ALASKA WORKERS' COMPENSATION BOARD

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

LAUTARO RUBKE, Employee, Claimant, v. PCL CONTRACTORS & RISK ENTERPRISE MANAGEMENT, Employer, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201406900 AWCB Decision No. 19-0008 Filed with AWCB Fairbanks, Alaska on January 15, 2019.

Lautaro Rubke's (Employee) March 28, 2014, May 19, 2014 and February 2, 2016 claims and December 2, 2016 and December 14, 2016 petitions were heard on October 12, 2017 and November 30, 2017, in Fairbanks, Alaska, a date selected on June 19, 2017 and October 12, 2017, respectively. Employer's May 17, 2017 Affidavit of Readiness for Hearing gave rise to this hearing. Employee appeared telephonically, represented himself and testified. Attorney Robert Griffin represented PCL Contractors and its insurer (Employer) and appeared in person at the first hearing and telephonically at the second hearing. Gemma Aghuchak testified on Employee's behalf. Adjuster Maria Garcia, testified for Employer. The record remained open for several months to receive tax documents and closed on November 19, 2018, after the panel reviewed additional briefing submitted on that date. The panel deliberated on December 17, 2018. Between the two hearings and while waiting for supplemental documentation, Employer paid benefits to Employee.

ISSUES

Employee contends he is entitled to a compensation rate adjustment to $1,155 a week, but he is not sure how he reaches that amount. He alternately contends he may be improperly classified as a seasonal or temporary worker or should be classified as a seasonal or temporary worker and is being treated as a "regular" worker. Employee contends his compensation rate is unfair and he is entitled to claim his four children as dependents.

Employer contends Employee was appropriately paid $426.59 a week. It contends Employee is a regular, hourly worker. Employer contends he should not be allowed to claim his four children as dependents because he cannot claim them as dependents on his taxes the year of his injury and is not supporting them.

1) Is Employee entitled to a compensation rate adjustment?

Employee contends he is entitled to additional and "missing" temporary total disability (TTD) benefits based on the opinion of Richard Cobden, M.D. and because Employer incorrectly interpreted child support withholding orders and improperly garnished three of his TTD checks.

Employer contends Employee is not entitled to additional TTD because it stopped his TTD on two occasions when he failed to sign releases and attend an Employer's Medical Evaluation (EME). It contends Employee is no longer entitled to TTD because his treating physician, Michael McNamara, M.D., found him medically stable on April 7, 2015, and predicted he could return to work on May 18, 2015. Employer contends any overpayment to child support is still a benefit to Employee and Employer should not have to repay him, as it would simply be withheld and sent to child support again because it is a lump sum.

2) Is Employee entitled to additional TTD benefits?

Employee contends he is entitled to temporary partial disability (TPD) benefits. He cites no medical evidence to support this contention.

Employer contends Employee is not entitled to TPD benefits.

3) Is Employee entitled to TPD benefits?

Employee contends he is entitled to permanent partial impairment (PPI) benefits. He cites no specific percentage or physician opinion to support this contention.
After the first hearing, Employer voluntarily paid Employee a 17 percent whole person PPI rating totaling $30,090 from an EME with Michael Fraser, M.D. Employer contends no further PPI is owed.

4) Is Employee entitled to additional PPI benefits?

Employee contends he is entitled to transportation costs, but initially did not specify the amount. After the second hearing, Employee submitted a mileage log and requested 3,540.3 miles.

Employer processed the mileage log and reimbursed Employee for 721.2 miles at the 2015 rate of 57 cents per mile totaling $726.41. Employer objected to some of Employee's entries and Employee did not respond to those objections or provide additional documentation to support the disputed mileage requests. Employer contends no further transportation costs are owed.

5) Is Employee entitled to additional transportation costs?

Employee contends he is entitled to additional per diem for travel to medical appointments. He cites no specific appointments and fails to provide any amount to support this contention.

Employer contends it gave Employee travel advances for medical travel and he actually owes Employer for these advances because he did not submit receipts pursuant to the regulation.

6) Is Employee entitled to additional per diem?

Employee contends he is entitled to an additional penalty and interest, but does not identify the specific benefits he contends have acquired a penalty and interest or the amount owed.

Employer paid a penalty on initial TTD payments issued without Employee's wage information, and on the PPI benefit. It contends no other penalty or interest is owed.

7) Is Employee entitled to additional penalty and interest?

Employee contends Employer frivolously and unfairly controverted his claim.
Employer contends its valid controversions were based on Employee's failure to sign releases and failure to attend an EME.

8) Did Employer file a frivolous or unfair controversion?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:
1) This case has been plagued by many difficulties, to include a withdrawal of two attorneys for Employee, a change in attorneys for Employer, a continued hearing, the need for supplemental documents and briefing, the inability of Employee to acquire the necessary documents due to incarceration, the need to re-open the record to clarify the supplemental documents, child support orders garnishing Employee's benefits and Employee's belief Employer inappropriately reported his tax information. Employee contends he is entitled to certain benefits based on advice he received from counsel, but Employee is unclear what legal authority entitles him to those benefits and is now pursuing his claims unrepresented. This decision is written without several documents requested from the parties. (Record, observations, inferences drawn from experience).
2) On March 8, 2014, Employee injured his left wrist while working as a laborer for Employer. (Report of Occupational Illness or Injury, April 15, 2014).
3) On March 24, 2014, Employee saw Gregory Gootee, PA-C, who assessed a sprain of the left wrist with concern for a scapholunate ligament rupture. (Orthopedic Physicians Anchorage Medical Record, March 24, 2014).
4) On March 28, 2014, Employee contacted the workers' compensation division's office because he was upset Employer required him to front lodging, clothes, travel, medical, and prescription costs for the original medical treatment he received immediately after his injury when he was flown to Anchorage. Employee was advised how to file a claim and did so the same day. (Contact with Employee in ICERS, March 28, 2014; record, observations).

5) On March 28, 2014, Employee claimed TTD, TPD, PPI, medical and transportation costs, review of a reemployment benefit decision (eligibility), penalty and interest. (Workers' Compensation Claim, March 28, 2014).

6) On March 31, 2014, Employee was placed on modified work. (Physician's Report, March 31, 2014).

7) On April 1, 2014, a workers' compensation technician sent Employee an e-mail with instructions on how to contact the adjuster assigned to his case and what he should submit to obtain reimbursement. (E-mail, April 1, 2014).

8) On April 2, 2014, Employee came into the division and stated he was called by a claims administrator, but they hung up. The technician contacted Wilton Adjustment Service with Employee present and put the parties in touch. Mary Garcia was the person handling his case. (ICERS Case Notes, April 2, 2014).

9) On April 3, 2014, Employee filed documents, which board staff helped him fax to the adjuster. Employee labeled these documents "receipts, medical bills, and reports." The first document is Gemma Aghuchak's bank statements, (Employee's fiancé, also known as Gemma Everett), reflecting bank charges and withdrawals in Anchorage, Alaska for food and incidentals from March 24, 2014 through March 28, 2014, totaling $422.97. The second document is a receipt to a United Postal Service (UPS) store in Fairbanks, Alaska for fax services, pens and sharpies totaling $19.07. The third document is a release for Employee to release medical records from Orthopedic Physicians of Anchorage to Sports Medicine and Orthopedics Fairbanks. The fourth document is a March 24, 2014 prescription from PA-C Gootee. The fifth document is a March 24, 2014 Report of Passenger Health Status for Transport for Employee. The sixth document is a March 25, 2014 e-mail from Sterling Gillon from Anchorage Midtown Hilton Hotel reflecting an additional reservation for Employee and noting it was directly billed to Employer at $129 for March 25, 2014 through March 26, 2014. The seventh document is a list of Employee's occupational therapy from April 4, 2014 through May 2, 2014, totaling seven appointments, and directions for contrast baths and active and passive wrist exercises. The eighth document is a batch of receipts. Some are copied dining receipts from various restaurants in Anchorage: a March 27, 2014 receipt for $77.40, a March 26, 2014 receipt for $83.72, a March 26, 2014 receipt for $34.31, and a March 24, 2014 receipt for $107.61. The next is a $115.99 receipt from AutoZone in Anchorage for oil, a battery and fuel treatments. The next is a March 27, 2014 receipt from Wal-Mart for incidentals totaling

$33.57. The next is a March 27, 2014 receipt from Fred Meyer Pharmacy in Anchorage for $44.19. There is another series of dining receipts from various restaurants in Anchorage on March 26, 2014 for $34.01, on March 25, 2016 for $27.00, and on March 24, 2014 for $88.00. The next is an April 1, 2014 receipt from Fred Meyer Pharmacy in Fairbanks for $57.59. The next is a March 26, 2014 restaurant receipt for $44.31. The ninth document shows Employee had an occupational therapy appointment on April 2, 2014. The tenth document is a work release from Sports Medicine Fairbanks stating Employee could return to work with restrictions on March 31, 2014, accompanied by a March 31, 2014 physician's report, and March 26, 2014 final reports by PA-C Gootee. (Employee's Documents, April 3, 2014).

10) On April 18, 2014, Employee again filed various documents which the board helped him fax to the adjuster. These documents were labeled by Employee as "W-2 Forms and medical release." The first document is Employee's April 18, 2014 medical release. The second document is Employee's W-2 Wage and Tax Statement, Form 1099-G, and Tax return transcript for 2013 which reflects Employee is single with no dependents and made $32,762 that year. The third document is Employee's W-2 Wage and Tax Statement, Form 1099-G, and Tax return transcript for 2012 which reflects Employee was the head of household with four dependents and made $7,275 that year. (Employee's Documents, April 18, 2014).

11) On April 19, 2014, Employer accepted Employee's March 28, 2014 claim and admitted TTD benefits, medical and transportation costs and reemployment benefits. (Answer, April 19, 2014).

12) On April 21, 2014, Employee was continued on modified work. (Physician's Report, April 21, 2014).

13) On April 28, 2014, adjuster Garcia stated Employee was paid per diem for his treatment in Anchorage, his prescriptions were being processed and his compensation rate was being increased based on additional wage information. (Prehearing Conference Summary, April 28, 2014).

14) On May 1, 2014, Employee attended an EME with Charles, Craven, M.D. Dr. Craven opined Employee was not medically stable, should see a specialized hand surgeon and should be placed on modified work. (EME, May 1, 2014).

15) On May 7, 2014, Employee came into the division and met with a technician to determine if his TTD payments were being calculated correctly. After listening to the process, Employee seemed satisfied. He was also advised on how to create a mileage log. (ICERS Case Notes, May 7, 2014).

16) On May 12, 2014, Employee was continued on modified work through August 20, 2014. (Physician's Reports, May 12, 2014, June 24, 2014, August 20, 2014).

17) On May 19, 2014, Employee asked for a compensation rate adjustment. (Amended Workers' Compensation Claim, May 19, 2014).

18) On May 22, 2014, Employee came in to the division and requested his compensation report and the May 1, 2014 EME report from Dr. Craven. (ICERS Case Notes, May 22, 2014).

19) On May 30, 2014, Employer filed the reports Employee requested from the division on May 22, 2014. The compensation report was signed by the adjuster, Ms. Garcia, on May 20, 2014. (EME Report, May 1, 2014, Compensation Report May 20, 2014, Employer's Documents, May 30, 2014).

20) On June 11, 2014, Garcia stated Employee had been paid all time loss benefits at the adjusted compensation rate, including a penalty of $175.59. Employee was not present. (Prehearing Conference Summary, June 11, 2014).

21) On June 23, 2014, Employee contacted the division asking if he should be receiving any more TTD payments. Employee was advised that if he was working, payments would stop unless he is taken off of work again by his doctor. Employee stated he had not received the check discussed at the last prehearing. He was instructed to contact the adjuster. (ICERS Case Notes, June 23, 2014).

22) On October 9, 2014, Employee saw his treating physician Dr. McNamara for a pre-operation appointment and was taken off of work for four to six months. He would be re-evaluated for light duty at two to three months, and for full duty at four to six months. (Work Status, October 9, 2014).

23) On October 10, 2014, Dr. McNamara performed a left wrist fusion on Employee in Anchorage. Employee was to wear a short-arm cast for six weeks. (Dr. McNamara record, October 10, 2014).

24) On October 15, 2014, Employee was seen post-operation. PA-C Robert Thomas noted there was swelling, and Employee was placed in a dressing with a splint. He was instructed to not change the dressing. Employee was driving that day with his girlfriend back to Fairbanks and a message was left for the adjuster regarding the instructions given to Employee. (Patient Visit Notes, October 15, 2014).

25) On October 24, 2014, Employee could not return to work for four to six weeks. (Physician's Report, October 24, 2014).

26) On October 31, 2014, Employee could not be released to work for three months. (Physician's Report, October 31, 2014).

