, who are specialists in ophthalmology. *Rogers & Babler*; *Apone*. Other than the April 7, 2017 opinion of Dr. McAnally, Employee has not produced reliable medical evidence supporting his claim for TTD. *DeYonge.*

Employee returned to work on July 17, 2017 as a manager at an auto parts store and has not missed time from this job owing to effects from the February 3, 2016 work injury. *Saling*. While the foreign body from the work incident remains lodged in Employee's eye and continues to cause pain and vision problems, an award of TTD must rest on loss of earning capacity, rather than injury per se. *Vetter*; *Hewing*. Because Employee has not produced reliable evidence of loss of earning capacity, his claim for temporary total disability benefits will be denied. AS 23.30.001; AS 23.30.120; AS 23.30.135; AS 23.30.185; AS 23.30.395(16), (28).

2) Is Employee entitled to medical and related transportation benefits?

Employee seeks medical benefits in the form of pulsed neuromodulation therapy and Lyrica prescription medication, both used to control pain. Employee also seeks an order stating he experienced a compensable work injury on February 3, 2016 and is disabled as a result. Employer does not dispute Employee experienced a compensable work injury, and has left the majority of medical benefits open. Employer has only denied the use of Lyrica and pulsed neuromodulation therapy on the grounds they are not reasonable and necessary in Employee's case.

i. Lyrica medication

Employee contends he needs Lyrica to control pain and ease symptoms related to the work injury. Employer contends use of Lyrica in this case is neither reasonable nor necessary. This raises a factual dispute to which the presumption analysis applies. AS 23.30.010(a); AS 23.30.120(1); *Meek*; *Saxton*; *Huit*.

Employee raises the presumption he is entitled to Lyrica with his own testimony the medication helped ease pain, helped him sleep, and enabled him to function. *McGahuey*; *Smith*; *Cheeks; Wolfer*. Employee also raises the presumption with the May 5, 2016 opinion of Dr. Chang that medications like Lyrica are effective to treat chronic ocular neuropathic pain, which Employee was likely experiencing. *Id.* Employee additionally raises the presumption with the October 12, 2016 opinion of Dr. McAnally that Lyrica in Employee's case is medically necessary. *Id*. Because Employee raised the presumption he is entitled to medical benefits in the form of Lyrica medication, Employer has the burden to overcome the presumption with substantial evidence. *Kramer*; *Smallwood.*

In its April 21, 2017 notice of controversion, Employer relies on the April 3, 2017 opinion of Dr. Baer that use of Lyrica in Employee's case is unnecessary. However, in his February 28, 2017 EME report, Dr. Baer responds to the question whether medications such as Lyrica were reasonable and necessary medical treatment in Employee's case by stating this was outside the scope of his practice, making Dr. Baer's April 3, 2017 opinion suspect. In response to the same question, Dr. Wicher's March 1, 2017 psychiatric EME report stated a medical doctor would need to address this question. Employer has not produced substantial evidence the use of Lyrica in Employee's case is not reasonable or necessary because it has not produced a medical opinion unequivocally so stating. *Rogers & Babler*. Employer has not rebutted the presumption.

Alternatively, if Employer did rebut the presumption Employee is entitled to Lyrica medication through Dr. Baer's April 3, 2017 opinion, Employee would still be able to establish he is entitled to this benefit. Assuming Employer rebutted the presumption, in the third step of the analysis evidence is weighed, inferences drawn, and credibility considered. *Saxton.*

