ALASKA WORKERS' COMPENSATION BOARD

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

SEVERINO D. ELARDO III, Employee, Claimant, v. WALMART, INC., Employer, and NEW HAMPSHIRE INSURANCE CO., Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201511371 AWCB Decision No. 19-0057 Filed with AWCB Anchorage, Alaska on May 8, 2019.

Severino D. Elardo III's (Employee) August 1, 2018 claim was heard on March 27, 2019, in Anchorage, Alaska, a date selected on October 24, 2018. Employee's September 7, 2018 hearing request gave rise to this hearing. Attorney J.C. Croft appeared and represented Employee. Attorney Vicki Paddock appeared and represented Walmart, Inc. (Employer). Employee appeared and testified. Kao Saelee and Katie Bailey appeared and testified for Employer. The record remained open until April 10, 2019, for additional filings and responses. The record closed on April 10, 2019.

ISSUES

Employee contends he sustained a compensable injury on July 20, 2015, while working for Employer. Employee admits he has not suffered any disability related to this injury and withdraws his claims for temporary total disability (TTD) and temporary partial disability (TPD) benefits. However, Employee contends he is entitled to permanent partial impairment (PPI) benefits.

Employer disagrees; it contends the work injury is not the substantial cause of Employee's need for medical treatment, and his PPI is due to the progression of a pre-existing condition.

1) Is Employee entitled to PPI benefits?

Employee contends he is entitled to an unspecified penalty on unpaid PPI benefits. Employer contends Employee is not entitled to penalty as it timely controverted Employee's claims, and he is not entitled to any benefit in this case.

2) Is Employee entitled to penalty?

Employee contends he is entitled to interest on unpaid PPI benefits. Employer contends Employee is not entitled to interest as it timely controverted Employee's claims, and he is not entitled to any benefit in this case.

3) Is Employee entitled to interest?

Employee contends he needs continuing medical care and treatment for his work injury. He seeks an order requiring Employer to pay for all medical benefits necessitated by his work injury. Employer contends Employee is entitled to no additional medical care or related transportation costs based on its employer medical evaluator's (EME) opinions, and his claim should be denied.

4) Is Employee entitled to medical and transportation costs?

Employee contends his attorney provided valuable services that will result in the award of benefits; consequently, he should be awarded attorney fees and costs. Employer contends he is entitled to no benefits so attorney's fees and costs should be denied.

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

FINDINGS OF FACT

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

1) On October 12, 2004, Employee began working for Employer. (Employee deposition, at 29).

2) On July 20, 2015, Employee was unloading a box of furniture from Employer's truck when he felt a pop and pain in his back. (Employee deposition at 45; Report of Occupational Injury or Illness, July 24, 2015).

3) On July 22, 2015, Employee reported having lower back and leg pain to an emergency room physician. He was prescribed Ibuprofen for pain and Flexeril for muscle spasms; he was also instructed to use ice and heat packs, avoid heavy lifting or strenuous activities, and see primary care provider if symptoms persist. He was also restricted from work until July 25, 2015. (Emergency Room report; Benjamin Shelton, M.D., letter, July 22, 2015).

4) On August 20, 2015, Pedro Perez, M.D., diagnosed Employee with a lower thoracic and lumbar muscle strain with sacroiliac pain. Dr. Perez referred Employee to physical therapy and released him to work with restrictions in effect until September 20, 2015. X-rays showed mild scoliosis and pelvic tilt, but otherwise normal appearing spine. (Perez report; Harold Cable, M.D., report, August 20, 2015).

5) In October 2015, Employee started working a second job at Sheraton as a busser. (Employee deposition; Dennis Chong, M.D., report, January 21, 2016).

6) On October 9, 2015, magnetic resonance imaging (MRI) showed "disc degeneration with annular tear and herniation centrally and to the left of midline L5-S1." Dr. Cable opined this did not severely stenose the canal, but it directly contacted and slightly displaced the left S1 root, which could easily cause low back and left leg pain. (Cable report, October 9, 2015).

