ALASKA WORKERS' COMPENSATION BOARD

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

KIEL L. CAVITT, Employee, Claimant, v. D & D SERVICES LLC, d/b/a NOVUS AUTO, Employer, and OHIO CASUALTY INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201513001 AWCB Decision No. 20-0039 Filed with AWCB Anchorage, Alaska on May 29, 2020

Kiel Cavitt's April 4, 2019 claim for benefits was heard in Anchorage, Alaska on March 3, 2020, a date selected on December 19, 2019. A November 20, 2019 affidavit of readiness for hearing gave rise to this hearing. Attorney Keenan Powell appeared and represented Mr. Cavitt (Employee) who appeared and testified. Attorney Martha Tansik appeared and represented D & D Services LLC d/b/a Novus Auto and Ohio Casualty Insurance Company (Employer). The record closed on March 16, 2020.

HISTORY

In *Cavitt v. D&D Services, LLC*, AWCB Decision No. 17-0109 (September 13, 2017) (*Cavitt I*), Employer acknowledged Employee had been injured in the course of his employment. *Cavitt I* ordered Employer to pay Employee TTD until he was medically stable and to pay interest on

past TTD that was not timely paid. It denied Employee's claims for a compensation rate adjustment, unfair or frivolous controversion, and penalty.

In *Cavitt v. D&D Services*, LLC, AWCAC Decision No. 248 (May 4, 2018) (*Commission Decision 248*), the Commission affirmed the Board's denial of a compensation rate adjustment and the unfair or frivolous controversion and penalty claims. The Commission determined Employer had "vigorously resisted" Employee's claim for ongoing TTD, and the *Cavitt I's* award of attorney fees did not properly reflect the value of that benefit. The Commission remanded the case for a redetermination of attorney fees.

Cavitt v. D&D Services, LLC, AWCB Decision No. 18-0060 (June 25, 2018) (*Cavitt II*), addressed several new issues, as well as the redetermination of attorney fees ordered by *Commission Decision 248*. It found Employee was entitled to TTD from February 13, 2018 through April 12, 2018, but he was not entitled to a penalty for late payment. The parties stipulated to a method to determine attorney fees.

Cavitt v. D&D Services, LLC, AWCB Decision No. 18-0103 (October 15, 2018) (*Cavitt III*) addressed Employee's July 5, 2018, July 8, 2018, and July 13, 2018 claims for a penalty on the TTD from February 13, 2018 through April 12, 2018, late paid medical costs, and attorney fees and costs. *Cavitt III* held it did not have jurisdiction to determine Employee's claim for penalty on the late-paid TTD because Employee had appealed that issue to the Commission.

In *Cavitt v. D&D Services, LLC*, AWCAC Decision No 264 (July 8, 2019) (*Commission Decision 264*), the Commission reversed *Cavitt III*, holding Employee had appealed the issue of referral to the Division of Insurance for an unfair or frivolous controversion, not whether he was entitled to a penalty because the TTD had not been timely paid.

Cavitt v. D&D Services, LLC, AWCB Decision No. 19-0087 (August 26, 2019) (*Cavitt IV*), denied Employee's petition for a second independent medical evaluation (SIME).

ISSUES

On October 17, 2018, Employer controverted temporary total disability (TTD) as of August 24, 2018 and began paying Employee a reemployment stipend under AS 23.30.041(k). Employee contends the controversion was unfair or frivolous, and as a result he is entitled to ongoing TTD as well as a penalty and interest. Employer contends the controversion was not frivolous, and Employee is not entitled to any of the benefits requested in his claim.

1) ***Was Employer's October 17, 2018 controversion frivolous and unfair?***

2) ***Is Employee entitled to TTD after August 24 2018, as well as a penalty and interest?***

Employee contends his attorney provided valuable legal services that will result in the receipt of additional benefits, and, as a result, he should be awarded attorney fees and costs. Employer contends Employee should not be awarded additional benefits, so he should not be awarded attorney fees and costs. Additionally, should Employee prevail, Employer contends Employee's attorney's bill includes work on issues unrelated to this hearing which should not be awarded.

3) ***Is Employee entitled to an award of attorney fees and costs?***

FINDINGS OF FACT

All findings in *Cavitt I*, *Cavitt II*, and *Cavitt III* are incorporated herein by reference. The following facts are reiterated from *Cavitt I*, *Cavitt II*, *Cavitt III* or are established by a preponderance of the evidence:

1) Employee worked for Employer as a glazier. On August 14, 2015, he was working on scaffolding replacing the windshield in a motorhome. He injured his right elbow when he fell while stepping off the scaffolding. (*Cavitt I*).

