# ALASKA WORKERS' COMPENSATION BOARD

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

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| JEDIDIAH J. HARRISON,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>ICE SERVICES, INC.,<br><br>Employer,<br>and<br><br>LIBERTY NORTHWEST INSURANCE CORP.,<br><br>Insurer,<br>Defendants. | INTERLOCUTORY DECISION AND ORDER<br><br>AWCB Case No. 201710716<br><br>AWCB Decision No. 20-0008<br><br>Filed with AWCB Fairbanks, Alaska on February 26, 2020 |

Jedidiah Harrison's (Employee) June 4, 2019 claim was heard on November 7, 2019 in Fairbanks, Alaska, a date selected on July 15, 2019. A June 19, 2019 request gave rise to this hearing. Attorney Keenan Powell appeared and represented Employee. Attorney Chantal Trinka appeared telephonically and represented Ice Services, Inc. and Liberty Northwest Insurance Corp. (Employer). Witnesses included Employee and Employee's mother, Carol Harrison, who both testified on Employee's behalf. The record closed on November 15, 2019 upon receipt of Employer's reply to Employee's supplemental affidavit of fees and costs.

## ISSUES

Employee contends his work injury, where he broke his foot while being chased by a grizzly bear, is the substantial cause his need for continuing medical treatment for complex regional pain syndrome (CRPS), and he seeks an award of medical and related transportation benefits. He

contends the opinion of Employer's medical expert is insufficient to rebut the presumption of compensability because the physician did not provide an alternative explanation for his pain complaints, and the most weight should be accorded the opinions of his treating physicians and the secondary independent medical evaluator (SIME).

Employer relies on its employer medical evaluator's (EME) opinion Employee's broken foot was medically stable nine months after the injury and he does not suffer from CRPS. It seeks denial of Employee's claim.

**1) Is Employee entitled to medical and related transportation benefits?**

Employee also contends his work injury is the substantial cause of his disability and he seeks an award of temporary total disability (TTD) benefits.

Employer again relies on its EME's medical stability opinion and contends no further TTD is due.

**2) Is Employee entitled to TTD?**

Employee contends his part time job delivering pizzas is a "Frankenstein," meaning a job created for him by a friend to help him out following Employer's controversion, and it is so limited in quality, dependability and quantity that a reasonably stable job market does not exist for his services. Consequently, he seeks an award of permanent total disability (PTD) benefits.

Employer contends neither its EME nor the SIME opined Employee is PTD, and Employee works as a part-time pizza delivery person in the most populous region of the state. On the basis of this "overwhelming" evidence, Employer contends Employee claim for PTD should be denied.

**3) Is Employee entitled to PTD?**

Employee contends he should be awarded a nine percent permanent partial impairment (PPI) rating he received from the SIME.

Employer contends the SIME's PPI rating is based on Employee's CRPS diagnosis, and since its EME concluded Employee had neither a work related impairment nor CRPS, Employee should not be awarded PPI.

**4) Is Employee entitled to PPI?**

Employee contends Employer's medical expert conducted a "sham" evaluation, which was "inherently unfair," for the sole purpose of discrediting his CRPS diagnosis, and since the medical expert had a "pre-ordained" opinion, it was not a responsible medical opinion on which Employer could controvert. He seeks penalties and interest on compensation awarded.

Employer contends its controversions are based on its EME report Employee was medically stable and did not suffer any PPI. It contends this report, when viewed in isolation, is sufficient to support a denial of benefits, so penalties and interest should not be awarded.

**5) Is Employee entitled to penalties and interest?**

Employee seeks a finding of unfair or frivolous controversion and referral to the Division of Insurance based on his same contentions for which he seeks penalties and interest.

Employer also relies on its same contentions in defense of penalties and interest.

**6) Was Employer's controversion unfair or frivolous?**

Employee contends he was aided by the services of his attorney and seeks "full" or statutory fees, "which ever is more," though he does not specify which type would result in a greater award.

Employer contends, since no benefits are due, neither are attorney fees and costs.

**7) Is Employee entitled to attorney fees and costs?**

## FINDINGS OF FACT

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

1) On July 26, 2017, Employee was working as a kitchen helper at the Little Red Camp in Deadhorse, Alaska, when a bear opened the door and came inside. Employee ran away from the bear, fell, broke is foot and sprained his ankle. (First Report of Injury, July 29, 2017; Employee).

2) X-rays taken at the North Slope Medical Clinic showed a well-aligned fifth metatarsal mid-shaft fracture and a fifth metatarsal proximal avulsion fracture. Splints were applied and arrangements were made to medevac Employee to Anchorage for further treatment. (McKinney chart notes, July 26, 2017).

3) Additional x-rays were taken in Anchorage and showed only one oblique fracture through the fifth metatarsal of the left foot. A cast was applied and Employee was provided with crutches and instructed to follow up in one week. (Welker chart notes, July 26, 2017).

4) On August 8, 2017, Employee transferred his care from Anchorage to the Matanuska-Susitna Valley, where he lived. (Anderson chart notes, August 8, 2017).

5) On August 10, 2017, Deryk Anderson, D.O., found Employee "totally incapacitated" from work. (Providers Return to Work Recommendations, August 10, 2017).

6) On August 31, 2017, Employee continued to have some pain in the lateral aspect of his foot and x-rays showed a minimally displaced fracture. Dr. Anderson instructed Employee to remain completely non-weightbearing. (Corneliussen chart notes, August 31, 2017).

7) On September 12, 2017, Employee showed no significant radiographic signs of healing. Dr. Anderson ordered a computed tomography (CT) study for further evaluation of healing, and considered performing open reduction internal fixation surgery. Employee was placed in a controlled ankle movement (CAM) boot and instructed to be strictly non-weightbearing. (Anderson report, September 12, 2017). Dr. Anderson released Employee to work with no standing, walking or driving, and a maximum of eight hours per day. (Providers Return to Work Recommendations, December 6, 2017). A CT study showed no evidence of callus formation across the fracture site. (CT report, September 12, 2017). The next day, Dr. Anderson discussed treatment options with Employee, which included open reduction internal fixation surgery and a

bone stimulator. Employee decided to tray a bone stimulator. (Anderson chart notes, September 13, 2017).

8) On October 17, 2017, Employee was responding well to the bone stimulator and his pain was improving. Early callus formation was noted on x-rays. (Anderson chart notes, October 17, 2017).

9) On October 31, 2017, Dr. Anderson prescribed physical therapy after observing disuse osteopenia in Employee's left foot. (Anderson chart notes, October 31, 2017). Employee was released to sedentary work for eight to 12 hours per day. (Providers Return to Work Recommendations, October 31, 2017).

10) On November 16, 2017, Employee had some stiffness with dorsiflexion and plantarflexion but no tenderness over his fifth metatarsal. Dr. Anderson decided to allow Employee progress to weight bearing as tolerated. (Anderson chart notes November 16, 2017).

11) On December 5, 2017, Employee had noticeable calf atrophy, obvious stiffness of the foot and ankle, and minimal tenderness over the fifth metatarsal. X-rays showed his fracture was now healing well. Dr. Anderson thought Employee should continue to increase weight bearing and transition into a normal shoe. (Anderson chart notes, December 5, 2017). Employee's work release was modified to allow standing and walking up to four hours per day. (Providers Return to Work Recommendations, December 5, 2017).

12) On January 11, 2018, Employee reported he had discontinued using crutches and his CAM boot, but was having a lot of pain in his ankle and in his foot, and he was walking with an abnormal gait. He also reported he was starting to get some low back pain. Dr. Anderson thought Employee's problems with his back, foot and ankle were related to Employee's range of motion. He explained Employee was walking with an abnormal gait because of stiffness in the ankle, which was causing discomfort into the back. Dr. Anderson instructed Employee to aggressively work on his range of motion and force himself to walk with a normal gait. Dr. Anderson thought these prescriptions would alleviate both Employee's back pain, as well as his foot and ankle pain. (Anderson chart notes, January 11, 2018). Employee's work release was modified to no standing or walking. (Providers Return to Work Recommendations, January 11, 2018).

13) On January 22, 2018, Employer's adjuster noted Employee had been terminated from his job. (Adjuster's note, January 22, 2018).

14) On January 29, 2018, Dr. Anderson predicted Employee would have the permanent physical capacities to return to work and as a Kitchen Helper and a Pantry Goods Maker. Dr. Anderson also predicted Employee would have the permanent physical capacities to work as a Commercial Cleaner and Stock Clerk. (Anderson job description responses, January 29, 2018).

