ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau,**

Alaska 99811-5512

DEVIN A. McNULTY, Employee, Claimant, v. LAST FRONTIER BAR, Employer, and COMMERCE AND INDUSTRY INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 200907861 AWCB Decision No. 18-0127 Filed with AWCB Anchorage, Alaska on December 13, 2018

Devin A. McNulty's October 4, 2012, March 1, 2017, April 2, 2018 claims and his June 4, 2018 petition to reinstate prescription medications were heard on October 31, and November 8, 2018 in Anchorage, Alaska, a date selected on July 5, 2018. A June 4, 2018 affidavit of readiness for hearing gave rise to this hearing. Attorney Eric Croft appeared and represented Devin A McNulty (Employee) who appeared and testified. Attorney Aaron Sandone appeared and represented Last Frontier Bar and Commerce and Industry Insurance Company (Employer). Witnesses included Jason Alward, Brandy Larson, Gary Olbrich, M.D., and Carol Frey, M.D. The record closed on November 13, 2018.

ISSUES

Employee contends Employer should be ordered to resume paying for medications prescribed by his doctor. Employer contends the medications are neither reasonable nor necessary to treat Employee's work injury, and it should not be ordered to pay for the medications.

1. Should Employer be ordered to resume paying for medications prescribed by Employee's doctor?

Employee contends he is entitled to a compensation rate adjustment. Employer contends Employee's compensation rate was correctly calculated, and he is not entitled to an adjustment.

2. Is Employee entitled to a compensation rate adjustment?

Employee contends he is entitled to temporary total disability (TTD) for the two days he missed work to attend an employer's medical evaluation (EME). Employer contends Employee is not entitled to additional TTD because he was medically stable at the time of the EME.

3. Is Employee entitled to additional TTD benefits?

Employee contends he is entitled to additional permanent partial impairment (PPI) benefits based on an 11 percent impairment rating. Employer contends the PPI rating was premature as Employee is not yet medically stable.

4. Is Employee entitled to an award of additional PPI benefits?

Employee contends he is entitled to interest on late-paid benefits. Employer contends Employee is not entitled to interest because all benefits were timely paid.

5. Is Employee entitled to interest?

Employee contends his attorney provided valuable services that will result in the award of benefits, and, as a result, he should be awarded attorney fees and costs. Employer contends Employee should not be awarded attorney fees because he should not be awarded any additional benefits.

6. Is Employee entitled to an award of attorney fees and costs?

FINDINGS OF FACT

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

1) Employee worked for Employer as a bouncer. On March 22, 2009, he was escorting a customer off the premises when a fellow bouncer who weighed about 400 pounds stepped on Employee's left foot. (Report of Injury, June 12, 2009; Employee).
2) After the injury on March 22, 2009, Employee went to the emergency room complaining of ankle pain. X-rays revealed a normal ankle, but a fractured fourth metatarsal in his left foot. The emergency department note states it was Employee's fifth metatarsal that was fractured. Employee's foot was wrapped, he was given opioids, and he was instructed to follow up with an orthopedist. (Providence Alaska Medical Center (PAMC), Emergency Department Note, March 22, 2009).
3) On March 23, 2009, Employee was seen by PA-C Tracie Rieker at Orthopedic Research Clinic of Alaska. X rays showed Employee had fractured his sesamoid bone and the base of his third metatarsal. He was prescribed a metatarsal boot and restricted from work for three weeks. (Orthopedic Research Clinic of Alaska, Chart Note, March 23, 2009).
4) On April 13, 2009, Employee was seen by Doug Vermillion, M.D. Employee's foot was markedly tender, and he complained of pain. X-rays showed a widening of the first and second metatarsal interspaces, a fracture of the fourth metatarsal, and a possible fracture of the third metatarsal. Dr. Vermillion diagnosed a left foot Lisfranc injury and recommended open reduction internal fixation surgery. (Orthopedic Research Clinic of Alaska, Chart Note, April 13, 2009).
5) On April 16, 2009, Dr. Vermillion performed the surgery, and on June 25, 2009, he again operated to remove the hardware from Employee's foot. (Alaska Spine Institute, Operative Reports, April 16, 2009 and June 25, 2009).
6) On November 12, 2009, Shawn Johnston, M.D., examined Employee for a permanent partial impairment rating. He determined Employee had a three percent whole person impairment as a result of the Lisfranc injury. (Dr. Johnston, Impairment Rating, November 12, 2009).
7) On December 4, 2009, Dr. Vermillion released Employee to work full time without any restrictions. (Orthopedic Research Clinic of Alaska, Chart Note, December 4, 2009).
8) On April 2, 2010, Employee reported increased pain to Dr. Vermillion. Dr. Vermillion recommended a fusion. (Orthopedic Research Clinic of Alaska, Chart Note, April 2, 2010).

