ALASKA WORKERS' COMPENSATION BOARD

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

GLENDA LARSON, Employee, Claimant, v. KENAITZE INDIAN TRIBE, Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201617835 AWCB Decision No. 19-0130 Filed with AWCB Anchorage, Alaska on December 11, 2019

Glenda Larson's (Employee) December 6, 2017 claim was heard on December 3, 2019, in Anchorage, Alaska, a date selected on October 23, 2019. A September 10, 2019 Affidavit of Readiness for Hearing gave rise to this hearing. Employee appeared, testified and represented herself. Attorney Vicki Paddock appeared and represented Kenaitze Indian Tribe and its insurer (Employer). The record closed at the hearing's conclusion on December 3, 2019.

ISSUES

Employee contends her work injury with Employer disabled her from working and Employer has not paid her all temporary total disability (TTD) benefits to which she is entitled. She seeks an order awarding TTD benefits from February 6, 2017, through March 27, 2017, and from September 21, 2017, and continuing until she is no longer disabled or is medically stable.

Employer contends it paid Employee all TTD benefits to which she is entitled. It contends Employer medical evaluator (EME) Joseph Lynch, M.D., and second independent medical evaluator (SIME) James Scoggin, M.D., agreed Employee was medically stable effective September 5, 2017, and her work injuries are no longer the substantial cause of any disability, and consequently, she is entitled to no additional TTD benefits.

1) Is Employee entitled to additional TTD benefits?

Employee contends she is entitled to permanent partial impairment (PPI) benefits for her work injury. She admits she has no PPI rating from her physician but contends the division never advised her to obtain one and file it as evidence for the hearing.

Employer contends the EME and SIME physicians both said Employee has a zero percent work-related PPI rating. Therefore, it contends she is not entitled to any PPI benefits.

2) Should Employee's PPI claim be dismissed without prejudice?

Employee contends she is entitled to medical care. She seeks an order requiring Employer to pay for electrodiagnostic tests her physician recommended, which she says she has not yet received.

Employer contends the EME and SIME physicians both agree Employee needs no further evaluation or treatment for her work injury with Employer.

3) Is Employee entitled to additional medical care or treatment at this time?

Employee contends she was found eligible for vocational reemployment benefits. She now wants to either select a job dislocation benefit, or go forward with a vocational retraining plan.

Employer contends Employee is not entitled to any reemployment benefit option because she has no PPI rating.

4) Is Employee entitled to either a job dislocation benefit or a vocational retraining plan at this time?

Employee contends Employer frivolously or unfairly controverted her benefits. She seeks an appropriate finding.

Employer contends it did not frivolously or unfairly controvert any benefits and paid Employee all benefits to which she is entitled.

5) Did Employer frivolously or unfairly controvert any benefits?

Employee contends Employer improperly denied her benefits. She contends she is entitled to an unspecified penalty from Employer.

Employer contends it did not improperly deny any benefits and timely paid Employee all benefits to which she is entitled.

6) Is Employee entitled to a penalty?

Employee contends she is entitled to interest on all past benefits awarded in this decision.

Employer contends this decision should award Employee no benefits. Therefore, it contends she is entitled to no interest.

7) Is Employee entitled to interest?

FINDINGS OF FACT

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

1) On December 12, 2014, Employee complained of left shoulder pain that started the previous night. She was at work moving furniture and climbing under desks following an office fire. (Dena'ina Health Center, December 12, 2014).

2) On February 27, 2015, Employee reported left shoulder pain with movement. She was working as an Information Technology (IT) Manager and was moving around computers "but denies that this could be the cause of her injury." (Dena'ina Health Center, February 27, 2015).

3) On March 30, 2015, Employee had shoulder pain which began in early November after lifting and carrying "heavy objects." She had been caring for her sick mother, which required lifting and assisting with feeding, bathing and transferring. (Dena'ina Health Center, March 30, 2015).

4) In June 2015, Employee underwent left shoulder physical therapy (PT) when her symptoms returned. (Dena'ina Health Center PT, June 1, 2015 through June 25, 2015).

5) On or about June 8, 2016, Employee reported left shoulder pain, which she had "on and off for 6+ years" (Employee disputes this and claims she referenced "6 months" and the error was carried over into successive medical records). She mentioned having shoulder pain while lifting a printer on an unspecified date. Her shoulder pain was getting worse. The "active problem" list confirmed among other things chronic depression, domestic violence victim and chronic pain in the left shoulder, neck and low back. Jack Hickel, M.D., recommended left shoulder and cervical magnetic resonance imaging (MRI) scans. Employee's providers discharged her from treatment citing "pain in left shoulder" as her final diagnosis. "Other sleep disorders" were also included as a secondary diagnosis. ("PCC ANMC" report, June 8, 2016).

6) On November 10, 2016, Employee reported a "left arm injury at work yesterday." She was going down an attic ladder at work and had a misstep, grabbed above her and "yanked" on her arm. She came to this appointment for an x-ray but said her arm was feeling better but was still sore. Employee believed she just pulled a muscle. The relevant diagnosis was a left shoulder and upper arm injury without fracture, consistent with a "muscle pull." She declined muscle relaxants and was told to return to the clinic if her situation did not improve within six weeks, or sooner if her pain worsened or impacted her daily activities. (Dena'ina Health Center, November 10, 2016).

7) Employee's job description with Employer near the time of injury states lifting requirements are "medium," which means exerting up to 50 pounds of force occasionally and up to 20 pounds of force frequently and up to 10 pounds of force constantly to move objects. It requires standing, sitting, walking, using hands, climbing stairs or ladders, stooping, kneeling, crouching, crawling, pushing or pulling and repetitive motion. (Job Description, September 16, 2016).

8) On November 29, 2016, Employee called her physician to state she was on vacation in Hawaii and her left shoulder injury was causing her "a lot of pain and discomfort" and she was considering going to a local emergency room for evaluation. (Dena'ina Health Center, November 29, 2016).