27) On November 11, 2014, Employee filed various documents which division staff helped him fax to the adjuster. The first document is telephone contact information for his fiancé Gemma and for the adjuster Garcia. The second document is notice and instructions for Employee's October 9, 2014 pre-operation appointment and October 10, 2014 surgery date with illegible handwritten notes. The third document is a print out from Alaska Hand Elbow and Shoulder with the type of services they perform; the following services are circled: S-L Ligament Injury, TFCC, and Trigger Finger. The fourth document are copies of Employee's round trip airline ticket, copies of two September 9, 2014 taxi cab receipts totaling $40 and a prescription receipt with no date for $84.05. (Employee's Documents, November 11, 2014).

28) On November 24, 2014, Employee contacted the division and said the adjuster agreed to pay him a higher TTD amount at the last prehearing and was not. A prehearing conference was scheduled. (ICERS Case Notes, November 24, 2014).

29) On December 12, 2014, attorney Griffin entered his appearance for Employer. (Entry of Appearance, December 12, 2014).

30) On December 16, 2014, the adjuster contacted Employee's physician's office and confirmed whether he could be released to light duty because Employer had a light duty position open. It was confirmed Employee could be released to light duty and he could work on the North Slope and could do home exercises while away from occupational therapy. (Alaska Hand-Elbow Shoulder Surgical Specialists Record, Work Status, December 16, 2014).

31) On January 12, 2015, Employer filed a Controversion Notice that was signed on January 8, 2015, and denied benefits for Employee's failure to sign releases that were sent to Employee on December 10, 2014 and received by Employee on December 12, 2014. (Controversion Notice, January 8, 2015).

32) On January 12, 2015, the same day the Controversion Notice was filed, Employee signed the releases. (Signed Releases, January 12, 2015, record, observations).

33) On January 21, 2015, Employee contacted the division regarding the Controversion Notice. He was advised his benefits were suspended because he did not sign releases and was advised to call and ask the adjuster if those benefits would be paid. (ICERS Case Notes, January 21, 2015).

34) Employer did not pay the benefits that were suspended due to Employee's failure to sign releases and did move for forfeiture of those benefits. (Record, observations, inferences drawn from experience).

35) On January 22, 2015, Employer filed two letters to withhold property for child support on behalf of Employee. (Child Support Letters, January 22, 2015).

36) On February 4, 2015, Employee contacted the division and raised concern that he only received $150 for a two-week TTD check after money was taken out for child support. (ICERS Case Notes, February 4, 2015).

37) On February 5, 2015, Employer contacted the division and explained that Employee owes $365.18 and $286.66 every two weeks in child support, which leaves him with roughly $189.16 every two weeks. (ICERS Case Notes, February 5, 2015).

38) Also on February 5, 2015, a division representative contacted Employee and relayed what Employer had explained. Employee was advised to contact child support regarding this issue. (*Id.*).

39) On February 10, 2015, Dr. McNamara placed Employee on limited duty, with approval to increase weight progressively as tolerated, with predicted full duty over two to three months. (Work Status, February 10, 2015).

40) On February 11, 2015, attorney James Hackett entered an appearance on Employee's behalf. (Entry of Appearance, February 11, 2015).

41) On February 17, 2015, Employer filed a Controversion Notice that was signed on February 13, 2015 and denied Employee's benefits based on his failure to attend an EME with Dr. Fraser on February 12, 2015, in Fairbanks. (Controversion Notice, February 13, 2015).

42) On February 18, 2015, Employee wrote Employer a letter and stated, "I am sorry I missed the Fairbanks IME on February 12, 2015. I was having some health problems. I have called and left messages for you yesterday and three times today. I apologize for my confusion and frustration. Please reschedule the IME…" (Employee Letter, February 18, 2015).

43) On March 20, 2015, Employee attended an EME with Dr. Fraser. He opined Employee had not reached medical stability and predicted he would reach medical stability six to eight months after his October 10, 2014 surgery, which would be between April 10, 2015 and June 10, 2015. (EME Report, March 20, 2015).

44) Employer did not pay the benefits that were suspended due to Employee's failure to attend an EME and did not move for forfeiture of those benefits. (Record, observations, inferences drawn from experience).

45) On April 7, 2015, Dr. McNamara found Employee medically stable and released him to work with no restrictions effective May 18, 2015. Dr. McNamara also referred Employee to Alaska Spine Institute for a PPI rating. (Dr. McNamara record, April 7, 2015).

46) There is no evidence this PPI rating ever occurred. (Record, observations and inferences drawn from the above).

47) Employee's treating physician, Dr. McNamara, found him medically stable on April 7, 2015, which was three days before EME Dr. Fraser's predicted date range from April 10, 2015 through June 10, 2015. Dr. McNamara released Employee to work without restriction on May 18, 2015, a date in the middle of Dr. Fraser's predicted date range. (Record, observations, inferences drawn from the above).

48) On April 9, 2015, Employee updated his mailing address to a new address in Fairbanks. (Change of Contact Info, April 9, 2015).

49) On August 28, 2015, Employee changed physicians to Richard Cobden, MD. (Notice of Change of Treating Physician, August 28, 2015).

50) On October 8, 2015, Dr. Cobden thought Employee's fusion may have healed in an awkward position. He referred Employee to a hand surgeon specialist at the University of Washington Hand Center. (Dr. Cobden record, October 8, 2015; Consultation Request, November 23, 2015).

51) On January 13, 2016, Hackett withdrew as Employee's lawyer and asserted a $4,478.99 lien. (Notice of Withdrawal and Lien, January 15, 2016).

52) On February 2, 2016, attorney John Franich entered an appearance on Employee's behalf. (Entry of Appearance, February 2, 2016).

53) On February 2, 2016, Employee claimed TTD benefits from March 8, 2014 through "various" and from May 19, 2014 through "ongoing," PPI benefits, medical and transportation costs, a reemployment eligibility evaluation, penalty, interest, an unfair or frivolous controversion finding and attorney fees and costs. (Workers' Compensation Claim, February 2, 2016).

54) On April 13, 2016, Mr. Franich withdrew as Employee's counsel. (Withdrawal of Counsel, April 12, 2016).

55) On April 20, 2016, Douglas Hanel, MD, at the University of Washington Hand Center opined Employee's wrist was in an appropriate position with a solid fusion and recommended no more surgery. Dr. Hanel later said Employee could return to work at two jobs in his ten-year history, specifically Material Handler, Construction Worker No. 1 and Flagger. (University of Washington Medical Records, April 18, 2016; Physician's Review Form, July 18, 2016).

56) Dr. Hanel did not specifically give an opinion on Employee's medical stability. (*Id.*).

57) On April 22, 2016, Dr. McNamara disagreed with Dr. Cobden's opinion the fusion had healed in an awkward way. (April 22, 2016, Letter).

58) Employee's original treating physician, Dr. McNamara, and the specialist to whom Employee's second treating physician, Dr. Cobden, referred him, Dr. Hanel, agreed Employee's fusion is in an appropriate position. (Inferences drawn from the above).

59) On July 23, 2016, rehabilitation specialist Tommie Hutto recommended Employee was not eligible for reemployment benefits based on Dr. Hanel's opinions. (Hutto Evaluation Report, July 23, 2016).

60) On August 24, 2016, the RBA Designee found Employee ineligible for reemployment benefits based on Hutto's July 23, 2016 evaluation. (Letter from RBA Designee, August 24, 2016).

61) On October 19, 2016, Employee was upset because most of his TTD benefits went to child support. (ICERS Case Notes, October 19, 2016).

62) On November 2, 2016, Employee said he wanted penalties and interest for his case due to being unavailable due to incarceration. He also wanted his retirement reinstated. Employee spoke to a reemployment technician who explained how to petition the board to review the reemployment decision. (ICERS Case Notes, November 2, 2017).

63) On November 2, 2016, Employee petitioned for review of the reemployment benefit decision. (Petition, November 2, 2016).

64) On November 4, 2016, Employee wanted to know why he was not receiving TTD benefits. Division staff told him he needed a physician to state he is not medically stable. (ICERS Case Notes, November 4, 2016).

65) On November 8, 2016, Employee requested a hearing on his petition for review of the reemployment eligibility decision. (Affidavit of Readiness for Hearing, November 8, 2016).

66) Also on November 8, 2016, Employee filed a change of address form and changed his address to a new address in Fairbanks. (Change of Address Form, November 8, 2016).

67) On November 28, 2016, Dr. Cobden met with Employee and counseled him regarding his diagnosis, treatment options, and expected prognosis. Dr. Cobden wrote:

> After reviewing his records and clinical findings, imaging studies and related material, I think he has now reached medical stability and can be given a PPI rating. I have told him that pursuing the vocational rehabilitation and retraining is a good idea and should be done at this time. He will not be going back to heavy labor or concrete work. No further surgery is contemplated at this time.

Dr. Cobden also filled out a November 28, 2016 work and school recommendation form stating Employee should not lift overhead, should lift a maximum of 15 pounds and should push and pull a maximum of 10 pounds. Dr. Cobden also wrote Employee, "will need vocational rehabilitation." (Dr. Cobden's Letter and Work Status Form, November 28, 2016).

68) Dr. Cobden never gave an exact date as to when Employee became medically stable, he simply stated he has now reached medical stability. (Observations).

69) Dr. Cobden never rated Employee or referred him to another physician for a PPI rating. (*Id.*).

70) On December 5, 2016, Employee contended his compensation rate was miscalculated and he is missing three disability payments -- one from November 2014, one from December 2014, and a third from January. He also contended he is owed medical travel costs and out-of-pocket medical costs for prescription medications. The designee scheduled a hearing on Employee's petition for review of the reemployment benefit decision. (Prehearing Conference Summary, December 5, 2016).

71) On January 3, 2017, Employer filed answers to Employee's December 12, 2016 and December 14, 2016 petitions for protective orders. Employee's petitions were never filed with the board. The answers reflect the petitions address the claim on the merits and are not in regards to medical releases. (Answers, January 3, 2017; observations and inferences drawn from the above).

72) On January 18, 2017, the division served a hearing notice to Employee's address of record. (Hearing Notice, January 18, 2017).

73) On February 8, 2017, Employee advised he was incarcerated but made arrangements to call in for the hearing. (ICERS Case Notes, February 8, 2017).

74) On February 9, 2017, a hearing was held on Employee's petition for review of reemployment benefits. Employer's counsel stated he had spoken to Employee's father and Employee was going to be released from incarceration and would attend the hearing in person. Employee did not appear

at hearing or call in. The chair attempted to contact Employee at his phone number of record. Office staff also attempted to reach Employee through his parents, wife and probation officer with no success. The hearing went forward without Employee. (Record, February 9, 2017).

75) On March 14, 2017, *Rubke v. Risk Enterprise Management*, AWCB Decision No. 17-0027 *(Rubke I)* denied Employee's November 2, 2016 petition for review of the reemployment benefit administrator designee's decision finding him ineligible for benefits. *Rubke I* held there was substantial evidence to support the RBA designee's finding. However, it noted there was a subsequent opinion from Dr. Cobden regarding reemployment benefits that was not available to the RBA designee at the time of her decision. Employee was advised he could seek modification of the RBA designee's decision within one year of its issuance. (*Rubke I*, March 14, 2017).

76) Employee did not move for modification of the RBA Designee's decision. (Agency file).

77) On May 17, 2017, Employer requested a hearing on Employee's claim and petitions. (Affidavit of Readiness for Hearing, May 17, 2017).

78) On June 19, 2017, during a prehearing conference the board's designee attempted to contact Employee with no success. The prehearing went forward. Employer stated the parties could not agree on per diem and child support issues, so it wanted to take Employee's claims and petitions to hearing. The designee scheduled a hearing on those issues and noted Employee's petitions were not in the agency file and advised it was his responsibility to file them. Employee called in after the prehearing and was notified of the hearing date. (June 19, 2017, Prehearing Conference Summary).

79) On July 10, 2017, during another prehearing conference the board's designee attempted to contact Employee again without success. The designee again noted Employee's December 2, 2016 and December 14, 2016 petitions were not filed and it was his responsibility to file them if he wanted the board to address them at the hearing. (Prehearing Conference Summary, July 1, 2017).

80) Employee never filed the December 2, 2016 and December 14, 2016 petitions with the board and they are not addressed by this decision. (Agency file; judgment).

81) On September 22, 2017, Employer filed the same receipts the board helped Employee fax to the Employer on April 3, 2014, above. It additionally included two September 8, 2014 cab receipts from Employee, one for $18.00 and one for $22.00. (Notice of Intent to Rely, September 22, 2017; observations).

82) On September 25, 2017, Employee said his current address was in Scammon Bay, Alaska. The board's designee instructed Employee to fill out a change of address form. Employee's

scheduled September 20, 2017 EME in Anchorage was discussed. Employer stated it had purchased a round trip airline ticket, prepaid the hotel room and the hotel shuttle would provide Employee transportation to and from the airport and to the EME appointment. Employer said it would inquire about getting Employee a $60.00 per diem check. Employee was advised to provide all his receipts to the adjuster. (Prehearing Conference Summary, September 26, 2017).