9) On September 17, 2010, Employee was seen by John Ballard, M.D., for an employer's medical evaluation (EME). Dr. Ballard examined Employee, reviewed his medical records, and identified the March 22, 2009 work injury as the only cause of Employee's Lisfranc disruption. Dr. Ballard agreed Employee was medically stable at the time of Dr. Johnston's PPI rating on November 12, 2009 and agreed with Dr. Johnston's three percent impairment rating. Dr. Ballard did not recommend further treatment at the time, but noted a fusion might be warranted in the future. (Dr. Ballard, EME Report, September 17, 2010).
10) On January 19, 2011, Employee reported to Dr. Vermillion the pain in his foot was getting worse, and on March 24, 2011, Dr. Vermillion performed the fusion surgery. (Orthopedic Research Clinic of Alaska, Chart Note, January 19, 2011; Alaska Regional Hospital, Operative Report, March 24, 2011).
11) On September 8, 2011, Employee was seen by Dr. Ballard for another EME. Employee reported to Dr. Ballard the pain was much worse since the surgery and he had decreased range of motion. Dr. Ballard again opined the cause of Employee's medical condition was the March 29, 2009 work injury. He found Employee was not medically stable and recommended a CT scan. Dr. Ballard noted Employee seemed to have subjective pain complaints that were not substantiated by objective findings. (Dr. Ballard, EME Report, September 8, 2011).
12) On October 7, 2011, Employee was seen by Eugene Chang, M.D., who reviewed a CT scan of Employee's foot. Dr. Chang noted good fusion as the first metatarsal cuneiform joint, but found questionable healing at the second metatarsal cuneiform joint. Because Employee clearly had pain over the head of one of the implanted screws, Dr. Chang recommended removal of the screw. (Dr. Chang, Chart Note, October 7, 2011).
13) On October 11, 2011, Dr. Chang removed the screw from Employee's foot. (Alaska Surgery Center, Operative Report, October 11, 2011).
14) On November 28, 2011, Employee was seen by Dr. Johnston for another PPI rating. Dr. Johnston determined Employee impairment remained at three percent. (Dr. Johnston, Impairment Rating, November 28, 2011).
15) On December 2, 2011, Employee was seen by PA-C John Love. Employee reported continued left foot pain. Based on Dr. Chang's recommendation, PA Love recommended a boot and crutches for three weeks. (PA Love, Chart Note, December 2, 2011).

16) Employee returned to PA Love on December 28, 2011 with continued foot pain. PA Love noted Employee could be suffering from nerve pain and there might not be a surgical solution. Employee asked for referral to a chronic pain clinic as there were no further surgical options. (PA Love, Chart Note, December 28, 2011).
17) On January 6, 2012, Dr. Chang agreed Employee's pain was likely neuropathic and he offered no surgical options at the time. Dr. Chang referred Employee back to Dr. Johnston. (Dr. Chang, Chart Note, January 6, 2012).
18) On January 16, 2012, Employee returned to Dr. Johnston. Employee explained he had been prescribed a variety of pain medication since the injury. Employee signed a medication management agreement, and Dr. Johnston prescribed Roxicodone and Mobic. (Dr. Johnston, Chart Note, January 16, 2012).
19) On March 16, 2012, Dr. Johnston referred Employee to Leon Chandler, M.D., a pain specialist at AA Spine & Pain Clinic. (Dr. Johnston, Chart Note, March 16, 2012).
20) Employee was seen by Dr. Chandler on May 14, 2012. Employee reported opioids did not provide pain relief, but Demerol had worked in the past. Dr. Chandler prescribed Demerol and Valium. (AA Spine & Pain Clinic, Chart Note, May 14, 2012).
21) On May 15, 2012, Employee was seen by Sidney Baucom, M.D., in Seattle. Dr. Baucom noted Employee's pain appeared neuropathic, and he recommended physical therapy and treatment at a pain clinic. Dr. Baucom noted it might be worth removing the remaining screw if Employee's pain continued. (Dr. Baucom, Chart Note, May 15, 2012).
22) On May 23, 2012, Dr. Vermillion stated Employee had not been medically stable during 2010. (Dr. Vermillion, Work Status Slip, May 23, 2012). However, on October 31, 2012, Dr. Vermillion stated Employee had been able to work between August 26, 2009 and the March 24, 2011 fusion surgery. (Dr. Vermillion, Response to Employer Question, October 31, 2012).
23) On March 1, 2013, Employee began treating with David Randall, D.P.M., at which time Dr. Randall prescribed new orthotics. On April 12, 2013 Dr. Randall discussed revision surgery with Employee. (Dr. Randall, Chart Notes, March 1, 2013 and April 12, 2013).
24) On June 28, 2013, Employee was again seen by Dr. Ballard for an EME. Dr. Ballard reviewed additional medical records and examined Employee. Dr. Ballard stated the work injury was still the substantial cause of Employee's disability and need for medical treatment, but Employee was medically stable under the legal definition. Dr. Ballard did not find any

indication Employee's pain was neuropathic, and he stated Employee's narcotic medications were appropriate. Dr. Ballard noted additional surgery to fuse the second tarsometatarsal joint was possible. (Dr. Ballard, EME Report, June 28, 2013).

25) On March 6, 2014, Dr. Randall performed surgery to fuse Employee second and third metatarsocuneiform joint and his Lisfranc complex. (Alaska Surgery Center, Operative Report, March 6, 2014).

26) On April 15, 2014, Employee reported to Dr. Randall that his pain was about the same as it had been before the surgery. (Dr. Randall, Chart Note, April 15, 2014).

27) On October 15, 2014, Dr. Randall performed surgery to remove hardware from Employee's foot. (Alaska Surgery Center, Operative Report, October 15, 2014).

