ALASKA WORKERS' COMPENSATION BOARD

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

MARY MARPLE,	)	
	)	
Employee,	)	FINAL DECISION AND ORDER
Claimant,	)	
	)	AWCB Case No. 199628357
v.	)	
	)	AWCB Decision No. 18-0088
STATE OF ALASKA,	)	
	)	Filed with AWCB Anchorage, Alaska
Self-insured Employer,	)	on August 30, 2018
Defendant.	)	
	)	

Mary Marple's (Employee) November 29, 2017 claim was heard on July 31, 2018, in Anchorage, Alaska, a date selected on April 5, 2018. Non-attorney representative Barbara Williams appeared initially and represented Employee who also appeared initially, by telephone. Attorney David Rhodes appeared and represented the State of Alaska (Employer). After arguing for a hearing continuance, denied by oral order, Employee and her non-attorney representative terminated their hearing participation and the hearing proceeded in their absences. There were no witnesses. The record closed at the hearing's conclusion on July 31, 2018.

ISSUES

As a preliminary matter, Employee requested a hearing continuance. Her grounds included Williams' federal lawsuit against numerous parties alleging violations of the Americans with Disability Act (ADA) and the Health Insurance Portability and Accountability Act (HIPAA).

Employer objected to the continuance request. It contended Employee failed to show good cause for continuing the hearing. An oral order denied the continuance.

1) Was the oral order denying Employee's continuance request correct?

After the oral order denied Employee's continuance request, she terminated her telephonic participation at hearing and her non-attorney representative left the hearing room, stating they would no longer participate in the hearing.

Employer wanted the hearing to proceed in Employee's absence. The hearing proceeded in Employee's absence.

2) Was the decision to proceed with the hearing in Employee's absence correct?

Employee contends she is entitled to an additional permanent partial impairment (PPI) benefit award. She requests an associated order for an unspecified PPI rating.

Employer contends Employee is not entitled to additional PPI benefits. It requests an order denying this claim.

3) Is Employee entitled to additional PPI benefits?

Employee contends she is entitled to additional temporary total disability (TTD) benefits. She requests an associated TTD award for unspecified disability periods.

Employer contends Employee is not entitled to any additional TTD benefits. It requests an order denying this claim.

4) Is Employee entitled to additional TTD benefits?

Employee contends she remains unable to work as a result of her work injury. She requests a permanent total disability (PTD) award beginning on an unspecified date.

Employer contends Employee is not permanently totally disabled, or if she is, her work injury did not substantially cause her disability. It seeks an order denying Employee's PTD claim.

5) Is Employee entitled to PTD benefits?

Employee contends she is entitled to a higher weekly compensation rate. She seeks an unspecified compensation rate adjustment.

Employer contends Employee was paid at the correct rate. It seeks an order denying her compensation rate adjustment claim.

6) Is Employee entitled to a compensation rate adjustment?

Employee contends she is entitled to past and future medical treatment and related transportation costs. She seeks an award of unspecified medical benefits and transportation.

Employer contends Employee is not entitled to additional medical care or related transportation costs for her work injury. It seeks an order denying her medical benefits claim.

7) Is Employee entitled to additional medical benefits or transportation costs?

Employee contends Employer unfairly or frivolously denied her claim. She seeks an order finding an unfair or frivolous controversion.

Employer contends it did not unfairly or frivolously deny Employee's right to benefits. It seeks an order rejecting her request for an associated finding.

8) Did Employer unfairly or frivolously controvert Employee's claim?

Employee contends she is entitled to interest, litigation costs and unspecified penalties. She seeks an associated order.

Employer contends Employee is entitled to no additional benefits. Therefore, it contends she is not entitled to interest or litigation costs. Employer contends there is no basis to award penalties.

9) Is Employee entitled to interest, litigation costs or penalties?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On August 15, 1996, Employee said she was walking down the steps at work and tripped over a strap from her bag and fell down the remaining steps. She claimed to have reinjured her left arm, having had recent left shoulder surgery. Employee reported no spinal injury. (Report of Occupational Injury or Illness; Nancy Reed Memorandum, August 15, 1996).

2) On October 16, 1996, Employer gave Employee an "Unsatisfactory" performance evaluation, with which she disagreed strongly. (State of Alaska Performance Evaluation Report, signed by rater, September 30, 1996; signed by Employee, October 23, 1996; signed by Deputy Director, December 13, 1996).

3) On December 14, 1996, Employee slipped and fell on ice in her work parking lot, landing on her "back side." Employee complained of back and head pain. She worked for the Alaska State Troopers as a Radio Dispatcher II at the time she fell. An ambulance took Employee to the hospital. (Report of Occupational Injury or Illness, December 14, 1996).

4) A witness described Employee's fall as follows:

> We both stepped off the curb at the same time onto the main roadway. It was at that moment when she slipped on the ice and fell onto her back. To give you an idea of how dramatic her fall was, her feet shot out in front of her into the air almost as high as the lower part of my chest. Mary fell hard onto the roadway and had the wind knocked out of her. . . . (John W. Wheeler statement, undated).

5) X-rays taken on December 17, 1996, showed anterior spurring at L3-4 and at L5-S1, and disc space narrowing at L5-S1. Employee's thoracic spine had mild spurring at each disc margin. (X-ray reports, December 17, 1996).

6) On December 17, 1996, William Reinbold, M.D., removed Employee from work for three weeks as a result of her work injury. He diagnosed a cervical sprain. (Reinbold report, December 17, 1996).

7) On December 24, 1996, a cervical magnetic resonance imaging (MRI) disclosed mild C6-7 disc bulging without neural impingement, and degenerative disc disease at C4-5 and C5-6. (MRI report, December 24, 1996).

8) On January 15, 1997, Edward Voke, M.D., recommended physical therapy three times a week and prescribed Anexsia for pain. (Voke report, January 15, 1997).

9) On February 3, 1997, Employee went to the emergency room stating she had slipped and fallen on December 14, 1996. She had intermittent back symptoms and had previously been seen in the emergency room where she received medications. "Screams were heard all over the emergency room because of the absolute pain and agony" because attendants tried to start an IV. The emergency room physician noted he had seen her previously for this incident and stated:

> After a rather unsuccessful emergency room visit, the patient did not seem to respond well to questioning, etc. It was unclear exactly what was happening with her. Patient was subsequently discharged home. Tonight she just simply could not tolerate the pain. She has been crying all day because of the pain and she is frustrated, anxious and aggravated because it is not getting better. (Alaska Regional Hospital Emergency Room report, February 3, 1997).

10) On February 4, 1997, Dr. Voke referred Employee to Michael James, M.D., for evaluation. (Voke report, February 4, 1997).

11) On February 11, 1997, Employee reported that during her slip and fall, her feet went out from under her and she fell, landing flat on her back and striking her head. She denied loss of consciousness but had immediate low back pain referred to the left lower extremity as well as neck pain and a headache. Within 10 days, her neck pain gradually improved. However, back pain continued. Physical therapy did not improve Employee's situation. Her MRI revealed no herniated disc and her lumbar spine x-rays were normal. Dr. James recommended a sacroiliac injection and a differential block or facet block. (James report, February 11, 1997).