7) On October 27, 2015, Jared Kirkham, M.D., saw Employee for a spinal evaluation. Employee reported pain in his left lumbar area radiating down the left gluteal area, posterior thigh, and posterior calf. Dr. Kirkham diagnosed a disc herniation at L5-S1 with a clinical LS1 radiculopathy, prescribed Naproxen, Gabapentin, and physical therapy. He also recommended an epidural steroid injection and released Employee to a full-time light-duty work with no lifting greater than 10 pounds. On October 29, 2015, Dr. Kirkham administered a left S1 selective nerve block and epidural steroid injection. On October 30, 2015, Employee began physical therapy. (Kirkham reports, October 27, 2015 and October 29, 2015).

8) On November 6, 2015, Employee reported lack of improvement from the epidural injection and physical therapy. On November 19, 2015, Employee reported slow improvement; Dr. Kirkham prescribed Cymbalta in lieu of Gabapentin for Employee's anxiety. On November 24, 2015, Dr. Kirkham administered a second left S1 selective nerve block and epidural steroid injection. (Kirkham reports, November 6, 2015, November 19, 2015, and November 24, 2015).

9) On December 8, 2015, Employee reported a significant improvement to his condition; Dr. Kirkham found him to be medically stable and ordered a functional capacity evaluation (FCE). On December 10, 2015, Dr. Kirkham rated Employee with a 9% permanent partial impairment (PPI). (Kirkham reports, December 8, 2015, and December 10, 2015).

10) On December 18, 2015, the FCE determined Employee had the ability to function in the medium physical demand category with frequent walking, sitting, standing, reaching overhead, and stooping, and occasional lifting of 40 lbs., reaching to the floor, and crouching. (FCE, December 18, 2015).

11) On January 4, 2016, Dr. Kirkham updated Employee's work restrictions based on the FCE. Employee reported he discontinued taking Cymbalta and Naproxen. Dr. Kirkham prescribed Trazodone as a sleep aid, reviewed the MRI findings with Employee, and opined his condition would not be amenable for surgical intervention. (Kirkham report, January 4, 2016).

12) On January 7, 2016, the insurance company's adjuster, Virginia Henley, discussed Employee's prescriptions, treatment, and medical stability, with Dr. Kirkham. (SIME medical records, Care Conference, at 121).

13) On January 21, 2016, Dr. Chong saw Employee for an EME and diagnosed Employee with chronic mechanical low back pain at the left sacroiliac joint, without an acute injury and unrelated to work, left sciatica in an S1 distribution supported by the MRI, without an acute injury and unrelated to work, and lumbar strain/strain, without an acute injury, related to work. Dr. Chong gave an 8% PPI rating for S1 sciatica unrelated to the work injury and opined the work injury had been resolved and was no longer the substantial cause of a disability or need for medical treatment. (Chong report, January 21, 2016).

14) On February 26, 2016, Dr. Kirkham disagreed with Dr. Chong's opinion; he reiterated the S1 radiculopathy resulted from the work injury and re-confirmed the 9% PPI rating. On April 27, 2016, Employee reported he was working customer service for Employer and bussing tables for

Sheraton. Dr. Kirkham ordered an electromyography (EMG) of the left lower extremity to rule out an ongoing axonal radiculopathy. (Kirkham reports, February 26, 2016, and April 27, 2016).

15) On May 10, 2016, EMG showed all nerve conduction studies were within normal limits; all examined muscles showed no evidence of electrical instability. Dr. Kirkham opined Employee's low back pain and intermittent left leg radicular symptoms were likely related to nerve root irritation without radiculopathy. (Kirkham report, May 10, 2016).

16) On August 24, 2017, Employer filed a controversion notice dated February 3, 2016, which denied medical benefits and the 9% PPI rating by Dr. Kirkham based on Dr. Chong's January 21, 2016 EME. It was submitted via facsimile at 1:09 PM on August 24, 2017, from 907-264-6782; Employer's telephone number listed in the notice was 907-264-6781. (Controversion Notice, August 24, 2017).

17) On November 15, 2017, Employee claimed PPI and medical costs and asked for a secondary independent medical evaluation (SIME). (Workers' Compensation Claim; Petition for an SIME, November 15, 2017).