Dr. Chang, a specialist in ophthalmology who performed surgery on Employee, stated in her May 5, 2016 opinion medications like Lyrica are effective to treat chronic ocular neuropathic type pain. Dr. McAnally testified the use of Lyrica in Employee's case is both reasonable and necessary, and has recommended its use on no less than four occasions: in reports dated October 12, 2016; December 19, 2016; February 14, 2017; and March 7, 2017. Dr. McAnally's reports are often accompanied by explanations of why this medication is beneficial in Employee's particular case. Dr. McAnally, whose specialty in pain management requires expertise in identifying patients seeking drugs for secondary gain, testified Lyrica has a low abuse potential, and he has never personally encountered such an instance in his practice, making the risk Employee is seeking this drug for secondary gain very low. Dr. McAnally went so far as to opine Dr. Baer's questioning of Employee's motives as "unconscionable." Considering Employee's PTSD and mental condition with respect to the work injury, Dr. McAnally's opinion Lyrica is effective as a mood stabilizer also receives some weight in favor of it being reasonable and necessary here. Employee testified in his deposition and at hearing Lyrica offered much relief from pain and anxiety, and enabled him to function without any of the negative side effects of

narcotics. Employee's own credible testimony concerning the benefits of Lyrica receives significant weight.

On the other hand, the opinions of Drs. Baer and Wicher are contradictory or inconclusive, and receive less weight on the issue of use of Lyrica when weighed against Employee's evidence. Dr. Baer's February 28, 2017 EME report repeatedly states an opinion on the use of medications such as Lyrica fall outside the scope of ophthalmologic practice. Then, on April 3, 2017, Dr. Baer states he believes the use of Lyrica in Employee's case is unnecessary. Dr. Wicher's March 1, 2017 opinion defers to a medical doctor on the issue of Lyrica. Although Dr. Baer's April 3, 2017 report expressed concerns about Employee's candor and truthfulness with how his verbal reports of visual problems correspond with objective testing results, Employee's visual acuity is not at issue. Dr. Baer's suspicions of Employee exaggerating his symptoms for secondary gain are contradicted by the credible evidence presented by Dr. McAnally, and are indeed perplexing, given the total medical record. AS 23.30.122; *Rogers & Babler*. Employee has a history of declining or resisting the use of narcotics, has been motivated to return to work, and has returned to work. Employee has expressed disappointment and frustration that he is failing his family as a provider. He has voluntarily undergone two complex and potentially dangerous surgeries – including with a 50% risk of complete blindness – in order to have the foreign body removed from his eye where it is still lodged. There is no evidence Employee is exaggerating or faking his symptoms for secondary gain. *Id*. The opinions of Drs. Chang and McAnally, combined with Employee's own testimony, receive significantly more weight than those of Drs. Baer and Wicher in favor of the use of Lyrica. Assuming Employer rebutted the presumption, the preponderance of the evidence shows use of Lyrica in this case as reasonable and necessary treatment for Employee's February 3, 2016 work injury. AS 23.30.010; AS 23.30.095; *Hibdon*. Employer will be ordered to reimburse Employee for the use of this medication as prescribed. *Id*.

ii. Pulsed neuromodulation therapy

Employee seeks treatment in the form of pulsed neuromodulation therapy to control pain. Employer contends pulsed neuromodulation therapy is not widely accepted as a treatment for Employee's condition. As above, this raises a factual dispute to which the presumption analysis applies. AS 23.30.010(a); AS 23.30.120(1); *Meek*; *Saxton*; *Huit*.

Employee raises the presumption he is entitled to pulsed neuromodulation therapy with his own testimony the treatment helped him and prevented flare-ups of pain for three to four months after the treatment. *McGahuey*; *Smith*; *Cheeks*; *Wolfer*. Employee also raises the presumption with the March 7, 2017 opinion of Dr. McAnally that pulsed neuromodulation should be ordered to address Employee's pain. Because Employee raised the presumption, Employer has the burden to overcome the presumption with substantial evidence. *Kramer*; *Smallwood.*

Employer relies on the April 3, 2017 opinion of Dr. Baer that pulsed neuromodulation is not regarded or accepted as a preferred primary treatment in this type of case. Dr. Baer's opinion provides explanation and background on how he came to his conclusion, including a brief description of the therapy itself, and general medical views on its use. Dr. Baer's April 3, 2017 opinion against the use of pulsed neuromodulation in Employee's case is sufficient to rebut the presumption. *Id*.

