ALASKA WORKERS' COMPENSATION BOARD

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

STEVEN HIBORIK, Employee, Claimant, v. WESTSIDE FLOORING, LLC, Employer, and AMERICAN FIRE AND CASUALTY COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201911330 AWCB Decision No. 20-0074 Filed with AWCB Anchorage, Alaska on August 31, 2020

Steven Hiborik's (Employee) August 30, 2019 claim was heard on July 30, 2020, in Anchorage, Alaska, a date selected on May 22, 2020. An April 30, 2020 hearing request gave rise to this hearing. Attorney Elliott Dennis appeared by telephone and represented Employee who appeared by telephone and testified. Attorney Adam Sadoski appeared and represented Westside Flooring, LLC, and its insurer (Employer). The panel declined to order Employer to present its adjuster to testify at hearing at Employee's request, because Employee had not subpoenaed her to compel it. This decision examines the oral order and decides Employee's claim on its merits. The record remained open to receive Employee's attorney fee and cost affidavit and Employer's response, and closed on August 7, 2020.

ISSUES

At hearing, Employee sought to call Employer's adjuster, whom he listed on his witness list but did not subpoena; she was not present at hearing. In his closing argument, Employee said he wanted to ask her why she paid him only the minimal temporary total disability (TTD) rate.

Employer objected to Employee calling the adjuster because she was a party witness and not subpoenaed. The panel declined to force Employer to make the adjuster available for examination.

1) Was the oral order declining to require Employer to present its adjuster for examination correct?

Employee contends he is entitled to a compensation rate adjustment for TTD benefits.

Employer contends Employee failed to produce any reliable evidence showing his prior earnings were similar to his earnings at the time of his work injury. Similarly, it contends he failed to show he would have continued to work for Employer after the work injury or for any other employer during the time he remains disabled from his work injury.

2) Is Employee entitled to a compensation rate adjustment?

Employee contends Employer has not properly resolved a Medicaid lien; he seeks an order requiring Employer to pay medical providers according to the Alaska Medical Fee Schedule.

Employer contends it has reached out to Employee's medical providers and asked if they sought "additional amounts" from the fee schedule versus what they have been paid already by Medicaid. If providers seek the increased amount, Employer is paying the difference and then reimbursing Medicaid for what it paid.

3) Is Employee entitled to an award regarding medical care?

Employee contends he is entitled to transportation expenses related to his medical care. He concedes he did not file a transportation log.

Employer did not comment on the transportation request.

4) Is Employee entitled to past transportation expenses for his medical care?

Employee contends he is entitled to late-filing and late-payment penalties, and interest. He contends these apply to all his benefits.

Employer contends it has already paid penalties and interest in accordance with the Act.

5) Is Employee entitled to "penalties" and interest awards?

Employee contends he is entitled to an attorney fee and cost award. He contends his attorney provided valuable services and prevailed on the main issues in his claim and he seeks both statutory minimum fees and actual fees on all benefits awarded.

Employer concedes Employee is entitled to some attorney fees. However, it objects to his claim for both statutory minimum and actual fees on the same benefits, calling this "preposterous."

6) Is Employee entitled to an attorney fee and cost award?

FINDINGS OF FACT

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

1) In or around 2015, Employee developed bilateral hip problems from using "knee kickers" to install carpet and generally being "abusive" to his body. (Employee, January 23, 2020 record).

2) On December 3, 2015, Employee applied for Social Security disability benefits. He said, "I am not sure if my earnings as shown on my Social Security statement are correct, or I do not have a Social Security statement." Employee reported no self-employment from 2014 through 2016. He "estimated" $54,000 in wages for 2014 from Chinook Roofing and $8,000 in 2015. Employee gave as reasons for his total disability: "Arthritis, Degenerative Disc Disease, Sciatica, Bulging Disc, Carpal Tunnel Syndrome and Blind-Left Eye." He reported difficulty sitting, standing and walking for long periods, bending, kneeling, getting up from sitting, hand

manipulation, repetitive motion and grasping, and had balance problems. (Application Summary for Disability Insurance Benefits, December 3, 2015).

3) In April 2017, Employee had right hip surgery followed by left hip surgery in July. He had a good result for the right hip but the left hip needed additional surgery in July 2017. (Employee, January 23, 2020 record).

4) The 2019 minimum compensation rate under AS 23.30.172(a) is $266, which is 22 percent of $1,211, the maximum compensation rate that year. (Bulletin No. 18-05, December 21, 2018).

5) By April 2019, Employee was looking for work and answered an online advertisement to work for Employer. The parties agreed Employee would be hired as an hourly worker and paid "under the table" partly because he could not carry heavy weights given his left hip issues but mostly because he had just had his toes cut off and was not cleared to return to work though he felt able. He needed the money because he had spent nearly three years going through hip and toe surgeries. For Employer, Employee worked 10 to 12 hours a day, six and sometimes seven days a week; he would text his hours to Employer's owner, Ross Walther, who would pay him weekly on Fridays. Employee's last paycheck before his work injury was $1,300 for one week working for Employer. (Employee, January 23, 2020 record).

6) On June 3, 2019, Employee, while working for Employer, fell off a portable classroom roof in Wasilla, Alaska and was seriously injured. Employer was reroofing, painting and installing new carpet in the portables. (Employee's Hearing Brief, January 15, 2020; Hearing Brief of Westside Flooring, LLC and Liberty Mutual, January 17, 2020).

7) Dan Baker, Employer's "main guy" present at the time of injury and Walther knew immediately that Employee had fallen off the roof because co-worker "Nadia" screamed and Baker immediately called Walther. Within two weeks after the injury, Walther visited him in the hospital repeatedly. (Employee, January 23, 2020 record).

8) Walther conceded that on the injury date, Baker called from the portables and told him that Employee had fallen off the roof. He never filed an injury report for Employee because he did not think he should have been on the roof. (Walther, January 23, 2020 record).

9) On July 10, 2019, Employee completed and filed an injury report following surgery and intensive care. "Nursing" at Alaska Regional Hospital where Employee had been treated sent a facsimile to the Department of Labor, Workers' Compensation Division, to which it attached Employee's 07-6100 injury report setting forth in detail his June 3, 2019 work injury and

identifying Employer by name. (Employee, January 23, 2020 record; Fax Transmittal Sheet; Employee Report of Occupational Injury or Illness to Employer, July 10, 2019).

10) Employee was hospitalized from the injury until July 11, 2019. Concerns about infections re-hospitalized him on July 19, 2019 through June 24, 2019. (Employee, January 23, 2020 record).

11) Employer hired him to work at school portables in Wasilla doing "everything" including painting and flooring. On the injury date, prior to his fall, Employee had completed Employer's project on an eight-plex in Palmer. (Employee, January 23, 2020 record).

12) From Employer's perspective, it hired Employee and another man "for cash"; their work was going to be a "onesie type deal" and they were "down on their luck" and needed help. Walther said he hired Employee "for this one job." However, Employee "did a pretty good job" on the first project so Walther hired him for additional work. Nevertheless, due to drama he was going through with Employee and his girlfriend's issues, Walther determined he was not going to hire Employee again. He paid him $25 per hour and did not dispute the hours Employee said he worked per week while working for him. No one on the school portables job got paid overtime. (Walther, January 23, 2020 record).

13) On August 30, 2019, Employee claimed TTD benefits, a compensation rate adjustment, attorney fees and costs, medical and related transportation costs, a late-payment penalty and interest. He described his work injury as "fell descending from roof, broke left hip/ leg and crushed lung." Employee filed his claim because "no benefits paid by Workers' Compensation insurer." Attached to Employee's claim was a compensation rate adjustment analysis and request. Relevant statements therein include:

> . . . However the information set forth below was reported to the attorney and is presented here as justification for employee's request that temporary total disability benefits be based upon this information, as opposed to the lack of earnings information pertaining to 2017 and 2018.
>
> 1. Mr. Steven Hiborik commenced working for employer between the first and middle of April 2019.
> 2. The hourly rate he and the employer agreed upon was $25 per hour.
> 3. He worked a minimum of 55 hours per week, when he started work with the employer and this continued until his date of injury on June 3, 2019.
> 4. The employer paid Mr. Hiborik in cash every Friday, as per their agreement, until his June 3, 2019 injury.

> 5. Because of the severity of the injury, employee was hospitalized from June 3, 2019 until July 16, 2019 and then re-hospitalized for another week.
> 6. Employee does not have documented earnings for 2017 and 2018 because he was recovering from significant medical treatment related to his hips and amputation of toes brought about by a frostbite injury. (Claim for Workers' Compensation Benefits, attachment, August 30, 2019).

14) Neither Employer nor its insurer ever answered Employee's claim. (Agency file).

15) Employer went out of business in September 2019. (Walther, January 23, 2020 record).

16) On September 20, 2019, Dennis wrote to the insurance adjuster and attached Employee's September 18, 2019 affidavit, to justify a rate adjustment "pursuant to AS 23.30.220(10)." (Letter, September 20, 2019).

17) On September 23, 2019, Employee filed and served his affidavit stating his hiring agreement with Employer. He and Employer agreed on a $25 per hour rate, "which was to increase to $38 per hour within a few months." It also stated his 2016 and 2017 earnings were "not documented" because he worked "off the books" for "various people" doing "construction work." Employee thought he was not "able-bodied" and consequently in 2016 and 2017 was not employable by "aboveboard construction companies." (Affidavit of Steven Hiborik, September 18, 2019).

18) On October 1, 2019, Employer denied all benefits. (Controversion Notice, October 1, 2019).