12) On March 4, 1997, Dr. James noted Employee had multiple physicians providing multiple narcotics. Dr. James advised Employee that if he were to continue caring for her he would be the only doctor prescribing medications. (James report, March 4, 1997).

13) On March 26, 1997, Employee drove her own vehicle to the emergency room where she reported increased low back and leg pain. She was out of medication and had not seen Dr. James recently for back problems. Straight leg raising was negative. Ken Zafren, M.D., diagnosed exacerbation of low back pain and gave Employee some mild pain killers to take home. (Emergency Room Report, March 26, 1997).

14) On March 17, 1997, Employee had not been taking Neurontin as recommended and said she had lost the prescription. Dr. James removed her from work for an additional three weeks. (James report, March 17, 1997).

15) On March 31, 1997, Employee reported no relief from Neurontin and admitted she had exceeded her Anexsia prescription. Dr. James told her if "she persists in this behavior that we will be unable to refill her medications." (James report, March 31, 1997).

16) On April 1, 1997, Dr. James reviewed Employee's job description with nurse case manager Elisa Conley. (James report, April 1, 1997).

17) On April 10, 1997, Dr. James opined Employee was capable of light duty work according to a recent physical capacities evaluation. Northern Rehabilitation Services (NRS) had reviewed her job and opined she was capable of performing her normal work. (James report, April 10, 1997).

18) On April 17, 1997, Employee, her adjuster and her NRS nurse signed a document setting forth Employee's return to work for the State of Alaska in a gradually increasing schedule. (Letter of Understanding, April 17, 1997).

19) On May 14, 1997, Employee reported pain exacerbation throughout the prior evening. She said her medications were accidentally removed by a friend the day prior. Dr. James provided a prescription and advised Employee to return in one month. (James report, May 14, 1997).

20) On May 27, 1997, Employee said that over the weekend she was moving clothing during a residence change and felt exacerbated pain. This was "severely incapacitating." Employee was "quite tearful" throughout her examination. Dr. James returned Employee to work the next day for six hours, increasing to seven and one-half hours the following day. He prescribed Flexeril and Ansaid in addition to her other medications. (James report, May 27, 1997).

21) On June 3, 1997, Employee reported she had fallen down a hill on May 29, 1997. Consequently, she had "severe back pain," which persisted over the weekend without relief. Employee increased her Lorcet as a result. After examining her, Dr. James told Employee she was better than she was the last time he had seen her and she should resume work on a full schedule as anticipated. He refilled her medication, noting her "pain problems are inconsistent with the objective findings." Dr. James recommended Employee see Mike Rose, PhD, for evaluation and clinical pain counseling. (James report, June 3, 1997).

22) On June 9, 1997, Employer denied Employee's right to disability and medical treatment related to an off-duty incident on May 29, 1997, which caused her symptoms to flare up. (Controversion Notice, June 6, 1997).

23) On July 7, 1997, Dr. Rose assessed Employee with a pain disorder associated with both physiological factors and a general medical condition. She tends to somatically convert stress into physical symptoms, so her symptoms are magnified. This does not mean her physical complaints are primarily psychogenic. She may benefit, in Dr. Rose's opinion, from cognitive behavioral strategies to manage her pain. (Rose report, July 7, 1997).

24) On July 10, 1997, Employee reported doing "fairly well." She had only one day of time loss since her prior visit. Employee reported continued back pain exacerbated by prolonged sitting or standing. She was working full time and her lumbar spine motion had improved. Dr. James continued her medication. (James report, July 10, 1997).

25) On October 7, 1997, NRS reported Employee had made arrangements with Employer for a six month leave of absence. (NRS report, October 7, 1997).

26) On December 22, 1997, Dr. James said Employee was medically stable for the December 14, 1996 injury and he was uncertain if she had any ratable PPI. (James answers to questionnaire, December 22, 1997).

27) On January 12, 1998, Employee's supervisor wrote her and confirmed Employee had been scheduled to return to work on January 9, 1998. The supervisor also reviewed Employer's recent interactions with Employee as follows: On December 20, 1997, Employee phoned the shift supervisor informed him she would not be returning to her job as a Radio Dispatcher. On December 22, 1997, Employee's supervisor called her in Kentucky and Employee verbally resigned her position as a Radio Dispatcher. Employee said she would provide a written letter of resignation. On December 23, 1997, the supervisor called Employee again to advise she had still not received Employee's resignation letter. Employee said she wanted to withdraw her accounts from the Division of Retirement Benefits. The supervisor advised Employee this could not occur unless and until Employer received her written resignation and she separated from the Department of Public Safety. On January 9, 1998, Employee's supervisor received a recorded message from her again stating she would send the written resignation letter by facsimile and by hard-copy. The state never received Employee's written resignation. Given her verbal resignation and her failure to report to work on January 9, 1998, Employee was administratively separated from state employment effective January 9, 1998. (Letter, January 12, 1998).

28) On January 13, 1998, NRS reported that Employee had contacted her supervisor with the Alaska State Troopers and stated she had resigned her position and was currently living with her

aunt in Kentucky and planning to stay there for "a long time." The supervisor also advised NRS that Employee had requested her money from state retirement and was not planning to return to Alaska. (NRS report, January 13, 1998).

29) On February 11, 1998, notwithstanding NRS' report, above, Employee told Dr. James she was getting ready to go to school and was continuing a modest exercise program. She continued to take prescription medication, and pain impaired her back mobility in all planes. Straight leg raising was negative. Dr. James continued her medications. (James report, February 11, 1998).

30) By August 6, 1998, Employee was doing surprisingly well and was working as a grocery store and gas station clerk. Her occasional back pain waxed and waned. Dr. James refilled her medications and suggested a swimming program. (James report, August 6, 1998).

31) By November 2, 1998, Employee had moved to "Alyeska" where she worked at the ski rental shop and was doing "quite well." She reported back pain and spasm, which came and went. Her spine mobility was improved and Employee had less pain behavior. Dr. James continued her medication but did not offer a diagnosis. (James report, November 2, 1998).

32) On March 25, 1999, Employee reported being stable since her last visit and using her medication. Dr. James said Employee's back mobility was "surprisingly improved over previous." He recommended Employee continue her medication and return in four months. (James report, March 25, 1999).

33) On November 4, 1999, Dr. James examined Employee for a six-month follow-up and noted she had been doing well except for a recent flare up. She had reduced mobility in all planes and tenderness in the lumbosacral junction, but negative straight leg raising. Dr. James prescribed medication but made no diagnosis. (James report, November 4, 1999).

34) On March 2, 2000, Employee was still experiencing low back pain, which "waxes and wanes" and is worse in the winter. She had negative straight leg raising but reduced range of motion in all planes. Dr. James charted no diagnosis. (James report, March 2, 2000).

35) On July 31, 2000, Dr. James again noted Employee had recurrence of her back pain, which "waxes and wanes." She demonstrated impaired mobility in all planes with negative straight leg raising. He diagnosed chronic low back pain. (James report, July 31, 2000).