Dr. McAnally first recommended Employee undergo pulsed neuromodulation therapy on March 7, 2017 and again on April 7, 2017. On April 24, 2017, Dr. McAnally wrote a letter in rebuttal to Dr. Baer's April 3, 2017 opinion, and stated pulsed neuromodulation therapy is so needed in Employee's case, Dr. McAnally will provide it free of charge. Dr. McAnally credibly testified pulsed neuromodulation therapy in Employee's case is both reasonable and necessary, if he continues to experience symptoms. As a specialist in pain management, Dr. McAnally's opinion on the subject of therapies to control pain receive more weight in this case than that of a specialist in ophthalmology. *DeYonge*; *Apone.* Dr. Baer's own opinion states the question of the use of this treatment in Employee's case "could be referred to a physician experienced in pain management," giving further weight to Dr. McAnally's opinion on the issue versus his own. Employee's credible testimony the treatment was of major benefit and helped relieve his pain for months at a time is also given significant weight. As above, there is no reliable medical evidence Employee is pursuing this treatment for secondary gain. AS 23.30.122; *Rogers & Babler*. The preponderance of the evidence shows use of pulsed neuromodulation therapy in this case as reasonable and necessary treatment for Employee's February 3, 2016 work injury. AS 23.30.010;

AS 23.30.095; *Hibdon.* Employer will be ordered to reimburse Employee for this treatment as prescribed. *Id*.

iii. Medical travel expenses

Employee seeks reimbursement of expenses incurred with travel for medical treatment for the April 3, 2016 injury. Employer contends transportation expenses incurred and submitted for reimbursement have been paid and no additional amounts are owed.

Employee has not filed proof of mileage or expenses incurred in connection with travel for medical treatment. Employee's claim for past transportation expenses will be denied for lack of proof. 8 AAC 45.084. In the event Employee incurs future medical travel expenses in connection with benefits ordered by this decision, he may submit those expenses to Employer for reimbursement, or file a claim. *Id*.

3) Did Employer unfairly or frivolously controvert Employee's claims?

Employee contends Employer's controversions are invalid because they are vague and ambiguous, and Employee was unable to determine which benefits were denied. Employee contends the controversions have the effect of controverting in fact all of his medical benefits, since their unclear language may have resulted in medical benefits being denied which were actually open.

For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits. AS 23.30.155; *Harp.*

Employer filed two notices of controversions in this case: the first on April 21, 2017 and the second on May 18, 2017. The April 21, 2017 notice states it relies on the EME opinions of Dr. Baer which stated his opinion Lyrica medication and pulsed neuromodulation therapy were not reasonable or necessary in Employee's case. The May 18, 2017 controversion also points to Dr. Baer's EME reports, and additionally states TTD is denied in reliance on the January 5, 2017 opinions of Drs. Chang and Francis that Employee had reached medical stability on that date. At

the time the controversion was filed, the evidence showed Employer had evidence upon which to deny the stated benefits. The foregoing medical evidence had been filed on medical summaries. Based on that evidence alone, the Board may have found Employee was not entitled to benefits. *Harp*. The notices state with sufficient specificity which medication and treatment was denied. AS 23.30.155; *Rogers & Babler*. Employee's contention he was under the subjective impression all benefits were denied is without merit. *Id*. Employer's April 21, 2017 and May 18, 2017 controversions were not unfair or frivolous. AS 23.30.001; AS 23.30.135; AS 23.30.155; *Harp*.

4) Is Employee entitled to a penalty?