19) On January 16, 2020, Employee timely filed and served affidavits setting forth Dennis' billing at $375 per hour beginning August 22, 2019, through December 31, 2019, and at $395 per hour beginning January 1, 2020, and continuing, and his paralegal's rate at $175 per hour. (Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees, and Costs; Affidavit for Award of Paralegal Fees Performed by Shona Embs, January 16, 2020).

20) On February 20, 2020, *Hiborik v. Westside Flooring, LLC*, AWCB Decision No. 20-0007 (February 20, 2020) (*Hiborik I*), held Employee's June 3, 2019 injury arose out of and in the course of employment with Employer and was not excluded from coverage under the Act. (*Hiborik I*).

21) On March 9, 2020, Employer petitioned the appeals commission to review *Hiborik I* solely on grounds the designated chair had a conflict of interest, should have recused himself and when he declined, the remaining panel members should have disqualified him from hearing the case.

On the same date, Employer also asked the commission to stay *Hiborik I*. (Petition for Review; Motion and Memorandum for Stay, March 9, 2020).

22) On April 29, 2020, the commission found *Hiborik I* was not accompanied "by an order to pay benefits, so there is no compensation order to be stayed." The commission further noted the workers' compensation system in Alaska is voluntary, "meaning that once an injury is found to be within the course and scope of employment there is an automatic duty on the part of the employer to pay benefits." The commission affirmed *Hiborik I*. (Order on Motion for Stay; Order on Petition for Review; AWCAC Appeal No. 20-005 (April 29, 2020) (*Hiborik II*)).

23) On July 9, 2020, Employer withdrew its controversion. (Employer's Notice of Withdrawal of Controversions, July 9, 2020).

24) On July 23, 2020, Employee filed a witness list including adjuster Stephanie Straub whom he wanted to ask about "absence of payments" to Employee and his medical providers after *Hiborik I* and *II* ruled in his favor. (Employee's Witness List, July 23, 2020).

25) On July 24, 2020, Dennis' affidavit set forth 11 hours attorney time ($4,345) and .5 hours paralegal time ($87.50) related to Bryan Haughom, M.D.'s deposition. (Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees, and Costs, July 24, 2020).

26) On July 28, 2020, Employer mailed Employee two checks for penalties. One was $881.60 as a 20 percent late-reporting penalty on TTD benefits and the other was $2,451 as a 25 percent late-payment penalty on TTD benefits. (Record).

27) At hearing on July 30, 2020, the parties stipulated the board could consider up-to-date payment data Employer filed after the evidence-filing deadline. They also stipulated Employee is entitled to a vocational reemployment benefits eligibility evaluation. (Record).

28) Employee has 12 years' high school education including vocational technical training for carpentry. For three years, he built houses including framing, laboring, roofing, insulation and did "everything from top to bottom" it takes to build a house, except electrical work. Employee eventually obtained his government equivalency diploma. Growing up, he worked for his uncle in construction doing "every phase of roofing there is." Following high school, he went to work as a framing carpenter for a few years and began flooring; he did all flooring installations. He has been a carpenter, roofer and flooring installer for approximately 35 years including stints in Pennsylvania, Montana, Washington and Alaska. He had his own business in Montana and Washington before coming to Alaska; his main business was flooring but if it was slow he would

roof. Employee came to Alaska in 2007 and began working for Eastside Carpet, owned by Ross Walther. He worked for Eastside Carpet for two years on base and in Alaska villages. While working for Eastside Carpet, Employee earned the standard union rate, $45 per hour. Then, Employee opened his own business Hiborik Carpet & Tile; he ran this business for several years until his hips started bothering him from using a knee-kicker. He had both hips replaced. Employee modified his work to account for hip pain; he tried roofing but was unable to continue so he applied for Social Security disability benefits; he stopped working in January 2015 and eventually had bilateral hip replacements in 2017. Right hip surgery occurred first followed by left hip surgery; the left hip required two operations. His recovery was slow; by 2018, Employee still had issues with his left hip. Nevertheless, he started working in late 2018 or 2019, cutting down trees and began working for Employer in April 2019. He had no full-time work in 2018 because he was still recovering from hip surgeries. In January 2019, Employee frost-bit his feet and had all his toes amputated as well as one-half a finger. Employee learned how to walk without toes so he could return to work and got "good at it." He is not a good record keeper; Employee has no records for his past earnings because he moved numerous times from state to state, traveled extensively to villages and military bases intrastate, had no way to store his documents and threw them away. Employee lives in a modified camper and has no public utilities. (Employee).

29) When he went to work for Employer in April 2019, he received no overtime pay but worked nearly every day from mid-April until his work injury on June 3, 2019; he worked 10 or 12 hours per day and sometimes longer. Employee sent text messages to Walther reporting his hours worked, but a woman stole his cell phone and he no longer has these records. He started out in the construction trades as a laborer earning $15 to $16 per hour. Employee has regularly earned $31 per hour while working as a carpenter and $35 to $45 per hour as a flooring person including when he worked for Walther previously. He has also done considerable painting. (Employee).

30) On the injury date, Employee was remodeling portables for a school district; he painted, roofed and did electrical work and carpentry. He said Employer agreed to increase his rate to $40 per hour after 30 days but this never happened. Employee did not complain about the lower wage because he just wanted to work having been off for a long time due to his preexisting hip and foot problems. In Employee's opinion, had he not fallen off the roof on June 3, 2019, he

would still be working for Employer, whom he said planned to open another store. Employee implied that in the past he worked for many companies "on the books and off the books" and said he usually became supervisor. In his view, if he did not work for Walther, he is positive he would have worked for someone else because he has always been able to find work doing something. (Employee).

31) Employee concedes he had no earning records or business financials from his own business. H&R Block should have his business financials locally. He has not attempted to get them from any union, former employer, H&R Block, Social Security, the Internal Revenue Service or any other source. He did not have any witnesses to support his earning history or future. He denied having worked for anyone either over- or under-the-table since his work injury. When asked about surveillance video showing him cutting firewood, Employee said it was for his personal use and he sold one chord to someone who had seen him cutting the wood and asked for some. That person paid Employee $150 for it. He also supervised a flooring project but hired others do the work; he received $2,000 and split it with the workers, retaining $1,000 total for himself. (Employee).

32) Employee said he had minimal earnings in 2016 through 2018 as he recovered from hip, toe and finger issues. In 2014 or 2015, Employee said he worked for Chugiak Roofing for 52 weeks at $25 per hour and earned $800 to $1,000 per week. In 2014, he worked "under the table" and said he earned "over $30,000" but that employer owed him an additional $16,000, which he never received. Employee could not recall his 2013 earnings. Between 2011 through 2013, Employee said his net self-employment earnings were from $80,000 to $100,000. The most Employee said he ever earned was $130,000 net, running his own businesses in Montana and Pennsylvania. He never had to take time off for any reason while he was healthy and working. (Employee).

33) Employee tried to call adjuster Straub at hearing, but Employer objected on grounds she was a "party witness" over which Employee had no control. Employee admitted he had not subpoenaed Straub, who was not physically present in the hearing room; it was not disclosed if Straub was available to testify by telephone. The designated chair declined to order Employer to make Straub available because Employee had not subpoenaed her. (Record).

34) Employee claims both statutory minimum fees and actual fees on the same benefits. Dennis has been practicing law in Alaska for about 43 years on "both sides," handling personal

injury and workers' compensation cases. Addressing the board's attorney fee regulation as well as Rules of Professional Conduct, Rule 1.5, Dennis stated: (1) this case was somewhat novel because he has never seen an employer who had insurance coverage intentionally fail to file an injury report; (2) this case has been time consuming and prevented him from accepting other cases; (3) his hourly rate is commensurate with rates other people charge locally; (4) the amount involved is significant, especially for Employee's medical care for which Employer now has to pay; (5) Employee has dire financial circumstances and needed help quickly, which Dennis provided; (6) Dennis believes he is a competent lawyer; (7) Dennis' attorney fees in this case are contingent and (8) this case presented a risk that he might receive nothing, and he had difficulty obtaining discovery. (Dennis).

35) Dennis contends his statutory attorney fees were triggered by Employer's failure to pay disability benefits and a penalty on a controversion-in-fact. Under AS 23.30.145(a), he contends he is entitled to 10 percent on all benefits resulting from his work including TTD benefits and medical expenses. In addition, he seeks actual attorney's fees under AS 23.30.145(b) for the insurer's failure to properly evaluate the case and accept it as a work-related injury. Employer presented no evidence in opposition to Dennis' statements, they are credible and accepted as fact; it concedes it paid Dennis no attorney fees or costs for his board work. (Dennis; record).

36) Employee concedes he has no past earning documentation and much past work was done "under the table." Employer paid him TTD at $266 per week, the minimum rate under the law, which he contends is not a fair rate. Rather, Employee contends he is entitled to a rate adjustment based on the undisputed evidence attached to his un-answered August 30, 2019 claim and the identical testimony adduced at hearing that Employer paid him $25 per hour for 55 hours per week, which totals $1,375 in gross weekly wages. Employee wanted to ask adjuster Straub her basis for paying him the minimum rate. He contends AS 23.30.220(a)(4) does not provide a fair and reasonable basis for calculating his TTD rate when there is no evidence of his earnings in the two years prior to his injury. Employee relies on his actual earnings when injured, long history in the building trades and Department of Labor statistics for earnings in the trades to support his position. Though $25 per hour is low for the building trades, Employee contends it is an appropriate basis for calculating his TTD rate in this instance. Furthermore, he contends Employer never answered his claim and the statements made therein are deemed admitted. He

contends his TTD rate should be based upon $1,375 per week, which results in an $861.29 weekly rate. (Record).