18) On December 6, 2017, Employer filed an answer to the November 15, 2017 claim admitting reasonable and necessary medical benefits related to the July 20, 2015 injury and denying PPI and medical benefits which are unnecessary, unreasonable, and/or unrelated to the July 20, 2015 injury. It did not oppose an SIME. (Answer to Workers' Compensation Claim; Answer to Petition, December 6, 2017).

19) On December 21, 2017, Employer controverted PPI and medical benefits which are unnecessary, unreasonable, and/or unrelated to the July 20, 2015 injury, based on Dr. Chong's EME. (Controversion Notice, December 21, 2017).

20) On January 16, 2018, Employee saw Erik Olson, D.O., and reported low back pain and sciatica. Dr. Olson recommended physical therapy and prescribed Cymbalta, Diclofenac for pain and inflammation, and Trazodone as a sleep aid. (Olson report, January 16, 2018).

21) On May 17, 2018, Employee was deposed. He denied having any injury to and/or seeking medical treatment for his back prior to the work injury. He continued to work full-time for Employer as a sales floor associate and 35 hours per week for Sheraton as a busser. He participated in recreational activities such as caribou hunting, fishing, four-wheeling, riding motorcycles, and hiking short distances; he also traveled to the Philippines to marry his wife. Employee slept under

and on a tarp during a caribou hunt in August 2017; he denied doing any actual hunting himself. (Employee deposition, May 17, 2018, at 16-39).

22) On May 24, 2018, David Bauer, M.D., saw Employee for an EME. He diagnosed a lumbar strain with radiculitis and opined Employee's ongoing symptoms were due to the progression of pre-existing degeneration unrelated to the work injury, which was the substantial cause of the need for medical treatment through 2016. Employee reached medical stability on May 10, 2016, with a 7% PPI rating, unrelated to the work injury; no care would be necessary other than home exercise program and over-the-counter anti-flammatory medications. Dr. Bauer noted Employee was not a surgical candidate, and there are no physical restrictions to continue his current job. (Bauer report, May 24, 2018).

23) On May 24, 2018, Employee saw Dr. Olson and reported worsening back pain and sciatica symptoms. Dr. Olson recommended ongoing conservative treatment and a repeat epidural steroid injection. He opined surgical intervention could be a reasonable option if they failed. (Olson report, May 24, 2018).

24) On June 1, 2018, Maria Patten, D.O., saw Employee for an SIME. She diagnosed L5-S1 annular tear with subligamentous herniation causing discogenic low back pain, left S1 radiculitis with nerve root impingement – improved with no current neurologic deficits, myofascial left gluteal pain, and mild left sacroiliac joint pain. Dr. Patten opined the work injury was the substantial cause of Employee's need for medical treatment, found Employee medically stable and capable of medium work consisting of lifting/ carrying/ pushing/ pulling 20-50 pounds occasionally, 10-25 pounds frequently, or up to 10 pounds constantly, and gave a 6% PPI rating based on the imaging study and a normal neurologic exam. (Patten report, June 1, 2018).

25) On August 1, 2018, Employee amended his claim to include temporary total disability (TTD), temporary partial disability (TPD), PPI, attorney's fees and costs, transportation, medical costs, and interest. (Workers' Compensation Claim; August 1, 2018).

26) On August 23, 2018, Employer answered and denied Employee's August 1, 2018 claim based on Dr. Bauer's EME. (Answer to Workers' Compensation Claim; Controversion Notice, August 23, 2018).

27) On September 29, 2018, Employer's investigator video-recorded Employee playing basketball on a local playground and kicking a football. (Physical evidence; Affidavit of Service, Kari Miranda, March 6, 2019).

28) On October 3, 2018, Dr. Olson stated Employee was safe to perform a physical capacity test for a job that included loading and unloading buckets to three high tier. Employee would have to lift 45-pound buckets from floor level to 28.5" and complete a 50-pound qualifying lift. However, Dr. Olson noted Employee had a 40-pound lifting restriction. (Physician Consent, Olson, October 3, 2018).

29) From October 2018 through February 2019, Employee held a third job while working for Employer and Sheraton. He worked 25 hours per week for Anchorage School District as a custodian, which required lifting of 50 lbs. (Employee).