2) Employee was taken to the emergency room, where he was diagnosed with a comminuted fracture of the proximal radius with displaced fragments. (*Cavitt I*).

3) On August 15, 2015, Kenneth Thomas, M.D., performed open reduction and internal fixation surgery, with a radial head arthroplasty and ligament repair. (*Cavitt I*).

4) On December 29, 2015, Employee was found to be medically stable by Dr. Thomas and released to light-duty work. (*Cavitt I*).

5) On July 20, 2016, a hearing was held on Employee's May 11, 2016 claim. At the hearing, the parties stipulated that Employee had been injured in the course and scope of his employment with Employer, that permanent partial impairment (PPI) benefits had been paid late and Employee was entitled to a penalty. (*Cavitt I*).

6) On August 16, 2016, Employee reported to Dr. Thomas that he had developed shooting pains in his right forearm. Dr. Thomas was concerned about possible nerve entrapment and referred Employee to Jared Kirkham, M.D., for nerve conduction studies. (*Cavitt I*).

7) On August 17, 2016, Dr. Kirkham performed the nerve conduction studies, which were within normal limits. Dr. Kirkham explained it was not unusual for patients to have persistent neuropathic pain of unclear origin after traumatic injuries. (*Cavitt I*).

8) On December 5, 2016, Employee was seen by PA-C Kristin Fredley. There was a fresh abrasion on Employee's right elbow, and he reported he had fallen after being hit by a car. (*Cavitt I*).

9) In mid-February 2017, Employee fell on an icy sidewalk while delivering pizza. (*Cavitt I*).

10) On March 1, 2017 Employee reported the pain worsened after a fall about two weeks before. Dr. Kirkham ordered a CT scan of Employee's right elbow. (*Cavitt I*).

11) On March 8, 2017, PA Fredley reviewed the CT scan and determined there had been either chronic or posttraumatic loosening of the prosthesis with "likely posttraumatic changes." (*Cavitt I*).

12) On March 10, 2017 Dr. Kirkham took Employee off work until March 14, 2017, and on March 15, 2017, he extended that restriction until April 15, 2017. (*Cavitt I*).

13) On March 15, 2017, Employee filed a claim seeking TTD from March 15, 2017 to the future, although the claim was later amended to change the date to March 10, 2017. Employee also sought an increase in his compensation rate and attorney fees and costs. (*Cavitt I*).

14) On April 5, 2017, Employer filed an answer to Employee's March 15, 2017 claim as well as a controversion notice. Employer contended there was no medical evidence connecting Employee's disability to the August 2015 work injury and noting there may have been a superseding or intervening event. Employer also denied Employee was entitled to a compensation rate increase. (*Cavitt I*).

15) On April 7, 2017, Employee amended his March 15, 2017 claim to include medical costs. (*Cavitt I*). His claim for TTD from March 15, 2017 to the future was unchanged. He did not include a claim for a compensation rate adjustment. (Observation).

16) On April 26, 2017, Employee was seen by R. David Bauer, M.D., for an employer's medical evaluation (EME). He concluded the most significant factor in bringing about Employee's current need for medical treatment was the 2015 work incident, and neither the motor vehicle accident nor the February fall were substantial factors. Dr. Bauer stated Employee required revision surgery for the prosthesis and was not medically stable. He predicted Employee would be medically stable within nine months of the surgery and Employee would be restricted to light-duty work until he became medically stable. (*Cavitt I*).

17) On April 28, 2017, Employer filed an answer and controversion in response to Employee's April 7, 2017 amended claim. Employer acknowledged that medical reports showed Employee was unable to work, but stated it was not clear the cause was the August 2015 injury. Employer noted Employee was working for another employer at the time of his February 2017 fall. (*Cavitt I*).

18) On May 5, 2017, Employer received Dr. Bauer's EME report, and on May 15, 2017, Employer began paying benefits, including TTD retroactive to March 10, 2017. (*Cavitt I*).

19) On June 29, 2017 Dr. Bauer responded to questions from Employer's attorney. He opined Employee was medically stable until such time as he pursued the revision surgery. Dr. Bauer also stated Employee would become medically stable either 90 or 180 days after the surgery, depending on what procedure was done. He stated Employee was capable of medium-duty work. (*Cavitt I*).

20) On July 7, 2017, Employer controverted TTD after March 15, 2017 based on Dr. Bauer's June 29, 2017 supplemental report. (*Cavitt I*).