28) On January 9, 2015, Employee was again seen by Dr. Ballard. Dr. Ballard again found the work injury to be the substantial cause of Employee's need for treatment. He noted Lisfranc injuries can result in chronic midfoot pain, but Employee was medically stable. Dr. Ballard reevaluated Employee's permanent impairment and determined it had increased from three percent to four percent. Dr. Ballard's PPI rating was based on a mild motion deficit diagnosis. Dr. Ballard stated narcotics were reasonable if monitored and controlled, but it would be best if Employee was weaned off narcotics. (Dr. Ballard, EME Report, January 9, 2015).

29) On August 26, 2015, Employee asked Dr. Randall if a below the knee amputation would allow him to be pain-free. Dr. Randall explained he could continue to experience pain even with an amputation. (Dr. Randall, Chart Note, August 26, 2015).

30) On September 8, 2015, David Mulholland, D.C., examined Employee for a PPI rating and stated Employee was deemed to be medically stable. Based on a diagnosis of metatarsal-tarsal fracture, Dr. Mulholland determined Employee had an 11 percent whole person impairment. (Dr. Mulholland, Impairment Rating, September 8, 2015). Dr. Mulholland's report was filed on October 2, 2015. (Medical Summary, October 2, 2015).

31) On November 20, 2015, Employee was seen by Dr. Ballard for another EME. Dr. Ballard opined the work injury was not the substantial cause of the need for treatment for Employee's knee, mid or lower back, or shoulder or arm complaints. Dr. Ballard disagreed with Dr. Mulholland's PPI rating, and restated his rationale for the four percent rating. Dr. Ballard noted Employee continued to have subjective pain complaints out of proportion to his objective findings. (Dr. Ballard, EME Report, November 20, 2015).

32) On August 23, 2016, Employee was seen by Carol Frey, M.D., for a Board-ordered second independent medical evaluation (SIME). Dr. Frey examined Employee and reviewed the medical records relating to the work injury. Dr. Frey diagnosed a history of a Lisfranc fracture dislocation at the first, second, and third metatarsocuneiform joint, degenerative arthritis/overuse of the fourth and fifth metatarsocuboidal joint, over use of the fourth and fifth metatarsals, impingement of the deep peroneal nerve, possible exuberant bone formation from the fusions, a very tight left Achilles tendon, and long-term opioid use. She stated the substantial cause of the Lisfranc injury was the work injury, and all of the other diagnoses were the direct result of the Lisfranc injury. Dr. Frey stated it was common for pain to continue after a Lisfranc injury. Dr. Frey noted Employee might benefit from surgery to shorten his fourth and fifth metatarsals, but the surgery was only successful about 75 percent of the time. She found Employee reached medical stability six months after the October 4, 2014 surgery, but if he elected to have the shortening surgery it would take six months to recover. Dr. Frey stated Employee would require pain management over a five-year period. One of the questions asked of Dr. Frey was whether she agreed with Dr. Ballard's "9% lower extremity (4% whole person)" impairment rating. In response, Dr. Frey calculated a lower extremity rating of 27 percent based on Employee's fusions and arthritis. (Dr. Frey, SIME Report, August 23, 2016).

33) Conversion of a lower extremity impairment to a whole person impairment is done using Table 16-10 of the *Guides to the Evaluation of Permanent Impairment*. Under Table 16-10, a 27 percent lower extremity rating is equivalent to an 11 percent whole person rating. The conversion requires no medical knowledge or skill. (*Guides to the Evaluation of Permanent Impairment*, 6th ed. 2008; Observation and Experience).

34) On November 8, 2016, Dr. Frey responded to written questions from the parties. One question was whether it was premature to rate Employee for a PPI if he chose to proceed with the recommended surgery; Dr. Frey responded it would be premature. (Dr. Frey, Response to Parties' Questions, November 8, 2016).

35) Employee returned to Dr. Randall on August 10, 2017. He explained he had stepped wrong and felt "cracking and popping" and increased pain in his foot. Employee told Dr. Randall about the surgery Dr. Frey had recommended. Dr. Randall referred Employee for an MRI, and asked for Dr. Frey's report. (Dr. Randall, Chart Note, August 10, 2017).

36) On November 16, 2017, Employee was seen by Gary Olbrich, M.D., a pain management and addictive disease specialist. Dr. Olbrich reviewed Employee's medical records, noting Employee's prescriptions. Employee told Dr. Olbrich he had abused alcohol when young, but had never blacked out or been in legal trouble as a result. He had voluntarily reduced his consumption to one to three drinks per week. Employee explained to Dr. Olbrich that narcotics, regardless of the type or dosage had never done more than take the edge off his pain. Dr. Olbrich diagnosed severe substance abuse disorder including opioid and diazepam use, as well as chronic pain disorder as the result of long-term narcotics use. Dr. Olbrich explained severe substance abuse disorder was also known as addictive disorder, which is a brain disease with a physiological basis. Only about ten percent of the U.S. population are susceptible to the disease which causes physiological changes in the brain pathways. Dr. Olbrich explained chronic pain disorder is caused by the use of opioids for longer than 90 days. One effect of long-term usage is that stimuli that were not previously perceived as painful become painful. Dr. Olbrich stated the Centers for Disease Control (CDC) recently published new guidelines for long-term opioid use. Opioids for postoperative pain should be limited to 10 days, and the morphine equivalent dose of any opioid should never exceed 90 mg. per day. Additionally opioids and benzodiazepines should not be prescribed concurrently. Dr. Olbrich recommended Employee be weaned off opioids and suggested two inpatient facilities. (Dr. Olbrich, EME Report, November 16, 2017).