83) On September 30, 2017, Employee underwent an EME with Dr. Fraser who did not recommend any future medical treatment. Dr. Fraser thought it was reasonable to adjust his date of medical stability to October 10, 2015, (one year after his surgery), and rated Employee with a 17 percent whole person PPI rating. (Fraser EME Report, September 30, 2017).

84) Dr. Fraser is the only physician to give Employee a PPI rating. (Agency file).

85) On October 5, 2017, Employer filed a hearing brief. The hearing brief admits Employee promptly cured the conduct that led to the two Controversion Notices that are the subject of this decision by signing releases and attending an EME. (Employer's Hearing Brief, October 5, 2017).

86) Employee did not file a hearing brief. (*Id.*).

87) On October 12, 2017, a hearing began with the parties' agreement and understanding the hearing may continue to a later date due to time constraints. (Hearing, October 12, 2017).

88) At hearing, Employer raised three preliminary issues. The first issue was it had received updated child support liens dated October 4, 2017. One for $34,480.12 and the other for $17,604.50. Employee thought his child support liens had been resolved and the amount should have changed. He noted his case was under review and he should not have owed more than $50 per month. The chair noted she had no jurisdiction over child support issues and if Employee believed the amounts to be incorrect, he needed to continue working in superior court to modify those amounts. (*Id.*).

89) The second preliminary issue was Employer had received a 17 percent PPI rating from the EME totaling $30,090.00. Employer noted this amount was subject to garnishment by child support and if Employee thought the lien amount was wrong he should address it with child support immediately. Employee contended Employer should only pay child support 40 percent. Employer noted PPI was a lump sum payment, and it needed to pay at 100 percent according to the withholding order. Employee said his children had been adopted two years earlier and he does not receive documentation from child support. The chair compared Employee's current address with the address on the withholding documents and determined he needed to update his address. (*Id.*).

90) The third preliminary issue was Employee received a PPI rating on September 30, 2017, but Employer only discovered it two weeks ago when preparing for hearing. The PPI was not timely paid and it was counsel's mistake, not the insurance company's; $7,522.50 is the penalty. The adjuster contended against paying the penalty, as the rating was given at a time when one physician did not deem Employee medically stable. Employee contended the penalty should be paid. The chair ordered further briefing on this issue, as the parties were just learning about this issue and it was not an issue scheduled for hearing. (*Id.*).

91) Employer subsequently voluntarily paid the $30,090.00 PPI benefit on October 19, 2017 and the $7,522.50 penalty on November 16, 2017. This entire amount of both checks went to child support because they were lump sum payments. There is no evidence interest was paid on this amount because $7,522.50 is 25 percent of $30,090.00. (Employer's Supplemental Briefing, November 17, 2017, Exhibits 15, 17; observations).

92) At the outset, the chair asked Employee to set forth the benefits he requested, with specificity. The designee asked Employee to begin with TTD -- what payments he believed he is owed and how he reached that amount citing specific numbers and dates. (Record, October 12, 2017).

93) Employee testified that when he had Hackett as counsel, they submitted IRS documentation for the money he made two years prior to the injury and came up with an average and submitted it to the adjuster and spoke with the adjuster's supervisor and was told they were not going to pay him more than a $1,000 a week. Employee therefore went back to work. The parties argued about his compensation rate again when he had surgery. Employee contends he is being treated as a temporary, seasonal Employee, but he is a full time construction worker. He worked an average of 17.5 hours a day. Employee believes his rate should be $1,155 a week. He calculated an average of what he made two years prior to his injury and divided it by 52. However, this factor was reached using IRS forms and was missing $11,500 Employer paid. He sent all this information to Employer. Employee then went to Franich who agreed his compensation rate was wrong and they re-sent all of his tax information. Employee earned $17,668 in 2012 and $32,762 in 2013. He could not explain how his calculations were reached, but contended his tax records were incomplete. Employee said his attorneys helped him reached those numbers. His attorney may have been using a combination of two different years, possibly 2013 and 2014. This amount may also include penalties; Employee is not sure. (Employee, October 12, 2017).

94) At the time of his injury, his four children were his dependents. Employee was not married at the time of his injury. He was living with his fiancé Gemma, who he has been with since 2011, and her two children. Employee was supporting his four children who were living with his parents. His four children were adopted two years ago. Employee disputes his ex-wife was given custody and he claims she abandoned their children. (*Id.*).

95) Employee's statement regarding custody of his children is contrary to the October 1, 2012 divorce decree, which gives Employee's ex-wife primary sole and legal custody. Employee's children were adopted after his injury on September 20, 2016. Employee did not provide any additional evidence about his children's legal status at the time of the injury. The only evidence submitted was the original divorce decree before the injury and the adoption certificate after the injury. Presumably, custody potentially changed over time, as the children were later adopted. However, Employee has not stated or provided evidence when the custody status changed and how this affects his ability to claim his children as dependents. (Divorce Decree, October 1, 2012; Certificate, September 20, 2016; agency file; observations and inferences drawn from the above).

96) Employee contends he is also missing some TTD benefit payments including TTD checks from December and January during the time he was paid $199 twice. This is when Employer inappropriately calculated the child support withholding orders and paid child support 80 percent of his check instead of 40 percent. Employee complained to Employer and was instructed to contact the child support office. He contacted the child support office and they agreed too much of his check had been garnished. Employee is missing a December check because of his failure to sign releases and a February check for his failure to attend an EME. When asked by the designee how much be believes he is missing in TTD benefits, he could not give a number. (Employee, October 12, 2017).

97) Employee did not attend one EME because he was not receiving benefits during this period. He attended a subsequent EME. (*Id.*).

98) Adjuster Mary Garcia explained how she determined Employee's compensation rate. She compared the 2012 and 2013 tax returns; 2013 was higher. The 2013 tax return shows Employee is single and does not claim any dependents. She divided his earnings by 50 and got his average weekly wage and then went to the online calculator to get the compensate rate. The compensation rate was $426.59 per week. She was treating Employee as a regular worker, not a seasonal worker. She believes five dependents could make a $50 to $75 difference. Employer paid him his regular

wages through April 1, 2014. The first TTD check was $418. Employer had not received any wage documentation at that time. Once Garcia got the wage documentation, she re-characterized the TTD rate and increased it to $702 and paid a $179 penalty. Employee went back to work. TTD payments started again on October 9, 2017, the day before his surgery. There were two child support withholding orders and Garcia paid both of them in full, which resulted in Employee receiving $199 TTD checks. She stopped paying on May 17, 2015, when Dr. McNamara released Employee to work. (Garcia, October 12, 2017).

99) Employer's brief provided the following chart and explanation of TTD payments. It paid Employee his regular wages through April 1, 2014. Employee did not provide wage documentation, so Garcia paid him at the statutory minimum compensation of $251 per week.

Date of Check	Payment Period	Amount
4/18/2014	4/2/14-4/15/14	$502.00
4/28/2014	4/16/14-4/29/14	$502.00

100) In May 2014, Employee provided documentation justifying a $426.59 rate, and May payments were adjusted to include the increase owed in April. A penalty was paid for the late April payments. Employer paid the following benefits:

Date of Check	Payment Period	Amount
5/14/14	4/30/14-5/6/14	$426.59
5/16/14	5/7/14-5/20/14	$853.18
5/23/14	*Penalty for 4/2/14-4/29/14	$175.59
5/23/14	*Adjustment 4/2/14-4/29/14	$702.36

101) On May 20, 2014, TTD ended because Employee went back to work at his usual summer employment with a different Employer, HC Contractors. TTD recommenced on October 9, 2014, because Dr. McNamara performed a pre-op followed by surgery. On April 7, 2015, Dr. McNamara found Employee medically stable and predicted he could return to work on May 18, 2015, with no restrictions. Time loss benefits therefore ended on May 18, 2015. The following benefits continued until May 18, 2015:

Date of Check	Payment Period	Amount
10/22/14	10/9/14-10/22/14	$853.18
11/2/14	10/23/14-11/5/4	$853.18

11/20/14	11/6/14-11/19/14	$853.18
11/24/14	11/20/14-12/3/14	$853.18
12/11/14	12/4/14-12/17/14	$853.18
12/24/14	10/9/14-10/22/14	$853.18
1/9/15	1/1/15-1/7/15	$426.59

102) Employee's benefits were suspended based on his failure to sign releases from January 8, 2015 to January 11, 2015. (Observations).

103) In January 2015, Employer learned about Employee's child support liens and paid the following benefits:

Date of Check	Payment Period	Paid to Employee	Paid to Child Support
1/19/15	1/12/15-1/25/15	$199.34	$365.18 $288.66
2/3/15	1/26/15-2/8/15	$199.34	$365.18 $288.66
2/17/15	2/9/15-2/12/15	$243.76	

104) Employee's benefits were suspended again based on his failure to attend an EME from February 12, 2015 to March 19, 2015. (Observations).

Date of Check	Payment Period	Amount to Employee	Amount to Child Support
3/31/15	3/20/15-4/2/15	$511.90	$341.28
4/13/15	4/3/15-4/16/15	$511.90	$341.28
4/23/15	4/17/15-4/30/15	$511.90	$341.28
5/12/15	5/1/15-5/14/15	$511.90	$341.28
5/12/15	5/15/15-5/17/15	$182.82	

(Employer's Brief, October 5, 2017).

105) Garcia said she believed Employee was told to keep receipts, but she never received any. The first travel advance was paid in March 2014 so he could see Dr. McNamara. Employer reimbursed him for a prescription for $57.59. It reimbursed Employee $40 on September 20, 2014 for cab fare. On October 2, 2014, he was given a $400 travel advance for an appointment with Dr. McNamara. On October 13, 2014, Employee was given a $120 travel advance. Employer never received

receipts showing how these advances were spent. In February 2015, there was a scheduled EME and Employee was advanced $60. Employee did not attend the EME, and there was a $906 no-show fee. For the final EME, Employee was given $60 cash at the hotel, and Garcia never received receipts as to how that was spent. (Garcia).

106) Employer made the following travel payments or other reimbursements:

Date of Check	Payment Period	Amount
4/14/2014	3/24/14-3/28/14 Travel Advance -Treatment for Initial Injury	$240.00
5/1/14	4/1/14 Prescription	$57.59
9/20/14	9/9/14 Cab Fare	$40.00
10/2/14	9/2/14-9/9/14 Travel Advance	$400.00
10/13/14	10/15/14 Travel Advance	$120.00
2/6/15	2/20/15 Travel Advance (EME Employee did not attend)	$60
9/30/17 (Cash)	9/30/17 Travel Advance (EME Employee did attend)	$60

(Employer's Brief, October 5, 2017).

107) Employee kept receipts and submitted them to his attorneys. He had Employer's brief before him as he testified, which laid out the travel Employer paid, but he could not point to a time when he believes he should have received per diem and did not receive it. (Employee, October 12, 2017).

108) Employee's fiancé, Aghuchak testified Employee told her he needed to keep receipts. Aghuchak kept his receipts to date and bank statements and gave them to an attorney. She does not understand why he has to reproduce them, when he already provided them. There were a lot of communication issues and she does not believe Employee was always paid what he was entitled to. Aghuchak always went to his appointments. She accompanied him on the surgery trip and they had to stay due to complications. She had to take care of him and she contends he should be owed compensation for two people for that trip. She also drove Employee back to Fairbanks. She does not have receipts, but can try to get statements from the bank. (Aghuchak, October 12, 2017).

109) Aghuchak never furnished additional bank statements. (Agency file).

110) Garcia's testimony that she never received any receipts is not supported by the evidence. Division staff helped Employee fax her some receipts on April 3, 2014, and Employer filed these same receipts and additional receipts on its September 22, 2017 Notice of Intent to Rely. Also on December 6, 2017, Employer filed a Notice of Intent to Rely and attached a June 16, 2015 letter from Employee's former counsel Hackett to Employer, which states Hackett sent Employee's receipts to Employer. Hackett's letter corroborates Employee's and Aghuchak's testimony on that issue. (Hackett letter, June 16, 2015; Notice of Intent to Rely, December 6, 2017; Employee's document's, April 3, 2014; Notice of Intent to Rely, September 22, 2017; judgment and inferences drawn from the above).

111) The applicable per diem rates are $0.535 per mile in 2017, $0.540 per mile in 2016, $0.575 per mile in 2015 and $0.560 per mile in 2014. Meals and incidentals are reimbursed at a maximum of $60 per day for travel less than 30 days. (State of Alaska Per Diem Rate Chart).

112) Employee never traveled over 30 days at a time, so he would have been paid per diem at the short term rate at a maximum of $60 per day. (Observations; inferences drawn from the above).