21) Employee underwent surgery on July 11, 2017 to revise the prosthesis and remove plates. (*Cavitt I*).

22) On August 28, 2017, the physical therapist reported Employee had elbow flexion of 120 degrees, and extension to 20 degrees. His forearm pronation was 75 degrees, and supination was 60 degrees. (Anchorage Fracture & Orthopedic Clinic, Physical Therapy Note, August 28, 2017).

23) The normal ranges for forearm pronation and supination are from 0 to 80 degrees. The normal range for elbow movement is extension is to 0 degrees and flexion to 150 degrees. (Observation, Experience).

24) On September 27, 2017, the physical therapist reported Employee had elbow flexion of 130 degrees, and extension to 5 degrees. His forearm pronation was 75 degrees, and supination was 70 degrees. (Anchorage Fracture & Orthopedic Clinic, Physical Therapy Note, August 28, 2017).

25) On October 2, 2017, Employee was seen by PA-C Kristin Fredley-McGlohn. She reported the range of motion for Employee's elbow was from 5 to 130 degrees, supination was 70 degrees, and pronation was 75 degrees. (Anchorage Fracture & Orthopedic Clinic, Chart Note, October 2, 2017).

26) On November 15, 2017, the physical therapist reported Employee had forearm pronation was 55 degrees, and supination was 60 degrees. Elbow flexion and extension were not reported. (Anchorage Fracture & Orthopedic Clinic, Physical Therapy Note, August 28, 2017).

27) On November 17, 2017, Employee was seen by Dr. Thomas who reported full extension (0 degrees), pronation of 60 degrees, and supination of 45 degrees. (Dr. Thomas, Chart Note, November 17, 2017).

28) On December 26, 2017, Employer filed an answer to Employee's December 1, 2017 claim. Employer admitted Employee was entitled to medical costs related to the work injury. It denied its controversions were unfair or frivolous, or that Employee was entitled to attorney fees and costs. (Answer, December 26, 2017).

29) On January 22, 2018, the physical therapist reported Employee's forearm pronation was 55 degrees, and supination was 48 degrees. Elbow flexion and extension were not reported. (Anchorage Fracture & Orthopedic Clinic, Physical Therapy Note, January 22, 2018).

30) On January 25, 2018, Employee was seen by Dr. Bauer for a second EME. In addition to examining Employee, Dr. Bauer reviewed medical records dated after his April 26, 2017 EME. Dr. Bauer's diagnosis were unchanged since his April 2017 EME report, and he continued to find the work injury was the substantial cause of Employee's disability and need for medical treatment, and that treatment to date had been reasonable and necessary. Dr. Bauer reported extension to 5 degrees, and pronation and supination of 60 degrees. He found Employee had reached medical stability as of the date of his examination and it was unlikely his range of

motion would improve beyond the current levels. The only further treatment Dr. Bauer recommended was a home exercise program and continued use of an elbow brace, although a functional capacity evaluation would aid in determining appropriate restrictions for future employment. Dr. Bauer rated Employee with an eight percent permanent partial impairment. (Dr. Bauer, EME Report, January 25, 2018).

31) On January 25, 2018, Employee filed a claim seeking TTD, modification of the RBA's determination that Employee was ineligible for reemployment benefits, a reemployment stipend under AS 23.30.041(k), and attorney fees and costs. The claim states it was filed in anticipation of Dr. Bauer's report. (Claim, January 25, 2018).

32) On February 12, 2018, Employer controverted TTD and medical costs other than a functional capacities evaluation after January 25, 2018, based on Dr. Bauer's January 25, 2018 EME report that Employee was medically stable and needed no further medical treatment. (Controversion, February 12, 2018).

33) On February 16, 2018, Employer filed both an answer to Employee's January 25, 2018 claim and an additional controversion. Employer denied TTD and medical costs other than a functional capacities evaluation after January 25, 2018, as well as modification of the reemployment benefits eligibility determination, the reemployment stipend, and attorney fees and costs. (Answer, Controversion, February 16, 2018).

34) On February 21, 2018, Employee filed a request to cross-examine Dr. Bauer about his January 25, 2018 EME Report. (Request for Cross-examination, February 21, 2018).

35) On February 22, 2018, Dr. Thomas reviewed Dr. Bauer's January 25, 2018 report and responded to several questions. He agreed with Dr. Bauer that Employee was medically stable and the only further treatment was a home exercise program, and he agreed with Dr. Bauer's recommendation for a functional capacity evaluation. Dr. Thomas noted "Excellent IME by Dr. Bauer." (Dr. Thomas, Response to February 12, 2018 Letter, February 22, 2018).