37) Employee also contends Employer should be required to pay his medical providers pursuant to the Alaska Medical Fee Schedule and it is not appropriate for Employer to contact a medical provider to see if they want the difference between what Medicaid paid them and the amount payable under the fee schedule. He contends Medicaid, *i.e.*, taxpayers, should not have to pay for work-related medical bills. He contends a "cleaner approach" is to require direct payment to the providers, who must then reimburse Medicaid. (Record).

38) Employee contends Employer conceded penalties are due for late notice and payment. He contends penalties are due on both TTD benefits and medical expenses; the penalty should be paid directly to medical providers who were not timely paid. He requests interest on all benefits, and attorney fees and costs as set forth in affidavits and Dennis' testimony. (Record).

39) Employer contends the injury was reported to the board electronically "once the carrier was actually notified by the employer of the injury." It contends a failure to answer specific claims does not mean they are "admitted." Employer contends the admitted "statements" referred to in the applicable regulation refers only to the "statement" that an injury occurred; it does not mean Employer admits Employee's right to all benefits requested. It contends the money Employee earned on the injury date does not prove he would have continued to make that much money into the future. Employer contends Employee could have easily documented his past earnings and future prospects to support a claim for a higher TTD rate. It contends he failed to obtain documentary or testimonial evidence from former employers or co-workers. Rather, it contends Employee simply says "trust him." Employer contends he has the burden to prove his earnings are not fairly calculable under §220(a)(4). It contends Employee's method is not fair, efficient or predictable in calculating a TTD rate. Further, it contends the available evidence shows Employee would not have continued to work for Employer because the business no longer exists and due to personal disagreements with Employee and co-workers. (Record).

40) Employer contends the recent *Cavitt* Alaska Supreme Court decision states an injured worker does not have standing to make a claim for benefits on a medical provider's behalf and seek more money than the provider has already accepted. Employer contends the method it is using to compensate medical providers and Medicaid is the best way to proceed as everyone is getting paid directly from the carrier. (Record).

41) Employer contends Employee's claim for actual attorney fees on top of statutory minimum attorney fees is "preposterous." It contends he can get either statutory minimum or actual attorney fees but not both. (Record).

42) In rebuttal, Employee contends if there is a presumption §220(a)(4) applies, he has rebutted it. Since there is no reliable earnings information for 2017 or 2018, he contends there is no basis for paying him TTD benefits under §220(a)(4). He contends if there is a problem calculating a TTD rate, and using §220(a)(4) does not yield a fair result, it makes sense to go to §220(a)(5). He contends the only and "best evidence" is Employee's testimony. (Record).

43) Gross weekly earnings totaling $1,375 on the injury date, for a single person with only himself as a dependent results in an $861.29 weekly TTD rate. (Online Benefit Calculator).

44) Medicaid is a "government agency." (Experience; judgment).

45) To date, Employee has incurred over $1 million in work-related medical expenses, not adjusted to the medical fee schedule. (Agency file).

46) Injured workers have sources from which to obtain past employment and earning evidence, including the Internal Revenue Service; Social Security Administration; State of Alaska, Department of Labor; unions; employers; bank records; and tax preparers. Evidence injured claimants can use to predict their future employment and earning potential includes labor statistics and similarly situated workers in the same field, who can testify about employment and wage availability after the claimant's injury. (Experience; judgment).

47) On July 30, 2020, Employee timely supplemented his itemized attorney fees and costs. His requested total for actual attorney fees and costs is $78,597.16. This includes $1,500 for Dr. Haughom's deposition witness fee, $571.20 for court reporter services for it and 2.8 attorney hours ($1,106) related to the deposition. He contends Dr. Haughom's deposition was reasonable and necessary to establish the June 3, 2019 work injury was still the substantial cause of Employee's need for treatment and disability; he had not reached medical stability; he needs ongoing medical treatment; he is physically impaired and will have difficulty with manual labor in the future; and because Employee underwent an employer's medical evaluation (EME) on July 7, 2020, and since Employee had no report, Dr. Haughom's deposition would protect Employee against any surprise medical defense at hearing; it would support a vocational reemployment eligibility evaluation and prove the medical necessity for Employee's ongoing medical care. (Supplemental Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees,

and Costs; Supplemental Affidavit for Award of Paralegal Fees Performed by Shona Embs, July 30, 2020).

48) On August 5, 2020, Employer timely objected to Employee's requested attorney fees and costs. It contends Employee should receive no attorney fees or costs for the July 30, 2020 hearing unless he prevails on some issue. Employer also objects to all attorney fees and costs related to Dr. Haughom's deposition; it contends this deposition was unreasonable and unnecessary and occurred after Employer had withdrawn its controversion. (Employer's Opposition to Employee's Attorney's Fees and Costs, August 5, 2020).

49) The panel considered no evidence or argument filed by either party after Employer filed its August 5, 2020 opposition. (Judgment).

PRINCIPLES OF LAW

The board may base its decision on not only direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). The "administrative adjudicators' expertise gained from repeated exposure to information in adjudications can support conclusions made from the evidence presented in a specific case." *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 780, 801 (Alaska 2019).

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
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> > (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
> . . . .
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> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses. . . .
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> **AS 23.30.020. Chapter part of contract of hire**. This chapter constitutes part of every contract of hire, express or implied, and every contract of hire shall be construed as an agreement on the part of the employer to pay and on the part of

> the employee to accept compensation in the manner provided in this chapter for all personal injuries sustained.
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> **AS 23.30.030. Required policy provisions**. A policy of a company insuring the payment of compensation under this chapter is considered to contain the provisions set out in this section.
> . . . .
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> (2) The policy is made subject to . . . this chapter and its provisions relative to the liability of the insured employer to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . the acceptance of the liability by the insured employer, the adjustment, trial, and adjudication of claims for the physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . compensation . . . and the liability of the insurer to pay the same are considered a part of this policy contract.
> . . . .
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> (4) The insurer will promptly pay to the person entitled to them the benefits conferred by this chapter, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . and all installments of compensation . . . awarded . . . under this chapter. . . . The policy is a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation . . . and is enforceable in the name of that person. . . .

In *Sherrod v. Municipality of Anchorage*, 803 P.2d 874, 875 (Alaska 1990), the Alaska Supreme Court cited §030(4) and stated the employer was "directly liable to health-care providers for treatment of work-related injuries."

> **AS 23.30.070. Report of injury to division.** (a) Within 10 days from the date the employer has knowledge of an injury . . . alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall file with the division a report. . . .
> . . . .
>
> (f) An employer who fails or refuses to file a report required of the employer by this section or who fails or refuses to file the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the

> legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.

In *Christie v. Rainbow King Lodge*, AWCB Decision No. 94-0113 (May 12, 1994), the claimant was injured in a plane crash while working for his employer. He completed an injury report within five days but, for reasons never explained, his employer filed the injury report with the division 54 days late. *Christie* ordered the employer to pay a penalty under §070(a).

> **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. . . .

The term "compensation" includes medical benefits. *Williams v. Safeway Stores*, 525 P.2d 1087 (Alaska 1974). In *Humphrey v. Lowe's HIW, Inc.*, AWCB Decision No. 15-0097 (August 13, 2015), an injured worker incurred medical expenses totaling $182,259.76 at University Medical Center in Fairbanks for his work injury. Medicaid paid $5,144.40 of the total charges.

> **AS 23.30.097. Fees for medical treatment and services**. (a) All fees and other charges for medical treatment or service are subject to regulation by the board consistent with this section. . . .
> . . . .
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> d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later. . . .

In *Williams v. Abood*, 53 P.3d 134 (Alaska 2002), the court held the compensability presumption does not apply to a compensation rate adjustment claim and held the party seeking a deviation from the statutory rate calculation must present substantial evidence that past wages will lead to an irrational workers' compensation award. *Abood* further held the board must use the correct formula from §220(a) to calculate an injured worker's gross weekly earnings unless there is substantial evidence showing that past wage levels will lead to an irrational award.

> **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 finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009). Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the fact-finders that the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71 (Alaska 1964).

> **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.
>
> (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 reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered. . . .

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the court stated the §120 presumption does not apply to attorney fee amounts or reasonableness. It further held the board must consider all factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee and either make findings related to each factor or explain why that factor is not relevant. *Rusch* held attorney fee reasonableness is not a factual finding but is a discretionary exercise. *State of Alaska, Department of Corrections v. Wozniak*, AWCAC Decision No. 276 (March 26, 2020), held that if an award under §145(a) and (b) is reasonable, then an award of statutory fees on benefits awarded divided between actual fees through time of hearing and fees on future benefits is also reasonable. Attorney fees in workers'

compensation cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990). Fees incurred on lost, minor issues will not be reduced if the employee prevails on primary issues. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011).

> **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. . . .
> . . . .
>
> (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.
> . . . .
> (p) An employer shall pay interest on compensation that is not paid when due. . . .

Moretz v. O'Neill Investigations, 783 P.2d 764, 766 (Alaska 1989), required a workers' compensation insurer to pay interest to the injured worker on medical benefits paid by a third-party insurer. *Moretz* rejected the carrier's claim that the injured worker would be "unjustly enriched" if he were to receive interest on third-party payments because he did not make them; the court decided if anyone had been "unjustly enriched" it was the carrier by "delaying payment" of the injured worker's medical benefits. This case was decided before the legislature adopted §155(p) and the board implemented 8 AAC 45.142(b). The penalty provision in AS 23.30.155(e) applies to medical benefits. *Childs v. Copper Valley Electric Association*, 860 P.2d 1184 (Alaska 1993).