15) On February 8, 2018, Employee reported his pain was getting better but he still experienced pain when walking for long period of time. He also had noticed some bruising in his foot, which lasted a day or two, and was still having pain in the lateral aspect of his foot, as well. Dr. Anderson thought the Employee's bone was healing well at that point and he instructed Employee to continue weightbearing as tolerated. Dr. Anderson opined Employee should undertake work hardening or functional capacity testing before performing a PPI rating, and also thought Employee needed to work aggressively on strength and range of motion with physical therapy. (Anderson chart notes, February 8, 2018). Employee's work release was modified to again allow standing and walking up to four hour per day. (Provider's Return to Work Recommendations, February 8, 2018).

16) On February 23, 2018, the Reemployment Benefits Administrator's (RBA) designee found Employee ineligible for reemployment benefits based on a January 29, 2018 predictions by Dr. Anderson that Employee would have the permanent physical capacities to return to work as a Kitchen Helper and Pantry Goods Maker, two jobs Employee's vocational rehabilitation counsellor selected in combination to describe his job at the time of injury. The RBA designee also pointed out Dr. Anderson had predicted Employee would have the permanent physical capacities to return to work as a Commercial Cleaner and Stock Clerk, the other jobs Employee had held during the ten year period prior to the date of his injury. (Helgeson letter, February 23, 2018).

17) On March 22, 2018, Employee reported he had been working hard in physical therapy but he was still having quite a bit of pain in the lateral aspect of his foot. He also reported getting discoloration of his skin and abnormal sensations in his foot. Dr. Anderson was concerned Employee may have developed CRPS but decided to continue with conservative management and physical therapy. (Anderson chart notes, March 22, 2018).

18) On April 2, 2018, Employee's physical therapist began observing "[s]light swelling" in Employee's last web space. (*E.g.* physical therapy notes, April 2, 2018; April 4, 2018; April 5, 2018; April 6, 2018).

19) On April 11, 2018, Employee reported observing some discoloration of his foot the previous evening, as well as continuing constant pain. (Physical therapy notes, April 11, 2018).

20) On April 13, 2018, Employer's adjuster left a telephone message for Employer's nurse case manager requesting that she encourage Employee's physical therapist to express concerns regarding "pain behaviors" to Employee's doctor. (Adjuster's note, April 13, 2018).

21) On April 16, 2018, Employee was re-evaluated by his physical therapist, who began observing "[v]ery slight brown discoloration" in Employee's last web space. (*E.g.* physical therapy notes, April 16, 2018, April 18, 2018, April 19, 2018, April 20, 2018). The physical therapist also noted Employee's Pain Disability Questionnaire (PDQ) "continues to worsen." (Physical therapy notes, April 16, 2018).

22) On April 24, 2018, Employee reported he was still having pain in the lateral aspect of his foot, as well as discoloration of his foot and neuropathic like sensations into his foot. He also felt like he was making slow progress in physical therapy. X-rays showed the fracture had healed with "good cortical bone all around the fracture site now." Dr. Anderson remarked, "The bone is remodeled nicely," but thought Employee "may have an element of CRPS." Dr. Anderson referred Employee to Sean Taylor, M.D., for evaluation and opined Employee was medically stable "if there is no CRPS." (Anderson chart notes, April 24, 2018).

23) On May 9, 2018, Dr. Taylor evaluated Employee, who described pain is his left lateral foot where a light touch feels like pressure. He also described occasional changes in skin color to this area, where the skin will turn gray. Dr. Taylor found normal symmetric hair growth over Employee's bilateral lower extremity and normal symmetric skin folds in his bilateral feet. Employee's bilateral feet were equal in color and temperature with no significant trophic changes and no asymmetry of perspiration was noted. Dr. Taylor ordered electrodiagnostic study of Employee's left lower extremity to evaluate for mononeuropathy of the left sural nerve. He also ordered a bone scan on account of Employee's descriptions of left foot allodynia and color change. (Taylor chart notes, May 9, 2018).

24) On May 16, 2018, Employee's bone scanned showed: 1) Accentuated uptake of tracer on delayed imaging for the left ankle hind foot and mid foot areas, sparing the fore foot. Presentation was compatible with non-recent complex regional pain syndrome, and 2) Prominent activity on soft tissue arterial phase and blood pool phase imaging for the right lower leg compatible with accentuated use and suggestion that patient is putting additional weight bearing

on the right foot favoring the left because of pain. (Bridges report, May 16, 2018; Bridges addendum, May 16, 2018).

25) On May 23, 2018, Dr. Anderson reviewed Employee's recent testing, including his electrodiagnostic studies and bone scan. He thought Employee's symptoms were "worrisome for complex regional pain syndrome," and referred Employee to Luke Liu, M.D., an interventional anesthesiologist for pain management. (Anderson chart notes, May 23, 2018). Employee was restricted to sedentary work. (Providers Return to Work Recommendations, May 23, 2018).

26) On May 24, 2018, Employer's adjuster noted she was working to schedule Employee for an EME. (Adjuster's note, May 24, 2018).

27) On June 4, 2018, Employer's adjuster noted the EME was to address hair loss, allodynia, sensation, temperature or color changes and whether diagnosing CRPS by a three phase bone scan is sufficient. (Adjuster's notes, June 4, 2018).

28) On June 13, 2018, Dr. Liu evaluated Employee, who had a slightly antalgic gait with left foot guarding. Employee was unable to push off left toes or toe walk. Employee's left lower extremity was cooler than his right and discoloration was noted on his left foot with some bluish tint and mottling. Employee's toenails were brittle on his left foot and his left great toe had a thicker nail than his right great toe. Upon palpation, Dr. Liu noted allodynia on the left dorsal side of Employee's left foot and a full range of motion with pain upon plantar and dorsi flexion. Dr. Liu assessed complex regional pain syndrome I of the left lower limb, pain in left ankle and joints of left foot and myofascial pain. Dr. Liu prescribed Gabapentin and performed a lumbar sympathetic nerve block. (Liu chart notes, June 13, 2018).

29) Between July 11, 2018 and October 31, 2018, Dr. Liu performed a series of left lumbar sympathetic nerve block injections. Employee repeatedly denied any significant changes to his pain condition. (Liu chart notes, July 11, 2018; August 1, 2018; August 15, 2018; September 5, 2018; September 19, 2018; October 3, 2018; October 10, 2018; October 17, 2018; October 31, 2018).

30) On August 23, 2018, EME Dennis Chong, M.D., evaluated Employee and, while recording Employee's history of present illness, wrote: "Dr. Liu then informed him that the doctor himself has complex regional pain syndrome, and he treats this with vitamins and supplements." On examination, Dr. Chong noted Employee had an antalgic gait and favored his left lower limb, but with symmetrical step length. Employee had a "comfortable" stance and his gait included doing

a heel strike, full floor flat, as well as toe off on the medial edge. He also performed toe, heel and tandem walking. "Neurological testing was intact." Dr. Chong found no discoloration and normal symmetrical hair growth, skin texture and nails. Employee's bilateral forefeet were symmetrically cool relative to the hindfeet. Dr. Chong's diagnosis included:

> 1. Left fifth metatarsal midshaft non-angulated and minimally displaced fracture, with extended healing course, and x-ray demonstrated healed by February of 2018, substantially caused by the industrial event.
> . . . .
>
> 4. Pre-existing anxiety and iatrogenic learned disability from rumination on having been told of having complex regional pain syndrome, and being told of being disabled.
>
> 5. There is no evidence of complex regional pain syndrome whatsoever. He does not meet Budapest Criteria for diagnosis.
> . . . .

Dr. Chong opined no further medical treatment was reasonable and necessary for the work injury. Specifically, Dr. Chong thought Employee's treatment concluded with work conditioning in May of 2018 and any persistent discomfort Employee might have had at that time did not preclude him returning to work without restrictions. Finally, Dr. Chong opined Employee had incurred no PPI as a result of his metatarsal fracture that had healed with no displacement or angulation. (Chong report, August 23, 2018).

31) On September 19, 2018, Employee followed-up with Dr. Liu, who noted Employee's left lower extremity was cooler than his right, discoloration of Employee's left foot, which had a bluish tint and brittle toenails. Allodynia was also noted on the left dorsal side of Employee's left foot. Dr. Liu discussed treatment options, including Ketamine infusions and a spinal cord stimulator. (Liu chart notes, September 19, 2018). Employee had not reached medical stability and was still unable to return to work without restrictions. (Providers Return to Work Recommendations, September 19, 2018).

32) On November 6, 2018, Employer controverted TTD, TPD, vocational rehabilitation and PPI benefits beyond August 23, 2018 based on Dr. Chong's EME report. (Controversion, November 6, 2018).

33) Employer was paying Employee a weekly compensation rate $513.93, based on an average weekly wage of $731.68. (Secondary Report of Injury, August 25, 2017; Incident Claims and Expense Reporting System (ICERS), Employee Wage Information).