36) On February 26, 2018, Employee filed a claim seeking TTD, medical and transportation costs, modification of the reemployment eligibility decision, reemployment stipend, penalty, interest, a finding of unfair or frivolous controversion, and attorney fees and costs. (Claim, February 26, 2018).

37) On February 28, 2018, Employee was seen by PA-C Kaliegh Bishop who works with Dr. Thomas. Employee reported increased pain in his elbow. Concerned about infection, Ms.

Bishop ordered an aspiration and cultures. PA Bishop reported full extension and flexion, pronation of 70 degrees and supination of 45 degrees. (AFOC, Chart Note, February 28, 2018).

38) On March 5, 2018, Employee was seen by Benjamin Westley, M.D., who stated Employee's pain could be due to an infection, and, if so, the prosthesis would have to be removed from his elbow. (Dr. Westley, Chart Note, March 5, 2018).

39) On March 21, 2018, Dr. Bauer reviewed additional records since his January 25, 2018 report and issued a supplemental EME report. Dr. Bauer stated a recent motor vehicle accident did not alter Employee's condition and his opinions were unchanged. (Dr. Bauer, Supplemental EME Report, March 21, 2018).

40) On April 13, 2018, PA Bishop reported Employee had good flexion and extension, and forearm pronation was 75 degrees, and supination was 45 degrees.. (PA-C Bishop, Chart Note, April 13, 2018).

41) On April 30, 2018, PA Bishop reported Employee had 120 degrees of flexion and extension to 20 degrees. Pronation was 65 degrees, and supination was 36 degrees.. (PA-C Bishop, Chart Note, April 13, 2018).

42) On May 7, 2018, Dr. Thomas was deposed. Dr. Thomas explained that the recent cultures did not show an infection in Employee's elbow and there was no need for surgery, although Employee required additional physical therapy and other conservative treatment. He stated physical therapy would be needed until Employee "plateaued," but he did not identify what other conservative treatment may be necessary. Dr. Thomas stated Employee would need checkups whenever he experienced pain or other problems, but at least annually until further notice. He explained that the estimated life of Employee's current prosthesis is approximately 10 years, and at that point the risk of needing replacement increases, although he could not say whether the surgery would consist of the replacement of Employee's existing prosthesis or a total elbow replacement. Additionally, surgery to increase Employee's range of motion might be needed. Dr. Thomas said his December 29, 2017 opinion that Employee could work at medium strength jobs was mistaken; Employee will be limited to sedentary work. (Dr. Thomas, Deposition, May 7, 2018).

43) On May 10, 2018, Employer withdrew its February 12, 2018, February 16, 2018, March 16, 2018, and April 9, 2018 controversions based on Dr. Thomas's deposition statement that

Employee needed further physical therapy and other conservative treatment, and was, therefore, not medically stable. (Withdrawal of Controversions, May 10, 2018).

44) The *Cavitt II* hearing was held on May 15, 2018. Because Employee had requested cross-examination of Dr. Bauer, but Employer had not produced him for deposition or called him as a witness for hearing, his January 25, 2018 EME report was not considered. However, Employee's petition to strike the report was denied; as *Cavitt II* explained, "If Employer were to produce Dr. Bauer for cross-examination prior to a future hearing, the report could be considered." (*Cavitt II*).

45) On July 11, 2018, the physical therapist reported Employee's forearm pronation was 55 degrees, and supination was 40 degrees. Elbow flexion was 4 degrees and extension was 132 degrees. (Anchorage Fracture & Orthopedic Clinic, Physical Therapy Note, July 11, 2018).

46) On August 24, 2018, Employee was seen by Dr. Bauer for a third EME. Dr. Bauer again reviewed the records identified in his prior report as well as subsequent records. He reported Employee had extension to minus 5 degrees and flexion to 130 degrees and 60 degrees of both pronation and supination. He requested diagnostic testing to determine whether there had been damage to the ulnar nerve that would require treatment. Dr. Bauer explained that the future surgery discussed by Dr. Thomas was a possibility, but not probable if Employee was engaged in sedentary work. He opined Employee had been medically stable since January 25, 2018, as there had been no significant change in his condition despite physical therapy. (Dr. Bauer, EME Report, August 24, 2018).