9) On November 29, 2016, Employee reported left shoulder pain that began three weeks earlier when she was "climbing a ladder for work" and pulled something in her shoulder. There was no weakness, numbness or tingling. Left shoulder x-rays showed no fractures or dislocations, and well-preserved joint spaces. A density on the left first rib raised a suspicion for a metastasis and the physician recommended a total body bone scan. The relevant left shoulder diagnoses included a possible rotator cuff injury, calcific tendinitis or adhesive capsulitis. (Hilo Medical Center, November 29, 2016).

10) On December 12, 2016, after returning home from her Hawaii vacation, Employee reported chronic left shoulder pain with a "recent left trapezius muscle strain/tear" after falling down a ladder at work approximately five weeks earlier. She planned to see "Dr. Hall in Soldotna who is a holistic med provider who she also uses frequently for the shoulder. . . ." Employee was concerned about a radiographic finding on her left first rib. She mentioned playing sports and a prior history of domestic violence, although she was unsure if she was ever hit in the ribs. Her provider noted Employee never got a left shoulder MRI prescribed in June, so the prescription was reactivated. (PCC ANMC report, December 12, 2016).

11) On December 22, 2016, Employee had a left shoulder MRI. The reader compared this with March 21, 2014 left shoulder x-rays and an April 8, 2014 left shoulder MRI. The reader found a "new" focal hyperintensity involving the posterior rim of the glenoid, which may be related to a posterior glenoid rim fracture. The impression was marked degenerative joint disease of the acromioclavicular joint with findings that may be related to shoulder impingement syndrome, possible tendinopathy or a partial tear. (MRI report, December 22, 2016).

12) On December 27, 2016, Employee had left shoulder and "multi-joint" pain. (Dena'ina Health Center, December 27, 2016).

13) On December 29, 2016, Herbert Bote, M.D., orthopedic surgeon, saw Employee for her left arm injury. She reported climbing down a ladder on November 8, 2016, when her foot slipped and she pulled her left arm while keeping hold on the ladder. Her history did not include her past left shoulder symptoms. The relevant diagnoses included a left wrist and shoulder injury and degenerative joint disease in the left acromioclavicular joint. He referred Employee for PT. (Bote report, December 29, 2016).

14) On January 11, 2017, Employee reported left shoulder pain, upper extremity tingling and weakness that interfered with her quality of life. Dr. Bote told her she did not have a surgical

issue. Overhead lifting and reaching above chest and shoulder level aggravated her symptoms. A physical therapist suggested Employee had a "rehabable shoulder." He likened a possible rotator cuff tear to "gray hair and wrinkles," noting they often do not affect function. The therapist opined Employee had impingement, which was likely the primary pain generator. Therapy decreased her symptoms significantly. Leon Richard, DPT report, January 11, 2017).

15) On January 30, 2017, Employee's left shoulder still hurt and was aggravated by activity. It awakened her at night. Dr. Bote restricted Employee from "lifting, pulling, pushing or climbing" and said if she did not obtain pain relief allowing her to return to full duty she may need to consider surgical options. (Bote report, January 30, 2017).

16) On February 3, 2017, Employer's insurer received Dr. Bote's January 30, 2017 medical record with the work restrictions, as evidenced by Alaska National's distinctive received stamp perforating the record. (*Id*.).

17) Employee's job description with Employer on the injury date states lifting requirements are "medium," which means exerting up to 50 pounds of force occasionally and up to 20 pounds of force frequently and up to 10 pounds of force constantly to move objects. It requires standing, sitting, walking, using hands, climbing stairs or ladders, stooping, kneeling, crouching, crawling, pushing or pulling and repetitive motion. (Job Description, September 16, 2016).

18) Employee, Employer's project lead, had a "go live" deadline for an IT project in early February 2017. She continued working so she could meet her deadline. (Employee).

19) Beginning February 6, 2017, it is unlikely Employee could have reasonably continued to perform her duties as set forth in her September 16, 2016 job description. Dr. Bote had already restricted her from lifting, pulling, pushing or climbing, which were essential parts of her job. (Job Description, September 16, 2016; experience, judgment and inferences drawn from the above).

20) On February 6, 2017, Employee with assistance from her medical provider completed a Family Medical Leave Act (FMLA) form. The form listed "12/27/16, 2/2/2017," as the approximate date her condition began and said its duration was "chronic." In a section completed by the medical provider, the form states Employee will need treatment at least twice a year for her condition and was referred to a "rheumatologist." The form states her job description was attached and her provider said she was "unable to perform any of [her] job functions due to the condition." She was having difficulty walking and moving "due to pain."

Employee was referred to a specialist for diagnosis, care and management of her "chronic condition." She would not be "incapacitated for a single continuous period" by her condition. She would need possible follow-up visits and would likely have "flare-ups." A specialist would assist her with managing her "work/life balance." The otherwise unspecified "condition" would periodically prevent Employee from performing her job functions. The form does not mention Employee's work injury with Employer and implies her chronic condition is rheumatoid arthritis. (Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), February 6, 2017; experience, judgment and inferences drawn from the above).

21) Employee believes February 6, 2017, was the date she could no longer continue working for Employer because her left shoulder symptoms were too painful. Her shoulder pain was getting worse, PT and pain pills were not helping and the go-live project was completed. She relies on Dr. Bote's January 30, 2017 work restriction for her TTD benefit claim. Employee gave the February 6, 2017 FMLA form to Employer's human resources department. She has not worked for anyone effective February 6, 2017. (Employee).

22) On February 16, 2017, Employee reported left shoulder pain even with moving her arm on a keyboard. Not moving at all and applying ice made her left shoulder feel better. Dr. Bote gave Employee a left shoulder steroid injection. (Bote report, February 16, 2017).

23) On February 21, 2017, Employee reported the steroid injection in her left shoulder "helped a lot." (Medi Center report, February 21, 2017).

24) By March 6, 2017, Employee had returned to Hawaii and was still reporting left shoulder pain interfering with combing her hair, pulling, closing doors and crossing her arm to take her shirt off. Her prognosis was good. (Klein Natural Health & Wellness report, March 6, 2017).