36) On October 4, 2000, Dr. James found Employee's pain complaints impaired her range of motion in all planes. He diagnosed chronic low back pain with weakness in the right quadriceps

"as a result of her internal derangement of the right knee, which was unrelated to industrial injury." She was considering going to Oregon for the winter. (James report, October 4, 2000).

37) March 1, 2001 x-rays revealed degenerative changes to the lower lumbar spine. A physician gave Employee Demerol, Phenergan, OxyContin and Anaprox. (Heart of Florida Regional Medical Center, March 1, 2001).

38) On July 9, 2001, Employee had been traveling around the United States and had been without narcotics for two months. In the prior two weeks she reported having recurrent, knot-like sensations in her low back with pain referred to her buttocks and impaired back mobility in all planes. Dr. James diagnosed probable exacerbation of facet syndrome and some degenerative changes in her lumbar spine with no radiculopathy. He suggested facet blocks if her symptoms did not improve within two weeks, and prescribed Anexsia. (James report, July 9, 2001).

39) On August 28, 2001, Employee had variable headaches and secondary stress from needle phobia. Her back mobility had improved, she had normal gait and station and normal strength in both legs. Dr. James prescribed Lorcet. Employee was planning to move to Fairbanks to study at University of Alaska Fairbanks. (James report, August 28, 2001).

40) On August 30, 2001, Employee underwent bilateral L4-5 and S-1 medial branch blocks and bilateral L4-5 facet blocks. (James note, August 30, 2001).

41) On October 21, 2001, Dr. James wrote that Employee had treated with him for several years. He diagnosed chronic low back pain with underlying degenerative disc disease and lumbar facet syndrome, all of which he said were consequences of Employee's "August 10, 1996" industrial injury. Dr. James did not think Employee had malingering or secondary gain issues but she was medically stable. He continued to give her 10 mg Lorcet. (James letter, October 21, 2001).

42) On October 20, 2002, Employee had a brain computer tomography (CT) in response to her complaints of upper extremity sensations. The CT scan showed no evidence of intracranial hemorrhage. (CT report, October 20, 2002).

43) On October 22, 2002, a brain MRI was unremarkable aside from a minor, focal abnormality. (MRI report, October 22, 2002).

44) On January 9, 2003, Dr. James did a PPI rating for Employee's low back work injury. He opined Employee's degenerative disc disease in the cervical spine was unrelated to her industrial

injury. He suggested chronic pain management with Class II narcotics, and provided an eight percent AMA Guide, whole-person lumbar PPI rating. (James report, January 9, 2003).

45) Well over two years later on May 19, 2005, Employee's x-rays revealed severe disc space narrowing at L5, intense sclerosis in the adjacent portion of the vertebral bodies and small anterior osteophytes. The radiologist found moderately severe degenerative changes particularly with degenerative joint disease and facet joint disease at L5-S1. (X-ray report, May 19, 2005).

46) In June and August 2005, Dr. James performed bilateral L4, L5-S1 medial branch blocks and right L5-S1 and left L5-S1 facet blocks. (James reports, June 29, 2005; August 24, 2005).

47) On August 24, 2005, Employee reported no improvement in her symptoms following Dr. James' injections. (Shawna Wilson, ANP report, August 24, 2005).

48) On September 20, 2005, Employee reported definite improvement in her low back following another injection. (Wilson report, September 20, 2005).

49) In December 2006, Employee's symptoms increased again followed by additional injections from Dr. James with significant improvement. (Wilson; James reports, December 6, 2006, December 11, 2006, February 7, 2007).

50) On November 16, 2007, Employee, with acute low back pain, visited an emergency room in Virginia. (Central Health Lynchburg General Hospital report, November 16, 2007).

51) On March 29, 2008, Employee, asking for stronger pain medication, visited an emergency room in New Jersey. (Salem Memorial Hospital report, March 29, 2008).

52) On July 10, 2008, a New Jersey hospital physician diagnosed Employee with chronic low back pain secondary to facet syndrome bilaterally L4-S1. Her right buttock pain was felt likely secondary to sacroiliac joint dysfunction. The physician recommended home exercise, x-rays and a referral to anesthesia for possible L4 through S1 bilateral facet joint injections. Employee continued taking Lorcet. She began treating with Steven Cohen, M.D. (Cooper University Hospital report, July 10, 2008).

53) Employee continued treating with Dr. Cohen. (Cohen, 2008 through 2009 reports).

54) On November 5, 2009, an MRI disclosed a large, right-sided synovial cyst at Employee's L4-5 level. There is no causation opinion. (MRI report, November 5, 2009).

55) On November 25, 2009, Employee underwent surgery for the synovial cyst. The surgery included an L4-5 laminectomy to expose the cyst, and a posterior lateral fusion with pedicle

screw fixation. Surgeon Steven Yocum, D.O., gave no causation opinion for this surgery. (Operative Report, November 25, 2009).

56) On December 21, 2009, Dr. Yocum wrote to Employee's workers' compensation claim adjuster in Anchorage. A physician had referred Employee to Dr. Yocum because she had increasing and worsening pain, which happened "fairly suddenly." Employee complained of excruciating pain and Dr. Yocum found a very large synovial cyst at L4-5 causing spinal canal compromise. Dr. Yocum opined the cyst resulted from long-term "facet injury and pain." He stated Employee's facet disease was "understood" to result from her work injury and the synovial cyst progressed from this disease. (Yocum letter, December 21, 2009).

57) Employee continued to follow up with Drs. Yocum and Cohen through 2010. (Yocum and Cohen records, 2010).

58) On July 8, 2010, Dr. Cohen noted Dr. Yocum felt Employee could return to work from a surgical standpoint. Dr. Cohen opined Employee had limitations that may prevent her from going back to work in her current position on a full-time basis. (Cohen report, July 8, 2010).

59) On September 17, 2010, Dr. Cohen renewed Employee's medications and released her to return to full work duty beginning September 20, 2010. He suggested Employee follow up with another physician to address her depression. (Cohen report, September 17, 2010).

60) On November 8, 2010, Dr. Yocum found Employee not doing well and, in fact, feeling worse than she was prior to her most recent surgery. Employee planned on returning to work in about two weeks. (Yocum report, November 8, 2010).

61) On March 29, 2012, a repeat MRI showed retrolisthesis of L-2 on L-3 and L-3 on L-4 with bulging discs and relatively minimal stenosis secondary to degenerative facet changes at these levels. Her prior fusion was solid with no complications. (MRI report, March 29, 2012).

62) On February 5, 2014, Andrea Stutesman, M.D., saw Employee for an employer's medical evaluation (EME). She diagnosed a slip and fall at work on December 14, 1996, causing a lumbar strain. Relevant, non-work-related diagnoses included 1) L4-5 and L5-S1 degenerative joint disease; 2) L3-4 and L4-5 facet disease noted in early 1997; 3) lumbar spondylosis; 4) lumbar synovial cyst; 5) L4-5 laminectomy and synovial cyst excision and related posterior lateral fusion with pedicle screw fixation; and all other noted diagnoses and medical conditions and complaints. (Stutesman report, February 5, 2014).