34) On December 27, 2018, Dr. Chong testified, after attending the University of Calgary Medical School, he then completed residencies in family medicine as well as physical medicine and rehabilitation. He is board certified in physical medicine and rehabilitation, works at the Rehabilitation Institute of Washington, and is on staff at Swedish Hospital. Upon evaluating Employee, Dr. Chong diagnosed a left fifth metatarsal midshaft non-angulated and minimally-displaced fracture, with an extended healing course, substantially caused by the industrial event. (Chong Depo., December 27, 2018 at 7). He also diagnosed pre-existing anxiety and iatrogenic learned disability from rumination on having been told of having complex regional pain syndrome and being told of being disabled. (*Id*. at 10). "Iatrogenic" means associated with the action or caused by a health care provider. (*Id*.). Dr. Chong diagnosed "no evidence of CRPS," and stated, "He does not meet the Budapest Criteria for this diagnosis." (*Id*. at 11). The International Association for the Study of Pain convened a learned committee to provide standardized criteria for the diagnosis of complex regional pain syndrome. The committee met in Budapest, Hungary, so the criteria is known as the Budapest Criteria. (*Id*. at 12-13). It is used by physicians throughout the world to make a diagnosis of CRPS. (*Id*.). Dr. Chong thought Employee became medically stable after he completed his work hardening program and did not suffer a permanent partial impairment. (*Id*. at 17-18). If a patient who is medically stable, but who continued to present with chronic pain, or who suffered from iatogenic learned disability, Dr. Chong would recommend treatment in a multi-disciplinary clinic, such as the one where he works, that includes psychologists, physical therapists, occupational therapists and vocational counselors. (*Id*. at 18-19). Such a program is known as SIMP, which is an acronym for Structured Intensive Multi-Disciplinary Pain Program. (*Id*. at 23). The following exchange then took place between Employee's attorney and Dr. Chong:

> Q. Why did you not recommend this for [Employee]?
>
> A. I did not recommend this for [Employee] because, number one, such a program is not available in Alaska. Number two, the evaluation was based upon his ongoing treatment and whether further such treatment was necessary; and thirdly, the other question that was raised to be answered was whether

[Employee] had the diagnosis of CRPS. Hence, my report focused on the reason for the referral and answered questions in that regard.

If I was posed a question of whether [Employee] could be referred to such a program out of state, for which I have been posed such questions in the past, then I would have responded accordingly.

Q. So it's your understanding that you were precluded from recommending this program because the insurance adjuster who sent you these questions did not ask you to include recommendations that might encompass leaving Alaska?

A. No. I was not precluded. I did not respond to such a question as such a question was not being posed. So, if such a question is being posed today, I would recommend that he be evaluated.

Q. Would you take a look at page 13 of your report.

A. Yes.

Q. Would you look at question number three?

A. Yes.

Q. And my read is the question number three states: Is additional medical treatment reasonable and necessary?

You're saying that question there, you could not answer that with what you just gave us because that wasn't posed properly?

A. No. That's incorrect. The question was, as you just read, additional medical treatment reasonable and necessary. . . . The therapist had already concluded that [Employee] was able to complete his previous job requirements and should be able to return to work, all be it with reports of pain.

So taking that into consideration with what I have reviewed in terms of the medical records, the history I took, and the physical examination, my conclusion back in August of 2018 was that he did not require any further medical treatment.

Q. Well, I'm kind of confused because you just said, I believe, that you were asked to opine upon whether or not he had CRPS, and if he did not have it . . . you were supposed to talk about what he needed, and I thought what you were saying is that once you concluded he did not have CRPS, he did not need any more medical treatment because he did not have CRPS.

Is that what you testified to?

A. That sound like a quick summary of what I testified to.

> Q. . . . . Okay. So now you're saying because [Employee] finished PT, he doesn't need the cognitive behavioral therapist, he doesn't need the OT, and he doesn't need the vocational counselor?
>
> A. What I'm saying is, and I believe you captured it for me earlier on, is that based upon the diagnosis that I made, and based upon his completion of appropriate treatment here in Anchorage, and based upon that he did not have the diagnosis of CRPS, I did not feel, back in August of 2018, when I evaluated him that he needed any further treatment.
>
> Q. Do patients in your clinic, that are treated by your clinic, have to have CRPS in order to be admitted to the SIMP program?
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> A. No, they don't.
>
> Q. Can they have the same kind of conditions you have diagnosed in [Employee] to be admitted to your SIMP program?
>
> A. Yes.
>
> Q. And so it's your understanding that you were not allowed to recommend the SIMP program because it's not available in Alaska?
>
> A. No. I do not have that understanding at all when I performed my IME's here in Alaska. I consider, as I testified earlier . . . in [Employee's] case . . . I did not feel he needed any additional treatment because he completed a work-conditioning program . . . and had been assessed by completion of that program to be able to complete his job requirements.

(*Id*. 21-25). However, Dr. Chong thought if Employee had not returned to work, "his iatrogenesis may have worsened, and then he would be a very good candidate for the SIMP program, which would render it medically necessary to attend such a program at this point." (*Id*. at 26-27). Employee's participation in the SIMP program would be related to his fractured foot in 2017. (*Id*. at 27). Dr. Chong "did not do a point by point recitation of how [Employee] did or did not fulfill the Budapest Criteria," rather he "summarized by stating that he did not." (*Id*. at 60-61). In over a year, Dr. Chong has evaluated about one dozen of Dr. Liu's CRPS patients and in each of those cases, Dr. Chong found the patient did not have CRPS. (*Id*. at 73). During the evaluation, Dr. Chong did not photograph Employee's feet because taking any type of recordings, which includes photography, is against the regulations in the State of Washington. (*Id*. at 74). Dr. Chong did not use an infra-red therma-scan thermometer to take the temperature of Employee's feet because there was not a thermometer in the room at the time. (*Id*. at 75-76).

According the American Medical Association's Guide to the Evaluation of Permanent Impairment, Sixth edition, which includes the Budapest Criteria for CRPS, if one is making the diagnosis of CRPS, the examiner should provide objective evidence such as photographic documentation, temperature measurements, etc., but Dr. Chong did not do these things because he did not make a CRPS diagnosis. (*Id*. at 79). Although Dr. Chong wrote, "There is no evidence of complex regional pain syndrome whatsoever," as a diagnosis, he stated, "that is not a diagnosis," and explained it is his opinion. He only wrote that in the diagnosis portion of his report because there was nowhere else to write it in the report's format. *(Id*. at 81-82). It would have been helpful if Dr. Chong included photographic evidence to confirm his non-diagnosis of CPRS, but since CPRS is an affirmative diagnosis, "it is more relevant and important . . . to show that the signs are there as opposed to showing the signs not [sic] there." (*Id*. at 84). If Dr. Chong were making the diagnosis of CRPS, it would have been helpful to document temperature asymmetry. (*Id*. at 86). A diagnosis of CPRS requires four objective sign areas and photographic and temperature evidence are in one category. Employee did not fulfill the other three catagories. (*Id*. at 86). A spinal cord stimulator may be reasonable treatment for "highly select patients." (*Id*. at 111). Evidence shows lumbar sympathetic blocks are not effective and should not be performed, but because there is not any other injection therapy that is more efficacious, "it is still commonly done and commonly accepted to be done." (*Id*.). The best evidence to date for treatment of CRPS is multi-disciplinary rehabilitation, such as the SIMP program. (*Id*.). Employee would be a good candidate for the SIMP program. (*Id*. at 113).

35) On June 3, 2019, Marvin Zwerin, D.O., performed an SIME. Employee described his subjective complaints, which Dr. Zwerin recorded as follows:

> [Employee] related that he has pain in the LLE at the 'foot where I broke it. It feels like pressure like someone is stepping on it, and in my ankle, it feels like someone is hitting it with a bone chisel.' The pain 'stays in my foot which gets discolored sometimes; it gets gray at times and blue at times. It's colder than [his] other foot. The hair on the left foot has become dystrophic 'it's different than my right foot' and 'if air blows on my foot it tingles.' With someone grabbing his foot 'I grimace and fall to the ground. I had a dog step on my foot once and it really, really hurt. Just touching it hurts.' With exposure to heat "it helps a little bit, but cold doesn't do anything.'