30) On October 24, 2018, the parties agreed to a March 27, 2019 oral hearing on the merits of Employee's claim for TTD, TPD, PPI, medical benefits, transportation costs, interest, and attorney fees and costs. (Prehearing Conference Summary, October 24, 2018).

31) On March 4, 2019, Dr. Bauer was deposed. He testified the work injury is not the substantial cause of Employee's symptoms and need for medical treatment. Employee's presentation was consistent with the progression of degenerative disk disease; he had a normal musculature without atrophy or abnormal reflexes. The neurologic examination was also normal. At the time of the injury, and for a short time afterwards, Employee had some neurologic symptoms; he experienced pain radiating down his leg, which was consistent with a temporary aggravation of the pre-existing degenerative progression. However, there was no evidence of any structural harm such as acute disk herniation, change to the structure of the spine, sensory or motor loss, and there were no objective findings to suggest an ongoing damage. MRI showed an annular fissure at the L4-L5 level, and there was disk degeneration and compression on the S1 nerve root slightly displacing it at the L5-S1 level. Dr. Bauer stated all the findings on the MRI were due to aging; they were related to the progression of the degenerative condition that would have occurred regardless of the work injury. He cited a 2015 study published in the Journal of Neuroradiology reporting someone of Employee's age in "his fourth decade of life would be 40 to 50 percent likely, even if asymptomatic, to have all the findings" of his MRI. Dr. Bauer disagreed with Dr. Patten; he stated there was no scientific evidence that the annular fissure at L5-S1 was correlated with discogenic low back pain. He agreed with Dr. Patten that the radiculitis had improved and there was no current neurologic deficits. He opined the myofascial left gluteal pain was caused by degenerative disk disease, and there was no evidence of injury or damage to the sacroiliac joint. He questioned the veracity of such a diagnosis. Dr. Bauer watched a video clip of Employee playing basketball

and commented there was no signs of pain behavior or disability. He explained that a person constantly degenerates so his steady state is not a straight line across the bottom, but rather, a line of steadily increasing impairments and disabilities as he gets older. Thus, just because Employee had an injury, it does not mean that everything that followed was caused by that injury. Dr. Bauer stated no work restriction was necessary with regard to the work injury. (Bauer deposition).

32) On March 8, 2019, Dr. Patten was deposed and testified the annular tear at the L4-L5 level and the left S1 radiculitis with nerve root impingement were caused by the work injury. The annular tear could be acute or degenerative; however, it is unknown whether the disc was degenerated before the work injury. The disc bulged and touched the S1 nerve root causing the exact symptoms Employee described. Although it is unknown whether repetitive lifting or genetics caused the tear, it was not "purely degenerative" as Employee had no symptoms until the date of the injury. Dr. Patten "apportioned" PPI, 60 percent to the work injury and 40 percent to degeneration overall. Generally, genetics would be the primary cause of degeneration; however, heavy labor could also be the cause. In Employee's case, Dr. Patten did not emphasize genetics as the cause of degeneration because not only he was relatively young at age 32, but also, MRI showed degeneration at only one disc; other discs "looked fine." Such would suggest the one-disc degeneration was caused by trauma rather than genetics as more discs would have been involved otherwise. Dr. Patten disagreed with Dr. Bauer's opinion that the May 10, 2016 EMG showed Employee returned to his baseline because he was still having radicular symptoms and back pain. There was a chronic problem that was no longer completely due to the work injury, but such an injury had instigated the cascade of events that were causing Employee's ongoing symptoms. Also, a normal EMG would not confirm a radiculopathy with loss of nerve fiber function, and a person could experience radiculopathy in the absence of such. Dr. Patten agreed with Dr. Bauer that there was no current neurological deficits, and surgical intervention was not reasonable. She opined a repeat left L5-S1 epidural steroid injection, as suggested by Dr. Olson, might be reasonable and necessary as a palliative measure in case of a flare-up. The diagnosis for sacroiliac joint pain was supported by a positive FABER maneuver; however, it was not work related. She recommended a more aggressive home exercise program for core strengthening and a short course of formal physical therapy sessions to ensure Employee would perform the program correctly. Dr. Patten watched the surveillance video clip of Employee playing basketball and commented there was no signs of pain behavior. Playing basketball would be a strenuous exercise but it was not

inconsistent with what Employee reported – being active made his pain somewhat better. She would not change her diagnoses and PPI rating as they were based on the actual exam she conducted, functional history, and imaging studies. (Patten deposition).