37) On May 17, 2018, in reliance on Dr. Olbrich's EME Report, Employer controverted opioids and valium after August 12, 2016, if Employee did not begin the weaning process recommended by Dr. Olbrich by June 17, 2018. (Controversion Notice, May 17, 2018).

38) On June 4, 2018, Employee filed a petition asking that his current medications be continued until he had the surgery recommended by Dr. Frey. (Petition, June 4, 2018).

39) On August 8, 2018, Employee returned to Derek Hagen, D.O., for his monthly pain management visit. His monthly prescriptions for oxycodone and diazepam were renewed. (AA Spine & Pain Clinic, Chart Note, August 8, 2018).

40) Employee began tapering off the oxycodone on his own, and by September 27, 2018, he had taken his last pill. (Employee).

41) Employer filed surveillance videos of Employee totaling three hours and 35 minutes taken on twelve days from February 4, 2017 through September 14, 2018. The videos show three events

of significance. On May 13, 2017, Employee is replacing the clutch cable on a motorcycle. He is able to squat and stand, but favors his left foot when doing so. When adjusting the cable, rather than straddling the motorcycle and shifting with his left foot, he stands to the left of the motorcycle partially seated and shifts with his right foot. The July 3, 2018 video shows Employee preparing for and playing Frisbee golf at Kincaid Park. Employee walks on uneven ground at times, but in roughly 45 minutes, he only completes five of the 18 holes before returning to his vehicle. On September 2, 2018, Employee is shown preparing for and going to a shooting range. He is at the shooting range about an hour and one half during which time he walks a short distance without apparent difficulty, and sits and stands while shooting. (Surveillance Videos).

42) Dr. Hagen was deposed on October 5, 2018. He had reviewed the surveillance videos and noted Employee appeared to be in less pain in the videos than when he came to Dr. Hagen's office, but the reason for that could be because Employee had taken pain medication. Dr. Hagen explained he was amenable to weaning Employee off his medications, but he did not want Employee to suffer just to prove a point. Dr. Hagen noted that while Employee's dosage had increased over the years, the increase was slower than that sought by addicts and was due to Employee's increased tolerance. (Dr. Hagen Deposition Transcript, October 5, 2018).

43) On October 10, 2018, Employee told Dr. Randall his fourth and fifth metatarsals moved out of place and needed to be "popped" back in several times per day. He also explained he had been cut off from opioids and had some withdrawal symptoms for a couple weeks. (Dr. Randall, Chart Note, October 10, 2018).

44) On October 13, 2018, Employee reported he had been off medications for over a month. He was prescribed 30 mg. morphine, three times per day. The valium and oxycodone prescriptions were discontinued. (AA Spine & Pain Clinic, Chart Note, October 13, 2018).

45) At his May 6, 2015 deposition, Employee testified he had taken a course to learn to operate heavy equipment and drive heavy trucks. Although he applied for multiple jobs, he was told he did not have enough experience and had no offers. He had thought about joining a union, but had not pursued it. (Employee, Deposition, May 6, 2015).

46) At hearing, Employee testified he had not abused his medications, and had never asked his doctors to increase the dosage, although he had told them he was not getting much relief. He had been prescribed opioids after two prior injuries, but had used them for only a short period.

After his oxycodone had been controverted and he was without, he discovered the opioids had been providing more relief than he previously believed. He explained he wanted to proceed with the surgery Dr. Frey had recommended, but his compensation rate was so low he could not afford to be off work for the time it would take to recover. He had continued to work after the work injury except for short periods after each of his surgeries, and he believed the opioids helped him to do that. (Employee).

47) Jason Alward is the vice president of Operating Engineers Local 302. The union's apprenticeship program combines 400 hours of course, with an additional 6,000 hours of experience and takes two to four years to complete. Typically, about one-third to one-quarter of the applicants, or 30 to 40 people, begin the program every year, and about 80 percent of those complete the program. Currently the median annual earnings for journeymen is nearly $65,000.00. Mr. Alward stated Employee's foot injury wouldn't necessarily preclude him from participating in the program, but being on oxycodone would. (Jason Alward).

48) Brandy Larson has lived with Employee since December 2015. She also uses opioids as a result of a degenerative soft-tissue injury, and they both kept their prescriptions in separate locked boxes and never shared or loaned each other pills. Employee's pain medication had allowed him to work and do things with his family, although he would often "work through the pain" rather than take another pill. While on the pain medications he had never missed work because of the pain, but he had missed some days since his medications were cut off. (Brandy Larson).