Employers are liable for penalties and interest on compensation not timely paid or controverted when due. AS 23.30.155. This decision finds Employer timely filed notices of controversions sufficient to satisfy the standard of good faith. *Harp*. Employee is not entitled to a penalty. *Id.*

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

Employee filed itemized statements and affidavits of attorney's fees totaling $23,297.37 up to March 7, 2018. Employer objects specifically to 11 time entries listed by Employee. The Act requires an employer pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. AS 23.30.145; 8 AAC 45.180; *Harnish*. Because this decision awards Employee controverted medical benefits, Employee is entitled to an award of attorney's fees and costs in connection with those benefits. *Id*. There is no presumption under AS 23.30.120 a submitted affidavit for attorney fees is compensable as submitted, and the presumption analysis used for other types of claims does not apply. *Docktor*. Employer's objections to the specific entries will be considered. *Id*

On March 23, 2018, Employee filed a third affidavit and itemization of attorney's fees and costs. The same day, Employee also filed an answer to Employer's March 23, 2018 objection to Employee's attorney's fees and costs. At the conclusion of the March 6, 2018 hearing, an oral order issued holding the record open until March 13, 2018 for the purpose of allowing Employer to respond to Employee's affidavit of attorney's fees and costs. Employee was not invited to file additional briefs or evidence after the March 13, 2018 close of the hearing record, nor has he filed a request for leave to do so. 8 AAC 45.120(m). Employee's March 28, 2018 affidavit and

itemization of attorney's fees and March 28, 2018 answer will not be considered. *Id*.; AS 23.30.001; AS 23.30.135.

i. Employer's objections to Employee's attorney's fees time entries

A July 12, 2016 entry for 0.1 hour (0.1 x $170 = $17) spent by Patty Jones teleconferencing with opposing counsel regarding scheduling of an EME is duplicative, and Ms. Jones' time for this task will be denied. 8 AAC 45.180(d)(2).

Entries for 0.1 hour by Eric Croft (0.1 x $400 = $40) and J.C. Croft (0.1 x $170 = $17) each on December 6, 2016 for periodic file review are duplicative, and J.C. Croft's time for this task will be denied. *Id*.

A March 6, 2017 entry for 0.1 hour (0.1 x $170 = $17) by Ms. Jones relates to a deposition with Dr. Bensinger, who was not an expert in this case nor called as a witness, will be denied. *Id*.

A March 24, 2017 entry for 0.1 hour (0.1 x $170 = $17) spent by J.C. Croft only listing "TCT Other" will be denied as too vague. *Id*.

A March 24, 2017 entry for 0.1 hour by Eric Croft (0.1 x $400 = $40) lists supervision of paralegals on "tort employment" will be denied as unrelated. *Id*.

Entries on April 18, 2017 for 0.2 hours (0.2 x $170 = $34) of paralegal time and 0.2 hours (0.2 x $400 = $80) of attorney time for Eric Croft for a conference will be awarded, as Employer has not stated a basis for why billing for a meeting between two members of Employee's attorney's law firm to discuss a case the firm is working on is improper.

A May 5, 2017 entry for 0.4 hours (0.4 x $400 = $160) by Eric Croft relates to research and a letter to Dr. Haen, who was not an expert in this case nor called as a witness, will be denied. *Id*.

Entries for 0.1 hour by Eric Croft (0.1 x $400 = $40) and J.C. Croft (0.1 x $170 = $17) each on October 12, 2017 for periodic file review are duplicative, and J.C. Croft's time for this task will be denied. 8 AAC 45.180(f)(14)(E).

A November 13, 2017 entry for 0.4 hours (0.4 x $170 = $68) by Ms. Jones to prepare a second independent medical examiner (SIME) form and pleadings will be denied, as Employee filed no petition for an SIME. 8 AAC 45.180(d)(2).

Entries for 0.1 hour by Eric Croft (0.1 x $400 = $40) and J.C. Croft as an attorney (0.1 x $225 = $22.5) each on November 29, 2017 for periodic file review are duplicative, and J.C. Croft's time for this task will be denied. 8 AAC 45.180(d)(2).