113) Evidence in the record corroborates Employee's and Aghuchak's testimony that he was advised to not fly home after surgery. On October 15, 2014, Employee was seen post-op by PA-C Thomas who noted there was swelling and placed Employee in a dressing and splint. Thomas noted Employee was driving back to Fairbanks and left a message for the adjuster regarding the instructions given to Employee. This is additionally corroborated by Employer's December 6, 2017 Notice of Intent to Rely, which attached the June 16, 2015 letter from Employee's former counsel Hackett to Employer. This letter states Employee experienced swelling and discomfort after his surgery, and Dr. McNamara, through his assistant requested Employee not to take the flight back, but to drive back to Fairbanks. The doctor was concerned elevation (while flying) could, and would, create pressure at the surgical site. Another physician's assistant assured Employee she would call the adjuster and inform her of the doctor's order. (Hackett letter, June 16, 2015; Notice of Intent to Rely, December 6, 2017; Patient Notes, October 15, 2014; inferences drawn from the above).

114) There is no other evidence regarding the need to drive or a travel companion for Employee. (Agency file).

115) At the October 12, 2017 hearing, Employer contended Employee's tax return is dispositive on the dependent issue. Employer contended if the 2013 tax return is chosen because it shows the highest income, that return controls the dependents issue, regardless of whether Employee claimed five dependents the year before and could potentially claim five dependents the year after and at the time of the injury. Employer denies Employee's former attorneys ever argued that the compensation rate should be $1,155 a week and that the dispute was over the number of dependents Employee could claim. Employer contended it was proper to controvert over Employee's failure to sign releases and attend an EME. It also contended the child support orders were ambiguous and Employer thought it was following the orders. Once Employer found out from child support it was withholding too much, it stopped. Any error regarding the child support withholding order should not be held against Employer because it still went to Employee's benefit. If Employee receives a penalty on this issue, it will be a lump-sum payment and will still go to child support. Employer contends it should be reimbursed for any travel advances where receipts were not provided as required. It contends that if reimbursement without receipt is not required, the regulation has no teeth. Employer also contended it should be reimbursed for the $906 EME no-show fee. (Employer's hearing arguments, October 12, 2017).

116) The issues of reimbursement for travel advances that cannot be supported by receipts and reimbursement for a no-show EME fee were not raised by a petition from Employer or listed as an issue for hearing. The hearings were set solely on Employee's claims and petitions, and this decision will not address the issue of reimbursement raised for the first time in Employer's briefs and at hearing. (Agency file; judgment).

117) The first hearing day ended and the parties had not finished presenting their case. They agreed to provide supplemental briefing, and a November 20, 2017 hearing date was chosen. Employee was encouraged to contact his former attorneys, furnish receipts and figure out how he got to a $1,155 per week compensation rate. Employee was encouraged to cross-reference his contentions against Employer's brief. The designee urged Employee to provide dollar amounts, corresponding dates and reasoning supporting his requests. (Record, October 12, 2017).

118) On October 16, 2017, the board issued a letter addressing supplemental briefing.

Dear Mr. Rubke and Mr. Griffin:

The panel wanted to clarify the nature of the supplemental briefing and documents it would find helpful to decide the case. Also, the panel originally stated that the briefing would be due November 12, 2017, but since that date is a Sunday of a holiday weekend, it shall now be due on Monday, November 13, 2017. The continued hearing remains scheduled for November 30, 2017.

A. TTD

1. What each party believes Mr. Rubke's appropriate compensation rate is, the authority (basis) behind their theory, and the calculation of how they reached that amount.
2. Whether Mr. Rubke is a regular or seasonal worker with authority (basis) and calculations of Mr. Rubke's regular vs. seasonal compensation rate.
3. The number of dependents that should be used when calculating Mr. Rubke's compensation rate, the authority (basis) for that position and the varying calculations that are reached when differing numbers of dependents are used.
4. The parties' position on what should be done regarding payments that were made to child support that were more than 40% of Mr. Rubke's earnings.
5. Mr. Rubke's complete 2012, 2013, 2014 tax returns, as it was alleged by Mr. Rubke that tax information is missing for his work for PCL. These should be provided as soon as possible, so that they can be used for the calculations of items 1-3.
6. A final total of all of the TTD that has been paid to Mr. Rubke with dates and a final total of the TTD Mr. Rubke believes he is still owed, with dates noted of missing payments.

B. Per Diem for Travel

1. A list of all of Mr. Rubke's medical appointments and travel, including his initial medical treatment and independent medical examinations, with locations, dates, methods of travel, and whether or not the travel cost has been paid.
2. Authority for the amount of per diem Mr. Rubke would be entitled to for each medical appointment and travel day.
3. A list of all of the per diem travel Mr. Rubke has received and a list of all the per diem Mr. Rubke believes he is owed.
4. The parties' position and authority (basis) regarding whether it is necessary for Mr. Rubke to furnish receipts for his per diem and the appropriate remedy if he no longer has the receipts.
5. Any receipts, documents, or bank statements the parties can furnish regarding medical travel.

C. Penalties

1. Each parties' position on whether penalties are owed, amount of the penalty, and the authority (basis) for the penalty.

D. Miscellaneous

> Any other documents, briefing, or authority that the parties believe would be helpful to the panel in deciding Mr. Rubke's March 28, 2014, May 19, 2014 (Amended), and February 2, 2016 Workers Compensation Claims (WCC's) and December 2, 2016 and December 14, 2016 Petitions.
>
> The Alaska Workers' Compensation Website: http://www.labor.state.ak.us/wc/, has a legal research tab on it which gives access to the workers' compensation statutes, case law, and regulations. It also has a benefit calculator that can be used to calculate TTD and a link to other workers' compensation bulletins. (Letter, October 16, 2017).

119) On October 20, 2017, Employer denied future medical benefits based on Dr. Fraser's September 30, 2017 EME report stating future medical treatment is not reasonable or necessary with regard to Employee's left wrist. (Controversion Notice, October 20, 2017).

120) The October 20, 2017 denial was the first time medical benefits were denied. This occurred after the hearing. Medical benefits were not an issue for hearing and are not addressed by this decision. (Observation).

121) On October 31, 2017, Aghuchak, contacted the division and said Employee was in jail. A technician gave mileage and compensation rate information. (ICERS Case Notes, October 31, 2017).

122) On November 9, 2017, the board issued a letter extending the supplemental briefing deadline to November 20, 2017, based on a medical emergency of Employer's counsel. This letter was e-mailed and mailed to both parties. (Board's letter, November 9, 2017).

123) On November 14, 2017, Aghuchak, contacted the division and was also advised of the briefing extension. (ICERS Case Notes, November 14, 2017).

124) On November 16, 2017, Employee filed a brief. (Employee's Brief, November 16, 2017).

125) Employee's November 16, 2017 brief re-iterated his general contentions that he is entitled to additional benefits, but did not clarify dates, amounts or cite to medical records. (*Id.*).

126) On November 17, 2017, Employer filed a supplemental brief. It reiterates the contention Employee is only entitled to claim the number of dependents he claims on his tax returns and points to form 07-6101 that employees previously used to report injuries (reporting is now electronic). Form 07-6101 was attached as Exhibit 6 and states: "Declare your marital status and the number of your actual dependents on the injury date. Actual dependents means the exemptions you

would be able to claim if you were filing your tax return." Employer notes the word exemptions and not dependents is used. Employer also notes Employee was in arrears in child support and has not produced evidence to dispute Employer's assertion that his four children are not dependent upon him. Employee claimed his four children on his 2012 tax return and did not claim them on his 2013 tax return. (Exhibits 2, 3 to Supplemental Briefing Requested by the Board, November 17, 2017).

127) Employer's November 17, 2017 supplemental brief contains copies of cleared checks for all TTD and travel advances discussed in the above factual findings. (Employer Supplemental Brief, November 17, 2017).

128) Employee did not submit his 2014 tax return. (Agency file).

129) It is common practice for divorced couples to alternate claiming their children on their tax returns every other year. (Experience).

130) Employee was not granted physical or legal custody, but a child support order was entered and his wages and workers' compensation benefits were being garnished. (Child Support Orders).

131) There is no evidence Employer tried to make arrangements with child support to correct the error and pay less to the child support agency in subsequent weeks to fix their error. (Agency file).

132) Employee's weekly TTD rate would increase from $426.74 to $463.22 if he were given five exemptions. (Online Benefit Calculator).

133) On November 17, 2017, Employer also provided the dispatch document to work for Employer from Employee's union showing he made $25.80 per hour. (Exhibit 1 to Supplemental Briefing Requested by the Board, November 17, 2017).

134) If Employee worked for Employer 40 hours per week and earned $25.80 per hour, his gross weekly earnings would be $1,032 (40 X $25.80 = $1,032). A single person with one child earning this amount would be entitled to a $643.64 weekly temporary disability rate assuming he met all requirements for a rate adjustment. (Online Benefit Calculator).

135) Employer attached a printout from the Social Security Administration of Employee's itemized statements of earnings from various employers from 2004-2014. Employee earned the following: 2004: $9,786; 2005: $11,348.98; 2006: $1,280.61; 2007: $7,907.46; 2008: $1,806.88; 2009: $0; 2010: $0; 2011: $1,484.53; 2012: $8,016.76; 2013: $32,762.99; and 2014: $28,509.91. HC Contractors, Inc. is the only employer Employee worked for a on a reoccurring basis, which

occurred in 2012, 2013, and 2014. The first year Employee worked for Employer was 2014. (Exhibit 10, to Employer's Supplemental Brief, November 17, 2017, record, observations).

136) On November 30, 2017, Employer filed a spreadsheet of Employee's wages with Employer, which reflects Employee worked for Employer from March 1, 2014 until April 5, 2014 and made a total of $11,358.45 working for Employer. The first week he worked 24 hours, the second week he worked 57.5 hours, the third week he worked 82.5 hours, the fourth week he worked 82 hours, the fifth week he worked 69 hours, and the seventh week he worked 34.5 hours. (Spreadsheet, November 28, 2017, observations).

137) Despite the board's supplemental briefing request, neither party has provided what they believe Employee's compensation rate would be if he were determined to be a seasonal or temporary worker. That calculation would be based on Employee's wages during the twelve calendar months immediately preceding the injury and would therefore include the $11,358.45 Employee earned working for Employer before the injury and whatever potion of the $32,762.99 Employee earned in 2013 that was earned during the calendar year before the injury. (Record, observations, inferences draw from experience).

138) The hearing continued on November 30, 2017. Employer reviewed its supplemental briefing and conceded it did not find any legal authority on what should happen if child support is over-paid. Employee went through the TTD and TPD statutes and continued to argue he was a skilled worker, he made $28 per hour and does not understand how that justifies $426 per week in TTD. The panel noted it had not received the 2014 tax returns it had requested and wanted to see a complete copy of the child support withholding instructions. (Record, November 30, 2017).

139) On December 4, 2017, Employer filed a complete copy of the withholding orders in Employee's child support cases. One order was for $34,480.12 and required a payment of $142.35 per weekly pay period. The other order is for $17,604.50 and required a payment of $91.17 per weekly pay period. The order gives the following instructions:

> If this money is payable in lump sum, you must withhold and deliver to CSSD 100% of that amount, but not to exceed the total amount of the arrearages, penalty, and interest stated above. If you are making recurring payments to the obligor, you should withhold one of the following amounts, depending on your pay cycle, but not to exceed 40% of an employee's net disposable earnings or 40% of the recurring payments if the payment is not the earnings. (Withholding Order, November 22, 2017).

140) At the time the liens were received, Employee was receiving $853.18 bi-weekly. On January 19, 2015 and February 3, 2015, Employer paid both child support orders the full bi-weekly amounts of $365.18 and $288.66, which was more than 40% of Employee's net disposable earnings. This resulted in an overpayment to child support in the amount of $625.14. (Record; observations and inferences drawn from the above).

141) Also on December 4, 2017, Employer sent Employee a mileage log to fill out, which was agreed to at the hearing and discussed in the supplemental briefing. The mileage log was supposed to have all of Employee's medical appointments on it, but the entire spreadsheet was blank. (Letter, December 4, 2017; Mileage Log).

142) On December 5, 2017, the panel ordered the following supplemental documents:

> Dear Mr. Rubke and Mr. Griffin:
>
> At the November 30, 2017 hearing, the parties agreed to submit additional documents. These documents are: (1) Mr. Rubke's 2014 tax returns, (2) a mileage log of all of Mr. Rubke's medical travel, (3) the decree in Mr. Rubke's adoption case, and (4) the complete instructions of the child support withholding order in this case. The panel notes that the first two items were previously ordered by the panel on October 16, 2017. Mr. Griffin has agreed to send releases and a list of medical appointments to Mr. Rubke. Mr. Rubke agreed to sign releases and fill in the appropriate mileage that corresponds to the list of medical appointments in order to create a mileage log. The parties discussed the fact that it may take a significant amount of time to obtain Mr. Rubke's tax returns via release and Mr. Rubke is therefore also going to try to obtain his tax information on his own. The panel will close the record when it receives all of the documents. If the documents cannot be obtained by January 15, 2018, the parties shall write the board and give an update as to the status of the documentation.
>
> Additionally, after the hearing board member Sarah Lefebvre recalled observing Colaska, Inc. was one of Mr. Rubke's employers per the IRS records. Colaska, Inc. is the parent company and holds the EIN for Exclusive Paving, Ms. Lefebvre's employer. Ms. Lefebvre thought it prudent to research which company Mr. Rubke had been employed by. In doing so, it was discovered that Mr. Rubke's most recent Colaska employment was with another Colaska subsidiary company out of either Anchorage or Juneau. However, it was also discovered that he worked for her company, Exclusive, in 2007. Ms. Lefebvre does not know Mr. Rubke and has stated that she can be fair and impartial. If the parties have any objection to Ms. Lefebvre serving as a board member on this panel, they shall file this objection by December 29, 2017. (Letter, December 5, 2017).