49) Dr. Olbrich explained opioids are more effective for musculoskeletal pain, and much less so for neurogenic pain. They are powerful psychological stimulators; they cause people to feel calm with a sense of well-being, and act as an energizer. When used to treat pain, opiates work well for a short period of time, but have not been shown effective for long periods. The strength of different opioids varies, and to compare dosages, drugs are given a morphine equivalent; oxycodone has a morphine equivalent of 1.5, so each milligram of oxycodone is equivalent to 1.5 milligrams of morphine. Recently, the CDC issued guidelines for the long-term use of opioids, and dosages should be limited to 90 mg. morphine equivalent per day. The CDC also cautions against prescribing opioids in combination with hypnotics, such as Valium (diazepam), and Dr. Olbrich noted Employee was being prescribed a high dose of diazepam together with the opioids. One significant side effect of opioids is they depress respiration.

While people can develop a tolerance to opioids and the dosage necessary to obtain pain relief increases, there is no increase in tolerance for respiratory depression. Individuals prescribed opioids for longer than 90 days begin to experience what had previously been non painful stimuli as painful. Dr. Olbrich explained the gold standard for long term opioid use is the patient must show a significant increase in function, and an increase in function is more important than a decrease in pain. He reviewed entries in several of Employee's medical records where Employee reported the opioids were not really helping his pain and he showed no increase in function. Employee had been started on a very high dose in 2012, and the dose had been increased over time to the point Employee was prescribed a morphine equivalent dose of 270 mg. Dr. Olbrich explained the best option for weaning was an inpatient program. While weaning could be done through a pain clinic, pain clinics typically lack the resources to provide the attention each patient requires. However, even without a program, he would still recommend reducing opioids gradually, to the 90 mg. morphine equivalent level if possible. He would not recommend going "cold turkey", and, if Employee was to proceed with the recommended surgery, he would not recommend weaning before that time as some pain medication would be necessary after the surgery. (Dr. Olbrich).

50) Dr. Frey had reviewed additional medical records, as well as the depositions of Dr. Hagen, Dr. Randall, and Dr. Olbrich, and she had viewed the surveillance videos. She noted that in the videos Employee was limiting the use of his left foot, and occasionally walked with his foot rotated, but it did not appear to slow him down. She no longer believed the surgery she recommended would improve Employee's function, but it could still provide a reduction in his pain. Dr. Frey explained the "popping out of place" described in Dr. Randall's October 10, 2018 chart note was more significant. At this time, Employee's election to have the surgery depends on how compromised he is by the pain, and he is more likely to benefit if the pain is localized. However, if Employee does not get the surgery within five years of the March 6, 2014 fusion, she would no longer recommend it. She clarified the statement in her August 23, 2016 report that Employee would need pain management for five years. The statement should have been that Employee would have pain for five years after his last surgery, and, therefore, would need pain management during that time. She found Dr. Olbrich's EME report to be excellent and supported weaning Employee off opioids. (Dr. Frey).

51) Employee was paid PPI benefits of $5,310.00 in November 2009 and $1,770.00 in January 2015, or a total of $7,080.00, which represents a four percent whole person impairment. (Record).

52) Prior to September 28, 2018, Employee's compensation rate was $340.42 per week. Employer represented this was based on documents provided by Employee. On September 28, 2018, Employer filed a Compensation Report showing Employee's annual earnings for calculating his compensation rate were $27,725.00, which results in gross weekly earnings of $554.50 and a compensation rate of $363.63 per week. In its hearing brief, Employer explains the $27,725.00 was Employee's gross Medicare earnings, but the source of that figure is unclear. There is no evidence Employee has been paid any TTD based on the newly calculated rate. (Compensation Report, September 28, 2018; Employer Hearing Representation; Employer Hearing Brief; Observation).

53) On September 24, 2018 Employee filed a Social Security earnings record showing he had Social Security and Medicare earnings of $29,904.00 in 2008. The earnings record also shows Employee's average annual earnings from 2013 through 2017 were $36,197.60. (Social Security Earnings Record).

54) Using the online benefit calculator and 2008 earnings of $29,904.00, Employee's gross weekly wage would be $598.08, and his weekly TTD compensation rate would be $390.59. (Alaska Workers' Compensation Division Benefit Calculator).

55) At hearing, Employer confirmed the surgery recommended by Dr. Frey had not been controverted, and Employee was free to pursue the surgery if he desired. (Employer Hearing Representation).

56) Employee filed affidavits of attorney fees and costs on September 24, 2018 and at the November 8, 2018 hearing. The affidavits detail total fees of $48,623.50 and costs of $3,003.65 for a total of $51,627.15. Deducting a prior payment of $6,000.00 left a balance due of $45,627.15. One of the cost items was a $1,282.50 payment to Jill Friedman & Associates to "prepare report on medical treatment options." (Fee Affidavits, September 24, 2018 and November 8, 2018).

57) On November 13, 2018, Employer objected to the costs for Jill Friedman & Associates. Employer contends Ms. Friedman was not called as a witness and the report was never submitted into evidence. (Objection, November 13, 2018).

58) Jill Friedman & Associates provides rehabilitation and medical case management services. (Experience, Observation).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter.
It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
. . . .

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The Board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on 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.
(a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

Under the Alaska Workers' Compensation Act, coverage is established by a work connection, meaning the injury must have "arisen out of" and "in the course of" employment. If an accidental injury is connected with any of the incidents of one's employment, then the injury both would "arise out of" and be "in the course of" employment. The "arising out of" and the "in the course of" tests should not be kept in separate compartments but should be merged into a single concept of "work connection." *Northern Corp. v. Saari*, 409 P.2d 845, 846 (Alaska 1966).

