ALASKA WORKERS' COMPENSATION BOARD

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

ALAN D. WARD, Employee, Claimant, v. FIRST GROUP AMERICA, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201609593 AWCB Decision No. 20-0077 Filed with AWCB Anchorage, Alaska On September 11, 2020.

Alan Ward's (Employee) September 5, 2018 and March 26, 2019 claims, and First Group America and New Hampshire Insurance Company's (Employer) June 1, 2020 petition were heard on August 6, 2020, in Anchorage, Alaska, a date selected on June 18, 2020. A June 3, 2020 hearing request gave rise to this hearing. Attorney Robert Bredesen appeared telephonically and represented Employee, who appeared telephonically and testified. Attorney Krista Schwarting appeared telephonically and represented Employer. Adjuster Shea Loescher testified telephonically for Employer. The record remained open for Employee's supplemental fee affidavit and Employer's objection and closed on August 12, 2020.

ISSUES

Hearing briefs were due by July 30, 2020; however, neither party filed one until August 4, 2020. At hearing, an oral order issued declining to consider the briefs.

1) Was the oral order declining to consider untimely hearing briefs correct?

It is undisputed Employee sustained a compensable injury on June 25, 2016, while working for Employer. Employee contends he is disabled, not medically stable and entitled to continuing temporary total disability (TTD) or temporary partial disability (TPD) benefits.

Employer contends Employee is not disabled as he is capable of doing light-duty work and was given a permanent partial impairment (PPI) rating, meaning he reached medical stability. Therefore, it contends Employee is not entitled to temporary disability benefits.

2) Is Employee entitled to TTD or TPD benefits?

Employee contends because Employer should have never stopped paying TTD benefits, he is entitled to a late-payment penalty. In addition, he contends Employer's March 20, 2017 controversion was not filed in good faith; therefore, he is also entitled to a penalty on this ground.

Employer contends Employee is not entitled to penalties because he is not entitled to TTD benefits and evidence or law support its controversion notice and TTD termination.

3) Is Employee entitled to penalties?

Employee contends he is entitled to past and ongoing benefits resulting from his attorney's efforts. Therefore, he seeks interest, attorney fees and costs.

Employer contends Employee is not entitled to additional benefits. Therefore, it contends there is no basis for interest, attorney fees or costs.

4) Is Employee entitled to interest, attorney fees and costs?

Employer contends it is entitled to an enhanced Social Security offset. Employee contends the offset should only applied towards the awarded interest, penalties and a future PPI rating.

5) Is Employer entitled to a Social Security offset?

FINDINGS OF FACT

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

1) On June 25, 2016, Employee injured his right leg while working as a bus driver for Employer. (First Report of Occupational Injury, July 4, 2016).

2) On June 25 and 26, 2016, Employee underwent right leg surgery at Providence Alaska Medical Center (PAMC). (Emergency Department Notes, June 26, 2016).

3) On July 26, 2016, Employee underwent another surgery to insert a spacer and bone graft to the gap in his right tibia. (Kenneth Thomas, M.D., report, July 26, 2016).

4) On September 7, 2016, Dr. Thomas prescribed a custom Charcot restraining orthotic walker (CROW) to stabilize Employee's right foot. (Thomas report, September 7, 2016). CROW is rigid in the outside and soft in the inside; it is much larger than regular shoes. Thus, it is really difficult to drive a vehicle wearing CROW. (Videoconference Deposition of Kenneth Thomas, M.D., July 27, 2020, at 7-9).

5) On October 28, 2016, Employee was fitted with a CROW. (Wil Sundberg, CPO, notes, November 3, 2016).

6) On November 2, 2016, Kristin Fredley-McGlohn, PA-C, set Employee's work status to "[light duty] only; staying at home for now." (Fredley-McGlohn report, November 2, 2016).

7) Employee has been entitled to receive $1,457.00 per month in SSDI benefits beginning December 2016. (Agency file).