47) On September 4, 2018, Employee went to physical therapy. He reported he still felt about the same and was planning on getting electrodiagnostic testing done soon. The physical therapist noted Employee had made no real progress with conservative occupational therapy, and further therapy would be on hold until employee had the testing done and followed up with PA-C Bishop. (Anchorage Fracture & Orthopedic Clinic, Physical Therapy Note, September, 2018).

48) On October 17, 2018, Employer controverted TTD benefits after August 24, 2018 based on Dr. Bauers' EME report. Because Employee was in the reemployment process, Employer stated the TTD Employee had received would be converted to the reemployment stipend payable under AS 23.30.041(k). (Controversion Notice, October 17, 2018).

49) On December 14, 2018, Employee returned to Dr. Thomas. Dr. Thomas noted he lacked about 15 degrees of full flexion and 20 degrees of supination but he had almost full pronation.

Dr. Thomas referred Employee to Dr. Kirkham, for repeat electromyography and a nerve conduction study. (Dr. Thomas, Chart Note, December 14, 2018).

50) There is no record Employee had any medical treatment from September 4, 2018 to December 14, 2018, a period of 101 days. (Medical Records; Observation).

51) Dr. Kirkham performed the electrodiagnostic testing on December 19, 2018. He reported it was a minimally abnormal study, showing only "a very mild right ulnar neuropathy," and stated it might be reasonable to consider ulnar nerve release surgery if Employee's symptoms persisted. (Dr. Kirkham, Chart Note, December 19, 2019).

52) On February 11, 2019, Employee returned to Dr. Thomas, who noted Employee had almost full flexion and extension, with supination to 45 degrees and pronation to 80 degrees. Dr. Thomas reviewed Dr. Kirkham's test results and prescribed low-dose gabapentin, a nighttime elbow splint. He referred Employee to Heath McAnally, M.D., a pain management specialist. (Dr. Thomas, Chart Note, February 11, 2019).

53) From December 19, 2018 to February 11, 2019 is 54 days. (Observation).

54) On March 13, 2019, Employee reported to Dr. McAnally that his pain was four out of ten. Dr. McAnally examined Employee and prescribed nortriptyline for neuropathic pain, as well as nutraceuticals. Dr. McAnally expected a 50 to 70 percent improvement in the pain, but if that failed, a nerve block would be considered. (Dr. McAnally, Chart Note, March 13, 2019.

55) On April 23, 2019, Dr. McAnally noted Employee had not filled the March 13, 2019 nortriptyline prescription, yet Employee's pain had decreased to 3 out of 10. Dr. McAnally renewed the nortriptyline prescription and referred Employee for occupational therapy. (Dr. McAnally, Chart Note, April 23, 2019).

56) On June 6, 2019, Dr. Bauer was deposed. Employee's attorney was able to question Dr. Bauer about his reports. (Deposition, June 6, 2019).

57) On September 3, 2019, Employee was seen by Even Evanson, PA-C, in Dr. McAnally's office. Employee rated his pain that day at 2 out of 10. Employee reported he had not engaged in physical therapy because he has spent the summer at a friend's cabin. PA Evanson prescribed gabapentin and again referred Employee for occupational therapy. (PA Evanson, Chart Note, September 3, 2019).

58) From April 23, 2019 to September 3, 2019 is 133 days. (Observation).

59) On September 9, 2019, Employee was seen by a hand therapist who reported Employee's extension was 5 degrees, his flexion was 130 degrees, his pronation was 50 degrees, and his supination was 40 degrees. (Advanced Hand & Orthopedics, Chart Note, September 9, 2019).

60) On October 25, 2019, Employee returned to Dr. Thomas, who reported Employee had full extension, but lacked full flexion, but he did not provide a measurement. He reported Employee had pronation to 80 degrees and supination to approximately 40 degrees, and he stated Employee had made "significant improvement." (Dr. Thomas, Chart Note, October 25, 2019).

61) On February 26, 2020, Employee filed an affidavit of attorney fees and costs. The affidavit details $18, 487.50 in fees and $149.50 in costs for a total of $18,637.00. In addition to setting out the time and labor expended, Employee's attorney addressed the factors the Board must consider in awarding attorney fees. Specifically, Employee's attorney addressed the novelty and difficulty of the questions involved, the skill needed to properly perform the legal services, whether acceptance of this representation precluded other employment, the fees customarily charged in the locality, the amount involved and the results obtained, time limitations, the nature and length of her professional relationship with Employee, her experience, reputation, and ability, and the contingent nature of the fee. (Employee, Affidavit of Fees and Costs, February 25, 2020).