Entries for 0.1 hour by Eric Croft (0.1 x $400 = $40) and J.C. Croft (0.1 x $225 = $22.5) each on January 26, 2018 for periodic file review are duplicative, and J.C. Croft's time for this task will be denied. 8 AAC 45.180(d)(2).

Considering the above, Employee's request for attorney's fees will be reduced by $398.00. AS 23.30.145; 8 AAC 45.180; *Rogers & Babler*.

ii. Issues on which Employee's attorney is entitled to fees and costs

Although the Supreme Court has held awards of attorney's fees under the Act should be fully compensatory and reasonable so that injured workers have competent counsel available to them, this does not mean an attorney representing an injured employee automatically gets full, actual fees. *Abood*. An employee is entitled to full reasonable attorney's fees for services performed with respect to issues on which the employee prevails. *Bouse*. There is no presumption under AS 23.30.120 that fees as requested are reasonable. *Docktor*. The Act requires a determination of the reasonableness of each request for fees by taking into consideration the nature, length, and complexity of the services performed, and the benefits resulting from the services to the compensation beneficiary. *Id*.

Although Employee's work injury was frightening and traumatic, the issues at hearing were not particularly novel or complex, nor was this case especially complicated. AS 23.30.145; *Bignell*; *Rogers & Babler*. Depositions of Dr. Baer and Employee were taken, but no SIME was ever requested or required. One short procedural hearing with no witnesses took place on February 28, 2018, which resulted in *Vue I*, for which Employee will receive fees. There were no discovery disputes or petitions litigated. The disputed issues were TTD, the need for pain medication and therapy, and a claim for unfair or frivolous controversion. These issues are common to most cases under the Act. *Docktor*. Nor was this case lengthy: Employee's attorney entered his appearance on July 13, 2016, and this final compensation order issued on April 12, 2018. *Rogers & Babler*.

The Commission has pointed out the lack of attorneys available to assist large numbers of unrepresented claimants in cases under the Act. *Docktor*. Represented claimants are usually more successful than unrepresented claimants, because attorneys are skilled in collecting and presenting the kind of evidence necessary to succeed in a workers' compensation case, which is a specialized and technical area of law. *Id*. Employee's attorney has obtained controverted medical treatment and medication which will significantly benefit Employee, and improve his quality of life and path towards recovery. Employee prevailed in obtaining controverted medical benefits, but not compensation for controverted time loss, medical transportation expenses, unfair or frivolous controversion, or penalty. Considering the nature, length, and complexity of this case, as well as the issues prevailed on and benefits awarded, a one-half reduction of Employee's attorney's fees and costs is reasonable. AS 23.30.001; AS 23.30.135; AS 23.30.145; 8 AAC 45.180; *Abood*; *Bouse*; *Bignell*; *Rogers & Babler*. Employee's attorney will be awarded $11,449.68 in attorney's fees and costs ($23,297.37 - $398.00 = $22,899.37 / 2 = $11,449.68). *Id*.

CONCLUSIONS OF LAW

1) Employee is not entitled to TTD.
2) Employee is entitled to medical benefits but not transportation benefits.
3) Employer did not unfairly or frivolously controvert Employee's claims.
4) Employee is not entitled to a penalty.

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

ORDER

1) Employee's May 8, 2017 claim is granted in part and denied in part.

2) Employer is ordered to pay for Lyrica medication as prescribed by a treating physician or provider.

3) Employer is ordered to pay for pulsed neuromodulation therapy as prescribed by a treating physician or provider.

4) Employer is ordered to pay Employee's attorney $11,449.68 in attorney's fees and costs.

Dated in Anchorage, Alaska on April 12, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Amy Steele, Member

/s/
Justin Mack, 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 GE VUE, employee / claimant; v. WALMART ASSOCIATES, INC., employer; NEW HAMPSHIRE INSURANCE CO., insurer / defendants; Case No. 201601904; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on April 12, 2018.

/s/

Elizabeth Pleitez, Office Assistant