ALASKA WORKERS' COMPENSATION BOARD

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

OVILA LAVALLEE, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201415155
BUCHER GLASS INC., Employer,	)	AWCB Decision No. 18-0077
and	)	Filed with AWCB Fairbanks, Alaska on August 2, 2018
COMMERCE AND INDUSTRY INSURANCE COMPANY, Insurer, Defendants.	)	

Ovila Lavallee's (Employee) October 9, 2017 claim was heard in Fairbanks, Alaska on April 26, 2018, a date selected on January 9, 2018. Attorney Robert Beconovich appeared and represented Employee. Attorney Krista Schwarting appeared and represented Bucher Glass and its insurer (Employer). Witnesses included Employee's wife, Kim Lavallee, one of his personal care attendants, Julio Cardona, and his primary care physician, Daniel Reynolds, D.O., who all testified on Employee's behalf. The record closed at the hearing's conclusion on April 26, 2018.

ISSUES

Employee contends his personal care attendant (PCA) hours should be increased from eight hours per day to 12 hours per day, as recommended by his primary care physician.

Employer relies on one of its medical evaluators, who opines eight PCA hours per day is appropriate for Employee's circumstances, and requests Employee's claim be denied.

1) Is Employee entitled to 12 PCA hours per day?

Employee contends his wife, who provides PCA services for him, is a certified nursing assistant (CNA), and she should be paid as a CNA rather than a PCA.

Employer contends there is no evidence Employee requires CNA services, instead of the PCA services he is already being provided, and requests Employee's claim be denied on this issue as well.

2) Is Employee entitled to CNA services?

Employee claims a penalty on additional medical benefits awarded.

Employer contends, since no additional benefits were due, neither is a penalty.

3) Is Employee entitled to penalty?

Employee seeks interest on past-due benefits.

Employer contends, since no additional benefits are due, neither is interest.

4) Is Employee entitled to interest?

Employee contends his attorney was instrumental in securing benefits on his behalf and seeks an award of reasonable attorney fees.

Employer contends, since no additional benefits are due, neither are attorney fees and costs.

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 September 9, 2014, Employee was crushed under four large glass panes that weighed in excess of a thousand pounds while working as a glass manufacturer. He experienced injuries to his spine, ribs and left leg. He was transported to Fairbanks Memorial Hospital with no sensation below the waist. Employee was diagnosed with a T12-L1 dislocation and spinal cord injury and a comminuted fracture of the left leg. Cervical spine and head computed tomography (CT) scans were taken and read as normal. A CT scan of the abdomen and pelvis showed a complex fracture at Tl2-Ll with compromise of the spinal canal and multiple left-sided rib fractures. A lumbar spine CT showed a complex burst fracture at L1 impacting the spinal canal, as well as smaller fractures at L2 and L4. The initial assessment was "Tl2-Ll flexion distraction injury with complete paraplegia but incomplete loss of right lower extremity sensation; without other obvious sacral sparing." (Compromise and Release Agreement, August 31, 2015).

2) On September 10, 2014, Employee underwent surgery consisting of a T10 to L3 posterior thoracolumbar stabilization and arthrodesis and decompression of T12 and L1. The operative report reflects:

> T10 to L3 posterior thoracolumbar stabilization and arthrodesis including Tl 2-L l fracture realignment and reduction and arthrodesis using inter transverse on lay auto graft as well as "BMP and Trinity stem cell." At operation, traumatic injury to paraspinal muscles in the region of the fracture was noted with some problematic oozing of blood from the "hamburgerized" muscle. Pedicle screw fixation was placed at T10, Tl1, and Tl2 on the right side, and T10 and Tl1 on the left side with construct spanning to L1, L2, and L3 on the right side and L2 and L3 on the left side. The left Tl2 pedicle was too traumatized to be incorporated into the construct. Adequate decompression of the spinal cord was verified, and there were no other complications. At the same time an open fracture of his left leg was debrided and fixed by way of an intramedullary nail.

(*Id*.).

3) Employee began a course of limited physical and occupational therapy while still in the hospital. (*Id*.).

4) Employer accepted Employee's injury as compensable and began paying compensation. (Secondary Report of Injury, September 23, 2014).

5) On September 22, 2014, Employee was transferred to Craig Hospital in Colorado for further treatment and rehabilitation. His intake assessment was the same as in Fairbanks; "ASIA Impairment Scale A, sensory and motor complete right-sided L3 sensory; left-sided L3 sensory; right-sided LI motor; left-sided LI motor paraplegia related to the work accident." Further, when Employee arrived at Craig Hospital, it was noted that his medical history was remarkable only for borderline diabetes. In addition to the orthopedic diagnoses, he was diagnosed with neurogenic bowel and bladder, the latter of which required catheterization. Employee was further diagnosed with depression and anxiety. (Compromise and Release Agreement, August 31, 2015).

6) Employee is confined to a wheelchair as a result of his work injuries. (*Id*.).

7) On November 10, 2014, Mark Johansen, M.D., conducted a driving evaluation at Craig Hospital. Dr. Johansen prescribed motor vehicle modifications, including hand controls, a steering device, a wheelchair lift, a transfer seat base, a remote start, a backup camera and wheelchair tie down tracks. It was further prescribed that the vehicle be either a GMC Savannah or a Chevrolet Express van with four-wheel or all-wheel drive. (*Id*.).

8) On November 20, 2014, Craig Hospital discharged Employee to return to Fairbanks. It was recommended he return for a comprehensive re-evaluation in six months. (*Id.*).