33) Employee did not fill prescriptions provided by Dr. Olson. (Record).

34) On March 22, 2019, Employee sought attorney's fees and costs. (Affidavit of Attorney Services, March 22, 2019).

35) On March 22, 2019, Employee withdrew his claims for TTD and TPD; however, he sought to add a claim for penalty on unpaid PPI benefits; Employer did not object. (Employee brief, March 22, 2019; record).

36) Employee agreed to file an amended fee affidavit by April 3, 2019, to address the following issues raised at hearing: (1) the coversheet of the March 22, 2019 affidavit showed 1.50 hours attributed to E. Croft, but a total of 0.4 hours for "EC" were computed in the attached spreadsheet, 0.1 hours on February 19, 2018, and 0.3 hours on May 22, 2018; (2) items with the same descriptions were duplicated in the March 11, 2019 entries; (3) the May 22, 2018 entry, legal research "on aggravation issue," needs clarification; and (4) the time spent on the withdrawn TTD and TPD claims was not deducted from the affidavit. (Affidavit of Attorney Services, March 22, 2019; record).

37) Employer agreed to file evidence to support its contention that the controversion notice dated February 3, 2016, was in fact filed on February 3, 2016, and not on August 24, 2017, as the division's records indicate. (Controversion Notice, August 24, 2017; ICERS; record).

38) The parties agreed to file their responses to additional documents by April 10, 2019. (Record).

39) On April 3, 2019, Employer filed a copy of (1) the controversion notice dated February 3, 2016, without a filing date stamp, (2) Dr. Chong's EME report dated January 21, 2016, (3) claim notes dated "2016-02-03" documenting mailing of the January 21, 2016 EME report and the controversion notice to Employee and faxing them to "ASI/Dr. Kirkham & ASI/PT Dept. as well as to ER," (4) the log documenting submission of unspecified documents such as "denial 2/3/2016" with a submission date of "02/04/2016" and "accepted w/errors" status and "correction 2/3/2016" with a submission date of "02/09/2016" and "accepted" status. (Employer affidavit; April 3, 2019).

40) Employee has not filed an amended affidavit of attorney services. (ICERS).

41) On April 9, 2019, Employer objected to Employee's request for penalty on unpaid PPI benefits. (Employer motion, April 9, 2019).

PRINCIPLES OF LAW

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

> **AS 23.30.010(a). Coverage**. (a) . . . compensation or benefits are payable under this chapter for . . . the need for medical treatment of an employee if . . . the employee's need for medical treatment arose out of and in the course of the employment. When determining whether or not the . . . need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of . . . the need for medical treatment. Compensation or benefits under this chapter are payable for . . . the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the . . . need for medical treatment.

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

> **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
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> (1) the claim comes within the provisions of this chapter; . . . .

Benefits sought by an injured worker are presumptively compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, an injured employee must first establish a "preliminary link" between his injury and

the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). The fact-finders do not weigh credibility at this stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

If the employer's evidence rebuts the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011) (reversed on other grounds, *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016)). This means the employee must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences drawn and credibility considered. *Wolfer*.

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

> Here, Korobkin disputed many aspects of Summers' application for adjustment of claim. Korobkin's answer advanced numerous defenses to Summer's claim, including that Summers' injury was not work-related . . . Summers is entitled to a hearing on Korobkin's defenses. If Summers prevails, Korobkin will still be able to controvert Summers' claim at a future hearing, if the grounds for controversion arise after the initial hearing. AS 23.30.130. However, a worker in Summers' position, who has been receiving treatment for an injury which he or she claims occurred in the course of employment, is entitled to a hearing and prospective determination on whether his or her injury is compensable.

In *Bockness v. Brown Jug, Inc.*, 980 P.2d. 445, (Alaska, 1999), the Supreme Court held by providing that employers are responsible only for providing that medical care and those services "which the nature of the injury or the process of recovery requires," the Act indicates that the

board's proper function includes determining whether the care paid for by employers is reasonable and necessary.