25) On March 28, 2017, Zain Vally, M.D., took a history and evaluated Employee's left shoulder. His relevant diagnosis was "left shoulder pain," though he did not know the cause. He opined the work injury as she described it was the medical cause of her symptoms. He removed her from work for 45 days. (Vally report, March 28, 2017).

26) On April 21, 2017, Employee had the whole body nuclear bone scan. The scan revealed findings most consistent with metastatic disease. (Bone scan report, April 21, 2017).

27) On April 25, 2017, Dr. Valley diagnosed left shoulder and wrist pain, wanted to rule out radiculopathy and again removed Employee from work for 45 days. He further reported:

> I reviewed the EMG/NCV [electromyography/nerve conduction velocity] study of the upper extremities result which revealed an impingement syndrome. I would like to refer the patient to an extremity surgeon, Dr. Okamura, for evaluation of the left wrist carpal tunnel syndrome and possible supraspinatus tear in the shoulder. (Vally report, April 25, 2017).

28) On May 4, 2017, Employee saw David Templin, M.D., rheumatologist, for evaluation for possible arthritis because she had previously tested positive for a rheumatoid factor. He read Employee's left shoulder MRI to show mostly degenerative changes, though there was a possible glenoid rim fracture and associated bone marrow edema. He diagnosed "positive rheumatoid factor, osteoarthritis, and generalized arthralgias." (Templin report, May 4, 2017).

29) On June 1, 2017, Dr. Vally again removed Employee from work for 45 days. (Vally report, June 1, 2017).

30) On June 7, 2017, Dr. Vally gave Employee a left shoulder Platelet Rich Plasma injection. (Vally report, June 7, 2017).

31) On June 27, 2017, Dr. Vally's diagnosis was left shoulder pain and strain of an unspecified muscle, fascia and tendon at the shoulder. He referred Employee to a surgeon to consider left shoulder surgery; he removed her from work for 45 days. (Vally report, June 27, 2017).

32) On June 28, 2017, on referral from Dr. Vally, Employee told Nino Murray, PhD, clinical psychologist, about her work injury with Employer. Dr. Murray diagnosed major depressive disorder, moderate, with anxious distress and problems with occupation and daily functioning "due to shoulder injury at work, pain, depression, and anxiety." Employee was worried about her health and occupation related to her injury and was suffering from shoulder pain. Dr. Murray recommended cognitive and behavioral therapy to address Employee's depression and anxiety. (Murray report, June 28, 2017).

33) On June 30, 2017, Employee reported she had been in treatment with acupuncture and therapeutic massage for three months and her "pain level is low." (Rehabilitation Hospital of the Pacific, June 30, 2017).

34) On July 6, 2017, left shoulder x-rays revealed mild degenerative changes. (X-ray report, July 6, 2017).

35) On or about July 7, 2017, Weichin Chen, M.D., evaluated Employee's left shoulder, took a consistent history of her work injury with Employer, and diagnosed posterior shoulder pain consistent with periscapular tendinitis. Dr. Chen did not record a history of any preexisting left

shoulder symptoms prior to the work injury, and did not give an opinion as to "the substantial cause" of Employee's need for recommended additional physical therapy and acupuncture. There is no mention of disability or medical stability in this report. (Chen report, July 7, 2017).

36) On July 25, 2017, Dr. Vally said Employee presented with shoulder pain located on the right shoulder, which radiated down the right arm. His report also mentions left shoulder pain radiating down the left arm. Though Dr. Vally's diagnoses are similar to his previous ones, there is no reference to a right shoulder or arm diagnosis. He removed Employee from work for another 45 days, through September 10, 2017. (Vally report, July 25, 2017).

37) On July 26, 2017, Dr. Vally referred Employee to a specialist for a rheumatoid arthritis evaluation but listed Premera Blue Cross Blue Shield as the responsible insurance company. (Vally referral report, July 26, 2017).

38) On July 28, 2017, Dr. Vally responded to a questionnaire and stated he did not concur with Dr. Chen's July 6, 2017 opinion regarding Employee's medical stability and work status. (Vally report, July 28, 2017).

39) Dr. Chen's July 6, 2017 opinion on medical stability and work status does not appear in the agency record. (Agency file).

40) On July 31, 2017, Dr. Vally submitted a treatment plan indicating his goal was to find a pain source in Employee's left shoulder and in other areas. (Vally treatment plan, July 31, 2017).

41) On August 10, 2017, Employee reported left shoulder pain at a 2/10 level that felt like "shocks or jolts." She thought it was a nerve sensation that occurred with certain movements. (Acupuncturist report, August 10, 2017).

42) On August 16, 2017, a left shoulder MRI for pain disclosed bone marrow edema or bone bruise of the posterior superior aspect of the glenoid rim. (MRI report, August 16, 2017).

43) On August 17, 2017, Employee's left shoulder pain remained at 2/10. (Acupuncturist report, August 17, 2017).

44) By August 29, 2017, her left shoulder pain had risen to 3/10. (Acupuncturist report, August 29, 2017).

45) On August 30, 2017, Employee told Kelly Wachi, M.D., rheumatologist, that she had relocated permanently to Hawaii and was looking for an IT job. Her lab work was unremarkable. (Wachi report, August 30, 2017).

46) On an unspecified date after Dr. Murray's June 28, 2017 report and after Dr. Lynch's September 5, 2017 evaluation, claims adjuster Alisa Horner handwrote on the June 28, 2017 report:

> The State of Alaska does not allow for pre-authorization. Ms. Larson's claim is open and billable and there are no denials at this time. Ms. Larson recently attended an IME, we are still awaiting the report. If the treating doctor is relating to treatment to the work injury it will be processed for payment, as long as there are no denials in place. (Horner note, undated, but after September 5, 2017).