9) Employee established treatment with David Witham, M.D., when he returned to Fairbanks. Employee also initiated treatment with Gabe Schuldt, M.D., for medication management. Dr. Schuldt referred Employee for physical and occupational therapy and noted he would refill Employee's medications but the goal was ultimately to reduce the amount Employee needed. Dr. Schuldt also referred Employee to a pain management specialist in the Fairbanks area to deal with his complex pain issues. (*Id*.).

10) On December 24, 2014, Dr. Schuldt prescribed aquatherapy, an antidepressant and directed Employee to follow-up with his back surgeon, Paul Jensen, M.D. He also reported,

> [Employee's] wife is trying to get paid for the CNA work she does with [Employee]. She is a certified CNA in the state [sic] of Alaska and has 30 years experience previously, brings in her certificate. She has been his caregiver since coming from rehab and helps with ADLs as well as transportation to multiple appointments every week and medication management.

(Schuldt report, December 24, 2014). Dr. Schuldt also authored a letter that same day, which states:

> [Employee] is under my care as his primary care provider. He suffered a severe work place spinal cord injury causing paraplegia as well as left leg fracture on 9/9/14. He is now confined to a wheel chair and is incontinent of his bowels and bladder without regular interventions.
>
> [Employee's] wife has been taking care of his needs on a daily basis including driving him to and from multiple weekly appointments, medication management, help [sic] with transfers and hygiene including shower set up and helping with the commode.
>
> [Employee] needs a PCA and she is licensed as a certified nursing assistant in the state [sic] of Alaska. I would recommend that she is [sic] paid for her time as his PCA.
>
> The total hours worked by her is 8 hours per day 7 days per week. She will need to be doing this for at least the next year as [Employee] recovers. It is difficult to know at this time how long his recovery will take and to what degree he will regain function. . .

(Schuldt letter, December 24, 2014). Employer stipulated to pay for PCA services. (Parties' stipulation, January 8, 2015). The parties' stipulation emphasized the following:

> The parties agree that [Employee's wife] is not and will not be an employee or agent of the employer . . . the employer's workers' compensation carrier . . . or the adjusting firm . . . as a result of her providing PCA services for her husband . . . at his specific request. She is acting as an independent contractor.

(*Id*.). They later submitted an amended stipulation, which provided:

> *[Employee's wife]* has requested that that further PCA services be provided through Access Alaska. She intends to continue as [Employee's] primary PCA, but her employment and billing will be through Access Alaska. This arrangement will also allow substitute PCAs to be provided through Access Alaska if necessary.

(Parties amended stipulation, May 11, 2015).

11) In late December 2014, the parties stipulated to Employee's eligibility for reemployment benefits. The Board subsequently issued its eligibility decision on December 30, 2014, and

Employee elected to undergo the retraining process. (Compromise and Release Agreement, August 31, 2015).

12) On January 15, 2015, Dr. Jensen re-evaluated Employee and noted his condition was stable but with pain management issues. Dr. Jensen recommended an interval CT scan and increased aquatherapy. (*Id*.).

13) On January 23, 2015, Employee underwent a lumbar CT that showed extensive degenerative and post-operative changes. He also underwent left leg x-rays, which showed a segmented left fibular fracture without definite callus formation. The x-rays also showed a subacute left fibula fracture with moderate soft tissue swelling. (*Id*.).

14) On February 5, 2015, Employee's vocational rehabilitation counsellor submitted a plan to return Employee to work as an appointment clerk. (Reemployment plan, February 5, 2015).

15) On May 1, 2015, Dr. Schuldt authored a letter on behalf of Employee's wife, which states:

> [Employee] is under my care as his primary care provider.
>
> His wife Kim has been his PCA and is getting paid for 8 hours of work per day.
>
> Due to [Employee's] disability, she has to work longer hours than this to care for him and is requesting an extension in her hours to 12 hours per day. I think this is reasonable given the complications associated with his spinal cord injury. . . .

(Schuldt letter, May 1, 2015).

16) On June 2, 2015, neurologist, Sean Green, M.D., and orthopedic surgeon, Thomas Toal, M.D., evaluated Employee on Employer's behalf. They opined Employee's conditions were not yet medically stable and ongoing medical treatment was indicated. Drs. Green and Toal thought Employee's selected vocational goal was appropriate; however, they were concerned about his ability to work on a full-time basis due to poorly controlled chronic pain, and to a lesser degree, fecal incontinence. They also thought Employee was currently permanently and totally disabled (PTD), although it was possible he could re-enter the workforce if his pain and bowel complaints improved. Regarding Employee's need for PCA services, Drs. Green and Toal, wrote:

> We discussed at some length his situation with regard to adaptive equipment and PCA. He does have a standing frame, but this is too large for him, and the standing frame that had been approved through the insurer has never arrived. He does have a passive exercise machine which puts his legs through a bicycling-like

> motion; however, when he uses this, he finds that his left leg (in particular left knee) swelling increases. He has obtained a firmer mattress which has been quite helpful in assisting him with mobility. It also makes it easier for his wife to help him up when necessary. He is still unable to drive, although he has obtained a rental van that can transport him - it does not have any hand controls, and it requires his wife to drive him wherever he needs or wants to go.
>
> With regard to ordinary activities, although he is capable with some difficulty at performing many ADLs, he requires assistance with setting out his clothing and sometimes with putting some of the more difficult items of clothing on such as his compression stockings. He can perform most ADLs independently, but some are difficult, and he does make routine use of his wife's assistance for a variety of ADLs. She does the shopping for the household, obtains his medications, and sets them out in a weekly pill box. She cooks his meals. She drives anywhere necessary. She carries his medical supplies for him, giving as an example having to carry in a case of straight catheters (containing 240 packaged catheters) which was quite heavy and awkward to carry. Most problematic for the couple is that he is having ongoing difficulties with fecal incontinence which occurs three to five times per week despite his bowel program, and he requires assistance in cleaning himself, his clothing, and bedding when this occurs. He is distressed because of this difficulty, as a result, he has sometimes resorted to bowel program multiple times daily, for example, just before setting out for aquatherapy (as he is very worried about the possibility of soiling during aquatherapy).
>
> He comments that his current home is not ideal for an individual with paraplegia and that getting items out of closets and some drawers or other places is quite difficult for him. For the time being, this is managed with his wife's assistance although she is attempting to have him perform activities for himself whenever feasible. The home he is currently in is a two- level, not a single-level home. He did on one occasion attempt to drag himself up the stairs, but he could not get past the first landing because of increased back pain.