> **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). When doctors disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 (August 25, 2008).

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing, the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

> **AS 23.30.145. Attorney Fees**. (a). Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . . In determining the amount of fees, the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries. . . .

> **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. To controvert a claim, the employer must file a notice. . . .
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> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14

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

In *Hammer v. City of Fairbanks*, 953 P.2d 500 (Alaska 1998), the Supreme Court held construing subsections (b) and (e), unless the employer files a controversion, the employer has 21 days after receiving a PPI rating from a doctor to pay compensation or be subject to the statutory penalty. In *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187 (Alaska 1984), the Supreme Court held a workers' compensation award, or any part thereof, shall accrue lawful interest from the date it should have been paid.

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides**.
> (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
> . . . .
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> (c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. If the combination of a prior impairment rating and a rating under (a) of this section would result in the employee being considered permanently totally disabled, the prior rating does not negate a finding of permanent total disability.
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> **8 AAC 45.082. Medical treatment**.
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> (d) Medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill, a written

justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and a completed report in accordance with 8 AAC 45.086(a). Unless the employer controverts the prescription charges or transportation expenses, an employer shall reimburse an employee's prescription charges or transportation expenses for medical treatment no later than 30 days after the employer received the medical provider's completed report in accordance with 8 AAC 45.086(a), a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and an itemization of the prescription numbers or an itemization of the dates of travel, destination, and transportation expenses for each date of travel. If the employer controverts (1) a medical bill or if the medical bill is not paid in full as billed, the employer shall notify the employee and medical provider in writing the reasons for not paying all or a part of the bill or the reason for delay in payment no later than 30 days after receipt of the bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and completed report in accordance with 8 AAC 45.086(a); (2) a prescription or transportation expense reimbursement request in full, the employer shall notify the employee in writing the reason for not paying all or a part of the request or the reason for delay within the time allowed in this section in which to make payment; if the employer makes a partial payment, the employer shall also itemize in writing the prescription or transportation expense requests not paid.

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 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. . . .

8 AAC 45.180. Costs and attorney's fees. . . .
. . . .

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

(d) The board will award a fee under AS 23.30.145 (b) only to an attorney licensed to practice law under the laws of this or another state. (1) A request for a fee under AS 23.30.145 (b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145 (a), if AS 23.30.145 (a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section. (2) In awarding a reasonable fee under AS 23.30.145 (b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

ANALYSIS

1) Is Employee entitled to PPI benefits?

There is conflicting medical evidence addressing PPI. This issue raises factual questions to which the presumption of compensability analysis applies. AS 23.30.120; *Meek*. Without regard to weight or credibility, Employee raised the presumption on his PPI claim with medical opinions from Drs. Kirkham and Patten. *Tolbert*; *Wolfer*. Each physician provided a medical opinion stating Employee has a PPI rating resulting from his compensable back injury. Disregarding weight or credibility, Employer rebutted the presumption with opinions from Drs. Chong and Bauer who opined Employee had no ratable PPI related to the work injury. *Huit*; *Wolfer*. Therefore, Employee must prove his PPI claim by a preponderance of the evidence. *Runstrom*; *Saxton*.

There is no dispute Employee sustained a back injury while working for Employer, and MRI showed an annular tear at the L4-L5 level and the left S1 radiculitis with nerve root impingement. Drs. Bauer and Patten agree Employee had neurologic symptoms due to the work injury until May of 2016; however, he reached medical stability, and disc degeneration has been the cause of his chronic back pain since. Thus, the main issue is whether disc degeneration is related to the work injury.

Dr. Bauer testified "all the findings on this MRI were due to aging"; they were related to the progression of the degenerative condition that would have occurred regardless of the work injury. He explained that a person constantly degenerates so his steady state is not a straight line across the bottom, but rather, a line of steadily increasing impairments and disabilities as he gets older. A 2015 study showed someone in his fourth decade of life would be 40 to 50 percent likely, even if asymptomatic, to have all the findings of Employee's MRI. Thus, just because Employee had an injury, it does not mean that everything that followed was caused by that injury. However, Dr. Bauer's opinions are given little weight and credibility as he neither addressed why degeneration would only show at one disc, and not in others, nor provided the basis for his conclusion degeneration pre-existed the work injury. AS 23.30.122; *Smith*. He did not consider other

potential causes of degeneration; he did not explain why Employee would belong to the 40 to 50 percent group, rather than the 50 to 60 percent group, absent the work injury. *Id*.