Employee also reported he has to sit down a lot with activity. Upon physical examination, Dr. Zwerin found "no evidence of symptom aggrandizement and/or dramatization during the

examination . . . . There [was] no indication [Employee] was lying, faking or malingering." Employee's range of motion in his hips, knees and right ankle were "100% normal," but his range of motion in his ankle was limited by pain and stiffness. Employee had a mildly abnormal tandem gait and landed on his heel instead of his toe to initiate stance. Dr. Zwerin recorded the following physical findings concerning CRPS: 1) Asymetric and slightly diminished hair pattern on dorsum of the left foot versus the right; 2) Slightly prolonged capillary filling times in the left toes; 3) Both allodynia and hyperpathia at the ankle and over the lateral left foot to light touch and pinwheel testing; and 4) A tri-phase bone scan showing diminished uptake in the left foot. Dr. Zwerin thought the causes of Employee's disability or need for medical treatment were: 1) Non-industrial chronic low back pain, lit up by the industrial injury on 7/26/17; 2) Left fifth metatarsal spiral fracture on 7/26/17 with delayed healing; and 3) CRPS Type I, gradual onset and late recognition per medical records. Upon being asked whether the work injury aggravated a preexisting condition, Dr. Zwerin answered, "It does not appear that the 7/26/17 employment injury combined with accelerated or aggravated the low back, the only preexisting condition, given that the treatment regimen for the LS spine did not change in any way following the 7/26/17 DOI." He continued, "The left [fifth] metatarsal shaft Fx is the 100% contributor to the need for acute treatment. The same fracture is the only possible cause for the onset of CRPS Type I in the left foot based on the medical records available to me." Dr. Zwerin thought that Employee's disability was continuing and he was medically stable, unless a spinal cord stimulator were implanted. Dr. Zwerin also opined, given Employee's eight prior injections, which did not provide him with lasting relief, additional injections would be "pointless." Employee's other treatment options were "few," according to Dr. Zwerin. He suggested a spinal cord stimulator trial, or a referral to a chronic pain Functional Restoration Program, which would have a "limited" likelihood of success, in his experience. The final treatment option Dr. Zwerin presented was the addition of Lyrica and/or Cymbalta to Gabapentin, which Employee had already tried. In terms of Employee's ability to return to work, Dr. Zwerin wrote, "It is most unlikely to near impossible that [Employee] will RTW at his prior occupational duties, but he did find part-time work delivering pizza in a vehicle." He then continued, "Maybe, [additional treatment will enable Employee to continue working] but hard to say given how tenuous his ability to deliver pizza is in terms of being out of the vehicle and ambulatory." With respect to Employee's participation in a reemployment plan, Dr. Zwerin similarly wrote, "Maybe, if the

reemployment plan offers him a sedentary occupation with minimal standing or walking and the ability to alternate sit/stand as dictated by his CPRS pain." Employee could "[a]bsolutely not" work at his normal occupation at the time of injury without restrictions. Notwithstanding these opinions, Dr. Zwerin thought Employee was capable of returning to work with "marked" modifications. He explained, "[Employee's] injury does not result in a level of permanent impairment which would preclude participation in the work force in some capacity." Dr. Zwerin rated Employee for CRPS Type I and posttraumatic left ankle loss of range of motion and arrived at a nine percent whole person impairment. (Zwerin report, June 3, 2019).

36) On June 4, 2019, Employee claimed temporary total disability (TTD), permanent total disability (PTD), permanent partial impairment (PPI), compensation rate adjustment, medical and transportation costs, penalty and interest, attorney fees and costs and a finding of unfair or frivolous controversion. (Claim, June 4, 2019).

37) During times relevant to this claim, Employee was also under the care of Ellen Lentz, N.P., for chronic low back pain management, which has been treated with opiate analgesics. (Lentz chart notes, October 17, 2017; January 16, 2018; March 21, 2018; December 13, 2018; March 5, 2019; May 14, 2019; October 8, 2019). His chronic low back pain was a pre-existing condition that was neither caused by nor aggravated by the work injury. (Harrison; Chong report, August 23, 2018; Zwerin report, June 3, 2019). Employee testified regarding his back pain, which resulted from a slip-and-fall on the Slope. He takes Percocet for his back pain, but the Percocet "doesn't do anything for [his] foot." (Employee).

38) On October 30, 2019, Employee claimed 61.9 hours in legal fees and paralegal costs, billed at $400 per hour and $185 per hour respectively, for a total of $21,836. He also claimed $1,163.14 in litigation expenses, for a grand total of $22,999.14. (Employee's fee affidavit, October 30, 2019).

39) As a preliminary issue at hearing, Employee stated he was "completely wrong" in his compensation rate calculation and stated he did not have a basis for seeking an adjustment. He also stated past transportation costs had been paid after he submitted a travel log. (Record).

40) Employee contends Dr. Chong testified a "very candidly" that the purpose of his evaluation was to "disprove" Employee's CRPS diagnosis. (Employee's hearing arguments). He similarly contends, "[Dr. Chong] testified candidly about his mission to disprove Dr. Liu," and alleges Dr. Chong's evaluation was a "sham" and "inherently unfair." Employee cited Dr.

Chong's deposition at 72:20-73:1 to support these contentions. (Employee's Hearing Brief; October 30, 2019). The portion of Dr. Chong's deposition Employee cited to support his contentions reads:

> Because, as you had indicated earlier, I have been doing IMEs in Alaska, and for the IMEs I have done whereby Dr. Liu is a treating provider, I have found that in most cases – overwhelmingly most of the cases I did not find any evidence of CRPS, and yet Dr. Liu would have been treating them for some time.

(Chong depo., December 27, 2018).

41) Employer objected to some of Employee's claimed attorney fees, including the preparation of medical summaries from December 11, 2018 to December 19, 2018, totaling 2.6 hours, because it was unclear why medical summaries needed to be updated at that frequency; .2 hours on December 13, 2018 to prepare a certificate of service because that task should not take more than .1 hour; two separate entries for a call to client on December 26, 2018 because these are duplicate entries; a double entry for reading an email on April 2, 2019; double entries on July 7, 2019 and July 15, 2019 for reading supplemental report. Employer also objected to awarding any time Employee spent in pursuit of his claims for a compensation rate adjustment and medical travel costs. (Employer's hearing arguments).

42) Employee testified concerning events surrounding his injury, his medical treatment and explained the nature of his ongoing left foot pain. He described being followed by Employer's private investigators, his work history, his current financial difficulties and his living arrangement in his mother's residence. Employee explained he was unable to continue working for Employer because it does not have light duty work available. He also explained he can work as a pizza delivery driver, because his doctor says he can work four to five hours per day if he is not on his feet continuously. Employee testified he works between 18 to 25 hours per week delivering pizzas, and earns $9.89 per hour plus tips, which results in weekly earnings of between $575 to $625 every two weeks, although a worsening of his symptoms does accompany that work. He described the EME and SIME evaluations, as well as the physical condition and appearance of his left foot. Employee also expressed his desire to obtain additional medical treatment. He has not applied to social security disability insurance "yet," and has not looked for another job because doing so would be "pointless" on account of his restrictions. (Employee).

43) Carol Harrison, Employee's mother, testified she has attended every doctor's appointment with him. She provided details, as well as her opinions, of Dr. Chong's evaluation, which she thought was unfair. Ms. Harrison described Employee as a hard worker, described his limp as well as him being in constant pain. (Carol Harrison).

44) Employee testified Dr. Chong made audio recordings during, what he believed to be, selective portions of his evaluation. Ms. Harrison also testified Dr. Chong recorded Employee's evaluation and stated Dr. Chong took photographs of Employee's foot and ankle. (Employee; Carol Harrison).

45) Employee's presentation was sincere and he naturally and spontaneously answered questions. The details of his testimony were supported by the written record in this case. Employee was a very credible witness. (Experience, judgment, observations, unique facts of the case and inferences drawn therefrom).

46) On November 8, 2019, Employee supplemented his attorney fees and costs. Attorney and paralegal time now totaled $29,476, and his litigation costs $1,540.75, for a grand total of $31,016.75. (Employee's supplemental fee affidavit, November 8, 2019).

47) On November 14, 2019, Employer objected to a certain number of Employee's fees and costs, including billing for attorney time, starting from her departure in Anchorage to her arrival back in Anchorage, on the hearing date. It also reiterated its objection to the duplicative time entries it articulated at hearing, and contended the fees should be reduced on account of Employee withdrawing his claims seeking compensation rate adjustment at hearing. After discounting Employee's fees and costs according to its objections, Employer then proposed further reducing Employee's attorney fees and costs on a pro rata basis by dividing Employee's fees and costs by the number of issues he claimed (eight), then multiplying that quotient by the number of issues actually litigated (six). (Employer's Reply, November 14, 2019).

## PRINCIPLES OF LAW

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

> **AS 23.30.010. Coverage**. (a) . . . [C]ompensation or benefits are payable under this chapter . . . if the disability . . . or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. . . .