8) On December 9, 2016, a physical therapist noted Employee "drove himself to appt." (Physical therapy notes, December 9, 2016).

9) On December 21, 2016, Dr. Thomas released Employee to sedentary work and cleared him to drive his personal vehicle. (Thomas report, December 21, 2016).

10) On January 23, 2017, Dr. Thomas saw Employee and recommended,

> We are going to continue with the Charcot restraint orthotic walker. He is going to be weightbearing as tolerated. I think he would benefit from a driving evaluation. They can do some modifications to his pedals. He is cleared to do light duty work, but he will need transportation assistance. I will see them back as scheduled. (Thomas report, January 23, 2017).

11) On January 3, 2017, Employer offered Employee a light duty job at its Eagle River Terminal location beginning January 9, 2017. (Employer's January 3, 2017 letter, Notice of Intent to Rely, July 17, 2020).

12) On January 23, 2017, Dr. Thomas released Employee to light duty work. (Thomas report, January 23, 2017).

13) On February 8, 2017, Employer again offered Employee a light duty job at its Eagle River Terminal location beginning February 15, 2017. (Employer's February 8, 2017 letter, Notice of Intent to Rely, July 17, 2020).

14) On February 22, 2017, Ben Bell, OT, saw Employee and recommended the parties decide whether "the left foot gas pedal is something they want to do or wait and see what happens with his right leg." Employee declined to do any driving and showed lack of interest in any modification to his personal vehicle. Bell stated, "[Employee] should not be driving long distances (if any distances) with his right leg. In a perfect world he would get some training with a left foot gas pedal, get one installed in his vehicle and use that until his right foot heals enough to not need the walking boot." (Occupational Therapy Disabled Drivers Evaluation and Hand Control Training report, February 22, 2017).

15) On March 16, 2017, Jasmine Dirkes, Employer's operations supervisor, submitted an "Offer of Alternative Employment" form to rehabilitation specialist Josetta Cranston. In Question 11, she responded:

> Employer or a direct subsidiary offers alternative employment to Employee. The title of the offered job is None Available. (Reemployment Benefits Eligibility Evaluation Report, March 21, 2017).

16) On March 20, 2017, Employer denied TTD benefits contending Employee declined a "light-duty work within his restrictions" it had offered. Employer also asserted Employee refused its offer to modify his vehicle with "a left foot gas pedal for adaptive driving," as recommended by Bell, which would have allowed him to travel to his light-duty work assignment. (Controversion Notice, March 20, 2017).

17) Changing footedness takes time and effort. (Experience; observation).

18) On April 11, 2017, Employee reported having redness and drainage from the open tibia fracture site. (Jessica Diab, M.D., report, April 11, 2017).

19) On April 20, 2017, Cranston concluded that "School Bus Monitor" was the only light-duty job that Dr. Thomas predicted Employee will have the permanent physical capacities to meet its physical demands. However, she reported "the position of Bus Attendant does exist in [Employee's] location, though they are competitive and there are few openings. There are currently two Bus Attendant positions available that are in towns within the state of Alaska, Soldotna and Fairbanks." (Labor Market Survey, Reemployment Benefits Eligibility Evaluation Report - Addendum, April 20, 2017).

20) On April 21, 2017, Dr. Thomas determined Employee had developed an infection which spread to the bone graft, recommended a graft removal surgery, and took him off work from April 21, 2017, through June 15, 2017. Employee has not been released to work in any capacity since April 21, 2017. (Videoconference Deposition of Kenneth Thomas, M.D., July 27, 2020, at 14-16).

21) On August 17, 2018, Jared Kirkham, M.D., saw Employee and diagnosed (1) open right tibia and fibula fracture post open reduction internal fixation complicated by infection and nonunion with ongoing pain and inability to ambulate and (2) permanent right foot aggravation of Charcot arthropathy with pain, deformity, and functional impairment. Dr. Kirkham opined Employee did not appear to have reached medical stability because he was planning for a right foot surgery, had limited weightbearing tolerance, and did not participate in any physical therapy awaiting additional osseous bridging between the proximal and distal tibia components. However, at Employee's request for a rating, Dr. Kirkham gave a 22 percent PPI rating. He said, "It is possible that this impairment rating may change once the patient reaches maximum medical improvement, which I anticipate will occur within 6 months to 1 year. I reserve the right to modify this impairment rating if the patient's functional status changes or further information becomes available." (Kirkham report, August 28, 2018).