47) On September 5, 2017, Joseph Lynch, M.D., orthopedic surgeon, examined Employee for an EME. Her chief complaint was left shoulder pain when she raised her arm. Dr. Lynch recorded Employee said she ran "into a door with her left shoulder, which caused shooting pain up towards her neck about two or three days prior to the MRI scan, which seem to reignite her symptoms and her left shoulder" (Employee disputes she said this). The report states Employee said her left shoulder pain is resolving but she now has overall body pain for which she has been seeing a rheumatologist. Dr. Lynch reviewed medical records and diagnostic studies and examined Employee. His relevant diagnoses included a left shoulder, ankle and wrist strain and a left shoulder contusion related to walking into a door as manifested by bone bruising on MRI scan performed two days later. He opined the work injury was the substantial cause of the straining injuries at work with Employer in November 2016. In his opinion, the work-related conditions were now resolved effective September 5, 2017. All treatment was completed for the work injury and no further treatment was needed. In Dr. Lynch's opinion, Employee was medically stable and needed no palliative treatment. She had no PPI rating for her work injury and in his opinion had no physical restrictions for working and could perform her duties as an IT Manager. (Lynch report, September 5, 2017).

48) On September 25, 2017, Employer denied Employee's right to benefits based on Dr. Lynch's EME report. (Controversion Notice, September 25, 2017).

49) On October 16, 2017, Dr. Vally referred Employee for a surgical consult for diagnosed left shoulder and wrist pain and possible radiculopathy. (Vally report, October 16, 2017).

50) On November 16, 2017, Timothy Twomey entered his appearance as attorney for Employee. (Entry of Appearance, November 16, 2017).

51) On November 28, 2017, Dr. Vally disagreed with Dr. Vally's: MRI review, medical stability, ankle and rheumatoid arthritis opinions, understanding of Employee's medications and pain drawing interpretation. Dr. Vally opined treatment delays would aggravate Employee's condition and prevent her from returning to work. In his view, treatment delays were also aggravating pain and causing her stress, anxiety and adjustment disorder. His relevant diagnoses included left shoulder pain and strain of an unspecified fascia and tendon in the shoulder. Dr. Vally's relevant referrals for Employee included an upper extremity EMG, referral to an orthopedic hand specialist and for a neurology and "psych" consult. He removed her from work for an additional 45 days. (Vally report, November 28, 2017).

52) On December 28, 2017, Employee told Dr. Murray she was still experiencing major challenges with "executive function, anxiety, and depression." Employee reported "marital discord," and was struggling with financial problems. Dr. Murray stated Employee was "still too emotionally and physically distressed to go back to work, and she is still suffering from right side facial pain but it is much better with the new medication." The report does not mention left shoulder pain but there is a reference the work injury. It also mentions the right facial pain was "from the attack." Dr. Murray opined Employee was not functioning well and was not able to do a full day's work because she was too depressed and had too many physical and psychological challenges. However, the report does not identify "the substantial cause" of Employee's inability to work. (Murray report, December 28, 2017).

53) On January 9, 2018, Dr. Vally reiterated his opinions offered on November 28, 2017. (Vally report, January 9, 2018).

54) On February 8, 2018, the parties signed an SIME form. PPI was not an issue listed in dispute. (SIME form, February 8, 2018).

55) On February 9, 2018, Employer through counsel submitted its SIME questions. Included was a question asking for a PPI rating. (Paddock letter, February 9, 2018).

56) There is no evidence the parties stipulated to having the SIME physician address a PPI rating. (Agency file; Prehearing Conference Summaries December 27, 2017; January 25, 2018; January 24, 2019; October 23, 2019).

57) On February 14, 2018, Dr. Vally reiterated his prior diagnoses and treatment and removed Employee from work for an additional 45 days. (Vally report, February 14, 2018).

58) On March 23, 2018, Dr. Vally's relevant diagnoses included left shoulder pain and left upper arm strain and insomnia, stress, anxiety and depression. His plan was to, "Rule out Brain Damage." He referred Employee to a neurologist. (Vally report, March 23, 2018).

59) On March 23, 2018, Dr. Vally also sought to rule out nerve damage in the left wrist and shoulder. To this objective, he referred Employee for electrodiagnostic testing for the left shoulder and wrist. (Vally report, March 23, 2018).

60) On July 5, 2018, Dr. Scoggin performed his SIME on Employee. She described her work injury and said when she fell her left shoulder "jerked a bit, but most of the injury was to the left wrist." Employee said she had not had an EMG or NCV study. Her left ankle no longer had any symptoms, and she had occasional left wrist and shoulder pain. Her pain while in Dr. Scoggin's office was at zero on a 10 scale. Her worst pain, when it occurs, is somewhere between five and six on a 10 scale. After reviewing her records and examining Employee, Dr. Scoggin diagnosed, among other things, left shoulder and scapular pain prior to the work injury for six years documented in the medical records, subsequent left shoulder injury just prior to the most recent left shoulder MRI, and a November 8, 2016 work injury resulting in a trapezius muscle strain and temporary aggravation of Employee's preexisting shoulder pain. He identified 15 causes of Employee's disability or need for medical treatment, including her work injury with Employer. Dr. Scoggin concluded the substantial cause of Employee's need for left shoulder care between November 8, 2016, and September 5, 2017, was the November 8, 2016 work injury with Employer. The work injury was a temporary aggravation of Employee's preexisting left shoulder condition. It was also the substantial cause of her disability for those same dates. However, the work-related disability did not continue; she was medically stable and her disability ended "by 9/5/17, if not sooner." In Dr. Scoggin's view, Employee needs no additional treatment for her November 8, 2016 injury. Her work injury has resolved to its baseline. In his opinion, any disability or need for additional medical treatment after September 5, 2017, is related to her preexisting left shoulder condition or other non-industrial causes as listed in his report. Dr. Scoggin opined Employee could return to work as a Technical Support Specialist with no restrictions and no permanent impairment. He generally agrees with Dr. Lynch's EME report. Employee needs no further diagnostic testing. (Scoggin report, July 5, 2018).