They concluded, "[Employee] currently requires a personal care attendant primarily because of his impaired mobility, lack of suitably equipped transportation, and fecal incontinence," and thought PCA services were reasonable and necessary, though they did not specify a frequency or duration for those services. (Green and Toal report, June 2, 2015).

17) Dr. Green's and Dr. Toal's later depositions clarify Dr. Green had authored those portions of their joint reports concerning PCA services. (Green depo., November 28, 2017; Toal depo., March 1, 2018; inferences drawn therefrom).

18) Based on Dr. Green's and Dr. Toal's June 2, 2015 report, Employer converted Employee's disability benefits to PTD benefits. The adjuster subsequently instructed the rehabilitation

specialist to discontinue retraining efforts based on the determination Employee is currently permanently and totally disabled. (Compromise and Release Agreement, August 31, 2015).

19) On July 14, 2015, Employee began treating with Robert Valentz, M.D., for pain management. (Initial Evaluation, July 14, 2015).

20) On August 24, 2015, Employee returned to Craig Hospital for follow-up treatment and rehabilitation. (History and Physical, August 24, 2015).

21) On August 31, 2015, a partial Compromise and Release Agreement (C&R) was approved settling disputes pertaining to unpaid medical bills and the modified van prescribed by Craig Hospital. (Incident Claims and Expense Reporting System (ICERS) event entry, August 31, 2015). However, disputes again arose over these same issues, which were decided in *Ovila Lavallee v. Bucher Glass, Inc.*, AWCB Decision No. 16-0055 (July 8, 2016) (*Lavallee I*). At the time of *Levallee I*, Employer had paid over one million dollars in medical bills on Employee's behalf. *Id.*

22) On July 5, 2016, Drs. Green and Toal re-evaluated Employee on Employer's behalf. Employee had begun seeing a psychotherapist for depression, but both Employee and his wife reported his depression was worse, rather than better. Drs. Green and Toal addressed the following questions regarding PCA services in their report:

> Q. Do you agree that [Employee] needs a personal care attendant, and if so, for which tasks do you recommend it?
>
> A. Yes, [Employee] does require a personal care attendant.
>
> As discussed in the body of the report, a personal care attendant can and should assist [Employee] with many activities of daily living that are either difficult or impossible for him to perform independently. In particular, at this time, he is requiring assistance with housekeeping, laundry and clothing, cooking and meal preparation, management of his fecal incontinence, and transportation.
>
> It is in general helpful for an individual to carry out as many tasks as he or she can perform independently, but depending on the available community services and layout of his home and city, it is plausible that many tasks will be difficult or impossible for him to perform independently.
>
> Q. How many hours per day does [Employee] require a personal care attendant, if one is recommended?

> A. In situations where the personal care attendant is not a spouse, it is common to provide a personal care attendant for four to eight hours per day. Typically, a personal care attendant will assist in laying out clothing, performing household tasks that the person cannot perform independently, etc., during a limited period of time during the day - allowing the person to otherwise care for themselves independently.
>
> [Employee] has previously done well with a personal care attendant scheduled for eight hours a day, although because his PCA is his spouse, it is difficult to break this down into a specific number of hours needed. Eight hours per day is a reasonable maximum.
>
> Q. For how long will [Employee] require a personal care attendant?
>
> A. It is unknown how long [Employee] will require a personal care attendant. If his pain problems and functional difficulties can be improved, it is likely that he will be able to progressively perform more and more tasks for himself.
>
> If he is able to better control this fecal incontinence and carry out more of his activities of daily living without assistance, he may need a PCA for far fewer hours or perhaps not at all.
>
> To a substantial degree, this depends on [Employee's] personality and motivation to care for himself. Some individuals prefer to endure considerable hardship or discomfort in order to be fully independent; others prefer to be dependent, thus avoiding some effort or discomfort.

(Green and Toal report, July 5, 2016).

23) Employee later criticized Dr. Green's opinion regarding PCA services in his hearing brief, where he wrote, "It was and is absolutely unclear what the foundation for this generic 'normative opinion' might be, or the basis for the opinion that [Employee] 'did well' with eight hours of PCA services. Dr. Green's deposition provides little substantive guidance." (Employee Hearing Brief, April 23, 2018).

24) On December 15, 2016, Dr. Schuldt responded to the following questions:

> Q. Does [Employee] require a personal care attendant (PCA)?
>
> A. Yes
>
> Q. What tasks are identified for the PCA?
>
> A. Medication management, toileting, cleaning fecal incontinence, cooking, transfers & repositioning, helping with dressing.

Q. How many hours per day does [Employee] require the PCA services?

A. 8

(Schuldt questionnaire responses to Employer, December 15, 2016).

25) Daniel Reynolds, D.O., assumed Employee's care when Dr. Schuldt left Employee's treating medical practice. (Employee Hearing Brief, April 23, 2018; Employer's Hearing Brief, April 23, 2018).