22) Generally, an injured worker is given a PPI rating after he or she reaches medical stability. (Experience; observation).

23) On September 5, 2018, Employee claimed TTD benefits and a late-payment penalty. (Claim for Worker's Compensation Benefits, September 5, 2018).

24) On November 5, 2018, Employer denied TTD benefits after March 1, 2017, and a late-payment penalty because it had offered light-duty work within Employee's restrictions (Answer, September 26, 2018) and paid PPI benefits after he received a PPI rating. (Amended Answer, November 5, 2018).

25) On March 26, 2019, Employee claimed TTD and TPD benefits, attorney fees and costs, a late-payment penalty and interest. (Claim for Worker's Compensation Benefits, March 26, 2019).
26) On April 12, 2019, Employer denied TTD or TPD benefits after March 1, 2017, attorney fees and costs, a late-payment penalty and interest based on its light-duty work offer and PPI payments. (Answer, April 12, 2019).
27) On June 1, 2020, Employer asked for an enhanced Social Security offset to recoup alleged overpayment of benefits it paid against Employee's Social Security Disability Insurance (SSDI) benefits. However, its petition did not show how the reduction was computed and was not filed with a copy of the Social Security Administration's award letter. Employer did not provide any reason it could not do so. (Petition, June 1, 2020; agency file; record).
28) On June 3, 2020, Employee opposed Employer's June 1, 2020 petition for enhanced offset contending he had limited income, and such an offset would result in unfairness to him. (Answer to Petition for Enhanced Offset, June 3, 2020).
29) On June 18, 2020, the parties agreed to a hearing on August 6, 2020, and to file their briefs pursuant to 8 AAC 45.114. (Prehearing Conference Summary, June 18, 2020). Briefs were due July 30, 2020; however, the parties did not file briefs until August 4, 2020. (Agency file; record).
30) On July 7, 2020, Dirkes testified as an operations supervisor she does the accounting, schedules routes, safety investigations, and drives a bus. She mainly works in the Wasilla terminal but runs the Eagle River terminal; she also performs dispatch duties, such as "speaking with the drivers over the radio, answering phones, checking them in and out, calling emergency services [. . . ,] or schools." Dirkes said no one had ever been hired to work just on dispatch, and at the time she communicated with Employee about the light duty job, she was not aware of his driving restrictions. Dirkes also said she could not remember why she wrote that there was no alternative employment available on the March 16, 2017 "Offer of Alternative Employment" form as she knew "there was driving positions." She said "I was sent this by our safety team for me to review and sign." (Deposition of Jasmine Dirkes, July 7, 2020).
31) On July 27, 2020, Dr. Thomas testified Employee was not medically stable as of April 6, 2020. However, he said Employee has always been able to do "non-ambulatory work" that would not involve using his right leg. Dr. Thomas explained when he said Employee was "not released to work," he meant "the previous work that [Employee] did, utilizing [the right] leg, but it's usual and customary to allow people to do sedentary work, sitting at a desk." However, Dr. Thomas

also said because Employee had developed an infection which spread to the bone graft, and the graft had to subsequently be removed, he again had a large gap between the end of his tibia and the top of his foot. Dr. Thomas said it could take years for the remaining tibia to grow and fill the gap. (Videoconference Deposition of Kenneth Thomas, M.D., July 27, 2020).

32) At hearing, Employee testified he owned an apartment complex and a used car dealership but did not earn any wages from them. He said he had sold about ten cars over the course of three years as a "hobby"; rental income was used to cover expenses. Employee conducted these two businesses via telephone. He also testified Dirkes told him "she had no job for [him]," and "she didn't know what they wanted." (Employee).