Former §220, the 1982 rate calculation statute that caused considerable compensation rate litigation and resultant decisional law, stated in relevant part:

> **AS 23.30.220. Determination of average weekly wage**. Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation, and is determined as follows;

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

In *Johnson RCA/OMS*, 681 P.2d 905 (Alaska 1984), the Alaska Supreme Court construed the 1982 statute, but did not decide the case on constitutional grounds. *Johnson*'s facts were:

> Johnson's salary for the final year of his military service, 1979, was $20,166.12. He asserted that his salary for the approximately 40 weeks that he worked for RCA-OMS was some $42,000.00, most of it earned after his injury. The Board, using subsection (2) of AS 23.30.220, determined Johnson's average weekly wage according to his military rather than civilian salary. So computed, his average weekly wage was $387.81, resulting in benefits of $258.54 per week. By contrast, if subsection (3) had been used, his average weekly wage would apparently have been approximately $1,000.00 with benefits two-thirds of that. (*Id*. at 906).

Johnson held the board was required to use an alternate sub-section of §220 in cases like Johnson's. Though it did not decide the case on constitutional grounds, *Johnson* also held for the first time:

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

Johnson derived this from Professor Larson's workers' compensation treatise where he said:

> The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of the impact of probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is

> necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis. (*Id*. at 907; citing 2 A. Larson, *The Law of Workmen's Compensation* §60.11(d), at 10-564 (1983)).

AS 23.30.220 was amended in 1983 (effective January 1, 1984) to read in pertinent part:

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

Section 220 was amended again in 1988 to take into account workers who were "absent from the labor market" for a time; this generated additional litigation. The seminal case resulting from this change is *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). *Gilmore* struck down §220 for the first time on constitutional, equal protection grounds:

> Gilmore started work for Klukwan on June 12, 1989 and was earning average spendable weekly wages of approximately $850. However, for the calendar years 1987 and 1988 he worked for a total of only thirty-nine weeks. He claims that for twenty-two of the thirty-nine weeks he was in vocational training programs learning to be a motorcycle mechanic. He contends that he should have been considered 'absent from the labor market' within the meaning of section .220(a)(2) for these twenty-two weeks. If he is correct, he would be entitled to an alternative wage computation, for he would have been 'absent from the labor market' for at least eighteen months during the two years in question. (*Id*. at 924-925).

The board rejected Gilmore's claim and he appealed. The Alaska Supreme Court on its own motion asked for further briefing on whether §220 in effect at that time could pass constitutional muster. The court ruled it could not and struck down §220 "as applied" to Gilmore's case. The law in effect when Gilmore was injured said in relevant part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury;
>
> (2) if the employee was absent from the labor market for 18 months or more of the two calendar years preceding the injury, the board shall determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history, but compensation may not exceed the employee's gross weekly earnings at the time of injury; . . .

The court asked parties to consider two hypothetical examples in their additional briefing:

> Example A: Two workers work side-by-side for eleven and one half months in 1992, ending December 15th, as well as for the last seven months of 1991, beginning June 1st. During this period each worker performs the same work and earns the same wage. Worker # 1, however, did not work the first five months of 1991 or at all in 1990 because he was injured. Worker # 2, on the other hand, worked all of both 1991 and 1990. On December 15, 1992, both workers suffered the same injury in an on-the-job accident. Under AS 23.30.220(a)(2) the wage base for worker #1 will be only 7/24 of that of worker #2.
> Example B: Same facts as Example A except that there is a third worker doing the same work at the same wage who suffers the same injury on December 15, 1992. Worker #3, however, did not work during the first seven months of 1991 or at all in 1990 because he was injured. Worker #3 would be entitled to an alternative calculation under AS 23.30.220(a) and may be eligible for compensation benefits based on his current wage which would approximate the wage base of worker #2 and be nearly 3.4 times higher than that of worker #1 (who worked two months longer than worker #3 during 1991). (*Id*. at 925-926).

Based upon these facts and hypothetical situations, *Gilmore* set forth the standard for reviewing the constitutionality of §220 in effect at the time Johnson was injured:

> Article I, section 1 of the Alaska Constitution provides in part that 'all persons are equal and entitled to equal rights, opportunities, and protection under the law.' This clause may be more protective of individual rights than the federal equal protection clause (citation omitted). As our examples illustrate, the current statutory scheme clearly classifies injured employees based on differences in their prior work history. These classifications will often result in substantially different disability benefits for similarly situated employees. The question . . . is whether this unequal treatment is permissible under the Alaska Constitution. (*Id*. at 926).

Gilmore held the legislature's intent could be gleaned from the session laws, which said: "It is the intent of the legislature that AS 23.30 be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of AS 23.30." (*Id*.). This legislative intent has now been codified into current AS 23.30.001(1). *Gilmore* found these goals were "legitimate purposes" but also found, reflecting back on the *Johnson* decision:

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

Gilmore found:

> We . . . conclude that no substantial relationship exists between calculating a worker's weekly wage by dividing the worker's earnings over the last two calendar years by 100 regardless of whether the number reached reflects the worker's actual losses and the goals of fairly approximating a worker's probable future earning capacity and achieving a 'quick, efficient, fair, and predictable delivery of indemnity and medical benefits.'
>
> The benefit levels among injured workers based on section 220(a) bear no more than a coincidental relationship to the goal of compensating injured workers based on their actual losses. In any of the many situations in which a worker's past wage and time of employment do not accurately reflect the circumstances existing at the time of the injury, the formula will misrepresent the losses (footnote omitted). The means chosen for determining an injured worker's gross weekly wage therefore do not bear a substantial relationship to that goal. (*Id*. at 928).

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

> This efficiency is gained, however, at the sacrifice of fairness in result. The purpose of the Act, as expressed by the legislature, is to provide a 'quick, efficient, *fair*, and predictable delivery of indemnity and medical benefits.' The facts of the present case amply demonstrate the potential unfairness of a rigid application of the mechanical formula (footnote omitted). Under the section 220(a)(1) formula as applied by the Board, Gilmore received only the statutory

> minimum amount of compensation, despite his earning over seven and one-half times more per week at the time of injury.
>
> Efficiency in this area does not require unfairness. A quick, efficient, and predictable scheme for determining a worker's gross weekly earnings could be formulated without denying workers like Gilmore benefits commensurate with their actual losses (emphasis in original). (*Id*. at 928).

Gilmore found Alaska was the only state that did not provide a viable option to take into account periods of unemployment in the rate calculation scheme. *Id*. Consequently *Gilmore* held:

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

Gilmore noted in some cases the statute might work well and "may roughly approximate the employee's lost wages when the employee worked full time during the entire two-year period at the same job held at the time of injury" or "when the employee has consistently worked only at seasonal occupations," but it does not "account for any upward or downward change in the employee's earning capacity and punishes workers who have newly committed to full time employment." *Gilmore* further stated the "formula also fails entirely to take account of any change in the employee's earning capacity that occurred during the year of injury." *Gilmore* at 932 n. 6. Notably, *Gilmore* provided a sample "model statute," which the court said would probably not be struck down as unconstitutional:

> Section 19. Determination of Average Weekly Wage. Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute the compensation and shall be determined as follows:
> . . . .
>
> (d)(1) If at the time of the injury the wages are fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages (not

> including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the fifty-two weeks immediately preceding the injury.
>
> (2) If the employee has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed under the foregoing paragraph, taking the wages (not including overtime or premium pay) for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.
>
> (e) If at the time of injury the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees. . . . (*Id*. at 932 n. 15; citing the Council of State Governments' Draft Workmen's Compensation and Rehabilitation Law, quoted in 2 Arthur Larson, *The Law of Workmen's Compensation* §60.11(a)(1), at 10.606 n. 77 (1993)).

In *Thompson v. United Parcel Service*, 975 P.2d 684 (Alaska 1999), the Alaska Supreme Court explained *Gilmore* and declined to accept a "broad" view that *Gilmore* required the board to calculate TTD rates by determining what "was fair" to both parties. *Thompson* said, citing *Gilmore*: "We noted that 'section 220(a) may be applied constitutionally in a number of circumstances, for example, where an injured worker has had the same occupation for all of the past two calendar years.'" (*Id*. at 689). Thus, the first question under *Gilmore* is not whether an award calculated according to §220(a)(1) is "fair." Rather, "it is whether a worker's past employment history is an accurate predictor of losses due to injury." (*Id*.). *Thompson* addressed §220(a) that read in relevant part:

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

Thompson noted:

> In fact, a primary purpose of our workers' compensation laws is to predict accurately what wages would have been but for a worker's injury. In *Johnson v.*

> *RCA-OMS, Inc.* (footnote omitted) we explained that under past versions of the statute at issue here, the 'entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity' (footnote omitted). We reiterated this theme in *Gilmore* with regard to the 1988 version of the statute involved in this case when we quoted *Johnson* with approval (footnote omitted). (*Id*. at 689-90).

Thompson also said "'intentions as to employment in the future are relevant to a determination of future earning capacity' in determining proper compensatory awards." (*Id*. at 690). Following *Gilmore*, Alaska's legislature amended §220 effective 1995, amended it again slightly in 2000, and incorporated most aspects of the "model statute." The "Model Act" §220(a) took variations in work histories into account to predict lost earnings and compensate injured workers for their actual losses during periods of disability. The amended 2000 §220 said in relevant part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
>
> . . . .
>
> 4) If at the time of injury the
>
> A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing by 13 the employee's earnings, including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;
>
> B) employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding (1)-(3) of this subsection and (A) of the paragraph, the employee's gross weekly earnings are computed by determining the amount that the employee would have earned, including overtime or premium pay, had the employee been employed by the employer for 13 calendar weeks immediately preceding the injury and dividing this sum by 13;
>
> 5) If at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees; . . .