> **AS 23.30.095. Medical treatments, services, and examinations.**
> (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require.

In *Bockness v. Brown Jug, Inc.*, 980 P.2d 462, 466 (Alaska 1999) the Supreme Court clarified that medical treatment under AS 23.30.095 is limited to reasonable and necessary treatment:

> While the Workers' Compensation Act may require employers to authorize some medical care during periods of medical instability as Bockness claims, the Act does not require employers to pay for any and all treatments chosen by the injured employee. Although no single provision states that all medical treatments must be reasonable and necessary, at several points in the Alaska Workers' Compensation Act the statutes make reference to that concept.

And in *Phillip Weidner & Assocs., Inc. v. Hibdon,* 989 P.2d 727, 732 (Alaska 1999), the Court addressed the issue of reasonableness of medical treatment:

> The question of reasonableness is "a complex fact judgment involving a multitude of variables." However, where the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of

> medically accepted options, it is generally considered reasonable. (citations omitted).
>
> **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 . . . .
>
> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

Under AS 23.30.120(a), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

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

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Kramer* at 473-74, quoting *Smallwood* at

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

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381. At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

In *Summers v. Korobkin Construction*, 814 P.2d 1369, 1372-73 (Alaska 1991), an injured worker filed a claim seeking a decision from the Board on whether his injury was "compensable." His doctor said he might need neck surgery and a major factor in the worker's decision whether to pursue surgery was whether the employer would pay for it. The Board declined to hear the case noting there was no actual "controversy," since the injured worker had not received any medical care for over a year, and there were no unpaid work-related medical bills or other claims. The superior court agreed. Reversing, the Alaska Supreme Court stated:

> Here, Korobkin disputed many aspects of Summers' application for adjustment of claim. Korobkin's answer advanced numerous defenses to Summer's claim, including that Summers' injury was not work-related . . . Summers is entitled to a hearing on Korobkin's defenses. If Summers prevails, Korobkin will still be able to controvert Summers' claim at a future hearing, if the grounds for controversion arise after the initial hearing. AS 23.30.130. However, a worker in Summers'

> position, who has been receiving treatment for an injury which he or she claims occurred in the course of employment, is entitled to a hearing and prospective determination on whether his or her injury is compensable.

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

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150-51 (Alaska 2007), the Supreme Court explained fee awards under AS 23.30.145(a) and (b):

> Subsection (a) authorizes the Board to award attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim. . . . In contrast, subsection (b) requires an employer to pay reasonable attorney's fees when the employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim.

Subsections (a) and (b) are not mutually exclusive, however.

> Subsection (a) fees may be awarded only when claims are controverted in actuality or fact. Subsection (b) may apply to fee awards in controverted claims, in cases in which the employer does not controvert but otherwise resists, and in other circumstances. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152, at 15 (May 11, 2011) (Citations omitted).

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990). An employee is entitled to attorney fees when the attorney is instrumental in inducing an employer to voluntarily but belatedly pay benefits. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993).

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

> **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.
>
> **AS 23.30.220. Determination of spendable weekly wage.**
> (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
> . . . . ;
>
> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;
>
> . . . .
>
> (7) when the employee is working under concurrent contracts with two or more employers, the employee's earnings from all employers is considered as if earned from the employer liable for compensation;

In *Straight v. Johnston Construction & Roofing, LLC,* AWCAC Decision No. 231 (November 22, 2016), the employee had worked for many years as a roofer. He was paid by the hour, and consistently made about $60,000 per year, but he took off large parts of 2013 and 2014 to build his own home. In 2014 he earned somewhat less than $19,000. He returned to work in 2015, and was injured; at the time of his injury, his weekly wage was over $2,100. The employer applied AS 23.30.220(a)(4), which resulted in the minimum compensation rate of $255.00 per week. Employee argued AS 23.30.220(a)(4) resulted in an unfairly low compensation rate, and his compensation rate should be determined under AS 23.30.220(a)(5) based on either his prior earning history or his current earnings. The Board denied the employee's claim holding AS 23.30.220 did not contain a "fairness" exception, and because his earnings could be determined under subsection (a)(4), subsection (a)(5) did not apply. The Commission reversed, holding the fairness provision in AS 23.30.001(1) applied to the entire Act, and if AS 23.30.220(a)(4) resulted in an unfair compensation rate, the Board should apply subsection (a)(5).

In *Cavitt v. D&D Services, LLC*, AWCAC Decision No. 248 (May 4, 2018), the employee made two arguments for a compensation rate increase. First, the employee argued he had been accepted into an electrician apprenticeship program, and his compensation rate was not indicative of his earning capacity during his period of disability. As there was no evidence the employee had started the apprenticeship, the Board rejected his claim as speculative, and the Commission agreed. Second, the employee's earnings in another job after the work injury were higher than his wages during the calculation period, and the employee argued his compensation rate should be adjusted accordingly. The Commission held that except for cases involving permanent total disability, a compensation rate must be based on employee's earnings at the time of injury.

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.**
> (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. 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. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.
>
> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.

In *Sumner v. Eagle Nest Hotel*, 894 P.2d 628 (Alaska 1995), the Supreme Court clarified PPI benefits must be paid or controverted within 21 days of an employer's receipt of the rating to avoid a penalty.