143) The board both e-mailed and mailed the above letter to both parties and noted in the e-mail that the mileage log sent to Employee appeared to be blank and did not contain the appointments as discussed. (E-mail, December 6, 2017).

144) On December 7, 2017, Employer acknowledged the original travel spreadsheet was incorrect and attached a new one. Employer noted it had received Lefebvre's disclosure and had no objection to her participation on the panel. The Employer also attached as supplemental authority a copy of *Arnesen v. Anchorage Refuse,* Inc., 925 P.2d 661 (Alaska 1996) addressing the dependents issue. (E-mail, March 7, 2018).

145) Employee never filed an objection to Lefebvre serving on the panel. (Agency file).

146) On December 7, 2017, Colby Smith took over for Bob Griffin. (Amended Entry of Appearance, December 7, 2017).

147) On December 14, 2017, Employee acknowledged that he received a mileage log from Employer, but noted that it was blank and did not contain his medical appointments, as previously discussed at hearing. (Employee's letter, December 14, 2017).

148) On December 15, 2017, Employer sent Employee a mileage log that contained his appointments and releases for tax returns for 2012 and 2013. (Letter, December 15, 2017).

149) On December 22, 2017, Employer filed an answer to a December 6, 2017 petition from Employee, which appears to have requested his IRS tax records for 2012, 2013, and 2014. Employee's petition was not filed with the board. Employer acknowledged it sent Employee a mileage log that was missing his medical appointments and noted it re-sent a mileage log that included the appointments. Employer also acknowledged it would send Employee updated releases for the specific years of tax records he requested. (Answer, December 22, 2017).

150) On December 26, 2017, Employee filed the complete order to withhold property for child support and the mileage log he attempted to complete that did not contain his medical appointments. (Evidence, December 26, 2017).

151) On January 18, 2018, Employer provided the following update: (1) it re-submitted a supplemental release to Employee to include the tax years of 2012, 2013, and 2014 based on his petition; (2) Employer had received Employee's mileage log and was processing it; (3) Employer wanted to confirm it was Employee's obligation to obtain his children's adoption decree; and (4) Employer attached updated child support withholding orders. (Status Report, January 18, 2018).

152) On January 22, 2018, Employee reiterated his general arguments. He did not clarify any monetary amounts or dates or provide any authority the panel requested. (Conclusion of Facts, January 22, 2018).

153) On January 25, 2018, Employer said it had received Employee's spreadsheet for mileage and was reimbursing Employee for 721.2 miles at the 2015 rate of .57 per mile totaling $726.41. It objected to four of the 51 entries. Employer contended it had objected to the September 9, 2014 and October 9, 2014 travel dates in its hearing brief. It also objected to entries 49 and 50 because they request reimbursement for travel to Scammon Bay, which was not Employee's address at the time. Employee was asked to file any airline receipts, rent payments in Scammon Bay or any other proof he lived in Scammon Bay at the time and the request would be re-evaluated. (Letter, January 25, 2018).

154) Employee did not file any documentation showing he lived in Scammon Bay at the relevant time or request his mileage request be re-evaluated. (Agency file).

155) Employer never filed the completed mileage log with Employee's entries. (Agency file).

156) On February 9, 2018, the panel advised the parties it was still waiting on the tax returns and an official document stating when Employee's parental rights ended. The panel attached the appropriate form for Employee to fill out to get the adoption certificate from the court. The panel also noted certain benefits had been paid to Employee since the hearings, including: PPI benefits, a penalty on PPI benefits, and transportation benefits and requested the parties file a brief statement and explain whether they believed those issues were resolved. (Letter, February 9, 2018).

157) On February 16, 2018, Employee reiterated all his arguments, but did not say whether he believed any of the issues had been resolved through interim payments. (Letter, February 16, 2018).

158) On March 7, 2018, Employee filed the certificate of termination of his parental rights, which says his rights were terminated to the following four children on September 20, 2016: Chokhyia Rubke, Lautaro Rubke, Lydia Rubke, and Aryeh Rubke. (Certificate, September 20, 2016).

159) Employee's parental rights were not terminated at the time his compensation rate was calculated. (Judgment).

160) On April 30, 2018, Employer filed a Third Party Reject Notification they received from the IRS in regards to the releases they provided the IRS in an attempt to help Employee get his official tax records. (Third Party Reject Notification, April 30, 2018).

161) On May 9, 2018, Employee filed his 2012, 2013, and 2014 Form W-2 Wage and Tax Statements. These documents do not reflect the number of dependents Employee claimed on his tax returns. (Tax Records, May 9, 2018).

162) On May 16, 2018, Employer said it attempted to help Employee retrieve his IRS tax records though a third-party release, which was rejected by the IRS. The parties agreed to move forward with the tax records already in the record. (Prehearing Conference Summary, May 16, 2018).

163) On October 3, 2018, Employee contended it was inappropriate for his benefits to be garnished in a lump sum manner by child support. (Employee's Brief, October 3, 2018).

164) On November 19, 2018, the board designee noted after going over the supplemental briefing, that the panel could not evaluate Employee's mileage log because the completed mileage log had not been filed. Employer agreed to provide it to the board and did so the same day. (Prehearing Conference Summary; Completed Mileage Log, November 19, 2018).

165) The following is the mileage log filled out by Employee and reflects a request of a total of 3,540.3 miles.

Date	Provider	Address	Home Address	Distance (Miles)	Method of Travel	Paid ?
3/24/14	Orthopedic Physician Alaska	3801 Lake Otis Parkway Anchorage, AK 99508	Bucks Drive Goldstream Road	365	LS Suburban	No
3/24/14	Turnagain Radiology	2440 E Tudor Road, #164 Anchorage, AK 99507	Bucks Drive Goldstream Road	365	LS Suburban	No
3/26/14	Diagnostic Health	4100 Lake Otis Parkway,#120 Anchorage, AK	Bucks Drive Goldstream Road		LS Suburban	No
3/31/14	Sportsmedicine Fairbanks	1919 Lathrop Street, Suite 105 Fairbanks, AK 99701	Bucks Drive Goldstream Road		LS Suburban	No
4/2/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
4/7/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No

4/9/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
4/14/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
4/18/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
4/21/14	Sportsmedicine Fairbanks	1919 Lathrop Street, Suite 105 Fairbanks, AK 99701	Bucks Drive Goldstream Road	17	LS Suburban	No
4/23/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
4/25/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
5/1/14	Charles Craven, M.D. (EIME)	3550 Airport Way, Fairbanks, AK 99709	Bucks Drive Goldstream Road	12.4	LS Suburban	No
5/2/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
5/5/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
5/12/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
5/12/14	Sportsmedicine Fairbanks	1919 Lathrop Street, Suite 105 Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
5/28/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
6/25/14	Sportsmedicine Fairbanks	1919 Lathrop Street, Suite 105 Fairbanks, AK 99701	Bucks Drive Goldstream Road	17.3	LS Suburban	No

8/20/14	Sportsmedicine Fairbanks	1919 Lathrop Street, Suite 105 Fairbanks, AK 99701	Bucks Drive Goldstream Road	17.3	LS Suburban	No
9/9/14	Michael McNamara, M.D.	4015 Lake Otis, #201 Anchorage, AK 99508	Bucks Drive Goldstream Road	365/365	LS Suburban	No
10/9/14	Michael McNamara, M.D.	4015 Lake Otis, #201 Anchorage, AK 99508	Bucks Drive Goldstream Road		Plane	Yes
10/10/14	Alaska Surgery Center	4100 Lake Otis Parkway #222 Anchorage, AK 99508	Bucks Drive Goldstream Road	Fiancé Drove 365/365	LS Suburban	No
10/13/14	Robert Thomas PAC	4015 Lake Otis, #201 Anchorage, AK 99508	Bucks Drive Goldstream Road	?	LS Suburban	No
10/15/14	Robert Thomas PAC	4015 Lake Otis, #201 Anchorage, AK 99508	Bucks Drive Goldstream Road	?	LS Suburban	No
10/20/14	Sportsmedicine Fairbanks	1919 Lathrop Street, Suite 105 Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
10/24/14	Sportsmedicine Fairbanks	1919 Lathrop Street, Suite 105 Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
10/31/14	Sportsmedicine Fairbanks	1919 Lathrop Street, Suite 105 Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
11/5/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
11/10/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
11/18/14	Robert Thomas PAC	4015 Lake Otis, #201 Anchorage, AK 99508	Bucks Drive Goldstream Road	15.3	LS Suburban	No
11/21/14	James Foelsch, M.D.	1919 Lathrop St., Suite 220 Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No

11/25/14	Fairbanks Memorial Hospital	1650 Cowles St, Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
11/26/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
12/23/14	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
1/7/15	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
1/7/15	Sportsmedicine Fairbanks	1919 Lathrop Street, Suite 105 Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
1/16/15	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
1/21/15	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
1/23/15	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
2/4/15	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
2/10/15	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
2/10/15	Michael McNamara, M.D.	4015 Lake Otis, #201 Anchorage, AK 99508	Bucks Drive Goldstream Road		Plane	Yes
2/27/15	Fairbanks Hospital PT	19 College Road Fairbanks, AK 99701	Bucks Drive Goldstream Road	15.3	LS Suburban	No
3/20/15	Michael Fraser, M.D. (EME)	516 2nd Avenue Fairbanks, AK 99701	Bucks Drive Goldstream Road	12	LS Suburban	No

4/7/15	Michael McNamara, M.D.	4015 Lake Otis, #201 Anchorage, AK 99508	Bucks Drive Goldstream Road		Plane	Yes
10/8/15	Richard Cobden M.D.	1405 Kellum, Suite 101 Fairbanks, AK 99701	Scammon Bay, AK	800 Miles	Plane/Truck (360 Air Miles ANC to FAI, 500 ANC to Scammon Bay)	No
11/28/16	Richard Cobden, M.D.	1405 Kellum, Suite 101, Fairbanks, AK 99701	Scammon Bay, AK	?		
9/30/17	Michael Fraser, M.D. (EME)	4500 Business Park Blvd., Anchorage, AK 99503			Plane	Yes

166) Employer previously filed objections to travel that began on September 9, 2014, October 9, 2014, October 8, 2015, and November 28, 2016 in the total amount of 2,260 miles. Employee was reimbursed for 721.2 miles. However, Employee requested a total of 3,540.3 miles. This leaves a balance of 559.1 miles that were not objected to or paid for by Employer. The September 9, 2014 and October 9, 2014 objections are for round trips from Fairbanks, AK to Anchorage, AK. Round-trip mileage paid at the state supervisory rate for these round trips would equal $416.10 per trip (730 miles X .57 per mile = $416.10). It is possible to purchase a round trip plane ticket from Fairbanks, AK to Anchorage, AK for around $200 depending upon timing of purchase. Employee's October 8, 2015 and November 28, 2016 entries regarding travel from Scammon Bay, AK to Fairbanks, AK for appointments with Dr. Cobden are hard to evaluate as it is unclear what method of travel Employee actually used, a question mark was included, and one box was blank. (Letter, January 25, 2018; record, observations, inferences drawn from experience).

167) Employee is articulate and did well presenting his case. However, he was never able to provide or clarify the amounts he believed he was owed, despite additional time and direction from the board. (Judgment and observations).

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.

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

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

> **AS 23.30.107. Release of information**. (a) Upon written request, an employee shall provide written authority to the employer, carrier ... to obtain medical and rehabilitation information relative to the employee's injury ....
>
> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance**.
> (a) If an employee objects to a request for written authority ... the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required ... the employee's rights to benefits under this chapter are suspended until the written authority is delivered.
>
> (b) ... At a prehearing ... the board's designee has the authority to resolve disputes concerning the written authority. If the ... board's designee orders delivery of the written authority and if the employee refuses to deliver it ... after being ordered to do so, the employee's rights to benefits ... are suspended until the written authority is delivered. During any period of suspension under this subsection, the

> employee's benefits under this chapter are forfeited unless the board ... determines that good cause existed for the refusal to provide the written authority.
>
> (c) At a prehearing on discovery matters ... the board's designee shall direct parties to sign releases or produce documents, or both .... If a party refuses to comply with an order by the board's designee ... concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense ....
>
> **AS 23.30.095. Medical Treatments Services, and Examinations**…..
> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer….If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited….
>
> **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 23.30.185. 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 23.30.190. 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.