Dougan v. Aurora Electric, Inc., 50 P.3d 789 (Alaska 2002) stated when the legislature adopted the "model law," the *Gilmore* test was no longer applicable. (*Id*. at 797). *Dougan* held the law in effect at the time of Dougan's injury provided a variety of methods to calculate a TTD rate, while *Gilmore*'s version of §220 relied exclusively on the average wage earned during a period of over a year without providing an alternate approach if the result was unfair. (*Id*.). There has been relatively little litigation over TTD rates since 2000. The "Model Act" §220 was, however, amended in 2005 to its present form, which states in relevant part:

> **AS 23.30.220. Determination of spendable weekly wage.** (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
>
> . . . .
>
> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;
>
> (5) if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees; . . .

In *Circle De Lumber Company v. Humphrey*, 130 P.3d 941, 947-48 (Alaska 2006), an employer contended the board erred by setting a permanent disability rate based on "statistical wage rates" rather than on the injured worker's earnings history and finding the worker's earning patterns "were improving." *Circle De Lumber* affirmed and held the board did not err by considering statistical wage rates because it used this information in conjunction with the injured worker's individual earnings history and employment when making its permanent disability rate adjustment. The court further found the injured worker's "hopes" he would continue working were relevant to the board's rate calculation and to its finding that his wage earning capacity was improving.

Wilson v. Eastside Carpet Co., AWCAC Decision No. 106 (May 4, 2009), held an employer may presume that for an hourly worker §220(a)(4) will provide a spendable weekly wage fairly approximating the worker's wages at the time of injury in most cases. An hourly employee has the burden to challenge the compensation rate established under §220(a)(4) if some previous earnings were in self-employment and the employee contends they do not represent equivalent "wages" at the time of injury. The board "must look at the evidence and decide the facts in each case" when determining the spendable weekly wage. (*Id*. at 4). *Wilson* found the board could not have ascertained the wage equivalent from the worker's small self-employment record, and therefore was required to use §220(a)(5) in these circumstances. It stressed that §220(a)(5) applies "only in cases of previously self-employed hourly workers if the board finds the employee's wage equivalent cannot be determined from self-employment records and other evidence, so that a spendable weekly wage may be calculated under" §220(a)(4). (*Id*. at 4-5). *Wilson* further held though tax records may be used to prove reported income, the board is not limited to federal tax returns as proof of an employee's earnings. (*Id.*). Once an injured worker claims a compensation rate adjustment, "the board must conduct a broader inquiry" to obtain evidence sufficient to determine the spendable weekly wage. (*Id.*). The board may disbelieve an employee's testimony that he actually received more income than reported to the Internal Revenue Service and its decision must reflect its assessment of the employee's credibility. (*Id*. at 5).

Straight v. Johnston Construction & Roofing, LLC, AWCAC Decision No. 231 at 5 (November 22, 2016), held "while not including a fairness provision in AS 23.30.220(a), the Legislature codified a fairness provision applicable to the whole Act in AS 23.30.001." *Straight* further said §220(a)(5) in conjunction with §001 mandates looking to future earning capacity when deciding if an injured worker's compensation rate has been fairly determined "before it can be determined whether AS 23.30.220(a)(4) is the proper method for determining the correct compensation rate." (*Id.*). *Straight* remanded the case for the board to determine the employee's probable future earning capacity during his disability period and stated, "The burden is on the employee to provide evidence of what his future earning capacity would have been but for the work injury." (*Id.* at 6).

In *Narcisse v. Trident Seafoods Corporation*, AWCAC Decision No. 242 at 15 (January 11, 2018), the commission reviewed the board's compensation rate adjustment denial and said, in respect to the injured worker's evidence presented at hearing on this issue:

> Likewise, Mr. Narcisse is not entitled to a compensation rate adjustment. He admitted at hearing he did not provide . . . tax returns for 2010 and 2011 because he did not have these records. According to his testimony at hearing, Mr. Narcisse earned $263.65 in 2010 and nothing in 2011.
>
> Pursuant to AS 23.30.220(a), as an hourly employee, Mr. Narcisse's compensation rate is based on his earnings from all occupations in either of the two calendar years immediately prior to the year of injury. Since Mr. Narcisse admitted to almost no earnings in either 2010 or 2011, Trident Seafoods was correct in paying him TTD at the minimum compensation rate of $110.00 per week (footnote omitted). Therefore, even if the Board had reached the merits of his claim for benefits in his November 2013 WCC, Mr. Narcisse would not have been awarded a compensation rate adjustment because he was paid at the proper rate under the Act.

Cavitt v. D&D Services, LLC, AWCAC Decision No. 248 at 6 (May 4, 2018) said, "In *Straight*, the question involved under which section of AS 23.30.220 should an employee's compensation rate be determined when the employee had been largely out of the labor market in the two years prior to the work injury (footnote omitted). Using AS 23.30.220(a)(4) may have not been an accurate method for calculating Mr. Straight's compensation rate." The Alaska Supreme Court in *Cavitt v. D&D Services, LLC*, 466 P.3d 345 (Alaska 2020) did not address a party's right to bring medical claims on providers' behalf and did not suggest a method to reimburse Medicaid.

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (23) 'gross weekly earnings' means gross weekly earnings as calculated under AS 23.30.220(a). . . .

> **8 AAC 45.050. Pleadings**. . . .
> . . . .
>
> (c) **Answers**.
>
> (1)An answer to a claim for benefits must be filed within 20 days after the date of service of the claim and must be served upon all parties. A default

> will not be entered for failure to answer, but, unless an answer is timely filed, statements made in the claim will be deemed admitted. . . .

8 AAC 45.082. Medical treatment. (a) The employer's obligation to furnish medical treatment under AS 23.30.095 extends only to medical and dental services furnished by providers, unless otherwise ordered by the board after a hearing or consented to by the employer. . . .

8 AAC 45.142. Interest. . . .

(b) The employer shall pay the interest

(1) on late-paid time-loss compensation to the employee. . . .
. . . .

(3) on late-paid medical benefits to
. . . .

> (B) to an insurer, trust, organization, or government agency, if the insurer, trust, organization, or government agency has paid the provider of the medical benefits. . . .

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

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. . . .

8 AAC 45.900. Definitions. (a) In this chapter
. . . .
(15) 'provider,' unless the statutory context requires otherwise,

> (A) means any physician, pharmacist, dentist, or other health service worker or any hospital, clinic, or other facility licensed under AS 08 to furnish medical or dental services, including chiropractic, physical therapy, and mental health services;

Rules of Professional Conduct. . . .

Rule 1.5. Fees. (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service 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.

ANALYSIS

1) Was the oral order declining to require Employer to present its adjuster for examination correct?

Employee listed adjuster Stephanie Straub on his witness list. At hearing, Employee called adjuster Straub as a witness; she was not present in the hearing room and it is unknown if she was available to testify by telephone. Employer objected, noting she was a "party witness" over which Employee had no control. Though he listed her on his witness list, Employee conceded he had not subpoenaed Straub to compel her testimony. He did not suggest Employer promised to make her available or the parties had otherwise stipulated to her availability. Absent a subpoena, the panel had no authority to require Employer to make Straub available for examination. AS 23.30.005(h). The oral order declining to require Straub's presence for testimony was correct.

2) Is Employee entitled to a compensation rate adjustment?

Employee requests a TTD compensation rate adjustment; he seeks an $861.29 rate based on $25 per hour working 55 hours per week without overtime ($25 per hour X 55 hours per week = $1,375 per week gross earnings). AS 23.30.220(a). He contends §220(a)(4) does not fairly compensate him for lost future earnings during his disability period, which continues. He seeks a rate adjustment under §220(a)(5), and contends his earnings have not been fixed or cannot be ascertained. Employer contends it properly calculated and paid Employee's TTD benefits, at the minimum $266 per week rate, based on his failure to provide earnings information for the two

years before his injury. It contends §220(a)(5) does not apply as §220(a)(4) is presumed to apply.

It is undisputed Employer paid Employee hourly at $25 per hour and he worked around 55 hours per week from the time Employer hired him until he fell off the roof, though there is nothing documenting these numbers. Walther did not keep track of it and a woman stole Employee's cell phone where he documented his hours in text messages. He has been disabled since his work injury and his disability continues; therefore, the period from June 3, 2019, and continuing, is the relevant period for determining Employee's lost future earning capacity. *Johnson*.

There is no dispute about Employee's earnings in the two calendar years prior to his work injury with Employer; they were minimal. Similarly, there is no dispute that Employee is owed some amount of TTD benefits; this is not a "coverage" issue. The parties simply disagree about his TTD benefit weekly rate. The statutory presumption analysis does not apply. *Abood*. Employee bears the burden in his compensation rate adjustment claim to provide evidence of what his future earning capacity would have been but for his work injury. *Abood*; *Straight*. Employee's contentions raise two theories for increasing his weekly TTD rate: (A) a *Johnson-Gilmore* type rate increase under §220(a)(4); and (B) an increase under §220(a)(5).

(A) Employee is not entitled to a Johnson-Gilmore rate increase under §220(a)(4).

The fact-finders are not limited to only income tax returns for an injured worker's wage and earning information. *Wilson*. However, in this case there are no income tax returns. In fact, there is no evidence demonstrating Employee's work history or earnings other than his testimony.

A basic premise in Alaska workers' compensation law, and the "entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity" during his disability period, when calculating a TTD rate. *Johnson*; *Gilmore*. *Gilmore* relied on then un-codified legislative intent, which stated the Act must be "interpreted . . . to ensure the . . . fair . . . delivery of indemnity . . . to injured workers at a reasonable cost to employers. . . ." This intent now appears as the first statute in the Act, and is applicable here. AS 23.30.001(1).