> **AS 23.30.395. Definitions.**
> In this chapter,
> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

. . . .

> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;

"Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary." *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567, 573 (Alaska 2012) citing *Grove v, Alaska Constructors & Erectors*, 948 P.2d 454, 458 (Alaska 1997).

In *Gillion v. The North West Company International*, AWCAC Decision No. 253, an employee sought TTD for three days he had missed work to attend an SIME. The Board awarded the three day's TTD, finding the employee was unable to earn wages on those days and was not medically stable. The Commission affirmed.

> **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. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:
>
> (1) costs incurred in making a witness available for cross-examination;
>
> (2) court reporter fees and costs of obtaining deposition transcripts;
>
> (3) costs of obtaining medical reports;
>
> (4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;

(5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;

(6) costs for telephonic participation in a hearing;

(7) costs incurred in securing the services and testimony, if necessary, of vocational rehabilitation experts;

(8) costs incurred in obtaining the in-person testimony of physicians at a scheduled hearing;

(9) expert witness fees, if the board finds the expert's testimony to be relevant to the claim;

(10) long-distance telephone calls, if the board finds the call to be relevant to the claim;

(11) the costs of a licensed investigator, if the board finds the investigator's services to be relevant and necessary;

(12) reasonable costs incurred in serving subpoenas issued by the board, if the board finds the subpoenas to be necessary;

(13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;

(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk

(A) is employed by an attorney licensed in this or another state;

(B) performed the work under the supervision of a licensed attorney;

(C) performed work that is not clerical in nature;

(D) files an affidavit itemizing the services performed and the time spent in performing each service; and

(E) does not duplicate work for which an attorney's fee was awarded;

(15) duplication fees at 10 cents per page, unless justification warranting awarding a higher fee is presented;

(16) government sales taxes on legal services;

(17) other costs as determined by the board.

ANALYSIS

1. Should Employer be ordered to resume paying for medications prescribed by Employee's doctor?

In essence, the issue is whether ongoing narcotic medications are reasonable and necessary. This is an issue to which the presumption of compensability applies. Without regard to conflicting evidence, and without considering credibility, Employee raised the presumption he was entitled to prescribed narcotics after August 12, 2016, the effective date of Employer's controversion. He did so through, Dr. Hagen's August 8, 2018 renewal of his monthly prescription and the October 13, 2018 morphine prescription. Because Employee raised the presumption, Employer was required to rebut it. It did so through Dr. Olbrich's November 16, 2017 opinion Employee should be weaned from narcotics.

Because Employer rebutted the presumption, Employee was required to prove he is entitled to the ongoing medications by a preponderance of the evidence. Dr. Olbrich's opinion will be given the most weight. His specialty is pain management and addictionology, and his opinion was strongly supported by Dr. Frey, who is independent of the parties. Although Employee's doctors have continued to prescribe narcotics, they have not addressed or rebutted Dr. Olbrich's opinion. Dr. Olbrich is clear it would be preferable if Employee were completely weaned from opioids. At hearing, however, he stated Employee should at least be weaned to a dosage of 90 mg. morphine equivalent per day until surgery, which implies such a dose would be reasonable and necessary. Employee is presently being prescribed a 90 mg. morphine equivalent dose. There is no evidence the continuance of opioids at the 90 mg. morphine equivalent level until surgery is currently either unreasonable or unnecessary.

Dr. Frey testified the need for surgery depends on Employee's pain levels, but if he does not get the surgery within five years of the March 6, 2014 fusion, she would no longer recommend it. It is likely that at some point in time, the surgery will no longer be reasonable and necessary. If that occurs, or if Employee opts not to proceed with the surgery, it may be appropriate to terminate ongoing opioids after providing Employee a weaning program if he desires.

2. Is Employee entitled to a compensation rate adjustment?

Because none of the facts related to this issue are disputed, the prsumption analysis need not be applied. Employee put forth three alternative bases for a compensation rate adjustment. First, he seeks an adjustment to reflect the earnings he would have received if he had completed the operating engineers' apprenticeship program. Second, he seeks an adjustment to reflect his earnings after the work injury, and, third, he seeks an adjustment to reflect his 2008 earnings as shown by Social Security.

As was the case in *Cavitt*, there is no evidence Employee was admitted to the apprenticeship program, and because completion of the program is not assured, the potential earnings are too speculative to serve as the basis for a compensation rate adjustment. Likewise, under *Cavitt*, Employee's post-injury earnings cannot serve as the basis for a compensation rate adjustment.

However, the Social Security Earnings Statement filed by Employee shows his 2008 earnings were $29,904.00. Because the source of the other figures for Employee's earnings are unclear, the earnings statement is most probative of Employee's wages in 2008. Employee is entitled to a compensation rate of $390.59 per week based on that amount.

3. Is Employee entitled to additional TTD benefits?

Employee seeks TTD for two days missed work to attend an EME appointment in November 2017. The facts relating to this issue are also not disputed, so the presumption analysis need not be applied. Because Employee could not work and attend the EME at the same time, he was clearly unable to earn the wages which he was receiving at the time of injury, making him disabled under AS 23.30.395(16). However, under AS 23.30.185, TTD may not be paid after medical stability.