26) On February 4, 2017, Dr. Reynolds authored a letter on Employee's behalf, which states,

> Patient is a partial paraplegic. He is in need for [sic] help with all his activities of daily living to include toileting, showering, and eating. He has chronic pain. He needs at least 12 hours daily of PCA care to make sure that his activities of daily living and needs are met. He needs to go to the swimming pool three times a week to rehab.

(Reynolds letter, February 14, 2017).

27) On August 15, 2017, Dr. Toal re-evaluated Employee on Employer's behalf. He still opined Employee was not yet medically stable, and continued to think PCA services were reasonable and necessary for transferring, toileting, bathing, meal preparation, dressing and transportation. However, when asked to opine the number of PCA hours necessary, Dr. Toal replied, "[Employee] requires constant care. The number of hours that his wife should be compensated for providing such care is not a medical decision." (Toal report, August 15, 2017).

28) On that same date, Dr. Green re-evaluated Employee on Employer's behalf and opined Employee was medically stable, although he thought medical stability was a "thorny issue," and he rated Employee's work-related whole person impairment at 66 percent. Dr. Green thought Employee's impaired mobility and incontinence necessitated PCA services and further opined eight hours per day was a "reasonable maximum." (Green report, August 15, 2017).

29) Also on August 15, 2017, Eric Goranson, M.D., performed a psychiatric evaluation on Employer's behalf, and concluded, while Employee did suffer from a work-related adjustment disorder, and a preexisting personality disorder, he did not suffer from post-traumatic stress disorder (PTSD) or a major depressive disorder. Dr. Goranson did not have an opinion on Dr. Schuldt reducing Employee's PCA hours in December 2016, but said, "Although I cannot comment on the non-psychiatric factors that would affect the personal care attendant's hours of

service, from a psychiatric standpoint, [Employee's] wife would provide a caring and concerned person who can take care of him and that would certainly be beneficial." (Goranson report, August 15, 2017).

30) On October 4, 2017, Employer controverted PCA services in excess of eight hours per day based on Dr. Green's August 15, 2017 report. (Controversions, October 4, 2017; October 26, 2017).

31) On October 9, 2017, Employee filed a claim seeking medical costs, which states:

> The carrier and employer have controverted PCA services as ordered by the treating physician. [Employee's wife] has been a CNA for approx. 36 years and has been getting paid only as a PCA, though she provides nursing services to the claimant. Her wage needs to [be] corrected to reflect reasonable market value for her work.

He also sought penalty, interest and attorney fees and costs awards. (Claim, October 9, 2017).

32) On October 26, 2017, Employer again controverted PCA services in excess of eight hours per day based on Dr. Green's August 15, 2017 report. (Controversion Notice, October 26, 2017).

33) On October 30, 2017, Dr. Reynolds wrote a letter on Employee's behalf, which states,

> [Employee] is a patient under my care.
>
> His medical situation has not changed if anything it has persisted and worsening [sic] and has caused some worsening of some of his medical conditions.
>
> He continues to require at least 12 hours of personal care assistant time on a daily basis. This assistance will be directed at helping him change positions, helping him with bowel movements personal hygiene, helping him with food preparation and helping him get to medical appointments and physical therapy appointments.

(Reynold's letter, October 30, 2017).

34) On November 28, 2017, Dr. Green testified he has been practicing medicine for over 20 years. (Green depo., November 28, 2017 at 4). He also testified regarding Employee's need for PCA services:

> Q. . . . . So in this letter, Dr. Schultz [sic] is asked whether [Employee] requires a personal care assistant. He indicates yes, and he goes on to recommend eight hours of PCA services, and its dated, at the bottom, 12-15-16.

Do you agree with Dr. Schultz's [sic] assessment?

A. Yes, I do.

Q. Why do you agree with Dr. Schultz's [sic] recommendation?

A. I agree with his assessment because he [sic] even though the ideal is for [Employee] to be as independent as possible, that's the best plan for him is to foster independence rather than dependence.

And even though occupational therapy and physical therapy had mentioned he was capable of being independent in toileting and transfers and so forth after his discharge from Craig Hospital, the reality is that things don't always go perfectly smoothly, and it can make a very substantial difference to have some assistance when needed, as long as a balance is struck to provide support that is helpful in fostering independence and return to normal activities.

A PCA is a very useful adjunct. Where a PCA becomes problematic is where it foster[s] dependence and prevents [Employee] from taking the initiative to perform as much as he can himself.

Dr. Schultz [sic] stated he thought a PCA would assist with medication management, toileting, cleaning fecal incontinence, cooking, transfers, repositioning, and helping with dressing. Many of those things [Employee] can do for himself.

He can actually manage his own medication. He can toilet himself. He may have episodes of fecal incontinence that are difficult for him to manage, given he is a paraplegic. In those situations, a PCA can be very helpful, but that is not likely to happen all day long.

Cooking, transfers, repositioning, help with dressing, all of those are things that he can do. But under adverse circumstances or the vagaries of ordinary life, that might not always be easy for him or impossible in some circumstances.

Q. How do we know he can perform those activities?

A. Based on the Craig Hospital evaluation. There has not been, to my knowledge, a more recent detailed evaluation by a therapist that's specifically trained in spinal cord injury, in terms of his ability, to perform what we call modified activities of daily living. That is, so he can perform his activities of daily [living] with suitable modifications or suitable adaptive equipment quilt [sic].

Q. Is that something that should be done; do you think?

> A. I'm not sure. I have not seen him in his home environment. I haven't seen exactly what's happening in Fairbanks. If there are substantial difficulties that he perceives with a PCA for eight hours versus 12 hours, then I think it is reasonable to have the Craig Hospital spinal cord injury team therapist reevaluate his ability to perform these activities or a similar team if he goes to Seattle for evaluation.