In amendments to §220(a) subsequent to *Gilmore* but before the current law, the legislature adopted something similar to the "Model Act" suggested in *Gilmore*. Amendments provided alternative ways to calculate gross weekly earnings when the "standard" method used for hourly employees did not reflect an injured worker's lost earnings during the disability period. Thus, for a time, and for injuries arising under the "model" statute, *Gilmore* did not apply. *Dougan*.

While the "model" equivalent statute was in effect, cases still arose under then-current and former §220 versions and the Alaska Supreme Court decided some. In 2006, *Circle De Lumber* arising under 1993 law affirmed a departure from the standard rate calculation method and approved future earnings "estimates" based on the injured worker's employment history and Labor Department statistical data for typical wages earned by workers in the applicable trades.

There were few compensation rate adjustment claims litigated while the "Model Act" §220 doppelgänger remained in effect. *Rogers & Babler*; *Rusch*. However, in 2005 the legislature amended §220 to its current form, which bears a striking resemblance to §220 as it existed when *Gilmore* decided §220 was unconstitutional as applied in some instances. Under this current version, Employer has the right to presume §220(a)(4) will provide a spendable weekly wage fairly approximating the injured worker's wages at the time of injury. *Wilson*. Since the law reverted to a similar scheme in effect when *Gilmore* was decided, *i.e.*, a spendable weekly wage statute that does not take into account higher earnings at a new job, and a legislative mandate to ensure the Act is "fair," *Gilmore* and its relevant progeny now apply to Employee's claim. *Straight*.

Gilmore concepts will be applied here but Employee still bears the burden to show §220(a)(4) is not "an accurate predictor of losses due to injury" and fairness to both parties is not the deciding factor. *Wilson*; *Thompson*; *Rusch*. Since Employee filed a rate adjustment claim, the factfinders "must conduct a broader inquiry" for evidence to determine his spendable weekly wage and associated TTD rate. *Wilson*. But that inquiry must still be based upon evidence Employee adduced at hearing, and not on speculation. *Saxton*.

Employee's intention to continue working for Employer is given some credibility and weight; he was sincere in his belief. However, Walther's testimony that he closed his business and would not rehire Employee in any event is given more weight and credibility. AS 23.30.122; *Smith*. Walther did not want Employee to roof because he lacked toes, and Walther was tired of drama related to Employee's girlfriend. The most credible evidence shows Employee would not have continued working for Employer, or Walther in another business, at least 55 hours per week at a $25 per hour rate to the present and continuing in any capacity. Therefore, credible and substantial evidence shows but for his June 3, 2019 work injury, Employee would not have continued working for Employer or Walther during the time his ongoing disability continues. *Johnson*.

But Employee said if he did not return to work for Employer, or Walther's new business, he was confident he would have returned to work for someone, full-time, making at least $25 per hour. He bases this on his past experience and work history and his previous ability to find and hold good paying jobs in the trades. Convincing evidence of this would have been documents showing Employee's ability to find and hold employment making at least $25 per hour continuously. He not only provided no income tax returns demonstrating his past earning capacity, but he did not even make an effort to find evidence supporting his past earnings, which could have implied those earnings would have continued into the future but for his work injury. He sought no employment hours or earnings information from the Alaska Department of Labor, Social Security, the Internal Revenue Service, or unions; he offered no witnesses who work in the trades to compare or contrast their ability to earn wages in the prevailing job market since June 3, 2019, and impute it to him.

Similarly, Employee did not request self-employment business financials from the local H&R Block even though he acknowledged it may have them. Such information could have supported his statement that he earned between $80,000 to $100,000 net between 2011 and 2013 while operating his own local flooring business. Nevertheless, Employee did not state he intended to start his own business as an alternative to seeking employment in the trades. He also said in 2015, Chugiak Roofing paid him $25 per hour for 52 weeks plus overtime "above board," meaning not "under the table." If accurate, Employee made approximately $52,000 that year.

However, on his 2015 Social Security application, Employee said he made approximately $54,000 in 2014 working for Chinook Roofing and $8,000 in 2015. At hearing, Employee said he installed flooring for an employer who paid him over $30,000 in 2014, but owed him another $16,000. He later corrected his testimony to suggest he may have worked for that flooring company in 2014; he could not recall his earnings in 2013. At hearing, Employee said Walther agreed to increase his hourly wage to $40 per hour after one month; but in his September 18, 2019 affidavit, he said Walther agreed to increase it to $38 per hour in a few months. While Employee seemed sincere in his beliefs about his work and earnings history, he was a poor historian and uncertain about his employers, pay agreements, actual earnings and in what year his wages were earned. AS 23.30.122; *Smith*.

Employee also relies on labor statistics showing what people in various trades in Alaska earn hourly. *Circle De Lumber* held it was appropriate for fact-finders to consider statistical wage rates in conjunction with an injured worker's individual earnings and employment history when calculating a permanent disability rate adjustment. The injured worker's "hopes" they would continue working and a finding that an injured worker's wage-earning capacity was improving are also relevant to a compensation rate adjustment inquiry. But, *Circle De Lumber* said these factors must be evaluated "in conjunction with" the worker's personal earning and employment history.

The problem is that Employee provided no evidence of his individual earnings and employment history other than his own testimony. Further, his labor statistics do not demonstrate to what extent employment was and is available in the trades since he fell from the roof on June 3, 2019. He could have had someone who has been working in the trades testify as to that person's experience, work history, physical limitations and employment since June 3, 2019. Such testimony could create an inference that Employee could have also earned similar wages since his work injury and continuing. Employee's under-the-table past earnings and his inability to recall specific details weakens the weight given to his testimony. In other words, though Employee is not incredible, his uncertainty, confusion and lack of documentary or other evidentiary support for his past and future earnings and hours are not convincing and entitled to little weight. AS 23.30.122; *Smith*.

Accepting Employee's estimated gross weekly earnings post-injury would suggest he would have earned at least $71,500 per year but for his work injury with Employer ($25 per hour x 55 hours per week = $1,375 per week x 52 weeks = $71,500). There is no convincing evidence supporting an inference that he has ever made anywhere near that much money while working as an employee; he did not suggest he had the intention or means to start his own business; even then, his self-employment earnings are supported by nothing other than his testimony, which is not reliable.

Furthermore, in 2015, two years before he had both hips replaced and four years before he fell in 2019, Employee applied for and received Social Security Disability benefits. In his application, Employee stated the issues giving rise to his disability included: "Arthritis, Degenerative Disc Disease, Sciatica, Bulging Disc, Carpal Tunnel Syndrome and Blind-Left Eye," and difficulty sitting, standing and walking for long periods, bending, kneeling, getting up from a sitting position and with hand manipulation, repetitive motion and grasping, and balance problems. Absent convincing evidence to the contrary, and absent another "sympathetic" employer like Walther, it is speculation to suggest Employee with these physical problems, to which has been added bilateral hip replacement surgeries, amputated toes on both feet and a half-finger amputation, would have continued to work 55 hours per week earning $25 per hour continuously 52 weeks per year. The evidence shows he began working in "mid-April" 2019 and continued until he fell on June 3, 2019. Assuming he began work for Employer on April 15, 2019, Walther said the work was finished when he fell on June 3, 2019. Employee only managed to find work for 49 days over the past several years before his injury. His earning capacity was not "improving." *Circle De Lumber*. Therefore, Employee's request for a TTD rate based upon $1,375 per week will be denied.

Similarly, Employee failed to produce substantial evidence suggesting any rate higher than the minimum TTD rate is warranted. *Narcisse*. His possible $52,000 or $54,000 in 2014 or 2015, earned while roofing for Chugiak Roofing or Chinook Roofing is too unreliable upon which to base a TTD compensation rate. Evidence, including convincing documents showing reliable and consistent past earnings and implying similar future earnings, or third-party testimony showing

likely future earnings supporting a TTD rate adjustment could have been obtained and presented at hearing; Employee simply did not present it. *Saxton*.

Given the above analysis, Employee has not met his burden and has not shown the compensation rate established under §220(a)(4) does not represent his equivalent wages when he was injured. *Narcisse*; *Wilson*. Therefore, a TTD rate adjustment under§220(a)(4) will be denied.

(B) Employee is not entitled to a rate increase under §220(a)(5).

Alternately, Employee contends, under *Straight*, the standard method for determining his gross weekly earnings under §220(a)(4) as an hourly worker is not an accurate predictor of his ongoing losses due to his injury. *Thompson*. He contends §220(a)(5) must be applied because the lack of pre-injury earnings evidence means his earnings at the time of injury "have not been fixed or cannot be ascertained." Therefore, he contends his TTD rate should be based on the usual wage for similar services. Unlike the situation in *Straight*, where fact-finders never considered §220(a)(5), so the commission remanded for more evidence to determine the injured worker's future earning capacity before deciding which §220 subsection to apply, Employee raised §220(a)(5) as the basis for his rate adjustment claim and had an opportunity to present evidence and argument supporting his future earning capacity and his requested $861.29 TTD rate.

This case is also distinguishable from other commission decisions addressing §220(a)(5) or even implying it might be the proper method for calculating a compensation rate. In *Wilson*, the injured worker was relying on self-employment earnings to calculate his rate, but those earnings were based on a small self-employment record. Employee's self-employment did not occur in the two years prior to his work injury with Employer and there is no self-employment record other than his testimony. *Cavitt* suggested §220(a)(4) may not have been an accurate method for calculating a compensation rate in *Straight* but §220(a)(5) was never considered in *Straight*; here it is.