62) At the March 3, 2020 hearing, the record was left open to allow Employee to file a supplemental affidavit of fees and costs and to allow Employer to object. (Record).

63) Employee filed a supplemental affidavit of attorney fees and costs on March 4, 2020. It details attorney fees of $20,422.50 and costs of $162.00, for a total of $20,604.50. Employee's attorney's explanation is essentially the same as that filed on February 26, 2020, with the addition of an explanation of the subsequent services. (Employee, Affidavit of Fees and Costs, March 4, 2020).

64) On March 16, 2020 Employer filed its objection to the attorney fees claimed by Employee. Employer first contended Employee should not be awarded attorney fees because he had not shown he was entitled to further benefits. However, if Employee is awarded attorney fees, Employer contented several entries on Employee's attorney's affidavit did not relate to the issues heard on March 3rd, and the fee charged for Employee's hearing brief was excessive in that much of it was copied from an earlier brief. (Employer, Objection, March 16, 2020).

PRINCIPLES OF LAW

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

AS 23.30.010. Coverage.

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

AS 23.30.041. Rehabilitation and reemployment of injured workers.

. . . .

(k) . . . If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability or permanent partial impairment benefits have been paid in a lump sum before the employee requested or was

> found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability or permanent partial impairment benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155 (j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. . . . .
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> **AS 23.30.095. Medical treatments, services, and examinations**.
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> (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. It shall be additionally provided that, if continued treatment or care or both beyond the two year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
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> **AS 23.30.120. Presumptions**.
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> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter . . . .

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

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Kramer* at 473-74, quoting *Smallwood* at 316. To rebut the presumption, an employer must present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment or (2) work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of her case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379 (Alaska 1991). At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71 (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 findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). When doctors disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 (August 25, 2008).

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

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

Rusch v. Southeast Alaska Regional Health Consortium, 450 P.3d 784, 803 (Alaska 2019), held the presumption of compensability does not apply to the amount and reasonableness of attorney fees sought by claimants in workers' compensation claims where "the parties did not dispute claimant's entitlement to attorney's fees; [but] they dispute the fees' reasonableness." More importantly, addressing what the board must consider when determining a reasonable attorney fee:

> To clarify our holding in *Bignell*, we hold that the Board must consider all of the factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney's fee. Those factors are virtually the same as the ones set out in *Bignell* and must guide the Board's analysis of the reasonableness of requested fees. Some factors mirror those set out in the Act, such as the amount involved and the results obtained. On remand, the Board must consider each factor and either make findings related to that factor or explain why that factor is not relevant. (Footnotes omitted.) (*Id*. at 798-99).

The specific Rule 1.5(a) factors to consider in awarding attorney fees in these cases include:

> (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;
> (3) the fee customarily charged in the locality for similar legal services;

(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 799).

> **AS 23.30.155. Payment of compensation.**
> . . . .
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
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> . . . .
>
> (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. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.

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

A controversion notice must be filed "in good faith" to protect an employer from a penalty under AS 23.30.155(e) or to avoid referral to the Division of Insurance under AS 23.30.155(o). *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on a responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." See also 3 A. Larson, *Larson's Workmen's Compensation Law* § 83.41(b)(2) (1990) ("Generally a failure to pay because of a good faith belief that no payment is due will not warrant a penalty."). "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* at 358.

> **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 23.30.395. Definitions. In this chapter,**
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> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
>
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;
>
> (29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition;

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

"The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment." *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974). An award

of compensation must be supported by a finding the claimant suffered a decrease in earning capacity due to a work-connected injury or illness. *Id*.

The Alaska Supreme Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012) said, "'Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary.' We therefore examine whether the employer rebutted the presumption." (Id. at 573).

An employer may rebut the continuing presumption of compensability and disability and gain a "counter-presumption" by producing substantial evidence that the date of medical stability has been reached. *Lowe's* at 8. Once an employer produces substantial evidence to overcome the presumption in favor of TTD, the employee must prove all elements of the TTD claim by a preponderance of the evidence. However, if the employer raised the medical stability counter-presumption, "the claimant must first produce clear and convincing evidence" he has not reached medical stability. *Id*. at 9. One way an Employee rebuts the counter-presumption with clear and convincing evidence is by asking his treating physician to offer an opinion on "whether or not further objectively measurable improvement is expected." Municipality of Anchorage v. Leigh, 823 P.2d 1241, 1246 (Alaska 1992). The 45 day provision in AS 23.30.395(28) merely signals "when that proof is necessary." *Id.*

In *Vetter*, the Alaska Supreme Court stated:

> The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability, or more precisely, a decrease in earning capacity due to a work-connected injury or illness. *Id*. at 266.