(*Id*. at 14-18). He later testified further on the subject:

> Q. Had there been any substantial changes in [Employee's] functions at the time of your prior evaluation?
>
> A. No objective change in function, but subjectively he complained of substantially diminished function. In particular, problems with sleep and increased depression and psychosocial problems around his home invasion and disruption of family relationships and these sorts of issues.
>
> Q. Now, you were asked again about personal care attendant hours, and I think that is discussed on page 21 of the report.
>
> A. Yes.
>
> Q. What was your opinion as to whether ongoing personal care services were medically reasonable and necessary?
>
> A. I felt eight was a reasonable maximum for PCA hours. I did think he would benefit from having a PCA available for the sort of reasons I talked about a while ago.
>
> [Employee] and [Employee's wife] are a little difficult to obtain a clear history from. It's not always clear how reliable that history is, so it's difficult to say exactly how many hours per day would be optimal.
>
> Again, the optimal is that amount of PCA hours it takes that improves his function and his ability to perform normal activities without fostering dependence or reducing the number of hours he was actually providing for himself.
>
> Q. Are PCAs typically provided for someone who is paraplegic, in your experience?
>
> A. Most often not. Probably the majority of paraplegic individuals I have seen have also not been as old as [Employee] and did not have the substantial comorbidities that he does.
>
> PCAs are typically required for people who are quadriplegic, who have much more difficulty in managing even in a modified environment. With suitable modifications, automobile controls, suitable wheelchair equipment, suitable

> transfer equipment, suitable living arrangements, most paraplegics are able to care for themselves and don't need a PCA.

(*Id*. at 27- 29). Then, during cross-examination, questioning again returned to the subject of PCA services:

> Q. I would like to switch gears a little and talk about the PCA issue, if there is an issue. The records that you've seen from Dr. Schultz [sic] indicate that he felt, at one point in time, that eight hours is appropriate; is that accurate?
>
> A. That's accurate.
>
> Q. Prior to that he felt 12 hours was appropriate?
>
> A. Yes.
>
> Q. Are you aware that after that he went to work for a different provider, and [Employee's] current doctor recommended 12 hours a day?
>
> A. Yes.
>
> Q. And you simply disagree with that?
>
> A. Yes.
>
> Q. Based on your feeling to what is normal?
>
> A. Yes. This is a difficult judgment to make depending on what is going to provide the best possible health outcome for [Employee]. It's not on what he would desire or what would make his life easiest, but what would actually provide the best objective medical outcome for him.
>
> The difficulty that I face in the PCA hour analysis is that there is not good science behind it. We have no really scientific method for determining that. It becomes a judgment call.
>
> Q. Let me ask a slightly different version of this questions. You're aware his wife of longstanding is a CNA as well?
>
> A. Yes.
>
> Q. And the question I have to ask and you can reject it if you're unable to respond is where does PCA services stop and where does nursing services start?

> For instance, there is the issue of fecal incontinence and manually evacuating his bowels. Is that a nursing function?
>
> A. Well, a CNA is a certified nursing assistant and not a nurse. Certified nursing assistants very commonly do provide the same type of services that a personal care assistant provides. There is not really a substantial distinction.
>
> Q. Things that are invasive are typically not a PCA function; is that accurate?
>
> A. That's accurate. My understanding is that those are also not typically CNA functions.
>
> Q. Beyond the fecal extraction issue, what other issues or CNA functions, as far as you perceive them to be, as far as his wife's activities are concerned?
>
> A. All of the activities that are described as being necessary for a PCA are activities that are typically performed by CNAs.
>
> Q. Is that management of medication?
>
> A. Yes. So a CNA operating in another institution would typically be tasked with managing medications, giving medications to patients, cleaning patients up, helping them toilet. Those are the very same activities that a PCA does.
>
> Q. Catheterization. Is that a CNA function or a PCA function?
>
> A. That's not typically a CNA function, but that's also something [Employee] can certainly do for himself. There's no reason why he can't cath himself. He has been trained to cath himself and was cathing himself successfully at Craig Hospital.
>
> Q. Ultimately, the board is going to be called upon to decide if 12 hours or eight hours is appropriate here. And is it accurate to say that you have an opinion as to eight hours, but Dr. Reynolds has an [opinion of] 12 hours? Are both of those potentially reasonable conclusions?
>
> A. Yes, I would agree with that. I favor my own analysis of eight hours for the reasons I explained previously. For example, he is not going to be toileting himself for 12 hours a day. He is not going to be catheterizing himself for 12 hours a day. And as much as possible, he should be doing these things for himself with a PCA there to help him when things are not readily possible for him or where the environment interferes with normal abilities to do things.

(*Id*. at 46-49).

35) At a January 9, 2018 prehearing conference, the parties' agreed hearing issues would be the number of Employee's personal attendant hours and rate of pay. (Prehearing Conference Summary, January 9, 2018).

36) On January 29, 2018, Dr. Goranson testified, ". . . I have no way of what the amount – the appropriate amount [of PCA hours] would be, but I would go along with Dr. Green." (Goranson depo., January 29, 2018 at 24).

37) On March 1, 2018, Dr. Toal testified, he thinks PCA services are reasonable and necessary, but he does not have a medical opinion on the number of hours, (Toal depo., March 1, 2018 at 11), or the type of activities with which Employee might need help, (*id*. at 17). Rather, Dr. Toal thinks these considerations are more of a social services decision than a medical decision. (*Id*.).

38) On April 20, 2018, Employee claimed $55,522.50 in attorney fees and $7,082.28 in costs, for a total of $62,604.78. (Fee Affidavit, April 20, 2018).