61) Neither Drs. Lynch nor Scoggin commented on Employee's ability to work between February 16, 2017 and March 27, 2017. There is no evidence Employer offered Employee a lighter-duty job consistent with Dr. Bote's January 2017 physical limitations. (Agency file).

62) On September 9, 2019, Employee's attorney withdrew. (Letter, September 9, 2019).

63) At hearing on December 3, 2019, Employee testified Dr. Bote significantly restricted her working ability in January 2017, but she continued working for Employer only so she could complete a project before an important "go live" deadline. Thereafter, her severe left shoulder pain prohibited her from working and she filed a FMLA request. She has not worked for anyone since February 6, 2017. Employee testified she could not continue to fulfill duties listed in her job description in light of Dr. Bote's physical limitations from February 6, 2017, forward. Employee expressed considerable confusion about PPI ratings and relied on her former attorney to provide appropriate evidence. When asked, she said no one at the Workers' Compensation Division ever told her that she needed to obtain a PPI rating from her attending physician, timely file and serve it and present it at hearing as evidence. So far as Employee knows, there are no unpaid work-related medical bills. Her medical benefit claim is for EMG and NCV tests, which she claims she never had; she has no recollection of having these tests prior to or cents Dr. Vally's April 25, 2017 examination, does not recall a carpal tunnel syndrome diagnosis but does recall him referring her to Dr. Okamura. She has no unpaid transportation expenses. Employee was found eligible for retraining benefits and initially testified she still wanted the retraining, but later testified she wanted a job dislocation benefit. Employee said Employer should not have denied her physician's referrals to specialists before it received Dr. Lynch's EME report. The basis for Employee's penalty claim was unclear but was based on her belief the insurance company received Dr. Bote's January 30, 2017 report restricting her ability to work but did not institute disability benefits promptly. (Employee).

64) At hearing on December 3, 2019, the panel left the record open for Employer to submit Employee's completed FMLA request signed by her provider. (Record).

65) On December 5, 2019, Employer filed and served the February 6, 2017 FMLA paperwork. (Medical Summary, December 5, 2019).

66) The parties attended four prehearing conferences, including one after Employee's attorney withdrew. No prehearing conference summary mentions Employee's understanding, or lack thereof, about obtaining a PPI rating and filing and serving it as evidence for her hearing. She

contacted the division for advice regarding her claim on numerous occasions, both before and after her lawyer withdrew. Consistent with her hearing testimony, there is no evidence anyone at the division ever advised Employee how to obtain a PPI rating from her physician, obtain a referral to a specialist if her physician did not perform PPI ratings, and file and serve PPI rating evidence in a timely fashion for use at her December 3, 2019 hearing. (Prehearing Conference Summaries, December 27, 2017; January 25, 2018; January 24, 2019; and October 23, 2019; agency file).

67) Employers and their workers' compensation insurers routinely pay for PPI ratings performed by attending physicians. (Experience).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

> (1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). "Administrative adjudicators' expertise gained from repeated exposure to information in adjudications can support conclusions made from the evidence presented in a specific case." *Rusch v. Southeast Alaska Regional Health Consortium*, Slip Op. No. 7422 (December 6, 2019).

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

In construing AS 23.30.010(a), *Morrison v. Alaska Interstate Construction, Inc*., 440 P.3d 224, 237 (Alaska 2019), said the board must consider different causes of the "benefits sought" and the extent to which each cause contributed to the need for the specific benefit at issue. The board must then identify one cause as "the substantial cause." *Morrison* held the statute does not require the substantial cause to be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." The board need only find which of all causes, "in its judgment is the most important or material cause related to that benefit." (*Id*.). *Morrison* further held that preexisting conditions, which a work injury aggravates, accelerates or combines with to cause disability or the need for medical treatment, can still constitute a compensable injury. (*Id*. at 234, 238-39).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
> . . . .
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> (g) Within 30 days after the employee receives the administrator's notification of eligibility for benefits, an employee shall file a statement under oath with the board, on a form prescribed or approved by the board, to notify the administrator and the employer of the employee's election to either use the reemployment benefits or to accept a job dislocation benefit under (2) of this subsection. The notice of the election is effective upon service to the administrator and the employer. The following apply to an election under this subsection:
> . . . .
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> (2) an employee who elects to accept a job dislocation benefit in place of reemployment benefits and who has been given a permanent partial impairment rating by a physician shall be paid
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> (A) $5,000 if the employee's permanent partial impairment rating is greater than zero and less than 15 percent;
> (B) $8,000 if the employee's permanent partial impairment rating is 15 percent or greater but less than 30 percent; or
> (C) $13,500 if the employee's permanent partial impairment rating is 30 percent or greater. . . .
>
> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board

> may authorize continued treatment or care or both as the process of recovery may require. . . .
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> **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. . . .

The presumption applies to any claim for compensation. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). In the first step, the claimant need only adduce "minimal" relevant evidence establishing a "preliminary link" between the injury and employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.,* 742 P.2d 239, 244 (Alaska 1987). In claims based on highly technical medical considerations, medical evidence is often necessary to make a connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312 (Alaska 1981). In less complex cases, lay evidence may be sufficient to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985). Credibility is not weighed here. *Resler v. Universal Services Inc.*, 778 P.2d 1146 (Alaska 1989).

In the second step, if the employee's evidence raises the presumption, it attaches to the claim and the production burden shifts to the employer. The employer has the burden to overcome the presumption with substantial evidence to the contrary. "Substantial evidence" is such "relevant evidence" as a "reasonable mind might accept as adequate to support a conclusion." *Tolbert*, 973 P.2d at 611-12. Credibility is not examined at the second step either. *Resler*.

In the third step, if the employer's evidence rebuts the presumption, it drops out and the employee must prove his claim by a preponderance of the evidence. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016) held in determining whether the disability or need for treatment arose out of and in the course of employment, the factfinders in the third step must evaluate the relative contribution of different causes of the disability or need for treatment. The employee must "induce a belief" in the fact-finders' minds that the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). However, *Huit* found if "no other cause was identified" as contributing to the employee's injury, the board need not evaluate the relative

contribution of different causes in the third step. The evidence is weighed, inferences drawn and credibility determined. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000).