> **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
> . . . .
>
> (6) if at the time of injury the employee's earnings are calculated by the week under (1) of this subsection or by the month under (2) of this subsection and the employment is exclusively seasonal or temporary, then the gross weekly earnings are 1/50 of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury
> . . . .
>
> (c) In this section,
>
> (1) "seasonal work" means employment that is not intended to continue through an entire calendar year, but recurs on an annual basis;
>
> (2) "temporary work" means employment that is not permanent, ends upon completion of the task, job, or contract, and ends within six months from the date of injury.

The 1982 average weekly wage and compensation rate statute stated in part:

> **AS 23.30.220. Determination of average weekly wage**. Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation, and is determined as follows;
> . . . .
> (2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury;
> (3) if the board determines that the wage at the time of the injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship to the employee, the wage for calculating compensation shall be the usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board. . . .

In *Johnson RCA/OMS*, 681 P.2d 905 (Alaska 1984), the Alaska Supreme Court construed the 1982 statute, but did not decide the case on constitutional grounds. *Johnson* held the board was required to use an alternate §220 sub-section in cases where an injured worker's wages from

prior years had no relationship to his earnings at the time he was injured. Though it did not decide the case on constitutional grounds, *Johnson* held for the first time:

> The objective of AS 23.30.220 is to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid. Normally the formula in subsection (2) will yield a fair approximation of this figure. However, sometimes it will not, and in those cases subsection (3) of the statute is to be used. (*Id*. at 907).

Since *Johnson*, the Alaska Supreme Court has often repeated this objective, which it derived from Professor Larson's workers' compensation treatise in which he said:

> The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of the impact of probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis. (*Id*. at 907; citing 2 A. Larson, *The Law of Workmen's Compensation* §60.11(d), at 10-564 (1983) (footnote omitted)).

The legislature amended AS 23.30.220 in 1983 to read in part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury.
>
> (2) if the board determines that the gross weekly earnings at the time of the injury cannot be fairly calculated under (1) of this subsection, the board may determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history. . . .

The legislature amended AS 23.30.220 again in 1988 to take into account workers who were "absent from the labor market" for a time. This version stated in part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for

> computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury;
> (2) if the employee was absent from the labor market for 18 months or more of the two calendar years preceding the injury, the board shall determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history, but compensation may not exceed the employee's gross weekly earnings at the time of injury. . . .

The seminal case resulting from this §220 iteration is *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). *Gilmore* for the first time struck down §220 on equal protection grounds. Gilmore claimed he was entitled to an alternative wage calculation because he was off work for a time in a vocational reemployment training plan, thus reducing his earnings. *Id*. at 924-25. The board rejected Gilmore's claim and he appealed. The Alaska Supreme Court asked for further briefing on whether §220 could pass constitutional muster. Subsequently, the court ruled it could not and struck down §220 "as applied" to the case. *Gilmore* held legislative intent could be gleaned from session laws stating, "It is the intent of the legislature that AS 23.30 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 AS 23.30." *Id. Gilmore* found these goals were "legitimate purposes" but also found, reflecting on *Johnson*:

> The overall purpose of AS 23.30.220(a) . . . is 'to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid' (footnote omitted). *Johnson*, 681 P.2d at 907. This 'fair approximation' is an essential component of the basic compromise underlying the Workers' Compensation Act -- the worker's sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation. (*Id.*).

Most notably, *Gilmore* found:

> We nevertheless conclude that no substantial relationship exists between calculating a worker's weekly wage by dividing the worker's earnings over the last two calendar years by 100 regardless of whether the number reached reflects the worker's actual losses and the goals of fairly approximating a worker's probable future earning capacity and achieving a 'quick, efficient, fair, and predictable delivery of indemnity and medical benefits.'

> The benefit levels among injured workers based on section 220(a) bear no more than a coincidental relationship to the goal of compensating injured workers based on their actual losses. In any of the many situations in which a worker's past wage and time of employment do not accurately reflect the circumstances existing at the time of the injury, the formula will misrepresent the losses (footnote omitted). The means chosen for determining an injured worker's gross weekly wage therefore do not bear a substantial relationship to that goal. (*Id*. at 928).

The employer in *Gilmore* argued former §220 is constitutional as applied because its application would lead to "quick, efficient results," but the court declared:

> This efficiency is gained, however, at the sacrifice of fairness in result. The purpose of the Act, as expressed by the legislature, is to provide a 'quick, efficient, *fair*, and predictable delivery of indemnity and medical benefits.' The facts of the present case amply demonstrate the potential unfairness of a rigid application of the mechanical formula (footnote omitted). Under the section 220(a)(1) formula as applied by the Board, Gilmore received only the statutory minimum amount of compensation, despite his earning over seven and one-half times more per week at the time of injury.
>
> Efficiency in this area does not require unfairness. A quick, efficient, and predictable scheme for determining a worker's gross weekly earnings could be formulated without denying workers like Gilmore benefits commensurate with their actual losses. (*Id*. at 928; emphasis in original).

Gilmore concluded Alaska was the only state that did not provide an option to take into account such factors as unemployment in rate calculations. *Id*. Consequently *Gilmore* held:

> The gross weekly wage determination method of AS 23.30.220(a) creates large differences in compensation between similarly situated injured workers, bears no relationship to the goal of accurately calculating an injured employee's lost wages for purposes of determining his or her compensation, is unfair to workers whose past history does not accurately reflect their future earning capacity, and is unnecessary to achieve quickness, efficiency, or predictability. Therefore, the formula expressed in AS 23.30.220(a) is not substantially related to the purposes of the Act. It cannot survive scrutiny on even the lowest end of our sliding scale and is therefore an unconstitutional infringement on the equal protection clause of the Alaska Constitution. Art. I, §1. (*Id*. at 929).

Gilmore noted in some cases the statute might work well and "may roughly approximate the employee's lost wages when the employee worked full time during the entire two year period at the same job held at the time of injury" or "when the employee has consistently worked only at seasonal occupations," but it does not "account for any upward or downward change in the

employee's earning capacity and punishes workers who have newly committed to full time employment." *Gilmore* further stated the "formula also fails entirely to take account of any change in . . . earning capacity that occurred during the year of injury." *Gilmore* at 932 n. 6. *Gilmore* provided a "model statute," which the court said would probably not be struck down:

> Section 19. Determination of Average Weekly Wage. Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute the compensation and shall be determined as follows:
> . . . .
>
> (d)(1) If at the time of the injury the wages are fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the fifty-two weeks immediately preceding the injury.
>
> (2) If the employee has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed under the foregoing paragraph, taking the wages (not including overtime or premium pay) for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. . . . (*Id*. at 932 n. 15; citing the Council of State Governments' Draft Workmen's Compensation and Rehabilitation Law, quoted in 2 Arthur Larson, *The Law of Workmen's Compensation* §60.11(a)(1), at 10.606 n. 77 (1993)).

Following *Gilmore*, Alaska's legislature amended §220 in 1995 and incorporated many provisions from the "model statute." The "model" §220(a) included a method to account for variations in work histories, predict earnings and compensate injured workers for actual losses during their disability. Effective 1995, §220 said in part:

> **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

> (A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing by 13 the employee's earnings, including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;
>
> (B) employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding (1)-(3) of this subsection and (A) of the paragraph, the employee's gross weekly earnings are computed by determining the amount that the employee would have earned, including overtime or premium pay, had the employee been employed by the employer for 13 calendar weeks immediately preceding the injury and dividing this sum by 13. . . .

Only two Alaska Supreme Court cases addressed this §220(a) version. In *Flowline of Alaska v. Brennan*, 129 P.3d 881 (Alaska 2006), the court affirmed the board's decision to use §220(a)(4)(A) because it was the most appropriate formula for calculating the injured worker's rate, based on the facts in a 1999 case. *Brennan* again referenced *Gilmore* and stated:

> As we pointed out in *Gilmore,* a fair approximation of a claimant's future earning capacity lost due to the injury is the 'essential component of the basic compromise underlying the Workers' Compensation Act -- the worker's sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation' (footnote omitted). Despite subsequent amendments to the statute aimed at increasing the efficiency and predictability of the compensation process, this compromise, and the fairness requirements it engenders, provide the context for interpreting the Workers' Compensation Act. (*Brennan*, 129 P.3d 882-83).

In *Thompson v. United Parcel Service*, 975 P.2d 684 (Alaska 1999), the Alaska Supreme Court said the 1995 §220 version did not apply to Thompson's case because her injury happened a month before the amended statute's effective date. *Thompson* instead construed an earlier §220 iteration and further explained *Gilmore*. The court declined to accept a "broad" view requiring the board to calculate TTD rates by determining what "was fair" to both parties. *Thompson* said, citing *Gilmore*, "We noted that 'section 220(a) may be applied constitutionally in a number of circumstances, for example, where an injured worker has had the same occupation for all of the past two calendar years.'" *Id*. at 689. Thus, the first question under *Gilmore* is not whether an award calculated according to AS 23.30.220(a)(1) is "fair." Rather, "it is whether a worker's past

employment history is an accurate predictor of losses due to injury." *Id*. When Thompson was injured, AS 23.30.220 read in relevant part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
> (1)the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury. . . .

Thompson noted:

> In fact, a primary purpose of our workers' compensation laws is to predict accurately what wages would have been but for a worker's injury. In *Johnson v. RCA-OMS, Inc.* (footnote omitted) we explained that under past versions of the statute at issue here, the 'entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity' (footnote omitted). We reiterated this theme in *Gilmore* with regard to the 1988 version of the statute involved in this case when we quoted *Johnson* with approval (footnote omitted). (*Id*. at 689-90).

Thompson also said "'intentions as to [future] employment . . . are relevant to [determine] future earning capacity' in determining proper compensatory awards." *Id*. at 690; (citation omitted).

In *Dougan v. Aurora Electric, Inc*., 50 P.3d 789, 797 (Alaska 2002), the Alaska Supreme Court stated, after the legislature adopted the "model law" suggested in *Gilmore*, the *Gilmore* test was no longer applicable because the law in effect at the time of Dougan's injury provided for a variety of methods to calculate a TTD rate, while *Gilmore's* version of §220 relied exclusively on the average wage earned during a period of over a year without providing an alternate approach if the result was unfair.

In *Circle De Lumber Company v. Humphrey*, 130 P.3d 941 (Alaska 2006), the Alaska Supreme Court, in a case based on 1993 law, approved a departure from the standard TTD rate calculation method. The board calculated Humphrey's weekly earnings by multiplying his hourly wage at the time of injury ($14.00) with his estimated yearly work period (50 hours per week and six months per year), to derive his gross weekly earnings and his TTD rate. *Humphrey* held the

board's employment estimations used for the TTD calculation based on Humphrey's work history and future earning potential were supported by substantial evidence.

AS 23.30.220 was amended in 2005 to its present form, which states:

> **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:
> (1) if at the time of injury the employee's earnings are calculated by the week, the weekly amount is the employee's gross weekly earnings;
> (2) if at the time of injury the employee's earnings are calculated by the month, the employee's gross weekly earnings are the monthly earnings multiplied by 12 and divided by 52;
> (3) if at the time of injury the employee's earnings are calculated by the year, the employee's gross weekly earnings are the yearly earnings divided by 52;
> (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;
> (5) if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees;
> (6) if at the time of injury the employee's earnings are calculated by the week under (1) of this subsection or by the month under (2) of this subsection and the employment is exclusively seasonal or temporary, then the gross weekly earnings are 1/50 of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury;
> (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;
> (8) if an employee when injured is a minor, an apprentice, or a trainee in a formalized training program, as determined by the board, whose wages under normal conditions would increase during the period of disability, the projected increase may be considered by the board in computing the gross weekly earnings of the employee; if the minor, apprentice, or trainee would have likely continued that training program, then the compensation shall be the average weekly wage at the time of injury rather than that based on the individual's prior earnings;
> (9) if the employee is injured while performing duties as a volunteer ambulance attendant, volunteer police officer, or volunteer firefighter, then, notwithstanding (1)-(6) of this subsection, the gross weekly earnings for calculating

> compensation shall be the minimum gross weekly earnings paid a full-time ambulance attendant, police officer, or firefighter employed in the political subdivision where the injury occurred, or, if the political subdivision has no full-time ambulance attendants, police officers, or firefighters, at a reasonable figure previously set by the political subdivision to make this determination, but in no case may the gross weekly earnings for calculating compensation be less than the minimum wage computed on the basis of 40 hours work per week;
> (10) if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of the employee's gross weekly earnings under (1)-(7) of this subsection does not fairly reflect the employee's earnings during the period of disability, the board shall determine gross weekly earnings by considering the nature of the employee's work, work history, and resulting disability, but compensation calculated under this paragraph may not exceed the employee's gross weekly earnings at the time of injury. . . .