Employee's gross weekly earnings "at the time of injury" were both fixed and ascertainable. He made $25 per hour and worked 55 hours per week. Employee conflates his gross weekly earnings with the method used to calculate them. An hourly worker's gross weekly earnings are

calculated by finding 1/50th of his total wages earned during either of the two calendar years immediately preceding his injury that is most favorable to him under §220(a)(4). *Narcisse*. If the result does not bear any resemblance to the injured worker's lost future earnings during the continuance of his disability, a *Johnson-Gilmore* rate adjustment may apply under §220(a)(4). *Straight*. Employee's failure under §220(a)(4) to present historical wage and hour documents or testimony demonstrating he or someone with his limitations, experience and abilities could have continued making the money he was making at the time of his injury, does not mean his earnings at the time of his injury have not been fixed or cannot be ascertained under §220(a)(5). His failure of proof does not invoke §220(a)(5). *Saxton*. It simply means he did not meet his burden under §220(a)(4) to prove his *Johnson-Gilmore* rate adjustment claim. Were Employee's theory accepted, injured workers could simply fail or refuse to provide any pre-injury earnings, claim their earnings "have not been fixed or cannot be ascertained," and demand on being compensated at the market rate based solely on Labor Department statistics. *Circle De Lumber*.

While it seems limited in application, §220(a)(5) appears to apply, for example, where an employer and employee have an employment agreement but failed to specify or perhaps misunderstood the exact hourly consideration. If that worker were injured on the job before the hourly rate issue was resolved, the worker could argue that "at the time of injury" his earnings "have not been fixed" or "cannot be ascertained." In that case, §220(a)(5) could be applied and the worker's earnings would be the usual wage for similar services. No similar factors apply in Employee's case.

Lastly, Employee contends because Employer never answered his claim, all statements made in it are deemed admitted and he is entitled to a compensation rate adjustment. 8 AAC 45.050(c)(1). It is true Employer never answered his claim. Consequently, statements made in it will be deemed admitted under §050(c)(1). However, the only "statements" made in the claim applicable to the rate adjustment issue are: Employee began working for Employer sometime between April 1 and April 15, 2019; the parties agreed upon a $25 per hour rate; he worked a minimum of 55 hours each week; Employer paid him in cash each Friday until his work injury; he was hospitalized from June 3, 2019 until July 16, 2019, and re-hospitalized for another week; and he does not have documented earnings for 2017 or 2018 because he was recovering from hip

and toe surgery. But Employer already admitted these facts or did not dispute them so the admissions for Employer's failure to answer is immaterial. Furthermore, Employee still bears the burden to prove his post-injury lost earning capacity, which he failed to do. *Straight*. For all these reasons, his request for a compensation rate adjustment under §220(a)(5) will also be denied.

3) Is Employee entitled to an award regarding medical care?

At hearing, Employee suggested there may be unpaid medical bills for Employee's work injury but he did not specifically identify any. To the extent he contends there are unpaid medical bills, his claim will be denied for lack of proof. *Saxton*. If this decision has made a factual error on this point, Employee can seek modification. To date, Employee has incurred over $1 million in work-related medical bills. Medicaid paid substantial sums for his work-related medical care before *Hiborik I* found his claim compensable. Medicaid has a lien. *Rogers & Babler*.

The real medical dispute is whom Employer should pay for Employee's medical care. He contends it must pay his medical providers directly under the Act pursuant to the Alaska fee schedule, and his providers must then reimburse Medicaid. He contends it is improper for taxpayers to pay medical bills that should have been paid by workers' compensation insurance. Employer contends it contacted Employee's medical providers and offered to pay them the difference between what Medicaid paid and what they would be entitled to under the Alaska fee schedule. It contends the Alaska Supreme Court in *Cavitt* said an injured worker cannot assert claims in behalf of his providers, and providers have a right to choose their method of payment. *Cavitt* does not address this issue, as Employer suggested.

(A) Public policy considerations support Employee's position.

There is no doubt the Alaska workers' compensation fee schedule provides greater remuneration to medical providers than does Medicaid for most medical procedures. *Humphrey*. Therefore, it is likely Employer would save considerable money if all it had to do was reimburse Medicaid for Employee's compensable medical treatment. Adopting Employer's policy would create an inappropriate incentive for employers to controvert claims, lengthen litigation and hope for Medicaid to provide payment for work-related medical services. This practice contravenes the

legislature's intent to ensure quick, fair, efficient and predictable delivery of benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1). Employee also contends taxpayers should not pay medical bills associated with a work-related injury falling under state law. These valid policy concerns support Employee's position.

(B) The statutes and regulations support Employee's position.

The Act provides a comprehensive system for processing work-related injuries. This decision must construe the Act to ensure benefits paid to Employee are a "reasonable cost" to Employer. AS 23.30.001(1). Every contract for hire is construed as an employer's promise "to pay" compensation in the manner provided in the Act. AS 23.30.020. Every workers' compensation policy requires the insurer to assume the obligation to pay "physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices," and "transportation charges" for a work injury. AS 23.30.030(2). The Act requires employers to pay "to the person entitled to them" all benefits conferred under the Act including medical benefits. AS 23.30.030(4). Employers must furnish medical care. AS 23.30.095(a). A fee schedule regulates medical costs. AS 23.30.097(a). Alaska's enabling statute and fee schedule, not Medicaid statutes, determine what the "reasonable cost" is to employers for a medical provider's services in a workers' compensation case; in other words, the fee schedule has already determined reasonableness.

Employer must pay all compensation "directly to the person entitled to it." AS 23.30.155(a). "Compensation" includes medical benefits. *Williams*. The Act does not expressly state who is "entitled" to medical benefits. "Medical and related benefits" include "physician's fees, nurse's charges, hospital services, hospital supplies, medicine and prosthetic devices, physical rehabilitation" and related transportation expenses. AS 23.30.395(26). With the exception of transportation expenses, all these benefits refer to providers who provide treatments or services. In a compensable case where a medical provider has unpaid bills for services rendered for a work injury the answer to whom benefits must be paid appears simple: The insurer owes the money directly to the provider. What happens if a third-party entity has already paid the provider's bills?

The most definitive answer is in the administrative regulations. "The employer's obligation to furnish medical treatment under AS 23.30.095 extends only to medical and dental services furnished by providers," unless otherwise ordered after a hearing or the employer otherwise consents. *Sherrod*; 8 AAC 45.082(a). Furthermore, "provider," unless the statutory context requires otherwise, means a "physician, pharmacist, dentist, or other health service worker or any hospital, clinic, or other facility licensed under AS 08 to furnish medical or dental services, including chiropractic, physical therapy, and mental health services." 8 AAC 45.900(15)(A).
With this statutory and regulatory background, the law requires Employer to pay medical bills for work injuries directly to the medical providers, even though Medicaid has already paid the bills. Interpreting the Act and regulations in this manner ensures quick, fair, efficient and predictable delivery of medical benefits to Employee at the pre-determined reasonable cost to Employer set forth in the Alaska fee schedule. AS 23.30.001(1); AS 23.30.097(a). It also prevents Employer and its insurer from obtaining a windfall at the providers' expense, and requires Employer and its insurer, rather than the taxpayer or medical providers, to pay for or absorb the costs for work-related medical needs. AS 23.30.095(a); *Moretz*. Employer will be ordered to pay Employee's providers directly for his compensable medical care in accordance with the Alaska fee schedule.

Federal law requires Employee's medical providers who accepted Medicaid payments to reimburse Medicaid and will prevent them from receiving double recovery. Employee will promptly provide Employer with bills for work-related medical care if he has not already done so.

4) Is Employee entitled to past transportation expenses for his medical care?

Employee conceded he had not filed and served a medical treatment transportation expense log. His request for past transportation expenses will be denied for failure of proof. *Saxton*.

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

(A) "Penalties."

Employee claims a 20 percent §070(f) late-reporting "penalty" on all past benefits to which he is entitled. Employer admits its injury report was late but contends it already paid a §070(f)

penalty on Employee's past TTD benefits, resolving this issue; Employee does not dispute this payment. However, Employee also seeks the §070(f) penalty on his past medical benefits. The statute expressly allows a discretionary penalty paid to Employee as well as any "other person entitled to compensation by reason of the employee's injury." "Compensation" under the Act includes medical benefits. *Williams*. Employer intentionally did not report Employee's injury in a timely manner. Consequently, Employee's request for a §070(f) penalty on his past, work-related medical benefits will be awarded subject to the following:

The §070(f) penalty awarded in this decision applies only to medical benefits "that were unpaid when due." Under the Act, medical benefits are "due" within 30 days after the date Employer received the provider's bill or a completed report, whichever is later. AS 23.30.097(d). It is unclear from the record if and when Employer, its insurer or their agents received all the medical records and related bills in question. To the extent Employee provided this information, and Employer did not pay the bills within 30 days in accordance with the Act and regulation, Employer will be directed to pay to the medical providers directly a 20 percent §070(f) penalty on the Alaska fee schedule value of the medical bills. *Christie*.