39) At hearing, Dr. Reynolds testified he recommends 12 hours of care per day because Employee's treatment needs are complicated. His primary concerns are Employee's need for physical therapy to avoid "contraction," and his need for someone to be with him to intervene in case depression overwhelms him. Employee has difficulty with his memory, but Dr. Reynolds is not sure why. Employee's medications may be the cause of Employee's memory problems. Employee may also have a learning disability, which is a concern, and it would be "great" to get Employee back to work. Employee is on an active treatment regimen with multiple providers. Employee also has an extensive list of medications and, at times, may not know why he is taking them. Employee's wife is a CNA and she sometimes gives Employee injections. PCAs are usually not allowed to give injections or manage medications. Dr. Reynolds has been treating Employee for about two years and his specialty is family medicine. He thinks Employee would "definitely benefit" from 12 hours of care per day because he worked as a home health aide in college and has seen patients' needs from that perspective, as well as from the doctor's perspective. Employee asked him to write the letter recommending 12 hours per day. He did not calculate 12 hours per day by breaking down different PCA activities, rather his "only calculation" in recommending 12 hours was thinking someone should be available during Employee's waking hours because of Employee's depression. Dr. Reynolds does not agree with Dr. Green's report because independent medical evaluators are paid "a lot of money." He acknowledged he was unaware of Dr. Green's credentials. Dr. Reynolds has never been in

Employee's home and did not know if Employee had durable medical equipment at home to assist Employee in performing exercises. Dr. Reynolds has never prescribed CNA care for Employee. (Reynolds hearing testimony).

40) At hearing, Kim Lavallee testified she and Employee have been married for 37 years, and she has worked as a CNA since she was a teenager. She loves caring for people and went to college so she could become licensed in Alaska. Mrs. Lavallee works through ACCESS Alaska. She administers injections and manages medications. Employee knows what some of his pills look like but he does not know the schedule on which he is to take them. Employee's incontinence can happen at any time. Eventually, Mrs. Lavallee would like to work outside the home in either a nursing home or a hospital, but right now she is committed to helping Employee. She and Employee have been the victims of four home invasions, and during one of them, she even shot at someone. Mrs. Lavallee thinks the home invasions are happening because of Employee's opiates. Employee's mental health deterioration has been very noticeable and he gets confused. She provides transportation for Employee because Employee's medications cloud his judgment. Mrs. Lavallee learned her hours were being reduced from 12 hours per day to eight hours per day when ACCESS Alaska called her. Thereafter, she kept two sets of time sheets, one for her eight hours' work, and another for her actual work hours. Mrs. Lavallee estimates the difference between working an eight-hour day and a 12-hour day amounts to a 1,000 dollar per week difference in her pay. When she is working outside the home, her rate of pay is 18 dollars per hour, but when she is caring for Employee, her rate of pay is 16 dollars per hour. Employee has another attendant, Julio, who works 6 hours per week. Mrs. Lavallee thinks another attendant should be in the home because Employee relates differently to someone else than he does to her. (Lavallee hearing testimony).

41) At hearing, Julio Cardona testified he has worked as a PCA since he was 12-years old, when he began caring for his father. He works through ACCESS Alaska and has worked with Employee for two and one-half months. Mr. Cardona is certified in medication administration, transfers and hoists, though he cannot perform these activities while he is working as a PCA for ACCESS Alaska. He helps with cooking, cleaning, vacuuming, and reaching, but not with transfers and hoists. Employee suffers from debilitating depression where Employee does not want to get up, but since he has been working for Employee, Employee is more motivated to go

to the pool. Mr. Cardona further testified Employee really wants to start going back to the pool. (Cordona hearing testimony).

42) On May 3, 2018, Employee claimed an additional $3,680 in supplemental attorney fees, for a revised total of $66,284.78. (Fee Affidavit, May 3, 2018).

PRINCIPLES OF LAW

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

> **AS 23.30.010. Coverage**. Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an Employee if the disability . . . or the Employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the Employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . .

> **AS 23.30.095. 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. . . . 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*. . . . (Emphasis added).

In *Bockness v. Brown Jug, Inc.*, 980 P.2d 462 (Alaska 1999), the Alaska Supreme Court rejected an injured employee's theory that employers are obligated to pay for any and all medical treatment chosen by the employee, no matter how experimental, medically questionable, or expensive it might be. *Id*. at 466-67. Instead, it held the statute's provision requiring employers to provide only that medical care "which the nature of the injury and the process of recovery requires," indicates the board's proper function includes determining whether the care paid for by employers is reasonable and necessary. *Id*. at 466.

The Statute does not require continuing rehabilitative or palliative care be provided in every instance. Rather, it grants the board discretion to award such "indicated" care "as the process of recovery may require." *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664 (Alaska 1991).

> **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 . . . .
>
> (c) The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress.

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. *Id.* An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Burgess*

Construction Co. v. Smallwood, 623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc*., 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds by *Huit*). If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller v. ITT Services*, 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary

> conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . .
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in-fact, is required for the board to 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." *Id*. at 152. 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.

> Although the Supreme Court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (citation omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (citation omitted). Subsection (b) may apply to fee awards in controverted claims (citation omitted), in cases which the employer does not controvert but otherwise resists (citation omitted), and in other circumstances (citation omitted).

Uresco Construction Materials, Inc. v. Porteleki, AWCAC Decision No. 09-0179 (May 11, 2011).

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), the Alaska Supreme Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the claim's merits, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, employer's resistance, and the benefits resulting from the services obtained, are considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975. Since a claimant is entitled to full reasonable attorney fees for services on which the claimant prevails, it is reasonable to award one-half the total attorney fees and costs where the claims on which the claimant did not prevail were worth as much money as those on which he did prevail. *Bouse v. Fireman's Fund Ins., Co.*, 932 P.2d 222; 242 (Alaska 1997).

> **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. . . .
>
> (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. . . .