33) At hearing, neither party provided a reasonable explanation why hearing briefs could have not been filed in a timely manner. (Record). The panel did not have sufficient time to review the briefs. (Observation).

34) Employee resides in Anchorage, Alaska. (Agency file).

35) Employer paid $515.22 per week in TTD benefits from June 26, 2016, through March 19, 2017, and from April 21, 2017, through July 16, 2018, totaling $53,141.26. It paid $38,940 in PPI benefits on August 17, 2018. (Loescher; ICERS; Notice of Intent to Rely, July 17, 2020).

36) There is no medical record indicating Employee has ever reached medical stability. (Agency file; record; observation).

37) Employee seeks $24,710 ($19,895 + $4,815 = $24,710) in attorney fees and $2,585.49 ($2,571.99 + $13.50 = $2,585.49) in costs, totaling $27,295.49. Bredesen billed 7.5 hours ($3,375) for Employee's hearing brief. (Affidavit of Counsel, August 3, 2020; Affidavit of Counsel, August 6, 2020).

38) On August 12, 2020, Employer opposed to Bredesen's hourly rate of $450. (Employer's Objections to Attorney Fees and Costs).

39) This is a complex case with voluminous medical records. (Observation).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that

> (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 . . . employers. . . .

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

> **AS 23.30.095. 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. . . .

> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter. . . .

Benefits sought by an injured worker are presumed compensable. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). The presumption applies to any claim for compensation under the workers' compensation statute. *Id.* The presumption involves a three-step analysis. To attach the presumption, an employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Credibility is not examined at the first step. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

Once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence.

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v.*

Harris, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

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

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

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id*. at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting

from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id*. at 973, 975.

In *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), the Alaska Supreme Court held "attorney's fees in workers' compensation cases should be fully compensatory and reasonable," so injured workers have "competent counsel available to them." Nonetheless, when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed.

Rusch & Dockter v. SEARHC, 453 P.3d 784, 803 (Alaska 2019), held an award of attorney fees will only be reversed if it is "manifestly unreasonable" -- this differs from the "substantial evidence" test used for review of factual determinations. The Alaska Supreme Court explained "[a] determination of reasonableness requires consideration and application of various factors that may involve factual determinations, but the reasonableness of the final award is not in itself a factual finding." *Rusch & Dockter*. It also held the board must consider all of the following eight non-exclusive factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining the reasonableness of a fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director. . . .
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> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment.
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> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

AS 23.30.155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). To avoid a penalty, a controversion must be filed in good faith. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352 (Alaska 1992). For it to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the board would find that the claimant is not entitled to benefits. *Id.*

Land and Marine Rental Co. v. Rawls, 686 P.2d 1187 (Alaska 1984), the Supreme Court held a workers' compensation award, or any part thereof, shall accrue lawful interest from the date it should have been paid. Interest and penalty are mandatory. AS 23.30.155(a), (e), (p).

> **AS 23.30.185. Compensation for temporary total disability**. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

For workers' compensation purposes "total disability" does not necessarily mean a "state of abject helplessness. It means the inability because of injuries to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *J. B. Warrack Co. v. Roan*, 418 P.2d 986, 988 (Alaska 1966). For an employer to rebut the presumption of compensability, it must produce substantial evidence that shows work within an employee's abilities is regular and continuously available in the relevant labor markets

described in (a) of the statute. *Leigh v. Seekins Ford*, 136 P.3d 214 (Alaska 2006). This burden may be satisfied with labor market surveys of the specific and relevant markets. *Id.*

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.**
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> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides. . . .