For injuries occurring on or after November 7, 2005, the relative contribution of all causes of disability and need for medical treatment must be evaluated, and if employment is, in relation to all other causes, "the substantial cause" of the disability or need for medical treatment, benefits are awardable. *City of Seward v. Hanson*, AWCAC Decision No. 146 at 10 (January 21, 2011).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . . .
>
> (r) In this section,
> . . . .
>
> (7) "remunerative employability" means having the skills that allow a worker to be compensated with wages or other earnings equivalent to at least 60 percent of the worker's gross hourly wages at the time of injury . . . .

> **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. . . .

> **AS 23.30.095. Medical treatments, services, and examinations**.
> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of

> treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid for by the employer. . . .
>
> **AS 23.30.110. Procedure on Claims.** (a) . . . the board may hear and determine all questions in respect to the claim.
> . . . .
>
> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.
> . . . .

Considering §135(a) and §155(h), wide discretion exists under AS 23.30.110(g) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties."

The Alaska Workers' Compensation Appeals Commission (Commission) in *Bah v. Trident Seafoods Corp.,* AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under §095(k) and §110(g). With regard to §095(k), the Commission referred to its decision in *Smith v. Anchorage School District,* AWCAC Decision No. 050 (January 25, 2007), at 8, in which it confirmed:

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

The Commission further stated in *dicta*, before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME will assist the board in resolving the dispute. *Bah* at 4.

The Commission outlined the board's authority to order an SIME under §110(g), as follows:

> [T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. . . . Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties.

*Id.* at 5.

Under either §095(k) or §110(g), the Commission noted the purpose of ordering an SIME is to assist the board, and the SIME is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physicians' opinion. Further, the Commission held an SIME may be ordered when, because of a lack of understanding of the medical evidence, the parties' rights cannot be ascertained. It stated:

> Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties in the dispute before the board.

*Bah* at 8.

The decision to order an SIME rests in the discretion of the board, even if jointly requested by the parties. *Olafson v. State Department of Transportation*, AWCAC Decision No. 06-0301 (October 25, 2007) at 6. Although a party has a right to request an SIME, a party does not have a right to an SIME if the board decides an SIME is not necessary for the board's purposes. *Id*. at 8. An SIME is not a discovery tool exercised by the parties; it is an investigative tool exercised by the board to assist it by providing disinterested information. *Id*. at 15.

> **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 text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id*. An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V*., 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc*., 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's

evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds by *Huit*). If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller v. ITT Services,* 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **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 finding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001; 1008 (Alaska 2009).

> **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. . . .

The board has broad statutory authority in conducting its investigations and hearings. *Tolson v. City of Petersburg*, AWCB Decision No. 08-0149 (August 22, 2008); *De Rosario v. Chenega Lodging*, AWCB Decision No. 10-0123 (July 16, 2010).

> **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. . . .
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in-fact, is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-53.

> Although the [S]upreme [C]ourt has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (citation omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (citation omitted). Subsection (b) may apply to fee awards in controverted claims (citation omitted), in cases which the employer does not controvert but otherwise resists (citation omitted), and in other circumstances (citation omitted).

*Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 09-0179 (May 11, 2011).

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent

nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975. Since a claimant is entitled to full reasonable attorney fees for services on which the claimant prevails, it is reasonable to award one-half the total attorney fees and costs where the claims on which the claimant did not prevail were worth as much money as those on which he did prevail. *Bouse v. Fireman's Fund Ins., Co.*, 932 P.2d 222; 242 (Alaska 1997).

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the Alaska Supreme Court clarified its holding in *Bignell*, and held "the Board must consider of the factors set out in Alaska Rules for Professional Conduct 1.5(a) when determining a reasonable attorney fee." *Id*. at 798-99. It emphasized, ". . . the Board must consider each factor and either make findings related to that factor or explain why that factor is not relevant." *Id*. at 799. The Court simultaneously noted,

> Alaska Rule of Professional Conduct 1.5(a) sets out eight non-exclusive 'factors to be considered in determining the reasonableness of a fee,' specifically:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
>
> (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily shared in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

*Id*. at fn 51. The Court also criticized the *Rusch* panel for going outside the agency record and consulting information in the workers' compensation database to determine a reasonable attorney fee without giving the parties an opportunity to respond to the information retrieved. *Id*. at 800-801. It also affirmed a prior decision, which held the presumption of compensability does not apply to reasonable attorney fee awards. *Id*. at 803 (citing *Soule v. Mid-Town Car Wash*, No. S-5634, 1994 WL 16459431 (Alaska Aug. 3, 1994).

> **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. . . .
>
> (f) If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment. . . . The additional amount shall be paid directly to the recipient to whom the unpaid compensation was to be paid.
> . . . .
>
> (h) The board may upon its own initiative at any time in a case in which . . . where right to compensation is controverted, or where payments of compensation have been . . . suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been . . . suspended . . . take the further action which it considers will properly protect the rights of all parties.
> . . . .
>
> (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. . . .

An employer must begin paying benefits within 14 days after receiving knowledge of an employee's injury, and continue paying all benefits claimed, unless or until it formally controverts liability. *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska 1987). Section 155(e) gives employers a direct financial interest in making timely benefit payments. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). It has long been recognized §155(e) provides penalties

when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). An employee is also entitled to penalties on compensation due if compensation is not properly controverted by the employer. *Williams v. Abood*, 53 P.3d 134, 145 (Alaska 2002). If an employer neither controverts employee's right to compensation, nor pays compensation due, §155 imposes a penalty. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992).

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp*, 831 P.2d at 358. "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." But when nonpayment results from "bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *State of Alaska v. Ford,* AWCAC Decision No. 133, at 8 (April 9, 2010) (citations omitted). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Harp*, 831 P.2d at 358 (citation omitted). Evidence in Employer's possession "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id.* If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155. *Id*. at 359.

The Alaska Workers Compensation Appeals Commission held in *Ford*, and reiterated in *Mayflower Contract Services, Inc. v. Redgrave*, AWCAC Decision No. 09-0188 (December 14, 2010), the requisite analysis to determine whether a controversion is frivolous or unfair under AS 23.30.155(o):

> First, examining the controversion, and the evidence on which it was based in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion, the board must decide if the controversion is a 'good faith' controversion. Second, if the board concludes that the controversion is not a good faith controversion, the board must decide if it is a controversion that is frivolous or unfair. If the controversion lacks a plausible legal defense or lacks

> the evidence to support a fact-based controversion, it is frivolous; if it is the product of dishonesty, fraud, bias, or prejudice, it is unfair. But, to find that a frivolous controversion was issued in bad faith requires a third step -- a subjective inquiry into the motives or belief of the controversion author.

*Id.* *Redgrave* also added clarification to the three-part test under the *Ford*:

> A controversion based upon a legal defense (such as that AS 23.30.095(a) barred the claim, or that a current medical opinion was required) is a "good faith" controversion (the first step of the analysis) if it is objectively "not legally implausible" or consists of "colorable legal arguments … based in part on undisputed facts;]" (citation omitted), it is frivolous (the second step of the analysis) if it is "completely lacking" in plausibility, (citation omitted). It may be found to be subjectively in bad faith (the third step of the analysis), if it is "utterly frivolous," that is, has "such a complete absence of legal basis ... that ... there is no possibility of mistake, misunderstanding, ... or other conduct falling in the borderland between bad faith and good faith. (citation omitted).

*Redgrave* at 16.

The Alaska Supreme Court has consistently instructed interest for the time-value of money must be awarded, as a matter of course. *E.g. Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984).

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

Even though an employee may have limited capabilities, she is not entitled to temporary total disability or permanent total disability when work is regularly and continuously available to her within her capabilities. *Summerville v. Denali Center*, 811 P.2d 1047; 1051 (Alaska 1991). The availability of regularly and continuously available work is relevant in determining whether an employee is entitled to disability benefits and is clearly set forth in the PTD statute. *Robles v. Providence Hosp.*, 988 P.2d 592; 596 (Alaska 1999). However, the ability to perform any kind of work does not determine whether a disability has ended, and employment by an employee's father, where employee does not receive a wage, did not mean disability benefits should cease. *Olson v. AIC/Martin J.V.,* 818 P.2d 669; 674 (Alaska 1991).

For workers' compensation purposes total disability does not necessarily mean a state of abject helplessness. It means the inability to because of injuries to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *J. B. Warrack Co. v. Roan*, 418 P.2d 986, 988 (Alaska 1966). For an employer to rebut the presumption of compensability, it must produce substantial evidence that shows work within an employee's abilities is regular and continuously available in the relevant labor markets described in (a) of the statute. *Leigh v. Seekins Ford*, 136 P.3d 214, 219 (Alaska 2006). This burden may be satisfied with by labor market surveys of the specific and relevant markets. *Id*. at 220.

> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.
>
> **AS 23.30.190. Compensation for permanent partial impairment; 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. . . .
>
> **AS 23.30.200. Temporary partial disability.** (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages

before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability . . . . Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

**8 AAC 45.092. Second independent medical evaluation**

(a) The board will maintain a list of physicians' names for second independent medical evaluations. The names will be listed in categories based on the physician's designation of specialty or particular type of practice and the geographic location of the physician's practice.

(b) The list of physicians will be created as follows:

(1) The board or its designee will ask the Alaska Chiropractic Society, Alaska Dental Society, Alaska Optometric Society, and Alaska State Medical Association to make recommendations from within their respective specialty. The recommendations must be received by the board on or before November 1, 1989 and on or before November 1 of each year after that.

(2) Not later than December 15 of each year, the board will publish a bulletin listing the names of the physicians recommended by the Alaska Chiropractic Society, the Alaska Dental Society, the Alaska Optometric Society, and the Alaska State Medical Association as well as the names of second independent medical examiners.

(3) An attorney who meets the following criteria may, not later than March 1 of each year, submit a letter to the commissioner volunteering to serve on a panel to select physicians for inclusion on the board's list as described in (5) of this subsection. The attorney must

(A) be admitted to the practice of law in this or another state;

(B) have personally presented a total of three cases, no more than one of which was resolved by agreed settlements, for board decision during the calendar year preceding volunteering to serve on a panel; and

(C) in the calendar year preceding volunteering, have represented one class of litigants, either employee or employer, 90 percent of the time; based on the class of litigant that was represented 90 percent of the time, the commissioner will classify the attorney as either an employee or employer attorney.

(4) By May 1 of each year, the commissioner shall choose, from the attorneys who volunteered in accordance with (3) of this subsection, two employee attorneys and two employer attorneys to serve on a panel to select physicians

for inclusion on the board's list of physicians. The panel shall meet and select physicians by August 1 of each year. The commissioner shall provide staff to schedule the panel's meetings, publish notice of the meetings, and arrange facilities or other support for the meeting to assist the panel, but the panel members may not be paid for their work or expenses for participating on the panel.

(5) The panel members shall vote, or abstain from voting, upon the physicians whose names were listed in the bulletin published under (2) of this subsection or are suggested by a panel member, even if the physician's name did not appear in the bulletin. A physician who receives three affirmative votes will be sent by the board or its designee an application and a letter asking if the physician is interested in performing second independent medical examinations. Unless the board determines that good cause exists to extend the time, not later than 60 days after the date of the board's letter the physician must submit

(A) a completed application listing the physician's education, training, work experience, specialty, and the particular discipline in which the physician is licensed, as well as the names and addresses of professional organizations that have certified the physician or in which the physician is an active member;

(B) a copy or proof of the physician's current license from the appropriate licensing agency in the state in which the physician practices;

(C) a certificate of insurance for the physician's current and enforceable professional liability insurance for the services performed; and

(D) a certificate of insurance for the physician's workers' compensation insurance if the physician has employees.

(6) If the physician complies with (5) of this subsection, the physician's name will be added to the board's list of second independent medical examiners, effective November 1 of that year. Except as provided in (7) of this subsection and (c) of this section, the physician's name will remain on the list for three years. After three years, the physician must be reselected in accordance with (5) of this subsection. If reselected, the physician will remain on the list unless

(A) three members of the panel described in (4) of this subsection recommend that the physician be removed from the list and the department determines that the removal of the physician is not inconsistent with this chapter; or

(B) the physician is removed from the list under (7) of this subsection or (c) of this section.

(7) Notwithstanding (d) of this section, the board may remove a physician's name from the list compiled in accordance with (6) of this subsection

(A) upon receipt of the physician's written notification that the physician no longer wants to perform second independent medical evaluations; or

(B) if, within 30 days after receipt of a written request, the physician does not annually submit a copy of or proof of licensing by the appropriate state agency, a certificate of insurance for professional liability insurance and, if required under AS 23.30, workers' compensation insurance.

(c) The board will, in its discretion, remove a physician's name from the list for

(1) the physician's repeated failure to

(A) timely file medical reports for treatment of injured workers;

(B) timely file written treatment plans when required by AS 23.30.095(c); or

(C) provide medical services and examinations to injured workers;

(2) the physician's failure to comply with an order of the board;

(3) revocation by the appropriate licensing agency of the physician's license to provide services;

(4) decertification of or disciplinary action against the physician by an applicable certifying agency or professional organization;

(5) disciplinary action taken against the physician by the State Medical Board, a representative of Medicare or Medicaid, or a hospital, for fraud, abuse, or the quality of care provided;

(6) fraudulent billing or reporting by the physician;

(7) knowingly falsifying information on the physician's application;

(8) conviction of the physician in a state or federal court of any offense involving moral turpitude or drug abuse, including excessive prescription of drugs;

(9) unprofessional conduct or discriminatory treatment by the physician in the care and examination of patients;

(10) use of treatment by the physician which is not sanctioned by the physician's peers or national provider associations as beneficial for the injury or disease under treatment;

(11) declaration of the physician's mental incompetency by a court of competent jurisdiction;

(12) failure by the physician to maintain professional liability insurance or, if required, workers' compensation insurance; or

(13) failure by the physician to annually submit a certificate of insurance for professional liability insurance and, if required, workers' compensation insurance.

(d) Before removing a physician's name from the list,

(1) the board will notify the physician, in writing, either by personal service or by certified mail of the proposed removal and the reason for it;

(2) a physician who receives a notification under (1) of this subsection may, within 30 days after the receipt of the notice, file a written request with the board for a hearing in accordance with AS 23.30.110;

(3) the board will issue a written decision within 30 days after the hearing, or, if no hearing is requested, the board will issue a written decision within 45 days after the written notice of proposed removal; the board's decision will be served on the physician personally or by certified mail, and will state whether the physician's name was removed from the list and the reason for the removal.

(e) If the parties stipulate that a physician not on the board's list may perform an evaluation under AS 23.30.095(k), the board or its designee may select a physician in accordance with the parties' agreement. If the parties do not stipulate to a physician not on the board's list to perform the evaluation, the board or its designee will select a physician to serve as a second independent medical examiner to perform the evaluation. The board or its designee will consider these factors in the following order in selecting the physician:

(1) the nature and extent of the employee's injuries;

(2) the physician's specialty and qualifications;

(3) whether the physician or an associate has previously examined or treated the employee;

(4) the physician's experience in treating injured workers in this state or another state;

(5) the physician's impartiality; and

(6) the proximity of the physician to the employee's geographic location.

(f) If the board or its designee determines that the list of second independent medical examiners does not include an impartial physician with the specialty, qualifications, and experience to examine the employee, the board or its designee will notify the employee and employer that a physician not named on the list will be selected to perform the examination. The notice will state the board's preferred physician's specialty to examine the employee. Not later than 10 days after notice by the board or its designee, the employer and employee may each submit the names, addresses, and curriculum vitae of no more than three physicians. If both the employee and the employer recommend the same physician, that physician will be selected to perform the examination. If no names are recommended by the employer or employee or if the employee and employer do not recommend the same physician, the board or its designee will select a physician, but the selection need not be from the recommendations by the employee or employer.

(g) If there exists a medical dispute under AS 23.30.095(k),

(1) the parties may file a

(A) completed second independent medical form, available from the division, listing the dispute together with copies of the medical records reflecting the dispute, and

(B) stipulation signed by all parties agreeing

(i) upon the type of specialty to perform the evaluation or the physician to perform the evaluation; and

(ii) that either the board or the board's designee determine whether a dispute under AS 23.30.095(k) exists, and requesting the board or the board's designee to exercise discretion under AS 23.30.095(k) and require an evaluation;

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived;

(A) the completed petition must be filed timely together with a completed second independent medical form, available from the division, listing the dispute; and

(B) copies of the medical records reflecting the dispute; or

(3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if

(A) the parties stipulate, in accordance with (1) of this subsection, to the contrary and the board determines the evaluation is necessary; or

(B) the board on its own motion determines an evaluation is necessary.