An employer must begin paying benefits within 14 days after receiving knowledge of an employee's injury, and continue paying all benefits claimed, unless or until it formally controverts liability. *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska 1987). Section 155(e) gives employers a direct financial interest in making timely benefit payments. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). It has long been recognized §155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d

838 (Alaska 1973). An employee is also entitled to penalties on compensation due if compensation is not properly controverted by the employer. *Williams v. Abood,* 53 P.3d 134, 145 (Alaska 2002). If an employer neither controverts employee's right to compensation, nor pays compensation due, §155 imposes a penalty. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992).

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp,* 831 P.2d at 358. "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." But when nonpayment results from "bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *State of Alaska v. Ford,* AWCAC Decision No. 133, at 8 (April 9, 2010) (citations omitted). "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*, 831 P.2d at 358 (citation omitted). Evidence in Employer's possession "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id.* If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155. *Id*. at 359.

The Alaska Supreme Court has consistently instructed interest for the time-value of money must be awarded, as a matter of course. *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984).

ANALYSIS

1) Is Employee entitled to 12 PCA hours per day?

Employer does not dispute the compensability of Employee's need for medical treatment in general, and neither does it dispute its liability for personal care assistant (PCA) services in particular. Rather, the dispute is how many PCA hours per day are reasonable and necessary for the nature of Employee's injury? Employee contends his PCA hours should be increased from

eight hours per day to 12 hours per day, as recommended by his primary care physician. Employer relies on one of its medical evaluators, who opines eight hours of PCA services per day is appropriate for Employee's circumstances. This is a factual dispute involving Employee's continuing care to which the presumption of compensability applies. *Carter*.

Employee attaches the presumption with Dr. Reynolds' February 4, 2017 and October 30, 2017 letters, recommending 12 hours of PCA services per day. *Cheeks*. Employer rebuts the presumption with Dr. Green's August 15, 2017 report, concluding eight hours of PCA services per day was a "reasonable maximum." *Miller*. Employee must now prove, by a preponderance of the evidence, that 12 PCA hours per day is reasonable and necessary for the nature of his injury. *Koons*; *Bockness*.

As a preliminary matter, Employee's former primary care treating physician, Dr. Schuldt, initially recommended eight PCA hours per day on December 24, 2014, then 12 PCA hours per day on May 1, 2015, and finally eight PCA hours per day in December 2016, just prior to leaving Employee's treating medical practice. Because Dr. Schuldt's opinions are now stale and supplanted by those of Employee's current treating physician, Dr. Reynolds, and because Dr. Schuldt is no longer available to explain his opinions, they will be accorded little weight. AS 23.30.122. Similarly, neither are the opinions of Employer's medical evaluators, Drs. Toal and Goranson, very useful, since Dr. Toal thinks PCA considerations are more a social services decision than a medical decision, and Dr. Goranson defers to another Employer medical evaluator, Dr. Green's opinion.

Employers in Alaska are not required to provide all medical care an injured worker may desire, but rather only that care which the nature of the injury requires. *Bockness*; *Carter*. The substantive opinions expressed on PCA hours Employee should be provided are intentionally set forth verbatim in this decision's factual findings. Even a cursory glance at the opinions expressed show Dr. Green's opinion is far more thoughtful than Dr. Reynolds' cursory opinion, which is summarily set forth in each of his two letters. AS 23.30.122. For example, even though Dr. Green did not initially opine on a specific number of PCA hours in his June 2, 2015 report, he nevertheless "discussed at some length [Employee's] situation with regard to adaptive

equipment and PCA." Then, over the course of nearly an entire, single-spaced, type-written page of his report, Dr. Green details his interview with Employee, which covered such topics as adaptive medical equipment in the home, type of mattress, personal transportation, activities of daily living, including dressing, shopping, obtaining medications, meal preparation, fecal incontinence management as well as the design and layout of Employee's home.

When Dr. Green evaluated Employee a second time on July 5, 2016, he discussed additional considerations, such as Employee's personality and his motivation level to care for himself. He explained, "Some individuals prefer to endure considerable hardship or discomfort in order to be fully independent; others prefer to be dependent, thus avoiding some effort or discomfort." Dr. Green's common-sense acknowledgement of the affects differing personalities have on real-world outcomes is insightful here since it comports with peoples' ordinary, everyday, lay experiences, which have shown a correlation between peoples' motivation levels and results achieved in any number of life's endeavors. *Roger & Babler*. It is in this report that Dr. Green expressed his opinion on PCA services with which Employee disagrees. Dr. Green thought, "[I]t is common to provide a personal care attendant for four to eight hours per day. . . . [Employee] has previously done well with a personal care attendant scheduled for eight hours a day . . . . Eight hours per day is a reasonable maximum."

In his hearing brief, Employee writes, "It was and is absolutely unclear what the foundation for this generic 'normative opinion' might be, or the basis for the opinion that [Employee] 'did well' with eight hours of PCA services. Dr. Green's deposition provides little substantive guidance." Presumably, the "normative opinion" to which Employee refers, is Dr. Green's statement, "[I]t is *common* to provide a personal care attendant for four to eight hours per day." (Emphasis added). Contrary to Employee's contentions, it is clear, within the context of Dr. Green's deposition testimony, that the foundation for his statement in this regard is his 20 plus years' experience practicing medicine. Similarly, it is equally clear the basis for Dr. Green's statement Employee "did well" with eight hours of PCA services was the lengthy interview he conducted with Employee on June 2, 2015. Furthermore, and notwithstanding Employee's contention to the contrary, the testimony delivered at Dr. Green's deposition was indeed substantive. AS 23.30.122.