Dr. Ballard found Employee medically stable as of January 9, 2015. At the time of his September 8, 2015 PPI evaluation, Dr. Mulholland also found Employee to be medically stable, and in her August 23, 2016 report, Dr. Frey stated Employee was medically stable six months after the October 2014 surgery, or by April 2015 unless he proceeded with the recommended surgery. As Employee had not proceeded with the surgery, he was medically stable at the time of the November 2017 EMEs, and is not entitled to TTD for those days. *Gillion*.

4. Is Employee entitled to an award of PPI benefits?

Because Employee has been paid for a four percent whole person impairment based on Dr. Ballard's January 9, 2015 report the question becomes whether it is entitled to the additional seven percent as found by Drs. Mulholland and Frey. The presumption analysis applies.

Employee raises the presumption through the opinions of Drs. Mulholland and Frey. Employer rebuts the presumption trough Dr. Ballard's November 20, 2015 opinion. After Employee's last surgery in October 2014, there are three impairment ratings. Dr. Frey's and Dr. Mulholland's opinions will be given the most weight as the diagnosis on which they based their ratings is more consistent with the medical records. Dr. Ballard's rating was based on a motion deficit; that appears at odds with Employee's history of fractures and fusions, and Dr. Ballard does not explain why it is a better diagnosis. Employer's argument that Dr. Frey's statement that the rating was premature until Employee had the recommended surgery is not well taken. Employee is medically stable, and the fact his impairment rating might change after an optional future surgery does not change that fact. Employee is entitled to payment for an additional seven percent permanent impairment.

5. Is Employee entitled to interest?

Under AS 23.30.155(p) interest is mandatory on benefits not timely paid. This decision awards Employee additional PPI benefits, a compensation rate adjustment, and medical costs for prescription medication. Employee has not alleged any other benefits were not timely paid. .

Although Employee established he was entitled to a compensation rate adjustment, the Social Security Earnings Record providing the basis for the adjustment was first filed September 24, 2018, as an attachment to Employee's hearing brief. Any compensation at the higher rate was not due before that time, so no interest is due.

This decision also awarded Employee medical costs in the form of continuing pain medication, but there is no evidence in the file showing any prescription costs were not timely paid.

Employee has been awarded additional PPI based on the ratings by Drs. Mulholland and Frey. Dr. Mulholland's rating was filed on October 2, 2015. Under *Sumner*, payment was due 21 days later, or by October 23, 2015. Employee is entitled to interest on the additional PPI from October 23, 2015 until paid.

6. Is Employee entitled to an award of attorney fees and costs?

Attorney fees may be awarded under AS 23.30.145(b) when an employer resists payment of compensation, and an attorney is successful in prosecuting the employee's claim. Here, Employer controverted or resisted all of the benefits sought by Employee at hearing. Employee was successful on all issues except the TTD he sought for two days – not a significant benefit. Employee will be granted fees and costs, but Employer's objection to the cost of Jill Friedman and Associates' report is well taken. Employee's fee affidavit indicates the report was on "medical treatment options." The only medical issue for hearing was the reasonableness and necessity of ongoing opioid medication. No one from Jill Friedman and Associates testified at the hearing, and the report was not filed with the board. There is nothing to indicate the subject of the report was ongoing opioid medication, and that cost will be denied. Employee will be awarded attorney fees and costs of $45,627.15 less $1,282.50, or $44,344.65.

CONCLUSIONS OF LAW

1. Employer will be ordered to resume paying for opioid medications prescribed by Employee's doctor up to 90 mg. morphine equivalent per day.

2. Employee is entitled to a compensation rate adjustment.

3. Employee is not entitled to additional TTD benefits.

4. Employee is entitled to an award of additional PPI benefits.

5. Employee is entitled to interest on the late-paid PPI.

6. Employee is entitled to an award of attorney fees and costs.

ORDER

1. Employee's June 4, 2018 petition to reinstate prescription medications is granted in part. Employer is ordered to pay for ongoing opioid medication up to 90 mg. morphine equivalent per day.
2. Employee's compensation rate is $390.59, based on his 2008 earnings of $29, 904.00.
3. Employee's claim for TTD for the two days attendance at the EME in November 2017 is denied.
4. Employer shall pay Employee seven percent additional PPI to reflect his 11 percent whole person impairment.
5. Employer shall pay Employee interest on the additional seven percent PPI October 23, 2015 until paid.
6. Employer shall pay Employee attorney fees and costs of $44,344.65.

Dated in Anchorage, Alaska on December 13, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Nancy Shaw, Member

CONCURRANCE AND DISSENT BY BRADLEY EVANS

I concur with the award of additional PPI, the compensation rate adjustment, the denial of TTD, and the awards of interest and attorney fees. I respectfully dissent with the majority's decision as to ongoing opioids. I did not find Employee's testimony regarding his past use of opioids to be credible, and given he had successfully stopped using opioids for a period of time, I do not believe it was reasonable or necessary to reinstate them.

/s/
Bradley Evans, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of DEVIN A McNULTY, employee / claimant v. LAST FRONTIER BAR, employer; COMMERCE AND INDUSTRY INSURANCE COMPANY, insurer / defendants; Case No. 200907861; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on December 13, 2018.

/s/
Charlotte Corriveau, Office Assistant