63) On August 12, 2014, EME William Andrews, M.D., diagnosed Employee as status post-lumbar laminectomy for acute cord compression from a degenerative cyst in the L4-5 disc, with significant weakness in the right lower extremity. He recommended a self-paced exercise program. He was uncertain an L3-4 decompression would help. Dr. Williams opined Employee's condition was not medically stable as she may need surgery at the level above the previous fusion. He did not think she was employable. (Williams report, February 12, 2014).

64) On August 12, 2014, Ronna Wright, M.D., a family practice physician, said when Employee first presented to her office, she had "no reason to doubt" Employee was injured at work. Employee presented as a follow up on a work injury. Employee always presented as pleasant with severe pain complaints. Dr. Wright was unable to reduce Employee's medication and said, "She falls in the category of difficult workmen's compensation patients and that nothing seems to make her better." On one occasion, Employee's sister confirmed to Dr. Wright "how bad the patient's pain was," but on the other hand, Dr. Wright has been told "when the patient has been seen in town, she seems more comfortable." It is a small town. Dr. Wright does not relate Employee's pain to her work injury but noted she was active before her fall but had "many issues following." She implies disagreement with Dr. Stutesman's opinion. (Wright report, August 12, 2014).

65) On October 21, 2014, Williams requested a copy of Employee's file. (State of Alaska Division Of Workers' Compensation Request for Release of Information form, October 21, 2014).

66) On November 14, 2014, the division mailed a compact disk (CD) to Williams containing Employee's entire, digitized agency file. This CD included the eyewitness statement from John W. Wheeler, who observed the slip and fall. (ICERS, Dani Byers, Comment, Event Details, November 14, 2014).

67) On January 15, 2015, Employer began litigation in this case by filing a petition for a second independent medical evaluation (SIME). (Petition, January 15, 2015).

68) On January 16, 2015, Dr. Stutesman reevaluated Employee and conferred with Dr. Andrews to answer specific questions. In reviewing Employee's "Past Injuries," Dr. Stutesman charted Employee had a "right knee injury in 1999 from playing softball." She also had a right peroneal rupture but refused to provide the date for that incident. Dr. Stutesman noted there was no evidence of bruising found in any early post-injury records, which one would

expect from a dramatic fall on the ice. Employee's January 6, 1997 MRI showed no evidence of a degenerative cyst. Dr. Stutesman opined the December 14, 1996 work injury only temporarily aggravated Employee's underlying lumbar degenerative changes but did not accelerate the condition or any associated symptoms. She concluded the work injury is not a substantial factor in Employee's medical treatment provided after August 6, 1998, and is unrelated to her present condition. The alternative cause for Employee's need for medical treatment or any disability is her preexisting degenerative lumbar disease. (Stutesman report, January 21, 2015).

69) On January 21, 2015, Dr. Andrews also reevaluated Employee's case and consulted with Dr. Stutesman. Dr. Andrews also noted Employee was active enough following her 1996 work injury to play softball and tear up her knee joint. Dr. Andrews opined this fact would make it difficult to link the degenerative cyst, which formed 13 years after her work injury, to the specific 1996 slip and fall on the ice at work. Employee had degenerative changes in her lumbar spine when she slipped and fell and, he agreed, there is no question the work injury would have aggravated this. However, Dr. Andrews opined that if the work injury led directly to cyst formation and related paraparesis Employee would have had persistent symptoms reported to her physicians and would not have been capable of activity leading to an ACL tear playing softball. In his view, Employee's work-related symptoms resolved by August 6, 1998, when Dr. James noted she only had occasional back pain and stabbing sensations and could wean herself from her medications. He noted Employee would have ongoing difficulty walking, standing or exerting herself physically because she has a foot drop. (Andrews report, January 21, 2015).

70) On April 29, 2015, Employee testified as follows: She has "no support system here whatsoever" near her home in Appomattox, Virginia. Employee has a sister but has had no contact with her family, "whatsoever." Following her work injury and separation from her state employment, Employee worked as a grocery store and gas station attendant in Anchor Point, Alaska, including occasionally pumping gas, operating the cash register and sweeping the store, without physical difficulty. She also worked post-injury at Alyeska Ski Resort renting skis, poles and boots to customers and would hand ski equipment to customers over the counter after properly setting the bindings, again all without physical difficulty. While working post-injury with Johnson Matthey in New Jersey for about two and one-half years from 2007 into 2009, Employee walked through the woods checking water from outfalls into rivers. She climbed ladders and got air samples and performed "just all kinds of physical-type work," without

difficulty. She worked for this company until she woke up "paralyzed" and was unable to continue working, in November 2009. (Telephonic Deposition of Mary Marple, April 29, 2015).

71) Employee resigned from working for the State of Alaska in December 1997 rather then return to work in January 1998 as previously planned. Employee resigned because of personal issues with specific co-workers. But for the personal issues, Employee felt she could have physically returned to work. (*Id.*).

72) On July 31, 2015, Employer denied Employee's right to all benefits for this injury based on EME Drs. Andrews and Stutesman's reports, who opined her work injury was no longer a substantial factor in her medical treatment or disability. They further provided an alternative cause for her symptoms, disability and need for treatment and stated Employee was medically stable without a work-related restriction or PPI rating. (Controversion Notice, July 30, 2015).

73) On January 18, 2016, Gregory Helm, M.D., performed a surgical fusion revision of Employee's prior L4-5 arthrodesis and performed an L3-5 posterior lateral arthrodesis and an L3 laminectomy. (Helm report, January 18, 2016).

74) On May 17, 2017, James Schwartz, M.D., saw Employee for an SIME. Non-attorney representative Barbara Williams accompanied Employee during the examination. Employee had severe hip pain, swelling in her lower extremities, right leg foot-drop and right buttock pain. She took Oxycodone 15 mg five times a day. Employee provided a generally accurate summary of her work injury and her subsequent treatment. She said she left her job with the Alaska State Troopers and, after working as a gas station cashier, returned to school in 2001 and obtained a BS in Environmental Sciences. She moved to New Jersey and got a job in 2008. After taking a history and examining Employee, Dr. Schwartz diagnosed: 1) lumbar degenerative disc disease preexisting her December 14, 1996 work injury; 2) a lumbar contusion or strain related to the December 14, 1996 injury; and 3) aggressive lumbar degenerative disc disease, degenerative facet joint disease and progression of facet arthropathy culminating in 2009 with a large synovial cyst and right-sided L5 radiculopathy and subsequent instability in the above level following decompression and fusion, the latter unrelated to the December 14, 1996 work injury with Employer. (SIME Schwartz report, May 17, 2017).