The primary bases for Employee's physician, Dr. Reynolds, recommending 12 PCA hours per day are set forth in his February 4, 2017 letter - to assist Employee with toileting, showering and eating. Later, in his October 30, 2017 letter, Dr. Reynolds slightly expanded his list of PCA activities to include body positioning and transporting Employee to appointments. However, Dr. Green's deposition testimony dispels most of the PCA activities cited by Dr. Reynolds. Dr. Green pointed out, "[Employee] can actually manage his own medication. He can toilet himself. . . . Cooking, transfers, repositioning, help with dressing, all of those are things that he can do." Then, when asked how we know Employee can do these things, Dr. Green succinctly and decisively answered, "Based on the Craig Hospital evaluation."

Moreover, much like his July 5, 2016 discussion of considerations such as Employee's personality and motivation, other portions of Dr. Green's deposition testimony display similar insightfulness. AS 23.30.122. He testified, "the optimal [number of PCA hours] is that amount of PCA hours it takes that improves his function and his ability to perform normal activities without fostering dependence or reducing the number of hours he was actually providing for himself." "Where a PCA becomes problematic is where it foster[s] dependence and prevents [Employee] from taking the initiative to perform as much as he can himself." Then, and notwithstanding Employee's contention to the contrary, Dr. Green does set forth the basis for his opinion during Employee's cross-examination where he testified, "It's not [based] on what [Employee] would desire or what would make his life easiest, but [on] *what would actually provide the best objective medical outcome for him*." (Emphasis added).

Dr. Green's opinion eight PCA hours per day is a "reasonable maximum" was brought into even sharper focus when he testified that PCAs are *not* typically provided for paraplegics. Rather, Dr. Green explained:

> PCAs are typically required for people who are quadriplegic, who have much more difficulty in managing even in a modified environment. With suitable modifications, automobile controls, suitable wheelchair equipment, suitable transfer equipment, suitable living arrangements, most paraplegics are able to care for themselves and don't need a PCA.

However, because of Employee's age and his substantial comorbidities, Dr. Green made an allowance for up to eight PCA hours per day.

In contrast to Dr. Green's deposition testimony, Dr. Reynolds' hearing testimony was unpersuasive. AS 23.30.122. Following Dr. Green's deposition testimony, which eliminated most the PCA activities upon which Dr. Reynolds' opinion was based, Dr. Reynolds then provided yet another basis for PCA services at hearing, where he testified his "only calculation" in recommending 12 PCA hours per day was his thought someone should be available during Employee's waking hours on account of Employee's depression. Dr. Reynolds' hearing testimony is plainly at odds with his February 4, 2017 and October 30, 2017 letters, where his opinion was expressly based on specific PCA activities, not Employee's mental health. AS 23.30.122.

Dr. Green's opinion is accorded far more weight than Dr. Reynolds' opinion, not only because it is considerably more thoughtful and insightful, as discussed above, but for other reasons, as well. His stated conclusion at deposition: "[The number of PCA hours are] not [based] on what [Employee] would desire or what would make his life easiest, but [on] what would actually provide the best objective medical outcome for him," mirrors the Court's rationale in *Bockness* limiting medical care to that which is reasonable and necessary for the nature of the injury. Moreover, Dr. Green's efforts to balance the goal of improving Employee's function without fostering an overdependence on PCA services further comports with "necessary and reasonable" requirement articulated in *Bockness*. Consequently, Employee has failed to carry his burden and is not entitled to 12 hours of PCA services per day. *Koons*.

As a concluding observation, during his deposition, Dr. Green pointed out Employee's ability to perform modified activities of daily living has not been evaluated by a therapist, specifically trained in spinal cord injuries, since his Craig Hospital evaluation. Dr. Green thought another evaluation might be useful in the event Employee perceives substantial difficulties with only having eight PCA hours per day. A more recent evaluation might also lead to a different conclusion than that reached in this decision.

2) Is Employee entitled to CNA services?

Employee contends his wife should be paid as a CNA, instead of a PCA. Even if Employee attaches the presumption with his wife's testimony that she provides CNA services, such as managing Employee's medications and administering injections, Employer rebuts the presumption with Dr. Green's numerous opinions in favor of PCA, not CNA, services. Employee is unable to carry his burden since no physicians in the record, not even his own, have recommended he be provided with a CNA, a point Dr. Reynolds clarified at hearing. Therefore, Employee is not entitled to CNA services. *Id*.

3) Is Employee entitled to penalty?

The law provides for penalty if benefits are not paid when due. AS 23.30.155(e). For the reasons set forth above, Employee is not entitled to penalty. *Id*.

4) Is Employee entitled to interest?

The law provides for interest to compensate the party entitled to payment for the time value of money. AS 23.30.155(p). For the reasons set forth above, Employee is not entitled to interest. *Id*.

5) Is Employee entitled to attorney fees and costs?

The law provides attorney fees and costs to compensate an injured worker who enlists the assistance of counsel in the successful prosecution of a claim. AS 23.30.145. For the reasons set forth above, Employee is not entitled to attorney fees and costs. *Id*.

CONCLUSIONS OF LAW

1) Employee is not entitled to 12 PCA hours per day.
2) Employee is not entitled to CNA services.
3) Employee is not entitled to penalty.
4) Employee is not entitled to interest.
5) Employee is not entitled to attorney fees and costs.

ORDER

Employee’s October 9, 2017 claim is denied.

Dated in Fairbanks, Alaska on August 2, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Sarah Lefebvre, Member

/s/
Jacob Howdeshell, Member

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 OVILA LAVALLEE, employee / claimant; v. BUCHER GLASS, INC., employer; COMMERCE AND INDUSTRY INSURANCE COMPANY, insurer / defendants; Case No. 201415155; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 2, 2018.

/s/
Ronald C. Heselton, Office Assistant II