Carter v. B&B Construction, Inc., 199 P.3d 1150, 1158 (Alaska 2008), held that where the employer does not rebut the raised presumption of compensability by substantial evidence to the contrary, the claimant is entitled to benefits as "a matter of law."

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. . . .

The board's credibility finding "is 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) . . . 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. . . .

Egemo v. Egemo Construction Co., 998 P.2d 434 (Alaska 2000) held filing a claim prematurely "does not justify [claim] dismissal," and stated:

> In our view, when a claim for benefits is premature, it should be held in abeyance until it is timely. . . . (*Id*. at 441).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
> . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after 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. . . . The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .
>
> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of

> each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.
> . . . .
>
> (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.
>
> (p) An employer shall pay interest on compensation that is not paid when due. . . .
>
> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

Lowe's v. Anderson, AWCAC Decision No. 130 (March 17, 2010), explained to obtain TTD benefits, assuming the presumption has been rebutted, an injured worker must establish: (1) she is disabled as defined by the Act; (2) her disability is total; (3) her disability is temporary; and (4) she has not reached the date of medical stability as defined in the Act. (*Id*. at 13-14).

> **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. . . .

In *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC Decision No. 153 (June 14, 2011), the commission vacated the board's decision finding a claim for PPI benefits was not ripe for adjudication. The injured worker claimed PPI benefits. At the first of several prehearing conferences, she reiterated her PPI benefit request and "indicated she understood the concept of [a] PPI rating and indicated she would like to assert the right to PPI when and if a rating became appropriate." *Id*. at 2. The employer's EME physician opined the injured worker did not suffer a work-related injury. Consequently, he declined to assign a PPI rating because in his view it was not applicable. Nevertheless, the injured worker's physician casted doubt on the zero PPI opinion and an SIME ensued. The SIME physician also said the claimant had no PPI rating. At the last prehearing conference prior to hearing, the injured worker acknowledged in respect to

PPI "there apparently is no rating but [Settje] believes there should be." *Id*. at 3. The commission held the injured worker's PPI claim was ripe for adjudication because it was in dispute, not hypothetical, had been raised at several prehearing conferences, was controverted and the claimant was well aware she needed to obtain and present at hearing evidence of a PPI rating. *Id*. at 5-6.

> **AS 23.30.395. Definitions**. In this chapter,
> . . . .
>
> (16) 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury. . . .
> . . . .
>
> (28) 'medical stability' means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence. . . .

An employer may rebut the continuing disability presumption and gain a "counter-presumption" by producing substantial evidence proving medical stability. *Anderson*. If the employer raises the counter-presumption, "the claimant must first produce clear and convincing evidence" he has not reached medical stability. (*Id*. at 9). The 45 day provision signals when "proof is necessary." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1246 (Alaska 1992).

In *Richard v. Fireman's Fund*, 384 P.2d 445, 448 (Alaska 1963), the Alaska Supreme Court set forth the board's duty to unrepresented claimants:

> If anyone deserves to be criticized for the manner in which this case was handled, it is the Board because of its failure to promptly advise the appellant on how to proceed when it was informed by Dr. Leer of the appellant's urgent need for additional surgery by an out-of-state doctor. We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law. (Citation omitted).

ANALYSIS

1) Is Employee entitled to additional TTD benefits?

Employee claims additional TTD benefits related to her left shoulder injury, with her other injured body parts having resolved. AS 23.30.185. Initially, she testified her TTD benefit claim spanned from February 6, 2017, through March 27, 2017. However, she subsequently also sought TTD benefits from September 22, 2017, and continuing so long as she was disabled by her work injury and was not medically stable. Differing medical opinions on disability raise factual questions to which the presumption of compensability analysis applies. AS 23.30.120(a)(1); *Meek*.

Disabling pain from a shoulder injury is not a complex medical issue requiring expert testimony to raise the presumption. *Wolfer*; AS 23.30.395(16). Without regard to credibility, Employee raises the presumption as to her TTD benefit claim from February 6, 2017, through March 27, 2017, with her lay testimony and with Dr. Bote's January 30, 2017 work restrictions. *Resler*; *Cheeks*; *Wolfer*; *Smallwood*. Employee testified she could no longer continue her normal work with Employer beginning February 6, 2017, because her shoulder injury was too painful. On January 30, 2017, Dr. Bote restricted her from lifting, pulling, pushing or climbing and said if she did not obtain pain relief allowing her to return to full duty, she may need to seek additional treatment. Employee said under Dr. Bote's restrictions, she could no longer perform her work and became disabled. There is no evidence Employer ever offered her a lighter-duty position after Dr. Bote's restrictions. Employee raises the presumption for her TTD benefit claim beginning September 22, 2017, and continuing, with Dr. Vally's September 5 and August 29, 2017 opinions. *Resler*; *Cheeks*; *Wolfer*; *Smallwood*. On August 29, 2017, he restricted Employee's work significantly and On September 25, 2017, Dr. Vally removed Employee from work for 45 days.

Without regard to credibility, Employer does not rebut the presumption for the period February 6, 2017, through March 27, 2017, because there is no evidence any physician, including Drs. Lynch or Scoggin ever commented on Employee's disability or medically stable during this period. *Resler*. Therefore, Employee is entitled to TTD benefits on the raised but unrebutted

presumption from February 6, 2017, through March 27, 2017. *Carter*. However, as to the period from September 22, 2017, and continuing Employer rebuts the presumption with Drs. Lynch's and Scoggin's respective reports. Both stated Employee was medically stable and able to return to her normal duties by no later than September 5, 2017. *Tolbert*. As to this latter period, Employee must prove she was both disabled and not medically stable beginning September 22, 2017. *Saxton*.