In *Wilson v. Eastside Carpet Co.*, AWCAC Decision No. 106 (May 4, 2009), the Alaska Workers' Compensation Appeals Commission, in a case arising under the current (2005) statute, held an employer may presume that for an hourly worker, AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the employee's wages at the time of injury in most cases. The hourly employee has the burden to challenge the compensation rate established under §220(a) if it does not represent the equivalent wages at the time of the injury, in Wilson's case from prior self employment. The board "must look at the evidence and decide the facts in each case" when determining the spendable weekly wage. (*Id*. at 4). In *Wilson*, the commission found the board could not have ascertained the wage equivalent from Wilson's small self-employment record, and therefore was required to use §220(a)(5) to fit these circumstances. *Wilson* further held though tax records may be used to prove reported income, the board is not limited to federal tax returns as proof of an employee's earnings. (*Wilson* at 4). Once an injured worker files a claim requesting a compensation rate adjustment, "the board must conduct a broader inquiry" to obtain evidence sufficient to determine the spendable weekly wage. (*Id*.).

Most recently, the AWAC in *Straight v. Johnston Construction & Roofing, LLC*, AWCAC Decision No. 231 (November 22, 2016), reviewed a case where an employee had worked for many years as a roofer, but took time off in the two years before his injury to build his own home. He was paid by the hour, and consistently made about $60,000 per year, but 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 that 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).

> **8 AAC 45.084. Medical travel expenses** (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.
>
> (b) Transportation expenses include
>
> > (1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;
> > (2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and
> > (3) ambulance service or other special means of transportation if substantiated by competent medical evidence or by agreement of the parties.
>
> (c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.
>
> (d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or more have accumulated, or upon completion of medical care, whichever occurs first.
>
> (e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.

8 AAC 45.090. Additional examination. (a) The board will, in its discretion, direct an employee who was injured before July 1, 1988, to be examined by an independent medical examiner in accordance with 8 AAC 45.092, and direct the independent medical examiner to provide the board and the parties with a complete report of findings, opinions, and recommendations, whenever in the board's opinion

(1) a physician has not impartially estimated the degree of permanent impairment or the extent of temporary impairment, or has not rated the degree of permanent impairment in accordance with 8 AAC 45.122;
(2) contradictory medical evidence exists; or
(3) the employee's best interests require it.

(b) Except as provided in (g) of this section, regardless of the date of an employee's injury, the board will require the employer to pay for the cost of an examination under AS 23.30.095 (k), AS 23.30.110 (g), or this section.

(c) If an injury occurred before July 1, 1988, an examination requested by the employer not less than 14 days after the injury, and every 60 days after that, is presumed reasonable, unless the presumption is overcome by a preponderance of the evidence, and the employee shall submit to an examination by the employer's choice of physician without further request or order by the board. Unless medically appropriate to obtain new diagnostic data, the physician shall use existing diagnostic data to complete the examination.

(d) Regardless of the date of an employee's injury, the employer must

(1) give the employee and the employee's representative, if any, at least 10 days' notice of the examination scheduled by the employer;
(2) arrange, at least 10 days in advance of the examination date, for the employee's transportation expenses to the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, at no cost to the employee if the employee must travel more than 100 road miles for the examination or, if the employee cannot travel on a government-maintained road to attend the examination, arrange for the transportation expenses by the most reasonable means of transportation; and
(3) arrange, at least 10 days in advance of the examination date, for the employee's room and board at no cost to the employee if the examination under AS 23.30.095 (e), AS 23.30.095 (k), AS 23.30.110 (g), or this section, requires the employee to be away from home overnight.

(e) If the employer fails to give timely notice of the examination date or fails to arrange for room and board or transportation expenses in accordance with (d) of this section, and if the employee objects to attending the examination because the employer failed to comply with (d) of this section, the employer may not suspend benefits under AS 23.30.095(e).

(f) If a physician examines an employee at the employer's request and if the employer objects to the board's consideration of the physician's report unless the physician is made available for cross-examination, the phrase "furnished and paid for by the employer" in AS 23.30.095 (e) includes paying in advance all the employee's costs for making the physician available for cross-examination.

(g) If an employee does not attend an examination scheduled in accordance with AS 23.30.095 (e), AS 23.30.095 (k), AS 23.30.110 (g), or this section,

(1) the employer will pay the physician's fee, if any, for the missed examination; and
(2) upon petition by a party and after a hearing, the board will determine whether good cause existed for the employee not attending the examination; in determining whether good cause existed, the board will consider when notice was given that the employee would not attend, the reason for not attending, the willfulness of the conduct, any extenuating circumstances, and any other relevant facts for missing the examination; if the board finds

(A) good cause for not attending the examination did not exist, the employee's compensation will be reduced in accordance with AS 23.30.155(j) to reimburse the employer the physician's fee and other expenses for the unattended examination; or
(B) good cause for not attending the examination did exist, the physician's fee and other expenses for the unattended examination is the employer's responsibility.

8 AAC 45.210. Weekly compensation rate.(a) The weekly rate of compensation is based on a seven-day week. When computing compensation for a number of days not equally divisible by seven, the result will be carried to three decimals.

(b) Until an employee provides the information requested on the green copy of form 07-6101 and submits it in accordance with the form's instructions, compensation is due based on the assumption that the employee is legally entitled to claim the marital status of "single" and himself or herself as a dependent.

(c) For the purpose of determining the weekly compensation rate under AS 23.30.175, 23.30.220, and 23.30.395(23), the number of dependents is determined as of the date of injury, and does not change, even if the employee's number of actual dependents does change.

In *Arnesen v. Anchorage Refuse, Inc.*, 925 P.2d 661 (Alaska 1996), the Alaska Supreme Court addressed a situation where an Employee's wife had custody of their two children and claimed them as dependents on her income taxes. Employee argued he should be able to claim the

children as dependents for the purposes of workers' compensation because he pays child support. The court held, ". . . If Arnesen cannot claim the children as dependents under the Internal Revenue Code, then he may not claim them as dependents for the workers' compensation benefit calculation. The statute looks to the employee's spendable weekly wage at the time of injury. That is an objective number: gross weekly earnings minus payroll taxes as defined in AS 23.30.265(23). The statute is concerned with how much money he takes home every week, not with how best to characterize his relationship with his children."

ANALYSIS

1) Is Employee entitled to a compensation rate adjustment?

It is undisputed Employer calculated Employee's compensation rate under AS 23.30.220(a)(4), based on his prior earnings with different Employers in the higher of the two calendar years immediately before his injury. Employee contends that this rate is unfair and contends he should receive $1,155 a week, because that amount more accurately reflects what he was earning at the time of his injury. Employer contends Employee's compensation rate is appropriately calculated under AS 23.30.220(a)(4) because he is a regular, hourly worker.

A history of compensation rate cases is included in the principles of law section, above. For many years compensation rate adjustment claims were hotly litigated until the legislature adopted something similar to the "Model Act." *Johnson*; *Gronroos*; *Deuser*. For several years thereafter, there was little if any litigation over weekly compensation rates. *Thompson; Dougan*. However, in 2005 the legislature changed the law back to something quite similar to what the Alaska Supreme Court had declared unconstitutional as applied in *Gilmore*.

Though the legislature took the "fairness" requirement out of AS 23.30.220, the legislature subsequently implemented AS 23.30.001(1), which requires the entire Act be interpreted to provide for, among other things, "fair" delivery of indemnity benefits to injured workers at a reasonable cost to employers. *Brennan.* Employee's compensation rate adjustment claim is based upon the notion that the current compensation rate statute applicable to Employee's injury may have the same infirmities as the statute the Alaska Supreme Court said was unconstitutional

as applied in some circumstances. Employee ultimately wants to base his compensation rate adjustment on his actual earnings at the time of injury because he believes the statutory formula does not result in a fair approximation of his lost earnings during the course of his disability. AS 23.30.001(1); *Gilmore*.

Employee's allegation that his rate is unfair because he was earning substantially more at the time of his injury than what resulted in his spendable weekly wage raises the presumption on the compensation rate issue. *Tolbert.* A broader inquiry must therefore be made to determine whether there is sufficient evidence to determine the spendable weekly wage. *Wilson; Straight*. Employee testified he is a skilled laborer construction worker, who earned high wages in a short period of time. He is a member of a union and accepts different jobs through the union for different employers. He has been doing this for several years. At the time of the injury, Employee worked for Employer from March 1, 2014 until April 5, 2014 and made a total of $11,358.45. If Employee were on track to earn those wages for a calendar year for the first time, Employee's argument that his compensation rate is unfair would be well taken. However, Employee's work history reflects that his construction work is sporadic and ultimately rebuts the presumption. Employee worked construction the previous two years before his injury for other employers, and the high wages and long hours were taken into account in those earnings. Therefore, when the higher of the past two years is used to calculate Employee's spendable weekly wage, they do have a relationship to the earnings at the time he was injured. *Johnson.* This is unlike other situations where an employee was absent from the labor market or made substantially less in the prior two years before their injury. *Johnson; Straight.*

The burden is on Employee to show by a preponderance of the evidence that AS 23.30.220(a)(4) does not result in a fair approximation of his probable future earning capacity. *Saxton.* Employee must present more evidence than the fact that he was earning more at the time of his injury than what resulted in his spendable weekly wage. Employee must show that he was on track to continue earning that amount throughout his disability through evidence that his earning capacity was different than the prior two years before. The evidence presented reflects that Employee worked off and on in construction and continued to work off and on in construction before, during, and after his injury. Additionally, the only reoccurring employer that Employee worked for, was HC

Contractors, which Employee went back to after his injury. This cuts against any argument Employee may have that his job with Employer would have continued for a calendar year.

Employee contended in the alternative that he may be a seasonal or temporary worker, but did not present evidence that his employment with Employer would recur on an annual basis or would end on completion of the task, job, or contract and would end within six months from the date of injury. AS 23.30.220(c). Even if Employee were to prove that a seasonal or temporary work calculation were appropriate, his rate would not increase to the rate Employee is requesting, because it would still be based on Employee's earnings the twelve months prior to the injury, and would continue to reflect that Employee worked off and on in construction and not a full calendar year. In this case, it would be unfair to raise Employee's compensation rate, as Employee's past employment history is an accurate prediction of losses due to his injury. *Gilmore.*

Employee also contends he is entitled to claim five dependents, himself and his four children. Employee's testimony that his four children were his dependents at the time of the injury raises the presumption. *Meek.* Employer contends Employee should not be allowed to claim his four children as dependents because he could not claim his children as dependents on his taxes at the time of injury. Employee's former wife was granted sole legal and physical custody of Employee's children per the 2012 divorce decree before the injury.

This issue was addressed by the Alaska Supreme Court in *Arnesen*, where the employee's wife had custody of their two children and claimed them as dependents on her income taxes. The employee argued he should be able to claim the children as dependents for the purposes of workers' compensation because he pays child support. The court rejected that argument and held, "…If Arnesen cannot claim the children as dependents under the Internal Revenue Code, then he may not claim them as dependents for the workers' compensation benefit calculation." *Arnesen.*

Therefore, under *Arnesen*, Employer rebuts the presumption with the 2012 divorce decree granting Employee's former wife sole legal and physical custody, which is evidence Employee could not claim his children as dependents on his taxes. *Wolfer.* Thus, Employee must prove all elements of

his compensation adjustment claim by a preponderance of the evidence. *Saxton*. Employee would need to provide evidence he legally claimed his children on his 2014 taxes. *Arnesen.* Despite leaving the record open for Employee to provide his 2014 tax records and Employer's attempt to get them on his behalf, the parties were not able to provide this supplemental evidence and agreed to move forward without it. Since Employee cannot show he could legally claim his children as dependents on his taxes at the time of injury, his compensation rate will not be adjusted for any change in number of dependents.

2) Is Employee entitled to additional TTD benefits?

Employee also seeks additional TTD benefits. AS 23.30.185. Employee was placed on modified work on March 31, 2014, and was paid his regular wages through April 1, 2014. Employee received TTD from April 2, 2014 through May 20, 2014, until he went to work for another Employer. TTD began again on October 9, 2014, the day before Employee had surgery.

The first time period TTD benefits were in dispute arose when TTD was suspended on January 8, 2015, based on Employee's failure to sign releases. TTD restarted on January 11, 2015 when Employee signed releases. Employee seeks reimbursement for this time period. Employee is required to sign a release or file a petition for a protective order within 14 days of service of the release. AS 23.30.108(a). While Employer controverted and suspended benefits based on Employee's failure to sign releases, it also admitted Employee promptly cured the problem by signing releases the same day the Controversion Notice was filed. Employer never filed a petition to compel Employee to sign releases and did not seek benefit forfeiture. AS 23.30.108(b),(c). The suspended benefits should be reinstated, as there is no evidence Employee "refused" to comply with an order of the board's designee because no order was requested or issued. *Id.* Employee is therefore entitled to reinstatement of his TTD benefits from January 8, 2015 through January 11, 2015.