The Alaska Supreme Court held §190 is "silent about the timing for both rating of and payment for a permanent impairment. It does not indicate that PPI is tied to medical stability as defined in the Act for purposes of either rating or payment. . . . [I]t does not indicate that PPI compensation is payable only after medical stability or only after TTD compensation ends." *Unisea, Inc., v. Morales de Lopez*, 435 P.3d 961, 972 (February 2019). The Court further explained §190(b) "provides that '[a]ll determinations of the existence and degree of permanent impairment shall be made strictly and solely' under the Guides; the legislature did not direct that an injured worker be evaluated for a permanent impairment at medical stability. Instead the legislature required that ratings be done "strictly and solely" under the Guides." *Id.*

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

The Alaska Supreme Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska

2012) said, "'[o]nce an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary.' We therefore examine whether the employer rebutted the presumption." *Id*.

8 AAC 45.065. Prehearings.

. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request. . . .

8 AAC 45.070. Hearings.

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(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing. . . .

8 AAC 45.114. Legal memoranda

Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must (1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established. . . .

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

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

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

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8 AAC 45.225. Social security and pension or profit sharing plan offsets.

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(b) An employer may reduce an employee's weekly compensation under AS 23.30.225(b) by

(1) getting a copy of the Social Security Administration's award showing the

(A) employee is being paid disability benefits;

(B) disability for which the benefits are paid;

(C) amount, month, and year of the employee's initial entitlement; and

(D) amount, month, and year of each dependent's initial entitlement;

(2) computing the reduction using the employee or beneficiary's initial entitlement, excluding any cost-of-living adjustments;

(3) completing, filing with the board, and serving upon the employee a petition requesting a board determination that the Social Security Administration is paying benefits as a result of the on-the-job injury; the petition must show how the reduction will be computed and be filed together with a copy of the Social Security Administration's award letter. . . .

ANALYSIS

1) Was the oral order declining to consider untimely hearing briefs correct?

At the June 18, 2020 prehearing conference, the parties stipulated to file and serve brief by July 30, 2020. 8 AAC 45.114(1). Neither party sought to have the June 18, 2020 prehearing conference summary amended or modified. 8 AAC 45.065(c), (d). Thus, absent any unusual and extenuating circumstances, this decision may not consider changing the hearing brief deadline. 8 AAC 45.070(g). Both Employer and Employee filed their brief on August 4, 2020; however, neither party offered a reasonable explanation why it could have not been filed in a timely manner. Thus, based on these reasons, neither brief will be considered. AS 23.30.135(a); 8 AAC 45.065(c); (d); 8 AAC 45.070(g).

2) Is Employee entitled to TTD or TPD benefits?

It is undisputed Employee sustained a compensable injury on June 25, 2016, while working for Employer. He underwent several surgeries to repair his work-related right leg fracture. Employer paid $515.22 per week in TTD benefits from June 26, 2016, through March 19, 2017, and from April 21, 2017, through July 16, 2018. It paid a lump sum PPI benefits on August 17, 2018, after Dr. Kirkham gave Employee a 22 percent rating, and has not paid TTD benefits since. Employee contends he is entitled to TTD benefits from August 18, 2018, and ongoing. AS 23.30.185. Employer contends he is not entitled to TTD benefits because Employee has not been disabled and has been medically stable since August 18, 2018.

a) Is Employee disabled?

Employee contends he has been totally disabled since the June 25, 2016 work injury; he has been incapable of earning the wages which he was receiving at the time of injury in the same or any other employment. AS 23.30.395(16); *Runstrom*. Employer contends he has not been disabled because Dr. Thomas said he could perform light-duty work, it offered him some, and he declined the light-duty job offer.

Employer did offer Employee a dispatch job on January 3 and February 8, 2017. However, it is unclear whether this job in fact existed. First, on March 16, 2017, Dirkes informed Cranston that Employer did not have an alternative employment for Employee. Further, Dirkes testified Employer had never hired anyone to work just on dispatch, and at the time she communicated with Employee about the light duty job, she was not aware of his driving restrictions. Dirkes also said

she could not remember why she wrote there was no alternative employment available on the March 16, 2017 "Offer of Alternative Employment" form as she knew "there was driving positions." Dirkes, as a supervisor, knew of available driving positions, but not dispatch positions. Employee also testified she told him "she had no job for [him]," and "she didn't know what they wanted." Thus, Employer's "light-duty work offer" is not credible and given no weight because the job did not exist; there was no light-duty job offer within Employee's restrictions. AS 23.30.122; *Smith*.