Vetter further held where a claimant, through voluntary conduct unconnected with his or her injury, leaves the labor market, there is no compensable disability. Expanding on its ruling in *Vetter*, however, the Court, in *Cortay v. Silver Bay Logging*, 787 P.2d 103, 106 (Alaska 1990) noted the definition of "disability" in AS 23.30.395 says nothing about an employee's reasons for

leaving work. The issue is whether the claimant is able to work despite his injury, not why he is no longer working.

Interpreting both *Vetter* and *Cortay*, the Alaska Workers' Compensation Appeals Commission, in *Strong v. Chugach Electric Assoc. Inc.*, AWCAC Decision No. 128 (February 12, 2010), held where an employee's unemployment is because of his work injury, and his earning capacity is impaired, he is entitled to compensation. *Strong* set the legal standard as "unemployed but willing to work and making reasonable efforts to return to work" when deciding if an unemployed injured worker's loss of earnings is due to a compensable disability or an otherwise non-compensable voluntary withdrawal from the work force. (*Id*. at 20).

ANALYSIS

1) Was Employer's October 17, 2018 controversion frivolous and unfair?

Employee contends Employer's October 17, 2018 controversion is frivolous or unfair for two reasons. First, Employee maintains the controversion was based on Dr. Bauer's August 24, 2018 EME report, which Employee argues merely "parrots" Dr. Bauer's January 25, 2018 EME report that was not considered in *Cavitt II*. Employee's argument is not well taken because *Cavitt II* specifically stated Dr. Bauer's January 25, 2018 EME report was not being stricken from the record, and that it could be considered at future hearings if Employer produced Dr. Bauer for deposition. Dr. Bauer was deposed on June 6, 2019, and Employee was able to cross-examine him on both the January 25th and August 24th reports. Both reports are admissible. In his August 24, 2018 report Dr. Bauer clearly discloses he is including reviews of Employee's medical records from his April 26, 2017 and January 25, 2018 reports, but he also dedicates several pages to his review of more recent medical records. Particularly, when Employee's doctor complimented Dr. Bauer on his January 25, 2018 report, it was not unfair or frivolous to include portions of that report in a subsequent report.

Employee's second argument is the controversion is unfair or frivolous because Dr. Bauer's August 24, 2018 opinion that Employee is medically stable is wrong. However, under *Harp*, the fact a controversion relied on a medical opinion later found to be wrong does not mean the

controversion was unfair or in bad faith. As *Harp* stated, "In circumstances where there is reliance by the insurer on a responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." Dr. Bauer first found Employee to be medically stable as of the January 25, 2018 evaluation, and he did not change that date when he again saw Employee on August 24th. Given Employee's physician, Dr. Thomas, complimented Dr. Bauer's January 25, 2018 report, Dr. Bauer's opinion on medical stability cannot be considered an irresponsible opinion, and it is not unfair or frivolous.

2) Is Employee entitled to TTD after August 24 2018, as well as a penalty and interest?

Employee contends he was not medically stable as of August 24, 2018, and, therefore, he should have continued to receive TTD rather than the reemployment stipend under AS 23.30.041(k). He also contends he is entitled to a penalty and interest on the resulting underpayment. Medical stability is an issue to which the presumption of compensability and the counter-presumption apply.

Under *Runstrom*, once an employee is disabled, the disability is presumed to continue. As Employee was disabled prior to January 25, 2018, he has raised the presumption that his disability continues past that date. Under *Lowe's*, an employer can rebut the presumption of compensability and gain a counter-presumption by producing substantial evidence of medical stability. Employer did so with Dr. Bauer's January 25, 2018 and August 24, 2018 reports.

Because Employer raised the counter-presumption, Employee was required to prove he was not medically stable by clear and convincing evidence. He did not do so. Employee contends the range of motion measurements taken during his treatment, particularly after Dr. Bauer's August 24, 2018 evaluation improved function. In reviewing the reported range of motion measurements, it is important to note that all of the measurements fluctuated, and none showed a consistent trend. Additionally, with one exception they were all rounded to the nearest five degrees. Consequently, a change of five degrees is not particularly meaningful.