The second time period TTD benefits were in dispute is when TTD was suspended from February 12, 2015 through March 19, 2015 based on Employee's failure to attend an EME. Employees are required to attend EME's pursuant to the Act and benefits are suspended until the

refusal to submit to the EME ceases. AS 23.30.095(e). These same benefits may be forfeited in the discretion of the board. *Id.* On February 17, 2015, Employer filed a Controversion Notice that benefits were suspended based on Employee's failure to attend an EME with Dr. Fraser on February 12, 2015. On February 18, 2015, Employee wrote Employer a letter and stated, "I am sorry I missed the Fairbanks IME on February 12, 2015. I was having some health problems. I have called and left messages for you yesterday and three times today. I apologize for my confusion and frustration. Please reschedule the IME…" On March 20, 2015, Employee attended an EME with Dr. Fraser. Employee additionally testified that he did not attend the EME because he was struggling and was not receiving benefits. In order for these suspended benefits to be forfeited, a finding must be made that Employee "refused" to attend the EME. Based on the facts that the Employee attempted to contact the adjuster and attended another EME, the board does not find that Employee refused to attend the EME and the suspended benefits from February 12, 2015 through March 19, 2015 should be re-instated.

On March 20, 2015, TTD recommenced and was paid until May 18, 2015, which is the date Dr. McNamara opined Employee was medically stable. Subsequently, Employee changed physicians to Dr. Cobden, who raised concerns about the way the fusion had headed. Dr. Cobden referred Employee to an experienced hand surgeon, Dr. Hanel, who never gave a specific opinion on the date of medical stability, but opined Employee's fusion had healed in an appropriate position, no further surgery was needed, and Employee could return to work to two jobs in his ten year history. On April 22, 2016, Dr. McNamara wrote a letter disagreeing with Dr. Cobden's opinion that the fusion had healed in an awkward way.

On November 8, 2016, Dr. Cobden opined, "after reviewing his records and clinical findings, imaging studies and related material, I think [Employee] has now reached medical stability." On September 20, 2017, Employee again saw Dr. Fraser who adjusted the date of medical stability to a year after surgery, October 20, 2015. Employee has raised the presumption that his date of TTD should be extended based on the opinions of Drs. Cobden and Fraser that he was medically stable at a later date than the original opinion of Dr. McNamara. *Tolbert.*

Employer rebuts the presumption with the opinion of Dr. McNamara, Employee's original treating physician and surgeon, that his date of medical stability was May 18, 2015. Because Employer rebutted the presumption, the analysis proceeds to the third step, in which Employee must prove by a preponderance of the evidence that his date of his medical stability, and his entitlement to TTD should be extended. *Saxton*. In making that determination, credibility is considered and the evidence is weighed.

Dr. McNamara's date of medically stability was originally supported by the March 20, 2015 opinion of EME Dr. Fraser, who opined Employee would reach medical stability six to eight months after his October 10, 2014 surgery, which would be between April 10, 2015 and June 10, 2015. The May 18, 2015 dated used by Dr. McNamara is right in the middle of that range. However, Dr. Fraser's subsequent opinion that the date of medical stability should be extended to a year after the surgery, to the date of October 20, 2015, is given more weight, as he was the last physician to examine Employee on September 20, 2017, and could review Employee's complete medical history at that time.

Dr. Cobden's November 8, 2016 opinion that Employee could "now be deemed medically stable" is given less weight because it is ambiguous as to when and why Employee is medically stable. Additionally, it is notable that Dr. Cobden, referred Employee to a specialist, Dr. Hanel, who ultimately agreed with Dr. McNamara that Employee's fusion is an appropriate position.

Employee has ultimately proved that he is entitled to additional TTD benefits based on the opinion of Dr. Fraser that he was medically stable a year after surgery, October 20, 2015. Employee is therefore entitled to TTD benefits from May 18, 2015 until October 20, 2015.

Employee is additionally missing TTD for when Employer misinterpreted the child support withholding orders and overpaid child support by paying more than 40 percent. Employer contends the child support orders were ambiguous and they thought they were following the orders. Once they found out from the child support agency that they were withholding too much, they stopped. Employer contends any error regarding the child support withholding order should not be held against Employer because it still went to Employee's benefit by reducing his arrearages. There is

no dispute Employer ultimately improperly followed the child support withholding order and shorted Employee TTD. As discussed in finding of fact 140, this resulted in an overpayment to child support in the amount of $625.14. AS 23.30.155(a) required Employer to pay TTD benefits directly to the "person entitled to it." In this instance, Employer paid $625.14 to child support rather than Employee even though Employee was the person entitled to this money. Employee is owed this amount in TTD.

3) Is Employee entitled to TPD benefits?

Employee presented no evidence or argument supporting his claim for TPD benefits. AS 23.30.200. All time loss benefits in this case were paid as TTD benefits. Employee could not receive both types of benefits at the same time. Therefore, he did not attach the presumption of compensability and the presumption analysis does not apply. *Rockney*. Employee has the burden of demonstrating he is entitled to TPD benefits. He has failed in his burden for lack of proof and his claim for TPD benefits will be denied. *Saxton*.

4) Is Employee entitled to additional PPI benefits?

Employee requested additional PPI benefits. AS 23.30.190. Dr. Fraser provided the only PPI rating to date in this case, which Employer paid in full. Employee provided no evidence suggesting he 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, he cannot meet this burden. *Saxton*. Employee's claim for additional PPI benefits will be denied.

5) Is Employee entitled to additional transportation costs?

The law allows a benefit for mileage traveled for Employee's attendance at medical appointments. It provides payment for both private automobile and public transportation. 8 AAC 45.084(b)(1),(2). Employee filled out a mileage log and requested 3,540.3 miles for private automobile travel. However, the law also required him to use the "most reasonable and efficient means of

transportation under the circumstances." 8 AAC 45.084(c). Employer processed the mileage log and paid Employee for 721.2 miles. Employer raised three specific objections.

The first objection is for Employee's September 9-10, 2014 trip to Anchorage to see Dr. McNamara. Employer purchased Employee a plane ticket, but Employee missed the plane. However, Employee made the appointment and seeks reimbursement for 730 roundtrip miles from Fairbanks to Anchorage. Round-trip mileage paid at the state supervisory rate for this trip would equal $416.10 (730 miles X .57 per mile = $416.10). Employee is required to use the most reasonable and efficient means of transportation under the circumstances. A round trip plane ticket from Fairbanks to Anchorage could cost around $200, depending upon timing of purchase. It is not reasonable or efficient for Employer to be required to pay for both a round trip plane ticket and to also reimburse Employee for mileage that is double the cost of the airfare. Employer's objection is well taken and this mileage entry will not be awarded.

The second objection is for Employee's October 9-15, 2014 travel from Fairbanks to Anchorage to have surgery with Dr. McNamara. While Employer purchased him a plane ticket, Employee ultimately had to be driven home from the appointment based on his surgeon's advice to avoid surgical complications from altitude. Under these circumstances, Employee used the most reasonable and efficient way to travel to and from his surgery. 8 AAC 45.084(c). Employee will be reimbursed $416.10 for an additional 730 miles for this trip.

The third objection is to Employee's October 8, 2015 and November 28, 2016 appointments with Dr. Cobden in Fairbanks. Employee is claiming 800 miles for these visits, because he is claiming he lived in Scammon Bay, AK at the time of these appointments. Employer encouraged Employee to file any plane receipts, rent payment in Scammon Bay, or any other documentation he lived in Scammon Bay at the time of the appointments and the request would be re-evaluated. Employee did not file any documentation showing he lived in Scammon Bay at this time. Employee knows how to update his address and did so three times in this case. Employee did not change his address to Scammon Bay until September 25, 2017, well after these appointments. Employee's entries regarding travel from Scammon Bay, AK are hard to evaluate as it is unclear what method of travel Employee actually used, a question mark was included, and one box was blank. Employee

ultimately did not provide enough information to raise the presumption on this entry in order to evaluate this request. *Tolbert.* Employer's objection is well taken and these mileage entries will not be awarded.

Despite requesting that Employer clarify the mileage log, there remains a discrepancy. Employee requested reimbursement for 3,540.3 miles. After subtracting the 721.2 miles that were voluntarily paid and the 2,260 miles that were objected to by Employer, there are still 559.1 miles that were not paid or objected to. Employee has raised the presumption on those 559.1 miles and Employer has failed to rebut that presumption. Employee is therefore entitled to a reimbursement of the 730 miles for Employee's October 9–October 15, 2014 travel to Anchorage and for the 559.1 miles that were requested by Employee, but not objected to or paid in the total mileage amount of 1,289.1.

6) Is Employee entitled to additional per diem?

Employee contends he is entitled additional per diem for his medical travel, but cannot state the amount owed, or point to the date of the medical travel for which per diem was not paid. Employer contends travel advances were provided to Employee and has presented documentation of this. Therefore, Employee did not attach the presumption of compensability and the analysis does not apply. *Rockney*. Employee has the burden of demonstrating he is entitled to additional per diem. He failed in his burden for lack of proof and his per diem claim will be denied. *Saxton*.

7) Is Employee entitled to additional penalty and interest?

Employee contends he is entitled to additional penalties and interest. AS 23.30.155(e). Employee received a penalty on May 23, 2014, for $175.59 for the period he was paid the minimum amount of TTD immediately after his injury from April 2, 2014 through April 29, 2014. On November 16, 2017, Employer paid a $7,522.50 penalty on a 17 percent PPI rating owed to Employee. There is no evidence interest was paid on this amount, as the $7,522.50 penalty is exactly 25 percent of the $30,090 PPI rating. Interest is therefore also owed in accordance with the Act.

This decision awards some benefits. Employee is entitled to penalty and interest pursuant to the Act on the $625.15 in TTD that was overpaid to child support. AS 23.30.155(e). Employee is not entitled to penalty or interest on the TTD that was suspended due to Employee's failure to sign releases and attend an EME because the suspension of those benefits was lawful and whether Employee had refused to take those actions had yet been decided. *Harp.* Employee is not entitled to a penalty or interest on the adjusted date of TTD, as it was appropriate for Employer to follow the date of medical stability given by Employee's original treating physician, Dr. McNamara. *Id.* Employee is not entitled to any penalty or interest on the mileage reimbursement, as he just recently submitted his travel log to Employer.

8) Was there an unfair or frivolous controversion?

Employee contends Employer unfairly or frivolous controverted his case. A controversion notice must be filed in good faith to protect an employer from imposition of a penalty. *Harp.* 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. *Id.* There are two Controversion Notices that are subject to this decision, as a third notice was filed in between the continued hearings and is therefore not addressed in this decision. The first was a January 8, 2015 Controversion Notice for Employee's failure to sign releases. The second was a February 17, 2015 Controversion Notice based on Employee's failure to attend an EME with Michael Fraser, M.D. on February 12, 2015 in Fairbanks. These are valid reasons to controvert a case. AS 23.30.108; AS 23.30.095(e). Employee admits he did not sign the releases or attend the EME that is the subject to those Controversion Notices. Employer did not unfairly or frivolously controvert the case.

CONCLUSIONS OF LAW

1. Employee's spendable weekly wage was properly calculated.
2. Employee is entitled to additional TTD benefits.
3. Employee is not entitled to TPD benefits.
4. Employee is not entitled to additional PPI benefits.
5. Employee is entitled to additional transportation benefits.
6. Employee is not entitled to additional per diem.

7. Employee is entitled to additional penalty and interest.
8. Employer did not frivolously or unfairly controvert compensation due Employee.

ORDER

1. Employee's May 19, 2014 claim for a compensation rate adjustment is denied.
2. Employee's February 2, 2016 claim for additional TTD is granted in part. Employee is owed TTD from January 8, 2015-January 11, 2015; February 13, 2015-March 19, 2015; May 19, 2015-October 20, 2015; and additional $625.14 in TTD that was overpaid to child support.
3. Employee's March 28, 2014 claim for TPD benefits is denied.
4. Employee's February 2, 2016 claim for PPI benefits is denied, as Employee has already been paid PPI benefits and is not entitled to any additional PPI benefits.
5. Employee's February 2, 2016 claim for additional transportation benefits is granted in the amount of 1,289.1 miles.
6. Employee's March 28, 2016 claim for per diem for medical travel is denied.
7. Employee February 2, 2016 claim for penalty and interest is granted in part. Employee is owed interest pursuant to the Act on the $30,090 PPI benefit and penalty and interest on the $625.14 in TTD that was overpaid to child support.
8. Employee's February 2, 2016 request for a finding Employer made an unfair or frivolous controversion is denied.

Dated in Fairbanks, Alaska on January 15, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kelly McNabb, Designated Chair

/s/
Sarah Lefebvre, Board 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 Lautaro Rubke, employee / claimant v. Risk Enterprise Management, employer, insurer / defendants; Case No. 201406900; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, January 15, 2019.

/s/
Ronald C. Heselton, Office Assistant II