75) Dr. Schwartz agreed with Drs. Andrews' and Stutesman's conclusions that Employee had preexisting lumbar discogenic and facet joint disease. In his opinion, the December 14, 1996 work injury produced no structural worsening of these diseases. The injury was a substantial

factor producing disability and need for treatment on a temporary basis, which resolved by 1998. Dr. Schwartz emphasized the fact that Employee was able to play softball following her release after Dr. James' medical stability opinion. In his view, the work injury ceased being a substantial factor causing Employee's disability, and any work-related need for treatment ended, when Dr. James said she was medically stable about two years post-injury. An alternate cause of Employee's continuing disability or need for medical treatment, which eliminates the work injury as a factor, was the underlying degenerative disc and facet diseases. Her chronic debilitating pain is not related to the December 14, 1996 injury, in his opinion. While appropriate, the treatment Employee received after Dr. James found Employee medically stable in 1998 is not related to the December 14, 1996 work injury. (*Id.*).

76) Dr. Schwartz did not agree Employee is permanently and totally disabled, but he agrees with Dr. Stutesman's list of non-work-related diagnoses. Dr. Schwartz opined there was no PPI rating for the 1996 work injury. (*Id.*).

77) Dr. Schwartz's SIME report does not record any difficulties or complaints from Employee or Williams about proceeding with the examination. (*Id.*).

78) On January 16, 2018, SIME George Chovanes, M.D., evaluated Employee's case based upon her comprehensive SIME medical records. He did not examine her. Dr. Chovanes opined Employee's work injury was a lumbar strain, which resolved by August 6, 1998, when Dr. James described her as doing "surprisingly well" with occasional back pain while working as a grocery store clerk. Employee's medical treatment from her December 14, 1996 injury to August 6, 1998 was reasonable and related to the lumbar sprain, in his view. Dr. Chovanes found Employee did not see Dr. James for approximately 15 months for low back pain and tore her right ACL in 1999 while playing softball, indicating her recovery and activity level. Dr. Chovanes also relied on Employee's deposition testimony that she worked in a ski rental lodge handing ski equipment to customers across the counter, and for an environmental company, walking through the woods, getting water samples, climbing ladders, getting air samples and "just all kinds of physical type work" for about two years. He further found Employee testified that if she had no personal issues with co-workers, Employee felt she could return to her work with the state troopers in 1998 following her work injury. (SIME Chovanes report, January 10, 2018).

79) Dr. Chovanes agreed Employee had preexisting degenerative disc disease and facet issues at L3-4 and at L4-5. Since these issues take time to develop, this proves she had preexisting conditions. The December 14, 1996 work injury temporarily aggravated her asymptomatic degenerative lumbar disease, which subsequently returned to baseline within two years in his opinion. Dr. Chovanes ruled out the December 14, 1996 work injury as a continuing cause of disability or need for treatment. He opined her present symptoms relate to the development of a lumbar synovial cyst diagnosed 13 years after her work injury, unrelated to the injury. He notes Employee did not have a good response to her initial or subsequent surgery to correct the cyst. In his view, Employee needs no further medical care or treatment for her work injury. (*Id.*).

80) Dr. Chovanes opined Employee likely has some working limitations and restrictions but these are not caused by her December 14, 1996 work injury. While Employee may need care for her depression, in his opinion the depression is not related to her work injury with Employer. In short, he concludes she has recovered from the work injury. (*Id.*).

81) Employee's December 14, 1996 work injury temporarily aggravated her preexisting degenerative disc and facet diseases. The injury did not accelerate or combine with Employee's preexisting spinal conditions to cause disability or the need for medical treatment after two years post-injury. (Experience, judgment, and inferences drawn from all of the above).

82) Employer paid Employee TTD benefits from December 15, 1996 through December 29, 1996; from January 15, 1997 through April 16, 1997; and for one day on May 13, 1997. Employee's weekly compensation rate is $397.83. It also paid her temporary partial disability benefits at varying rates from April 17, 1997 through May 12, 1997. On February 12, 2003, Employer paid Employee a lump-sum PPI benefit totaling $10,800. (Compensation Report, February 12, 2003).

83) On November 29, 2017, Employee filed her first and only claim in this case, seeking unspecified TTD, PTD, PPI, a rate adjustment, a finding of an unfair or frivolous controversion, attorney fees and costs, transportation costs, medical costs, an unspecified penalty for late compensation, and interest. (Claim for Workers' Compensation Benefits, November 28, 2017).

84) On April 5, 2018, Employee clarified her claim and withdrew her request for attorney fees but retained her claim for litigation costs. Furthermore:

> The parties stipulated to an oral hearing to be held on 07/31/2018, for approximately 8.5 hours on which date they will be on a trailing calendar. (Prehearing Conference Summary, April 5, 2018).

85) The parties also stipulated to filing their evidence, witness lists and hearing briefs pursuant to normal filing deadlines set forth in the administrative regulations. (*Id*.).

86) Employee and Williams filed no evidence, witness list or brief for the July 31, 2018 merits hearing. (Agency file).

87) On July 2, 2018, the division served notice of the July 31, 2018 hearing on the parties at their proper mailing addresses. (Hearing Notice, July 2, 2018).

88) On July 23, 2018, Williams made her second request for a copy of Employee's agency file. However, Williams incorrectly called this her "3rd request for this information." (State of Alaska Division of Workers' Compensation Request for Release of Information form, July 23, 2018).

89) On July 26, 2018, division employee Danielle Kalmakoff sent an invoice to Williams and correctly advised her that Williams' July 23, 2018 request for a copy of Employee's file "would be your 2nd Copy for this file." The invoice asked Williams to remit payment by check or money order for either paper copies or a CD at Williams' option. (Letter, July 26, 2018).

90) Division policy provides one free file copy to an injured worker. Injured workers are charged a fee for subsequent copies. (Official notice).

91) To date, Williams has not paid the July 26, 2018 invoice and, consequently, the division has not provided a second copy of Employee's electronic file. (Agency record).

92) On July 27, 2018, at 4:18 PM, Williams as plaintiff filed a lawsuit in US District Court alleging ADA and HIPAA violations, against the State of Alaska, the Workers' Compensation Division and numerous other named parties. (Notice of Electronic Filing, July 27, 2018).

93) On July 30, 2018, Employee petitioned for a hearing continuance, "until such time as the Federal Court Rules on the ADA accommodation and HIPPA violations are heard and decided." Attached to Employee's request was a notice showing Williams filed a federal lawsuit. An attached document showed "Barbara Williams" as the sole plaintiff and federal court jurisdiction based on "Diversity." (Petition, July 30, 2018, and attachments).

94) On July 31, 2018 at hearing, Williams filed an affidavit supporting her continuance petition. The affidavit asserted the hearing should be continued until the federal court hears and rules on Employee's ADA issues. Williams asserted the board has a "corrupt record that has not

been corrected." She found fault with the SIME records and accused the division of "corruption of government records." Williams contended the board may not rely on "incorrect or incomplete reports." She further asserted no party to the case or the board has had a valid medical record release from her client since 2016, resulting in Employee's records being "mishandled." Williams further contended the board and Employer have disregarded requests for reasonable accommodations. Her affidavit accused Employer and the board of engaging in "deceptive practices" regarding discovery, subpoenas and "other information sequestered in the AWCB files." Williams contended Employer and the division have denied necessary access to Employee's file and irreparable harm will occur if a hearing is held before the federal court rules on her pending complaint. (Affidavit in Support of Continuance, July 31, 2018).