As to the first period requested in her TTD benefits claim, had she not prevailed on the raised but unrebutted presumption, Employee's credible testimony demonstrated her extreme left shoulder pain disabled her from February 6, 2017, through March 27, 2017. AS 23.30.122; *Smith*. On January 30, 2017, Dr. Bote restricted her working ability dramatically to account for her shoulder pain and Employee said given those restrictions, she could no longer continue working. The fact she continued to work after the January 30, 2017 work restriction, so she could assist Employer by completing her "go live" project, does not mean she could or should have continued working despite her extreme left shoulder pain. Therefore, based both on the raised but unrebutted presumption and on a preponderance of evidence analysis, Employee will be entitled to TTD benefits from February 6, 2017, through March 27, 2017.

By contrast, for the second period for which Employee claims TTD benefits, September 22, 2017, and continuing, Employer presented evidence from two orthopedic surgeons, Drs. Lynch and Scoggin, stating she was medically stable by no later than September 5, 2017. *Anderson*; *Leigh*. By law, TTD benefits cannot be paid after the date of medical stability. AS 23.30.185. Employee provided contrary medical evidence from Dr. Vally, whose specialty is not clear from the record. More weight will be given to the orthopedists' opinions because Employee's left shoulder is primarily an orthopedic problem. AS 23.30.122; *Smith*. Given the medical stability date for her work injury, the substantial cause of Employee's continuing disability, if any, from September 22, 2017, and ongoing, is immaterial. AS 23.30.010(a); AS 23.30.395(25); *Huit*; *Morrison*.

In summary, this decision will award Employee TTD benefits from February 6, 2017, through March 27, 2017, a period totaling 49 days. However, Employer paid Employee TTD benefits

through September 21, 2017. Since the more heavily-weighted medical evidence from two orthopedists found medical stability on September 5, 2017, and no TTD benefits are payable after the date of medical stability, Employer has overpaid TTD benefits from September 6, 2017, through September 21, 2017, a period totaling 15 days. It is possible Employer will owe Employee no further TTD benefits. Thus, this decision will allow Employer to withhold the entire 15 days from the awarded 49 days, resulting in a TTD benefit award totaling 34 days. AS 23.30.155(j). Her request for TTD benefits from September 22, 2017, and continuing, will be denied based on the September 5, 2017 medical stability date. Should Employee's work injuries worsen in the future and become medically unstable and result in disability, she retains her right to seek additional TTD benefits at that time. Employer reserves its defenses.

2) Should Employee's PPI claim be dismissed without prejudice?

Employee's claims request PPI benefits. AS 23.30.190(a). It is undisputed she has no PPI rating from her physician. For nearly two years, Employee relied on her attorney's expertise to prosecute her claim. Her attorney withdrew on September 9, 2019. At hearing, Employee expressed confusion about PPI ratings and credibly testified no one at the division advised her she needed to have an actual PPI rating higher than zero from her attending physician to present as evidence at hearing. AS 23.30.122; *Smith*. The division has a duty to advise unrepresented injured workers how to protect their rights and perfect their claims. *Richard*.

The parties attended several prehearing conferences and Employee made numerous calls to the division seeking advice about her case, before and after her attorney withdrew. There is no evidence suggesting division staff ever advised her how to obtain and present a PPI rating prior to hearing. There was an SIME, but PPI was not listed as an issue and there is no evidence the parties ever stipulated to adding it. However, Employer submitted a PPI question to the SIME physician, who provided an opinion. Since there is no evidence showing Employee's attending physician, or someone to whom her attending physician referred her for a PPI rating, has ever evaluated her and given a PPI rating, and the division did not advise her how to do this after her attorney withdrew, her PPI claim was premature and will be dismissed without prejudice. AS 23.30.135(a); *Egemo*.

This case is distinguishable from *Settje*, where the injured worker appeared at a prehearing conference and stated "she understood the concept of [a] PPI rating and indicated she would like to assert the right to PPI when and if a rating became appropriate." The EME in *Settje* also said the injured worker had no work injury, unlike this case, where the EME conceded the work injury was the substantial cause of Employee's left shoulder injury. Further, at the last prehearing conference in *Settje* before hearing, the injured worker stated in respect to PPI "there apparently is no rating but [Settje] believes there should be." *Settje* decided the PPI issue was ripe for decision because the injured worker raised the issue in several prehearing conferences at which she said she understood "that she needed a rating to obtain PPI benefits."

The same is not true here. Employee expressed confusion about what a PPI rating was. There is no evidence she had any inkling about how to obtain a PPI rating or how and when to file and serve it as evidence for hearing. The uncontradicted testimony from Employee was that no one at the division ever advised her about this after her attorney withdrew. *Richard*. It would be unfair to hold an unrepresented claimant, who had no idea how to perfect a PPI claim, to the same standards as an attorney, contrary to the legislative intent to ensure fair and predictable delivery of indemnity benefits to injured workers at a reasonable cost to employers and to decide cases on their merits. AS 23.30.001(1), (2). Insurers regularly pay for PPI ratings performed by an injured worker's attending physician; there is nothing unreasonable about that potential cost. *Rogers & Babler*. Although this decision will dismiss her PPI claim without prejudice, Employee retains her right to obtain a PPI rating from her attending physician or from a specialist to whom her physician refers her, higher than the two current zero percent PPI ratings. In that event, Employee can file an appropriate claim and revisit this issue if Employer, who reserves its defenses, controverts any future PPI rating. She may contact a technician for further information.

3) Is Employee entitled to additional medical care or treatment at this time?

At hearing, Employee testified there were no unpaid work-related medical bills. When pressed on what she requested in her claim for medical care or treatment, Employee said there were referrals for diagnostic testing that she had never received. AS 23.30.095(a). Specifically, Employee requested EMG and NCV studies to rule out a nerve injury, about which she was very

concerned. But, Dr. Vally's April 25, 2017 report specifically mentions reviewing EMG and NCV tests, which disclosed left carpal tunnel syndrome. Dr. Vally referred her to a physician for this condition. Employee testified she recalled being referred to the physician but did not recall either the testing or the carpal tunnel syndrome diagnosis. It is difficult to explain the discrepancy between the April 25, 2017 report and Employee's recollection. Nevertheless, more weight will be given to the contemporaneous report than to Employee's memory, since it has been over two and one-half years since the electrodiagnostic testing was completed and it is more likely the report is correct than it is Employee's memory is correct. AS 23.30.122; *Smith*. Therefore, absent a new recommendation for electrodiagnostic testing, given the testing has already been completed and showed no nerve injury associated with the left shoulder, and given Employee currently requests no additional medical care or treatment ongoing, she is not entitled to additional medical care or treatment at this time. However, in the event any body part or function injured in the November 8, 2016 work injury becomes symptomatic and needs additional care or treatment in the future, Employee retains her right to seek additional medical benefits and Employer retains its defenses.