Employee also claims a 25 percent §155(e) late-payment "penalty" on all past benefits to which he is entitled. Employer admits delay in paying Employee's past TTD benefits but contends it already paid him a §155(e) penalty, resolving this issue; he does not dispute this payment. But he also seeks the §155(e) late-payment "penalty" on his past medical benefits. The statute requires an additional amount equal to 25 percent of compensation not paid within seven days after it became due. "Compensation" includes medical benefits. *Williams*. This additional amount must be paid directly to the party to whom the unpaid installment was to be paid. Medical providers are the party to whom medical benefits are paid. Accordingly, Employee's request for a §155(e) penalty on his past, work-related medical benefits will be awarded subject to the following:

The §155(e) penalty awarded in this decision applies only to medical benefits "that were not paid within seven days after it becomes due." Medical benefits are "due" under the Act within 30 days after the date Employer received the provider's bill or a completed report, whichever is later

under §097(d). To the extent Employee provided this information, and Employer did not pay the bills within seven days after payment was due in accordance with the Act and regulation, Employer will be directed to pay to the medical providers directly a 25 percent §155(e) penalty on the Alaska fee schedule value of the medical bills. *Childs*.

(B) Interest.

Employee claims interest on all benefits paid following *Hiborik I*. Interest under the Act is mandatory. AS 23.30.155(p). Employee is entitled to interest on all TTD benefits paid as a result of *Hiborik I*, from the date of each installment. 8 AAC 45.142(b)(1). Employer contends it has already paid him appropriate interest on TTD benefits; Employee did not disagree but he also wants interest paid to his providers on his medical benefits as well.

Interest payable to Medicaid and Employee's providers requires a little more analysis. Medicaid paid medical bills for his work injury. However, experience shows Medicaid pays significantly less for most medical procedures than the Alaska fee schedule requires. *Rogers & Babler*; *Rusch*; *Humphrey*. Medicaid is a "government agency" and, while it paid some of Employee's work-related medical expenses, Medicaid did not pay the billed expenses in full according to the Alaska fee schedule. 8 AAC 45.142(b)(3)(B); *Rogers & Babler*; *Rusch*; *Humphrey*. In that sense, the providers "have not been paid." Medicaid is entitled to interest from Employer on the work-related medical benefits it paid to Employee's providers, to compensate Medicaid for its loss of use of its money and to prevent Employer's unjust enrichment. AS 23.30.155(p); 8 AAC 45.142(b)(3)(B); *Moretz*. Employee's medical providers also lost the use of the difference between what Medicaid paid them and what Employer should have paid and now must pay them under the Alaska fee schedule. Therefore, Employee's medical providers are entitled to interest on the difference between what Medicaid paid them and what has "not been paid" under the Alaska fee schedule. AS 23.30.155(p); 8 AAC 45.142(b)(3)(C); *Moretz*. Employer shall pay providers interest in accordance with this decision.

6) Is Employee entitled to an attorney fee and cost award?

Employee requests statutory minimum attorney fees and actual attorney's fees on the same benefits; *i.e.*, on all benefits to which he or his providers are entitled. AS 23.30.145(a), (b).

Employer objects to this, calling it "preposterous." While his request is not necessarily preposterous, Employee's cited case law and arguments do not support a request for enhanced attorney fees on the same benefits, which appears to be what he is requesting.

Dennis' representation in this case was instrumental in obtaining significant benefits for Employee and his providers. His services helped him establish a compensable injury, obtain approximately $1 million in (pre-Alaska fee schedule adjusted) medical care to date, ongoing medical care, past and future disability benefits and potentially permanent partial impairment and reemployment benefits, all of which were previously controverted. AS 23.30.145(a).
There is no dispute over whether Employee is entitled to some attorney fees and costs; yet Employer contends he should receive no attorney fees for the July 30, 2020 hearing unless he prevails on an issue and he should receive no attorney fees or costs related to Dr. Haughom's deposition because it was not necessary for the issues heard. Reasonable and necessary costs may be awarded to a claimant if the costs relate to the issues upon which he prevails at hearing. 8 AAC 45.180(f). The statutory presumption of compensability does not apply to attorney fee amounts or reasonableness. *Rusch*. Attorney fees in these cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Cortay*. An injured worker may be entitled to statutory minimum attorney fees on part of an award and actual attorney fees on another part. *Wozniak*. Fees incurred on minor issues on which an injured worker loses at hearing will not be reduced if he prevails on primary issues. *Porteleki*.

Dennis documented his actual attorney fees and costs incurred representing Employee in his mostly successful claim. He billed at $375 and $395 per hour during two separate periods; he bills his paralegal costs at $175 per hour. Employer did not object to the time Dennis or his paralegal spent on this case or on their hourly rates, with two exceptions: it objects to attorney fees or costs related to Dr. Haughom's deposition and to issues on which Employee did not prevail at hearing. Dennis went through the required factors supporting his request for reasonable attorney fees from Rule 1.1(a). *Rusch*. Based on Dennis' representations at hearing, and without any objection from Employer, other than its objection to fees and costs related to Dr. Haughom's deposition and time spent for the July 30, 2020 hearing issues on which he did not prevail, Dennis' time spent and hourly rate is otherwise reasonable and necessary. *Rusch*.

As to Employer's specific objections, it is difficult to see how Dr. Haughom's deposition was necessary or reasonable for Employee to prepare and present the issues at the July 30, 2020 hearing. One major issue was a compensation rate adjustment claim, for which Dr. Haughom's testimony is not relevant. The matters decided in this decision were decided without reference to his deposition. Therefore, Employee's requested attorney fees will be reduced by hours spent preparing for and taking Dr. Haughom's deposition ($5,451) and his litigation costs by paralegal, expert and deposition transcript costs ($2,158.70). According to his attorney's July 30, 2020 supplemental affidavit, Employee requests $78,597.16 in actual attorney fees and costs. Given this analysis, and taking into account requirements in §145(a) and all *Rusch* factors, Employee will be awarded actual fees and costs totaling $70,987.46 ($78,597.16 - $5,451 in deposition-related attorney fees - $2,158.70 in deposition-related litigation costs = $70,987.46). This decision does not preclude Employee from seeking the excluded attorney fees and costs if Dr. Haughom's deposition becomes reasonable and necessary in the future under 8 AAC 45.180(f).

Employee prevailed on compensability and his request for payment to his providers, interest and penalty on Employee's past medical bills and obtained a stipulation from Employer that he is entitled to a vocational reemployment benefits eligibility evaluation. The evaluation has value to him, whether he is found eligible or not. The only major issue Employee did not succeed on was his compensation rate adjustment claim. The amount at issue in the rate adjustment claim was not "minor," as he would have been entitled to a significant sum if he won. However, the "compensability" win is responsible for all benefits to which he is now entitled and to which he may be entitled in the future; legal services put into the compensation rate adjustment issue were relatively minor; only Employee's testimony was offered to support this claim. Therefore, Employee's attorney fee and cost award will not be reduced because he did not prevail on his compensation rate adjustment claim. *Porteleki*.

Employee is entitled to statutory minimum fees on the value of Employee's ongoing benefits because all future benefits derive from Dennis' efforts. *Wozniak*. Employer will be directed to pay Employee statutory minimum attorney fees on his continuing TTD benefits and on any future medical or other benefits to which he may be entitled under the Act. Employee's request

for both actual attorney fees and statutory minimum attorney fees on all past benefits will be denied.

CONCLUSIONS OF LAW

1) The oral order declining to require Employer to present its adjuster for examination was correct.
2) Employee is not entitled to a compensation rate adjustment.
3) Employee is entitled to an award regarding medical care.
4) Employee is not entitled to past transportation expenses for his medical care.
5) Employee is entitled to "penalties" and interest.
6) Employee is entitled to an attorney fee and cost award.

ORDER

1) Employee's claim for a compensation rate adjustment on TTD benefits is denied.
2) Employer shall pay Employee's medical providers directly for all medical services incurred for his June 3, 2019 work injury, in accordance with the medical fee schedule and this decision.
3) Employer shall pay Medicaid interest on all amounts Medicaid paid on Employee's behalf for his June 3, 2019 work injury, in accordance with this decision.
4) Employer shall pay Employee's providers interest on the difference between all amounts Medicaid paid those providers on Employee's behalf for his June 3, 2019 injury, and the amount Employer must now pay those same providers under the medical fee schedule, in accordance with the Act, regulations and this decision.
5) Employee's claim for past personal transportation expenses for his medical care is denied.
6) Employee's request for "penalties" and interest is granted. Employer shall pay §070(f) and §155(e) penalties to Employee's medical providers directly, in accordance with this decision.
7) Employee's request for interest is granted. Employer shall pay interest to Medicaid and Employee's medical providers directly, in accordance with this decision.
8) Employee's request for enhanced attorney fees on the same benefits is denied.
9) Employee's request for actual attorney fees for his attorney's services up to the July 30, 2020 hearing is granted in part. Employer shall pay Dennis $70,987.46, in accordance with this decision.

10) Employee's request for statutory minimum attorney fees on all ongoing benefits that Employee incurs or to which he is entitled after July 30, 2020, is granted. Employer shall pay Dennis statutory minimum attorney fees on all benefits provided to Employee from July 30, 2020, and continuing, including but not limited to, medical care and vocational reemployment services.

Dated in Anchorage, Alaska on August 31, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

CONCURRING OPINION, BRONSON FRYE, MEMBER

Member Frye concurs with the above decision and order in its entirety. However, member Frye also finds that Employer took unfair advantage of Employee in an unscrupulous manner. Walther paid Employee approximately one-half the prevailing wage for the work Employee was doing at the time he was injured. Since Employer was working on a school project, all employees should have been paid at the Davis-Bacon wage rate. Furthermore, after taking advantage of Employee, who he knew desperately needed income, Walther also intentionally failed to file an injury report, thus delaying Employee's ability to receive benefits for his work injury.

/s/
Bronson Frye, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Steven Hiborik, employee / claimant v. Westside Flooring, LLC, employer; American Fire And Casualty Company, insurer / defendants; Case No. 201911330; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on August 31, 2020.

/s/
Nenita Farmer, Office Assistant