95) At hearing, Employee initially stated she objected to the designated chair's participation in the hearing solely because he had written a letter to Williams previously stating he would no longer be presiding over Employee's case because he had assumed duties as Acting Chief of Adjudications. Upon further questioning, Employee disclosed she was not seeking the designated chair's recusal or disqualification. As grounds for continuance, Williams said she had filed a lawsuit in US District Court but had not received a stay or an injunction preventing the board from holding its hearing. Employer objected to the continuance request because Employee failed to offer "good cause" for the continuance. Employee countered that she requested discovery from the board, which she was waiting for but had not yet received. Employee also contended Employer did not give requested discovery, particularly the John Wheeler witness statement, which Employee learned about through the last decision in this case but never received from Employer. Employer contended two attorneys looked for the Wheeler witness statement and could not find it. Employee contended "irreparable harm" would occur if the hearing went forward because Employee lacked complete and full discovery, accommodations have not been made or honored and medical records are incorrect. She contended these issues have been going on since Williams' involvement. Given her knowledge of these alleged infirmities, when asked why Employee stipulated to a July 31, 2018 hearing on April 5, 2018, Employee contended she had "no choice" but to so stipulate because "the train was going to the wreck with or without" her. (Employee's and Employer's hearing arguments).

96) An oral order denied Employee's continuance request primarily because the parties stipulated to a hearing in April 2018. Further, though complaining vigorously about alleged

discovery abuses and other hearing and procedural irregularities, Employee has not appealed or petitioned for relief in regard to these issues. (Oral order).

97) After the designated chair denied Employee's continuance request, Williams made parting comments and voluntarily left the hearing room. Employee voluntarily terminated her telephonic participation at the hearing. The hearing proceeded in their absences. (Record).

PRINCIPLES OF LAW

This 1996 case comes under substantive and decisional law applicable to 1996 injuries. The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). In 1996, before the Act expressly provided for interest, the seminal case *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187 (Alaska 1984), provided for the universal application of interest in Alaska workers' compensation cases.

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

> **AS 23.30.120. 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. . . .

Benefits sought by an injured worker are presumed compensable. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). The presumption applies to any claim for compensation under the workers' compensation statute. (*Id.*). The presumption involves a three-step analysis. To attach the presumption, an employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Credibility is not examined at the first step. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985). If the employee's evidence raises the presumption, it attaches to the claim and in the second step the burden of production shifts to the employer. Credibility is not examined at the second step either. (*Id.*). If

the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. The employee 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). In the third step, the evidence is weighed, inferences are drawn and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000).

When there is no factual dispute on an issue, the statutory presumption analysis does not apply. *Rockney v. Boslough Construction, Inc.*, 115 P.3d 1240 (Alaska 2005).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249 (Alaska 2007). When doctors' opinions disagree, the board determines credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 at 11 (August 25, 2008).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. . . .
> . . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after 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 time period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid. . . .
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." 3A. Larson, *Larson's Workmen's Compensation Law* §83.41(b)(2) (1990). "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. Evidence the employer possessed "at the time of controversion" is the relevant evidence to review. *Id.*

> **AS 23.30.180. Permanent total disability**. (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . . In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
>
> (1) area of residence;
> (2) area of last employment;
> (3) the state of residence; and
> (4) the State of Alaska.
>
> (b) Failure to achieve remunerative employability as defined in AS 23.30.041(p) does not, by itself, constitute permanent total disability.

> **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 Alaska Supreme Court in *Thurston v. Guys With Tools, Ltd*., 217 P.3d 824, 828-29 (Alaska 2009), clarified the rules applicable to preexisting conditions versus injuries involving two or more independent causes. *Thurston* stated:

> Whether a work injury is a substantial factor in a resulting disability is evaluated differently in the context of a preexisting condition than in the context of two independent conditions.
>
> In the context of a preexisting condition . . . the employee must show that the work injury 'aggravated, accelerated, or combined with the disease or infirmity to produce the . . . disability for which compensation is sought' (footnote omitted). To prove that a work injury combined with a preexisting condition to produce a disability, the employee must show that '(1) the disability would not have happened 'but-for' an injury sustained in the course and scope of employment; and (2) reasonable persons would regard the injury as a cause of the disability and attach responsibility to it' (footnote omitted). . . .
>
> In the different context of a subsequent independent condition . . . the employee must show that the work-related condition is a substantial factor in the overall disability. . . . Thurston does not need to show that but for her work injury she would not be disabled. To be eligible for TTD or PTD benefits Thurston needs to show that her work-related disability is a substantial factor in her total disability, without regard to whether her cancer could independently have caused the total disability (footnote omitted). . . .

> **AS 23.30.190. Compensation for permanent partial impairment**. (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $135,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section.

> **8 AAC 45.050. Pleadings.** . . .
> . . . .
>
> (f) **Stipulations**. . . .

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or prehearing.

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

8 AAC 45.070. Hearings. . . .

. . . .

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

(1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;

(2) dismiss the case without prejudice; or

(3) adjourn, postpone, or continue the hearing.

8 AAC 45.074. Continuances and cancellations. . . .

. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or canceled only for good cause and in accordance with this section. For purposes of this subsection,

(1) Good cause exists only when

. . . .

(N) the board determines that despite a parties due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

8 AAC 45.180. Costs and attorney's fees.

. . . .

(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.

ANALYSIS

1) Was the oral order denying Employee's continuance request correct?

The parties have been litigating this case since Employer filed its January 15, 2015 petition for an SIME. Employee filed her first and only claim in this case on November 29, 2017. On April 5, 2018, the parties at a prehearing conference stipulated to a July 31, 2018 hearing on the merits of Employee's claim. 8 AAC 45.050(f). On July 27, 2018, in late afternoon just before the court closed, and a mere four days prior to hearing, Williams filed a federal lawsuit against various parties. Williams is the only plaintiff. On July 30, 2018, on the eve of hearing, Employee filed her petition to request a hearing continuance. At hearing on July 31, 2018, the only reason Employee initially gave for requesting a continuance was the fact that Williams had sued various parties in a federal lawsuit a few days earlier. Employee subsequently also contended the division and Employer had failed to comply with proper discovery requests, and no one involved in this case had honored Employee's HIPPA and ADA rights. Employee contended these issues would result in "irreparable harm" to her case if the hearing proceeded. 8 AAC 45.074(b)(1)(N). Employer objected to these grounds as invalid reasons to continue the hearing.