4) Is Employee entitled to either a job dislocation benefit or a vocational retraining plan at this time?

It is undisputed Employee was initially found eligible for vocational reemployment benefits. She elected to pursue these through a plan. However, it is further undisputed that because Employer controverted her right to benefits, no plan was developed. At hearing, Employee actually stated she still wanted to pursue a retraining plan. She later said she wanted to elect a job dislocation benefit. In either case, without a PPI rating greater than zero percent, Employee is entitled to neither a job dislocation benefit nor a retraining plan. Although a prediction of a PPI rating greater than zero is all that is required for eligibility for reemployment benefits, ultimately, there must be a PPI rating greater than zero to continue in the reemployment process with either a job dislocation benefit or a retraining plan. AS 23.30.041(g)(2)(A)-(C). Therefore, Employee's request for vocational retraining benefits at this time will be denied. In the event Employee obtains a future PPI rating for a body part or function injured in her work injury with Employer, she retains her right to revisit the job dislocation benefit or vocational retraining plan issue, and Employer retains all its defenses. AS 23.30.135(a); *Egemo*.

5) Did Employer frivolously or unfairly controvert any benefits?

Employee contends Employer frivolously or unfairly controverted her benefits because it should not have denied medical referrals before it received Dr. Lynch's EME report. AS 23.30.155(o). However, Employer filed no controversions until after Dr. Lynch's EME report, on September 25, 2017. It is unclear what referrals Employee believes Employer improperly refused to pay or authorize. Dr. Vally made referrals for diagnostic testing and evaluation prior to Dr. Lynch's EME report. When pressed at hearing for more specificity, Employee implied a request for EMG and NCV testing never occurred because Employer refused to authorize it. But as discussed above, Dr. Vally's April 25, 2017 report states he reviewed Employee's EMG and NCV studies for her upper extremities, diagnosed left wrist carpal tunnel syndrome and a possible supraspinatus tear in the shoulder and referred her to an orthopedic specialist for evaluation. While Employee does not recall the testing or carpal tunnel diagnosis, she recalls the referral. Based on this record, this decision will not find Employer frivolously or unfairly controverted any benefits.

6) Is Employee entitled to a penalty?

Employee's penalty request is similarly unclear but presumably arises under AS 23.30.155(a), (e). Employer received Dr. Bote's January 2017 report significantly restricting her ability to work and Employee implies Employer should have begun paying her TTD benefits immediately thereafter. However, Employee also conceded she completed her FMLA paperwork but agreed the paperwork listed chronic pain caused by rheumatoid arthritis. Employee's testimony shows Employer received the FMLA paperwork after it received Dr. Bote's January 2017 report. Post-hearing, at the panel's request, Employer forwarded the FMLA paperwork, which is now in the agency file. This document does not mention Employee's work injury. It would not have suggested to Employer that Employee's disability beginning February 6, 2017, was related to her work injury, since there is no evidence a chronic rheumatoid arthritis condition is work-related. The subsequent FMLA report would have given Employer the exact opposite impression and suggested she was disabled by a non-work-related condition. Therefore, this decision will not award a penalty based on this record. This penalty issue is distinguishable from the TTD benefit issue, decided in Employee's favor, above. This decision will award Employee TTD benefits based on the raised but unrebutted resumption, and on its merits, based on the evidence in retrospect. By contrast, the penalty issue must be reviewed in light of the information Employer had at the time for which Employee requests a penalty. While the record as a whole justifies limited, retroactive TTD benefits in accordance with this decision, the same record does not justify a penalty given the FMLA report as explained in this analysis.

7) Is Employee entitled to interest?

This decision awards Employee TTD benefits netting 34 days. She is entitled to statutory interest on this amount. AS 23.30.155(p).

CONCLUSIONS OF LAW

1) Employee is entitled to additional TTD benefits.
2) Employee's PPI claim will be dismissed without prejudice.
3) Employee is not entitled to additional medical care or treatment at this time.

4) Employee is not entitled to either a job dislocation benefit or a vocational retraining plan at this time.
5) Employer did not frivolously or unfairly controvert any benefits.
6) Employee is not entitled to a penalty
7) Employee is entitled to interest.

ORDER

1) Employee's claim for additional TTD benefits is granted in part and denied in part.
2) Employer will pay Employee TTD benefits from February 6, 2017, through March 27, 2017, a period totaling 49 days, less 15 days for its TTD benefit overpayment, for a net 34 days, in accordance with this decision.
3) Employee's claim for TTD benefits beginning September 22, 2017, and continuing, is denied in accordance with this decision.
4) Employee's claim for PPI benefits is dismissed without prejudice, in accordance with this decision.
5) Employee's claim for additional medical costs and related transportation expenses is denied, in accordance with this decision.
6) Employee's claim for a reemployment benefits plan or job dislocation benefit is denied, in accordance with this decision.
7) Employee's request for a frivolous or unfair controversion finding is denied.
8) Employee's claim for a penalty is denied.
9) Employee's claim for interest on TTD benefits totaling 34 days is granted, in accordance with this decision.

Dated in Anchorage, Alaska on December 10, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Nancy Shaw, 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 Glenda Larson, employee / claimant v. Kenaitze Indian Tribe, employer; Alaska National Insurance, insurer / defendants; Case No. 201617835; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on December 10, 2019.

/s/
Kimberly Weaver, Office Assistant