By contrast, Dr. Patten testified it is not certain whether the annular tear was acute or degenerative, or if it were degenerative, such a degeneration existed before the work injury. She noted, generally, genetics would be the primary cause of degeneration; however, heavy labor could also be the cause of such. Dr. Patten stated she did not emphasize genetics as the cause of Employee's degenerative condition because not only Employee was young, but also, MRI showed the degeneration at only one disc; other discs "looked fine." Such would suggest the one-disc degeneration was caused by trauma rather than genetics as more discs would have been involved otherwise. Dr. Patten also disagreed with Dr. Bauer's opinion that the May 10, 2016 EMG showed Employee returned to his baseline. Employee did not return to his baseline because he was still having radicular symptoms and back pain that had never subsided. There was a chronic problem that was no longer completely due to the work injury, but such an injury had instigated the cascade of events that were causing Employee's ongoing symptoms. Also, a normal EMG would not confirm a radiculopathy with loss of nerve fiber function, and a person could experience radiculopathy in the absence of such. Although the surveillance video of Employee playing basketball showed no signs of pain behavior, Dr. Patten would not change her diagnoses and PPI rating as they were based on the actual exam she conducted, functional history, and imaging studies. Dr. Patten's opinions are given the greatest weight as she considered both the known and unknown factors to logically reach her conclusions. AS 23.30.122; *Smith*; *Moore*.

Dr. Patten "apportioned" PPI, 60 percent to the work injury and 40 percent to degeneration overall. Nevertheless, this is not the apportionment set forth in AS 23.30.190(c) which requires reduction of the PPI rating based on the permanent impairment that existed before the compensable injury. She probably meant PPI was 60 percent attributable to the July 20, 2015 injury and 40 percent attributable to degeneration. *Rogers & Babler*. Dr. Patten opined and this decision finds degeneration was caused by work injury; thus, there is no PPI apportionment. Lastly, Dr. Kirkham, gave him a nine percent PPI rating attributable to his compensable back injury. Dr. Patten gave him a six percent PPI rating. Employee presented no contrary medical evidence suggesting Dr.

Patten's reduction was improper. *Saxton*. Employee is entitled to $10,620 in PPI benefits based on the 6% rating. AS 23.30.010(a); AS 23.30.190(a).

2) Is Employee entitled to penalty?

Employee first raised the penalty issue in his hearing brief; it was confirmed at hearing. Employer did not object until April 9, 2019. This decision entertains and resolves the penalty issue.

Compensation paid under the Act "shall be paid periodically, promptly, and directly to the person entitled to it, without an award," except when it is controverted. To controvert, Employer must file a controversion notice. AS 23.30.155(a). Employer has 21 days to file a controversion notice after receiving a PPI rating from a doctor to pay compensation or be subject to the statutory penalty. AS 23.30.155(b) and (e); *Hammer*. Dr. Kirkham rated Employee with a 9% PPI on December 10, 2015; yet, it is unclear when Employer received the PPI rating from Dr. Kirkham. However, based on the subject of the communication between adjuster Virginia Hanley and Dr. Kirkham on January 7, 2016, it can be concluded Employer was aware of the PPI rating on that date. Consequently, the controversion notice must have been filed by January 28, 2016. *Id*.

The division's records indicate the first controversion in this case was filed on August 24, 2017, via facsimile from 907-264-6782, which appears to be Employer's facsimile number, similar to its telephone number listed in the notice, 907-264-6781. This notice was dated February 3, 2016. Employer provided documents to support its contention that it timely controverted on February 3, 2016; however, no clear evidence shows its controversion notice was filed on February 3, 2016. Regardless, even if the notice were filed on February 3, 2016, it would still be six days late. Employer had an obligation to either pay or controvert the PPI claim by January 28, 2016. AS 23.30.155(a), (b), (e). It did neither timely. Under both analyses, Employee's request for a penalty will be granted. This decision grants PPI benefits in the amount of $10,620; Employer is ordered to pay Employee $2,655 in penalty on unpaid PPI benefits. AS 23.30.155(e).