The fact Employee filed no witness list or brief prior to the hearing implies she never intended to go to hearing. Instead, Employee waited until the last possible moment and tried to continue her hearing. She bolstered her request by contending she made several file copy requests to the division, some of which remained outstanding. In reality, the division filled Employee's October 21, 2014 file copy request on November 14, 2014. Her July 23, 2018 file copy request, incorrectly called her "third request," was actually her second request, made only one week before hearing. Employee made this request belatedly so she could have a reason to declare seven days later, when she asked for a continuance, that an outstanding file copy request was still pending. Her failed litigation tactic likely deprived some other injured worker, who was actually ready, willing and able to go to hearing on July 31, 2018, the opportunity. *Rogers & Babler.*

Hearing continuances are disfavored and will not be routinely granted. 8 AAC 45.074(b). At hearing, Williams said the division's alleged malfeasance and Employer's alleged discovery abuses have been going on since she entered the case in 2015. Yet Employee has never sought

higher review of any discovery decision or petitioned to compel Employer to produce documents. Employee's failure to address these alleged problems does not reflect "due diligence" on her part. Consequently, her objections do not arise to "good cause" and she failed to demonstrate "irreparable harm" would result without a hearing continuance. 8 AAC 45.074(b)(1)(N).

Employee's most vocal discovery concern has been John Wheeler's witness statement, which she contends Employer has improperly and deliberately withheld, and which she says she still does not have. The facts show otherwise. On October 21, 2014, Williams requested her one free copy of Employee's agency file. On November 14, 2014, division staff sent Williams a CD including her client's entire file as of that date. This file includes Wheeler's witness statement. Williams has had this document in her possession since November 2014. *Rogers & Babler*.

The regulations provide numerous grounds considered "good cause" to grant a hearing continuance. A party's non-attorney representative filing a federal lawsuit in the representative's name against various parties is not one of them. A party complaining about years of alleged discovery abuse but taking no action to bring these preliminary matters to hearing is not on the list either. Accordingly, the oral order denying the hearing continuance request was correct.

2) Was the decision to proceed with the hearing in Employee's absence correct?

On April 5, 2018, Employee through her representative had knowledge of the July 31, 2018 hearing date, to which Williams stipulated. The division mailed the April 5, 2018 prehearing conference summary to Employee and Williams. On July 2, 2018, the division served a formal hearing notice on all parties. Employee and her non-attorney representative both initially appeared and participated at hearing. When the designated chair denied Employee's continuance request, she and her non-attorney representative voluntarily terminated their participation in the hearing. Leaving a hearing voluntarily is functionally equivalent to being "not present at the hearing" after being properly served with a hearing notice. 8 AAC 45.070(f); *Rogers & Babler*. Employer came prepared to hold a hearing and wanted the hearing to proceed in Employee's and her representative's absences. The panel followed the designated order of priority in such circumstances and proceeded with the hearing in Employee's absence and will decide the claim.

8 AAC 45.070(f). The decision to proceed with the hearing without Employee and her representative was, therefore, correct.

3) Is Employee entitled to additional PPI benefits?

Employee requests additional PPI benefits. AS 23.30.190. Dr. James provided the only PPI rating to date in this case, which Employer paid in full on February 12, 2003. Employee provided no evidence suggesting she had a higher PPI rating. There is no conflicting medical evidence on this point. Therefore, Employee did not raise the presumption of compensability on this issue and the presumption analysis need not be applied. *Rockney*. Employee has the burden to produce evidence of a work-related PPI rating higher than the amount Employer already paid. Since Employee provided no evidence of a higher PPI rating, she cannot meet this burden. *Saxton*. Furthermore, SIME physician Dr. Schwartz explicitly stated Employee had no PPI related to her December 14, 1996 work injury. His opinion as an independent examiner is given great weight. AS 23.30.122; *Smith*. Employee's claim for additional PPI benefits will be denied.

4) Is Employee entitled to additional TTD benefits?

Employee also seeks additional TTD benefits. AS 23.30.185. The medical evidence on this issue arguably creates a factual dispute to which the presumption of compensability must be applied. AS 23.30.120; *Meek*. Employee raises the presumption with Dr. Wright's opinion implicitly linking her continuing disability and need for medical treatment to her December 14, 1996 work injury. *Tolbert*; *Wolfer*. Employer rebuts the presumption with Dr. James' opinion stating Employee was medically stable and with Drs. Stutesman's, Andrews', Schwartz's and Chovanes' opinions, all of whom agree that Employee's work injury resolved within two years post-injury and is not a substantial factor in her disability thereafter. *Wolfer*. Thus, Employee must prove all elements of her TTD benefit claim by a preponderance of the evidence. *Saxton*.

A) Aggravation, acceleration or combination with a preexisting condition.

The credible medical opinions from EME Drs. Andrews and Stutesman, and SIME physicians Drs. Schwartz and Chovanes show Employee had a preexisting degenerative disc and facet joint disease prior to her December 14, 1996 work injury. Therefore, to prevail she must show the

work injury aggravated, accelerated or combined with the preexisting conditions to produce the TTD benefits she seeks. *Thurston*. The only medical comments implicitly supporting Employee's claim are Dr. Wright's, her family physician, and Dr. Yocum's who merely said it was "understood" that Employee's facet disease resulted from her work injury and the synovial cyst progressed from this disease. Dr. James stated Employee was "medically stable" in December 1997 and never changed his opinion on medical stability, which would disqualify her from TTD entitlement as a matter of law. AS 23.30.185. On October 21, 2001, Dr. James also opined Employee's chronic low back pain, underlying degenerative disc disease and lumbar facet syndrome were all consequences of an industrial injury -- but not this one. His report references an "August 10, 1996" injury, not an injury at issue here. Assuming Dr. James was referring to the August 15, 1996 work injury where Employee fell down the stairs, she made no claim to a spinal injury on that occasion, and only reinjured her left shoulder. All these comments are given little weight. AS 23.30.122; *Smith*.

Dr. Wright is a family physician and not a demonstrated expert in orthopedic issues, such as synovial cysts. *Rogers & Babler*; *Steffey*. Furthermore, Dr. Wright labored under the incorrect assumption that Employee was physically active before the November 14, 1996 work injury with Employer, and was not physically active thereafter. In fact, Employee was active after the work injury, played softball, injured her knee doing so and worked as a gas station cashier, at Alyeska ski resort and in New Jersey as an environmentalist -- all without any physical difficulties. To use Employee's words, she did "just all kinds of physical -type work." Therefore, Dr. Wright's comment is given lesser weight. Dr. Yocum's comment is given lesser weight because he erroneously "understood" Employee's case was "settled" as a work-related injury and did not offer his own explicit causation opinion. Other medical evidence belies Dr. Yocum's understanding. Dr. Wright never actually offered her own causation opinion and assumed she treated a work injury. AS 23.30.122; *Smith*.

EME Drs. Andrews and Stutesman, and SIME physicians Drs. Schwartz and Chovanes all agree Employee suffered a lumbar strain or sprain when she slipped and fell on the ice on December 14, 1996. They all also agree Employee recovered from her work injury with Employer within two years, when Dr. James found her medically stable and she had improved significantly and

returned to work. They all agree Employee's December 14, 1996 work injury with Employer was and is a temporary aggravation of her preexisting spinal conditions and no longer a substantial factor in Employee's disability. All four physicians provided an alternative cause for Employee's subsequent disability -- her naturally progressing, preexisting degenerative disc and facet diseases. Their uniform opinions as medical specialists are given significant weight. AS 23.30.122; *Smith*; *Moore*; *Thoeni*; *Steffey*. No physician opined the December 14, 1996 work injury accelerated or combined with the preexisting spinal conditions to be a substantial factor in ongoing disability beyond two years post-injury.