"Total disability" does not necessarily mean Employee is in a "state of abject helplessness." *Roan* at 988. Due to his work injury, Employee is incapable to "perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Id*. To rebut the presumption of continued disability, Employer must demonstrate with substantial evidence that work within Employee's abilities is regularly and continuously available in the relevant labor markets; this burden may be satisfied with labor market surveys. *Leigh*.

Although Employer did not produce a survey to support its position, Cranston's April 20, 2017 survey provides a glimpse of the relevant labor markets; she reported "the position of Bus Attendant does exist in [Employee's] location, though they are competitive and there are few openings. There are currently two Bus Attendant positions available that are in towns within the state of Alaska, Soldotna and Fairbanks." Employee resides in Anchorage; there is no evidence that work within his abilities is regular and continuously available in Anchorage. *Id.*

Further, Employee uses a custom CROW to stabilize his right foot; it is rigid outside and soft inside and is much larger than a regular shoe. Thus, Dr. Thomas said it is really difficult to drive a vehicle wearing a CROW. This significantly reduces the range of services Employee could perform. *Roan.* Dr. Thomas said a pedal modification may help Employee, but also he "will need transportation assistance." Bell also said "[Employee] should not be driving long distances (if any distances) with his right leg. In a perfect world he would get some training with a left foot gas pedal, get one installed in his vehicle and use that until his right foot heals enough to not need the walking boot." The fact he once, albeit inadvisably, drove himself to an appointment is immaterial. Changing footedness takes time and effort. *Rogers & Babler*.

Lastly, Employee testified he owned two businesses and did not earn any wages from them -- the apartment complex is owned through a separate company, and the used car dealership is more of a "hobby." Neither generates much income; Employee conducts business via telephone. His testimony is credible. AS 23.30.122; *Smith*.

In short, Employer failed to produce substantial evidence to rebut Employee is not totally disabled as defined in the Act. *Leigh*; *Runstrom*.

b) Is Employee medically stable?

"Medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment. AS 23.30.395(28). Generally, injured workers are given a PPI rating once they are medically stable. Based on this, Employer contends Employee became medically stable when Dr. Kirkham gave him a PPI rating; this is incorrect. The timing for both rating of and payment for Employee's PPI is not tied to his medical stability. *Lopez*. The Act does not indicate that PPI benefits are payable only after medical stability or only after TTD benefits ends. *Id*. All determinations regarding PPI should be made solely under the American Medical Association *Guides to the Evaluation of Permanent Impairment*; the legislature did not intend that an injured worker be evaluated for a PPI at medical stability. AS 23.30.190(b); *Lopez*. In short, Employee cannot be deemed to be medically stable just because he was given a PPI rating.

Medical records support Employee has never reached medical stability since the work injury. On August 17, 2018, Dr. Kirkham opined Employee did not appear to have reached medical stability because Employee was planning for a right foot surgery, had limited weightbearing tolerance, and did not participate in any physical therapy awaiting additional osseous bridging between the proximal and distal tibia components. On July 27, 2020, Dr. Thomas testified Employee was not medically stable as of April 6, 2020; he said because Employee had developed an infection which spread to the bone graft, and the graft had to subsequently be removed, he again had a large gap between the end of his tibia and the top of his foot. Dr. Thomas said it could take years for the

remaining tibia to grow and fill the gap. By contrast, there is no medical evidence showing Employee has ever reached medical stability. Therefore, Employee is not medically stable.

In summary, because Employee has been totally disabled and has never been medically stable since his June 25, 2016 work injury, he is entitled to TTD benefits from March 20, 2017, through April 20, 2017, and from August 18, 2018, and ongoing. AS 23.30.185. Consequently, PPI benefits Employer paid will be reclassified as TTD benefits.