3) Is Employee entitled to interest?

Interest is mandatory. AS 23.30.155(p). Employee is entitled to accrued interest on unpaid PPI benefits from January 28, 2016, forward. AS 23.30.155(p); 8 AAC 45.142(a); *Rawls*.

4) Is Employee entitled to medical and transportation costs?

Employee does not presently seek a specific medical treatment. In *Summers,* the Court held an employee is entitled to a prospective determination of compensability; it did not address an order for specific ongoing benefits. Here, this decision established Employee suffered a compensable injury; thus, under AS 23.30.095(a), Employer must provide medical treatment "which the nature of the injury or the process of recovery requires." In *Bockness,* the Supreme Court explained that meant "reasonable and necessary" medical care. Whether a particular treatment is reasonable and necessary depends in part on timing. Whether or when Employee will need medical procedures and/or treatments is unknown. Without specific recommendations from his treating physicians, an order for future medical treatment can do no more than require Employer to pay reasonable and necessary future medical costs, which the Act already requires it to do. Therefore, this decision finds Employee is entitled to all reasonable and necessary medical care related to this compensable injury to the extent Employee properly files and serves appropriate medical records and billing statements. AS 23.30.095(a); 8 AAC 45.082(d). Employee is also entitled to medical travel expenses for the back injury to the extent he provides appropriate documentation. 8 AAC 45.084.

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

Employee requests attorney fees and costs. AS 23.30.145(a); 8 AAC 45.180. This is a complex case with voluminous medical records. There are several physicians' depositions, which were helpful. *Rogers & Babler*. Employee prevails on his PPI claim; this decision awards him six percent PPI worth $10,620 plus interest and penalty. Employer controverted Employee's claim, which allows this decision to award actual attorney fees under AS 23.30.145(a). At hearing, Employee agreed to file an amended fee affidavit to address several discrepancies noted in the March 22, 2019 fee affidavit; also, the time Croft spent on TTD and TPD claims needed to be removed. AS 23.30.135(a). The record remained open until April 3, 2019, to allow Employee to comply with 8 AAC 45.180(b), which requires an attorney requesting fees in excess of statutory fees to file an affidavit "itemizing the hours expended as well as the extent and character of the work performed." Nonetheless, Employee did not file an amended fee affidavit. This failure deprived Employer the ability to review the claimed fees. Employee's failure to comply with the statutory and regulatory rules by providing the board and Employer with a proper affidavit

detailing his time and costs leaves no choice but to award statutory fees. Attorney fees in excess of the statutory minimum in AS 23.30.145(a) will not be awarded.

CONCLUSIONS OF LAW

1) Employee's work for Employer is the substantial cause of his need for medical care.
2) Employee is entitled to PPI benefits.
3) Employee is entitled to penalty on unpaid PPI benefits.
4) Employee is entitled to interest on unpaid PPI benefits.
5) Employee is entitled to medical and transportation costs.
6) Employee is entitled to attorney's fees and costs.

ORDER

1) Employer shall pay $10,620 in PPI benefits.
2) Employer shall pay $2,655 in penalty.
3) Employer shall pay interest on unpaid PPI benefits from January 28, 2016, forward pursuant to 8 AAC 45.142(a).
4) Employer shall pay reasonable and necessary future medical costs and related medical travel expenses for the work injury.
5) Employee is entitled to the statutory minimum attorney fees set forth in AS 23.30.145(a).

Dated in Anchorage, Alaska on May 8, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M Yeo, Designated Chair

/s/
Bronson Frye, Member

/s/
Randy Beltz, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of SEVERINO D. ELARDO III, employee / claimant v. WALMART INC., employer; NEW HAMPSHIRE INSURANCE CO, insurer / defendants; Case No. 201511371; dated and filed

in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on May 8, 2019.

/s/
Nenita Farmer, Office Assistant