B) The subsequent independent condition analysis.

Employee's biggest physical problem became the synovial cyst in her lumbar spine. This condition, first disclosed on November 5, 2009 after Employee noticed sudden onset of symptoms, necessitated repeated surgery and caused subsequent disability. Again, Dr. Yocum simply "understood" Employee's facet disease, which he says caused the synovial cyst, resulted from her work injury and accepted this as a fact. He never actually provided an explicit causation opinion of his own. Similarly, Dr. Wright "had no reason to doubt" Employee was injured at work but simply accepted Employee's presentation as a "follow up" on a work injury. She too never offered an explicit opinion linking the synovial cyst to Employee's work injury. Their comments, as opposed to actual opinions, are entitled to little weight. AS 23.30.122; *Smith*; *Thoeni*; *Moore*.

By contrast, EME Drs. Andrews and Stutesman, and SIME physicians Drs. Schwartz and Chovanes all agree the December 14, 1996 injury did not cause the synovial cyst discovered 13 years later. Furthermore, the medical evidence and records overall strongly support their opinions. The overwhelming weight of the medical opinions demonstrates that the December 14, 1996 work injury was not a substantial factor in causing the synovial cyst. Dr. Andrews opined Employee would have noticed continuous and increasing symptoms arising from the cyst years before her symptoms arose suddenly in 2009, if they came from the 1996 work injury. She would not have been able to participate in softball and other strenuous activities had a synovial cyst been present and developing. His testimony is accorded significant weight. AS 23.30.122; *Smith*; *Moore*. Employee cannot show the work injury was a substantial factor in her overall

disability, beginning two years post-injury and continuing, including disability caused by her synovial cyst and its necessitated treatments. *Saxton*; *Thurston*.

Lastly, Employee admitted she probably could have returned to her regular employment absent personal issues with her coworkers. She voluntarily terminated her position and administratively separated from state employment when she did not report to work on January 9, 1998. Employee cannot demonstrate work-related disability or a lack of medical stability arising from her December 14, 1996 work injury with Employer after Dr. James declared her medically stable. Therefore, she is not entitled to additional TTD benefits and her claim will be denied.

5) Is Employee entitled to PTD benefits?

Employee seeks PTD benefits beginning on an unspecified date. AS 23.30.180. While Employee arguably may not have been able to work since her 2009 lumbar surgery, the overwhelming weight of the medical evidence shows any permanent total disability arises from consequences related to the synovial cyst, and shows the December 14, 1996 work injury was and is not a substantial factor in causing, aggravating, accelerating or combining with that medical condition to produce disability. Therefore, Employee's education, age, experience, training and work availability are all irrelevant to the PTD analysis because something other than, and totally unrelated to, her work injury began disabling her in 2009. Consequently, the same analysis addressing Employee's TTD claim applies to her PTD claim, and that entire analysis is incorporated here by reference. Based thereon, she is not entitled to PTD benefits either and her PTD benefit claim will be denied.

6) Is Employee entitled to a compensation rate adjustment?

Employee presented no evidence or argument supporting a compensation rate adjustment claim. Therefore, she did not attach the presumption of compensability and the analysis does not apply. *Rockney*. Employee has the burden of demonstrating that she was paid at an incorrect compensation rate. She has failed in her burden for lack of proof and her compensation rate adjustment claim will be denied. *Saxton*.

7) Is Employee entitled to additional medical benefits or transportation costs?

Employee requests additional medical benefits and related transportation costs. AS 23.30.095(a). The medical evidence on this issue creates a factual dispute to which the presumption of compensability must be applied. AS 23.30.120; *Meek*. Employee raises the presumption with Dr. Wright's statement implicitly linking her continuing need for medical treatment to her December 14, 1996 work injury. *Tolbert*. Employer rebuts the presumption with Drs. Andrews', Stutesman's, Schwartz's and Chovanes' opinions stating Employee's work injury resolved within two years and was and is not a substantial factor in her need for any medical care thereafter. *Wolfer*. Therefore, Employee must prove all elements of her medical benefit claim by a preponderance of the evidence. *Saxton*.

The TTD causation analysis, above, applies to this medical issue as well and is incorporated here by reference in its entirety. The overwhelming weight of records and opinions from medical experts demonstrates that Employee's December 14, 1996 work injury was and is no longer a substantial factor in her need for any medical care since Dr. James released her to return to work and deemed her medically stable. AS 23.30.122; *Smith*; *Steffey*; *Moore*. Her claim for medical benefits and related transportation expenses will be denied.

8) Did Employer unfairly or frivolously controvert Employee's claim?

Employee seeks a finding that Employer unfairly or frivolously denied her right to benefits. AS 23.30.155(o). On July 31, 2015, Employer controverted Employee's right to continuing benefits based on Drs. Andrews' and Stutesman's EME reports. AS 23.30.155(a)-(d). Both doctors stated Employee's December 14, 1996 work injury was no longer a substantial factor in any ongoing disability or in any ongoing need for medical treatment, and provided an alternative explanation for her disability and need for medical treatment. Had this issue gone to hearing on July 31, 2015, and had this been the only evidence presented, Employee would not have been entitled to benefits. *Harp*; 3A *Larson* §83.41(b)(2). Therefore, Employer's controversion was based on valid medical opinions and was not frivolous or unfair. Employee's request for an order finding Employer made a frivolous or unfair controversion will be denied.

9) Is Employee entitled to interest, litigation costs or penalties?

Employee seeks interest, and unspecified litigation costs and penalties. *Rawls*, AS 23.30.155; 8 AAC 45.180(f). This decision awards no past or ongoing benefits. Since Employee is awarded no past benefits, she is not entitled to interest. Employee produced no evidence or argument supporting a claim for an unspecified penalty. Lastly, because she did not prevail on any claim, Employee is not entitled to costs. Therefore, all these benefits will be denied.

CONCLUSIONS OF LAW

1) The oral order denying Employee's continuance request was correct.
2) The decision to proceed with the hearing in Employee's absence was correct.
3) Employee is not entitled to additional PPI benefits.
4) Employee is not entitled to additional TTD benefits.
5) Employee is not entitled to PTD benefits.
6) Employee is not entitled to a compensation rate adjustment.
7) Employee is not entitled to additional medical benefits or transportation costs.
8) Employer did not unfairly or frivolously controvert Employee's claim.
9) Employee is not entitled to interest, litigation costs or penalties.

ORDER

Employee's November 28, 2017 claim for past and future TTD benefits, past and future PTD benefits, past and future PPI benefits, a past and future compensation rate adjustment, a finding Employer made an unfair or frivolous controversion, past and future medical costs and related transportation expenses, litigation costs, penalties and interest is denied.

Dated in Anchorage, Alaska on August 30, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Amy Steele, Member

/s/
Pam Cline, 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 Mary Marple, employee / claimant v. State of Alaska, defendant; Case No. 199628357; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 30, 2018.

/s/
Charlotte Corriveau, Office Assistant