3) Is Employee entitled to penalties?

Penalties are imposed when employers fail to pay compensation when due. AS 23.30.155(e); *Haile*. Also, to avoid a penalty, a controversion must be filed in good faith. *Harp*. For it to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the claimant would not be entitled to benefits. *Id.*

a) Employer's March 20, 2017 controversion was not filed in good faith.

Employer controverted TTD benefits contending Employee declined its light-duty work offer; however, on March 16, 2017, Dirkes had expressly stated Employer did not have an alternative employment for Employee. Further, Employer's controversion is also based on Employee's refusal to modify his vehicle with "a left foot gas pedal for adaptive driving," which would have allowed him to travel to his light-duty work assignment. Under the Act, Employer has the obligation to "furnish apparatus for the period which the nature of the injury or the process of recovery requires." AS 23.30.095(a). No statute, regulation, or case law supports Employer's controversion based on Employee's alleged "refusal" to use an apparatus that is meant to accommodate his life. *Rogers & Babler*. In short, Employer did not possess sufficient evidence to controvert TTD benefits; based on these discrepancies, the board would not find that Employee is not entitled to TTD benefits. *Harp*. Employer's March 20, 2017 controversion was not filed in good faith; therefore, he is entitled to a penalty on unpaid TTD benefits from March 20, 2017, through April 20, 2017. AS 23.30.155(e); *Harp*.

b) The termination of TTD benefits as of the PPI rating was not in good faith.

Employer should have not stopped paying TTD benefits when Dr. Kirkham said Employee was still not medically stable and only rated him at his request. Nonetheless, Employer relied on Dr. Kirkham's report, which expressly stated Employee was not medically stable, to terminate TTD benefits. Employer did not possess sufficient evidence to support the TTD termination; without any other evidence, solely based on Dr. Kirkham's report, the panel would not find that Employee is not entitled to TTD benefits because PPI rating is not tied to medical stability. *Harp*; *Lopez*. However, Employer made a lump-sum PPI payment on August 17, 2018, which will be re-characterized as TTD. Thus, while Employer did not properly rely on Dr. Kirkham's report to controvert TTD benefits, no TTD benefits were "unpaid when due" because TTD benefits were actually prepaid as PPI benefits. Accordingly, Employee is not entitled to a penalty for the termination of TTD benefits on July 17, 2018. AS 23.30.155(e).

4) Is Employee entitled to interest, attorney fees and costs?

Interest is mandatory. AS 23.30.155(p). Employee is entitled to accrued interest on unpaid TTD benefits from March 20, 2017, through April 20, 2017. AS 23.30.155(p); 8 AAC 45.142(a); *Rawls*. Employer is directed to calculate interest in accordance to the Act and regulations.

Employee requests attorney fees and costs. AS 23.30.145(a); 8 AAC 45.180(b). Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(a); *Childs*. This is a complex case with voluminous medical records. *Rogers & Babler*. Employee prevails on his TTD and a penalty claims. Employer controverted Employee's TTD benefits, which allows this decision to award actual attorney fees under AS 23.30.145(a). Employee has to comply with 8 AAC 45.180(b), which requires an attorney requesting fees in excess of statutory fees to file an affidavit "itemizing the hours expended as well as the extent and character of the work performed." Also, *Rusch* requires this decision to look at the eight factors in Alaska Rule of Professional Conduct 1.5(a) in determining a reasonable fee:

> *1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly:*

This case dealt with TTD, PPI and medical stability issues, which can be quite difficult, and the answer often depends on complicated legal concepts that are frequently misunderstood by adjusters and doctors.

2. The likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer:

To some extent, time spent working on any client's case prevents an attorney from spending that time on another client's case. However, Employee's attorney did not state the work for Employee precluded him from other employment.