Although Employee focuses on the time after Dr. Bauer's August 24, 2018 evaluation, looking at a longer time period is illustrative. At the time of Dr. Bauer's January 25, 2018 evaluation,

Employee's elbow extension was exactly the same as it was on October 2, 2017 – five degrees. Over the same time period, his flexion increased slightly, from 130 degrees to 140 degrees. From November 15, 2017, through January 25, 2018, Employee's pronation varied between 55 and 60 degrees. And while his supination varied from 45 to 60 degrees, on January 25, 2018, it was 60 degrees, exactly the same as it had been on November 15, 2017. This is not clear and convincing evidence Employee's range of motion was improving prior to January 25, 2018, the date Dr. Bauer opined Employee was medically stable.

Between Dr. Bauer's January 25, 2018 and August 24, 2018 evaluations, Employee's extension ranged from zero to 20 degrees; on August 24, 2018, it was minus five degrees, which is a modest improvement from the five degrees measured on January 25, 2018. His flexion varied from 120 to 132 degrees, but on August 24, 2018, it was 130 degrees, down from 140 degrees on January 25th. His pronation varied from 55 to 75 degrees, but on August 24th, it was 60 degrees, the same as it was on January 25th. His supination measurement dropped as low as 36 degrees, but on August 24th, it too was 60 degrees, the same as it had been on January 25th. This is not clear and convincing evidence Employee's range of motion improved between Janaury 25, 2018 and August 24, 2018.

Employee contends focusing on the time after Dr. Bauer's August 24, 2018 evaluation proves he was not medically stable. During that time, Employee's extension was twice measured at zero degrees and once at 5 degrees. With the exception of one measurement on April 30, 2018, that is consistent with every measurement back to September 27, 2017. His flexion improved from 130 degrees on August 24, 2018 to 150 degrees on February 11, 2019, but by September 9, 2019, it was back to 130 degrees. His pronation was measured as 80 degrees, then 50 degrees, and again at 80 degrees. While that might be an improvement over the 60 degrees measured on August 24, 2018, it is not consistent. And his supination ranged from 20 to 45 degrees, down from the 60 degrees measured on August 24th. Additionally, this includes two lengthy time periods when Employee went without medical treatment. It is not clear and convincing evidence Employee's condition improved after January 25, 2018, the date Dr. Bauer found him medically stable.

While Employee focused on his range of motion as evidence he was not medically stable, *Lowe's* explained one way to rebut the counter-presumption is with an opinion from a treating physician that further objectively measurable improvement is expected. However, Employee did not do so. On September 4, 2018, the physical therapist noted Employee had made no real progress with conservative occupational therapy. On March 13, 2019, Dr. McAnally stated he expected a 50 to 70 percent improvement in Employee's pain using conservative treatment, but he did not say the treatment would increase Employee's physical capacities or that Employee was disabled by the pain. Employee did not take the medication prescribed by Dr. McAnally for over a month, then did not engage in the recommended physical therapy for 103 days. Nevertheless, by September 3, 2019, when he returned to Dr. McAnally's office, his pain had still decreased to half of what is was on March 13th. Without an opinion that further objectively measurable improvement is expected, treatment to reduce ongoing pain, such as recommended by Dr. McAnally, is palliative care and is not clear and convincing evidence Employee was not medically stable on January 25, 2018.

Employee has not shown he was not medically stable after August 24, 2018, and he is not entitled to TTD after that date. Because he will not be awarded further TTD, he is likewise not entitled to a penalty or interest.

3) Is Employee entitled to an award of attorney fees and costs?

Attorney fees may be awarded under AS 23.30.145(a) only on the amount of compensation controverted and awarded. This decision does not award Employee any compensation, and attorney fees cannot be awarded under AS 23.30.145(a).

Attorney fees may be awarded under AS 23.30.145(b) when an employer resists payment of compensation, and an attorney is successful in prosecuting the employee's claim. Employee's attorney was not successful in prosecuting Employee's claim. Employee's claim for attorney fees and costs will be denied.

CONCLUSIONS OF LAW

1) Employer's October 17, 2018 controversion was neither frivolous nor unfair.
2) Employee is not entitled to TTD after August 24 2018, or to a penalty and interest.
3) Employee is not entitled to an award of attorney fees and costs.

ORDER

1) Employee's April 4, 2019 claim is denied.

Dated in Anchorage, Alaska on May 29, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Sara Faulkner, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of KIEL L. CAVITT, employee / claimant v. D & D SERVICES LLC d/b/a NOVUS AUTO, employer; OHIO CASUALTY INSURANCE COMPANY, insurer / defendants; Case No. 201513001; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by Certified U.S. Mail, postage prepaid, on May 29, 2020.

/s/
Nenita Farmer, Office Assistant