(h) In an evaluation under AS 23.30.095(k), the board or the board's designee will identify the medical disputes at issue and prepare and submit questions addressing the medical disputes to the medical examiners selected under this section. The board may direct

(1) a party to make a copy of all medical records, including medical providers' depositions, regarding the employee in the party's possession, put the copy in chronological order by date of treatment with the initial report on top, number the records consecutively, and put the records in a binder;

(2) the party making the copy to serve the binder of medical records upon the opposing party together with an affidavit verifying that the binder contains copies of all the medical reports relating to the employee in the party's possession;

(3) the party served with the binder to review the copies of the medical records to determine if the binder contains copies of all the employee's medical records in that party's possession; the party served with the binder must file the binder with the board not later than 10 days after receipt and, if the binder is

(A) complete, the party served with the binder must file the binder upon the board together with an affidavit verifying that the binder contains copies of all the employee's medical records in the party's possession; or

(B) incomplete, the party served with the binder must file the binder upon the board together with a supplemental binder with copies of the medical records in that party's possession that were missing from the binder and an affidavit verifying that the binders contain copies of all medical records in the party's possession; the copies of the medical records in the supplemental binder must be placed in chronological order by date of treatment, with the initial report on top, and numbered consecutively; the

party must also serve the party who prepared the first binder with a copy of the supplemental binder together with an affidavit verifying that the binder is identical to the supplemental binder filed with the board;

(4) the party, who receives additional medical records after the binder has been prepared and filed with the board, to make two copies of the additional medical records, put the copies in two separate binders in chronological order by date of treatment, with the initial report on top, and number the copies consecutively; the party must file one binder with the board not later than seven days after receiving the medical records; the party must serve the other additional binder on the opposing party, together with an affidavit stating the binder is identical to the binder filed with the board, not later than seven days after receiving the medical records;

(5) Repealed 5/12/2019.

(i) The report of the physician who is serving as a second independent medical examiner must be done not later than 14 days after the evaluation ends. The evaluation ends when the physician reviews the medical records provided by the board, receives the results of all consultations and tests, and examines the injured worker, if that is necessary. The board will presume the evaluation ended after the injured worker was examined. If the evaluation ended at a later date, the physician must state in the report the date the evaluation was done. An examiner's report must be received by the board not later than 21 days after the evaluation ended. If an examiner's report is not timely received by the board, a party may file a petition asking that another physician be selected to serve as a second independent medical examiner. The board or its designee may, select another physician to serve as a second independent medical examiner, and will make the selection in accordance with this section. Until the parties receive the second independent medical examiner's written report, communications by and with the second independent medical examiner are limited, as follows:

(1) a party or a party's representative and the examiner may communicate as needed to schedule or change the scheduling of the examination;

(2) the employee and the examiner may communicate as necessary to complete the examination;

(3) the examiner's communications with a physician who has examined, treated, or evaluated the employee must be in writing, and a copy of the written communication must be sent to the board and the parties; the examiner must request the physician report in writing and request that the physician not communicate in any other manner with the examiner about the employee's condition, treatment, or claim.

> (j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to
>
> (1) submit written questions or depose the examiner, the party must
>
> (A) file with the board and serve upon the examiner and all parties, not later than 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the written questions; if notice or the written questions are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or serves written questions; and
>
> (B) initially pay the examiner's charges to respond to the written questions or for being deposed; after a hearing and in accordance with AS 23.30.145 or 23.30.155(d), the charges may be awarded as costs to the prevailing party;
>
> (2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or
>
> (3) question the examiner at a hearing, the party must initially pay the examiner's fee for testifying; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155(d), the board will, in its discretion, award the examiner's fee as costs to the prevailing party.
>
> (k) If a party's communication with an examiner is not in accordance with (j) of this section, the board may not admit the evidence obtained by the communication at a hearing and may not consider it in connection with an agreed settlement.

## ANALYSIS

**1) Is Employee entitled to medical and related transportation benefits?**

For medical and transportation benefits to be compensable, Employee's work injury must be, in relation to all other causes, "the substantial cause" of his need for treatment. *Hanson*. Both Employee's physician, Dr. Anderson, and the EME, Dr. Chong, agree Employee experienced delayed healing of the fifth metatarsal fracture he suffered at work, but the fracture ultimately did heal, sometime between February and April of 2018. Instead, the parties' current disputes

primarily center on Employee's CRPS diagnosis. This is a factual dispute to which the presumption of compensability applies. *Sokolowski*.

In the absence of evidence to the contrary, Employee is presumed entitled to the medical and transportation benefits he seeks. AS 23.30.120(a)(1). He attaches the presumption with Dr. Anderson's March 22, 2018 and April 24, 2018 chart notes, which indicate Dr. Anderson was suspicious Employee was developing CPRS as his fractured healed, and Dr. Liu's subsequent June 13, 2018 CRPS diagnosis and treatment recommendations. *Wolfer*. Employer is now required to rebut the presumption. *Miller*.

As Employee contends, Employer is unable to do so. Instead of either providing an alternative explanation of Employee's need for treatment, or eliminating employment as a factor in causing his need for treatment, Dr. Chong summarily concludes in his August 23, 2018 report, "There is no evidence of complex regional pain syndrome whatsoever." Not only is Dr. Chong's opinion insufficient to rebut the presumption under *Huit*, but when his other opinions were explored in detail at his deposition, they ultimately supported, not only the compensability of Employee's medical treatment, but also Employee's entitlement to disability benefits. Employee will be awarded the medical and transportation benefits he seeks. AS 23.30.010(a).

**2) Is Employee entitled to TTD?**

Dr. Chong's failure to opine on an alternative cause for Employee's need for medical treatment makes an evaluation of competing causes impossible. However, at least initially, Dr. Chong did seem to provide an alternative cause of Employee's disability in his August 23, 2018 report, where he diagnosed Employee with an iatrogenic disability. At his deposition, Dr. Chong explained, "iatrogenic" means associated with or caused by a health care provider. Although Dr. Chong does not explain, in either his report, or at his deposition, how he came to learn, let alone conclude, that a health care provider inflicted such a fate upon Employee, the context of his report, along with his deposition testimony, make clear, his opinion is Dr. Liu caused Employee to become disabled by merely diagnosing him with CRPS. *Rogers & Babler*; AS 23.30.122.

As the record shows, Dr. Anderson referred Employee to Dr. Liu because Dr. Anderson feared Employee was developing CRPS as a sequela to his metatarsal fracture, which would, of course, relate Employee's CRPS treatment back to his original work injury. *Rogers & Babler*. In fact, Dr. Chong acknowledged as much at his deposition, where he candidly admitted, since Employee had not returned to work, his iatrogenesis may have worsened, which would now make Employee a good candidate for his SIMP program, and Employee's participation in the SIMP program would be related to his foot fracture at work. Since Dr. Chang's own testimony relates Employee's continuing disability to his original work injury, albeit under a different theory of disability, Employer ultimately fails to rebut the presumption, so Employee is entitled to an award of TTD. AS 23.30.010(a). Based on the credibility determinations and weighing of evidence in the PPI analysis below, the medical stability date should be in accordance with Dr. Zwerin's June 3, 2019 report. AS 23.30.122.

**3) Is Employee entitled to PTD?**

Employee's entitlement to PTD is a factual dispute to which the presumption of compensability applies. *Sokolowski*. In the instant case, Employee is unable to attach the presumption he is permanently and totally disabled on multiple bases. Significantly, no physician in this case has opined him so. *Wolfer*. Additionally, the availability of regularly and continuously available work is relevant in determining whether an employee is entitled to disability benefits and this standard is clearly set forth in the PTD statute. *Robles*. Employee testified, in considerable detail, regarding his current job delivering pizzas, where he works between 18 to 25 hours per week and earns $9.89 per hour plus tips, which results in bi-weekly earnings of $575 to $625. The failure to achieve remunerative employability does not, by itself, constitute a permanent and total disability, AS 23.30.180(b), and even though an employee may have limited capabilities, he is not entitled to permanent total disability benefits when work is regularly and continuously available to him that is within his capabilities, *Summerville*.

PTD benefits are awarded if a disability is total in character and permanent in quality. AS 23.30.180(a). Employee's disability is not total in character for, as he testified himself, his

doctor says he can work four to five hours per day if he is not on his feet continuously. The SIME physician, Dr. Zwerin, commented extensively on Employee's ability to work, which included referencing Employee's job delivering pizzas. Although Dr. Zwerin opined Employee could "absolutely not" return to work at his job at the time of injury, he did think Employee could be retrained if the reemployment program offered Employee a sedentary occupation with minimal standing or walking and the opportunity to alternate between sitting and standing as dictated by Employee's CRPS pain. Dr. Zwerin also pointedly wrote, "[Employee's] injury does not result in the level of permanent impairment which would preclude participation in the workforce in some capacity."