3. The fee customarily charged in the locality for similar services:

In his affidavit, Bredesen charged $450.00 per hour. Neither party provided any evidence as to the hourly rate customarily awarded to employee attorneys in workers' compensation cases in Anchorage. Employee cited the $450.00 hourly rate awarded to attorney Michael Jensen; Employer objected to the hourly rate stating Jensen has been practicing significantly longer than Bredesen. Bredesen has practiced law for more than 20 years, overwhelmingly involving workers' compensation cases. An hourly rate of $450.00 is appropriate.

4. The amount involved and the results obtained:

Employee's attorney was successful in obtaining Employee's TTD and penalty claims, which are of substantial value.

5. The time limitations imposed by the client or by the circumstances:

In his affidavit, Employee's attorney did not identify any time limitation imposed by the client or the circumstances.

6. The nature and length of the professional relationship with the client;

In this case neither party has explained how the length of the professional relationship would affect the fee.

7. The experience, reputation and ability of the lawyer or lawyers performing the services:

Employee's attorney has practiced law in Alaska since 1999; while he has practiced in several areas of law, he has broad experience in workers' compensation, having served as an attorney for both employers and employees.

8. Whether the fee is fixed or contingent:

Virtually all fees for employee attorneys in workers' compensation are contingent. The contingent nature of the work is considered in determining an appropriate hourly rate.

Employee seeks $24,710 in attorney fees and $2,585.49 in costs, totaling $27,295.49. Because his hearing brief was filed late and was not considered, $3,375.00 will be deducted from $27,295.49. Thus, Employee is entitled to $21,335.00 in fees and $2,585.49 in costs, totaling $23,920.49. In light of the benefits obtained and the time expended, this is a reasonable, fully compensatory amount. AS 23.30.145(a); *Bignell*; *Childs*.

5) Is Employer entitled to a Social Security offset?

Employer contends it is entitled to an enhanced Social Security offset. Employee contends the Social Security offset should only applied towards the awarded interest, penalties and a future PPI rating. However, Employer did not compute Employee's weekly compensation reduction under AS 23.30.225(b) using his initial entitlement, excluding any cost-of-living adjustments. 8 AAC 45.225(b)(2). Also, its petition did not show how the reduction will be computed and was not filed with a copy of the Social Security Administration's award letter. 8 AAC 45.225(b)(3). Thus, Employer's petition for an enhanced Social Security offset will be denied based on its failure to follow 8 AAC 45.225(b)(2),(3).

CONCLUSIONS OF LAW

1) The oral order declining to consider untimely hearing briefs was correct.
2) Employee is entitled to TTD. Employee is not entitled to TPD.
3) Employee is entitled to a penalty.
4) Employee is entitled to interest, attorney fees and costs.

5) Employer is not entitled to a Social Security offset.

ORDER

1) The parties' untimely hearing briefs will not be considered.
2) Employer is ordered to pay Employee TTD benefits from March 20, 2017, through April 20, 2017, and from July 17, 2018, and ongoing.
3) Employer shall reclassify $38,940 it paid in PPI benefits as TTD benefits.
4) Employee is not entitled to TPD.
5) Employee is entitled to accrued interest on unpaid TTD benefits from March 20, 2017, through April 20, 2017.
6) Employer's March 20, 2017 controversion was not in good faith because Employee's refusal of the vehicle modification was reasonable, and Employer did not have light duty work available to him at the time the controversion was issued. Employer is ordered to pay Employee a 25 percent penalty on unpaid TTD benefits from March 20, 2017, through April 20, 2017.
7) Employee is awarded $21,335.00 in attorney fees and $2,585.49 in costs, totaling $23,920.49.
8) Employer's petition for a Social Security offset is denied.

Dated in Anchorage, Alaska on September 11, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Bob Doyle, Member

/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 Alan D. Ward, employee / claimant v. First Group America, employer; New Hampshire Insurance Co., Ltd., insurer / defendants; Case No. 201609593; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on September 11, 2020.

/s/
Kimberly Weaver, Office Assistant II