Employee's disability may also not be permanent in quality, as Employee's own physician, Dr. Liu, has proposed further treatment options, such as Ketamine infusions and a spinal cord stimulator, which may improve Employee's ability to "perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Roan*. Similarly, the SIME physician, Dr. Zwerin, has also proposed additional treatment options such as a spinal cord stimulator, a Functional Restoration Program and the addition of Lyrica or Cymbalta to Employee's medication regimen, which may improve his functional capacity to work. *Id*. Finally, even Employer's medical evaluator, Dr. Chong, acknowledged at his deposition that Employee might be a good candidate for his SIMP program. Since Employee cannot attach the presumption, let alone establish by a preponderance of the evidence, he is permanently and totally disabled, his claim seeking PTD will be denied. *Cheeks*.

**4) Is Employee entitled to PPI?**

As before, the parties dispute with respect to PPI centers on Employee's CRPS diagnosis. This is a factual dispute to which the presumption of compensability applies. *Sokolowski*. Employee establishes the presumption he is entitled to PPI with the nine percent whole person rating by the SIME physician, Dr. Zwerin. *Smallwood*. Employer rebuts the presumption with the August 23, 2018 report of its medical evaluator, where Dr. Chong opined Employee had incurred no PPI. *Miller*. Employee must now prove his entitlement to PPI by a preponderance of the evidence. *Koons*.

Dr. Chong, who opined Employee did not meet the Budapest Criteria for a CRPS diagnosis, only rated Employee for a PPI based on a non-displaced healed metatarsal fracture. Meanwhile, Dr. Zwerin rated Employee for CRPS Type I with a loss of range of motion in his left ankle, thus accounting for the differing ratings. In evaluating whose rating should be accorded the most weight, consideration is initially given to Dr. Chong's deposition testimony. Large portions of it are tortured, but nowhere more so than during the lengthy portion quoted in this decision's factual findings. Dr. Chong's credibility severely suffers as a result. AS 23.30.122.

When Dr. Chong was asked why he did not recommend a SIMP program for Employee in his August 23, 2018 report, he cited several reasons why he did not do so, the very first of which was such a program is not available in Alaska. Then, during his subsequent testimony, Dr. Chong repeatedly denied the unavailability of a program in Alaska was a basis precluding his recommendation, instead insisting he did not make the recommendation because he was not asked to make it. *Id*. Dr. Chong's deposition testimony then took another turn for the worse when it was pointed out that Employer had explicitly asked him whether he thought any additional treatment was reasonable and necessary. *Id*. From that point onward, Dr. Chong began qualifying his answers concerning the opinions expressed in his report with, "back in August of 2018," indicating his opinions had since changed. *Id*. As was made clear in the analysis of Employee's entitlement to TTD above, indeed, they had. *Id*.

Dr. Chong's unique findings upon his physical examination of Employee are of concern, as well. While none of physical findings recorded by the numerous providers in the record perfectly overlap; all, except for Dr. Chong's, include findings common to others. Examples of specific, common, findings among the various providers include, allodynia, skin discoloration, asymmetrical hair growth, temperature disparities, brittle toenails and an antalgic gait with an inability to push off the left toes or assume a comfortable stance. Glaringly, other than noting an antalgic gait, not only did Dr. Chong not observe any of physical findings indicative of CRPS that were observed by the numerous other providers in the record, but he explicitly denied any of these other findings existed at the time of his evaluation. Because of Dr. Chong's inconsistent

and contradictory deposition testimony, as well as his findings upon physical examination, which stand alone in the record, his PPI rating is accorded no weight. AS 23.30.122.

On the other hand, the SIME physician, Dr. Zwerin, is the board's physician. *Bah*. Whereas, an employee's physician might be predisposed to render favorable opinions on behalf of a patient; and, whereas, an EME might be predisposed to render favorable opinions on behalf of his client, exhaustive rules have been adopted to render truly independent medical opinions to board panels. 8 AAC 45.092. No taints of bias are noted in Dr. Zwerin's report and his findings upon physical exam are similar to those of Employee's numerous providers. As a result, Dr. Zwerin's PPI rating is accorded great weight. AS 23.30.122. Accordingly, Employee has proven, by a preponderance of the evidence, he is entitled to a nine percent whole person PPI benefit. *Saxton*.

**5) Is Employee entitled to penalties and interest?**

An employee is entitled to penalties on compensation due if it is neither timely paid, *Haile*, nor properly controverted by an employer, *Abood*. Employee contends Employer's controversion was not issued in good faith since it was not based on a "responsible" medical opinion, and he not only seeks an award of penalties and interest, but also contends Employer's controversion was unfair and frivolous, so he seeks a such a finding and referral to the Division of Insurance. In support of his positions, Employee cites the following portion of Dr. Chong's deposition testimony:

> Because, as you had indicated earlier, I have been doing IMEs in Alaska, and for the IMEs I have done whereby Dr. Liu is a treating provider, I have found that in most cases – overwhelmingly most of the cases I did not find any evidence of CRPS, and yet Dr. Liu would have been treating them for some time.

Employee represents this testimony as evidence that "[Dr. Chong] [had] testified candidly about his mission to disprove Dr. Liu." Employee further alleges this testimony is evidence that Dr. Chong's evaluation was therefore a "sham" and "inherently unfair."

The testimony Employee cites simply shows Dr. Chong most frequently disagrees with Dr. Liu's diagnosis and treatments. Obtaining professional *opinions*, which often differ, is precisely the

purpose engaging expert witnesses in the first place - to ascertain the parties' rights. AS 23.30.095(k); AS 23.30.135(a); AS 23.30.155(h). Dr. Chong is a licensed, board certified physician, who has completed residencies in two medical specialties. He reviewed Employee's medical records and diagnostic imaging, and conducted a physical examination, as one would expect, before rendering his opinions. Dr. Chong's opinions are not irresponsible medical opinions merely because Employee disagrees with them, or because Dr. Chong disagrees with Dr. Liu. Employee's cited testimony is not evidence of a bad faith controversion.

For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, it would be found the claimant is not entitled to benefits. *Harp*. Here, Employer had a medical report in its possession that showed Employee's fifth metatarsal fracture had healed, he was medically stable, did not require any further treatment, was able to return to work without restrictions, and had not incurred any PPI. Based on this evidence alone, a panel would find that Employee was not entitled to any further benefits. AS 23.30.185; AS 23.30.095; 23.30.190. Since Employer's controversion was issued in good faith, Employee is not entitled to penalty. *Harp*. However, Employee and his providers are entitled to interest on benefits awarded as a matter of course. *Rawls*.

**6) Was Employer's controversion unfair or frivolous?**

Before finding a controversion was either unfair or frivolous, it must first be determined that it was not issued in good faith. *Ford*. Since it was just concluded Employer's controversion was in good faith, Employers controversion was neither unfair nor frivolous. *Harp.*

**7) Is Employee entitled to attorney fees and costs?**

Reasonable attorney fees may be awarded when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Moore*. Here, Employer resisted paying benefits by controverting and litigating Employee's claim, which necessitated an SIME and Dr. Chong's deposition. Employee has partially prevailed on issues he claimed, so he is entitled to an award of reasonable attorney fees under AS 23.30.145(b).

Recently, the Alaska Supreme Court instructed workers' compensation panels that they must consider the eight factors set forth under Alaska Rule of Professional Conduct 1.5(a) when awarding reasonable fees. *Rusch*. Since most of the information required under this rule cannot be found in the agency's record, the parties' rights on the issue of a reasonable attorney award cannot be ascertained. Therefore, the record should be re-opened to receive additional evidence. AS 23.30.135(a); AS 23.30.155(h). The parties will be instructed to request a prehearing conference, the purpose of which will be to determine procedures for the filing of additional evidence and arguments to decide the issue of a reasonable fee award.

CONCLUSIONS OF LAW

1) Employee is entitled to medical and transportation benefits.
2) Employee is entitled to TTD. The medical stability date should be in accordance with Dr. Zwerin's June 3, 2019 report.
3) Employee is not entitled to PTD.
4) Employee is entitled to nine percent PPI.
5) Employee is not entitled to penalty, but shall be awarded interest as a matter of course.
6) Employer's controversion was neither unfair nor frivolous.

7) Employee is entitled to reasonable attorney fees and costs in an amount that cannot be ascertained on the record presented.

## ORDERS

1) Employee's June 4, 2019 claim is granted in part and denied in part, as set forth above.
2) The parties shall request a prehearing conference, the purpose of which will be to determine procedures for the filing of additional evidence and deciding upon an award of reasonable attorney fees.

Dated in Fairbanks, Alaska on February 26, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Robert Weel, Member

/s/
Lake Williams, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of JEDIDIAH J. HARRISON, employee / claimant v. ICE SERVICES, INC., employer; LIBERTY NORTHWEST INSURANCE CORP., insurer / defendants; Case No. 201710716; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on February 26, 2020.

/s/
Ronald C. Heselton, Office Assistant II