ALASKA WORKERS' COMPENSATION BOARD

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

ALAN PAUL MITCHELL, Employee, Claimant, v. STATE OF ALASKA, Self-insured Employer, Defendant.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201907686 AWCB Decision No. 21-0039 Filed with AWCB Fairbanks, Alaska on May 4, 2021

Employee Alan Paul Mitchell's October 30, 2019 workers' compensation claim was heard on December 3, 2020 in Fairbanks, Alaska, a date selected on October 28, 2020. A stipulation of the parties gave rise to this hearing. Attorney J. John Franich appeared and represented Employee. Attorney Adam R. Franklin appeared and represented State of Alaska (Employer). Witnesses included Employee, Cassandra Champagne-Christian, Brian Jones, and R. David Bauer, M.D. (by deposition). The record was held open to receive Employee's Supplemental Affidavit of Attorney's Fees and closed on December 4, 2020.

ISSUES

Employee contends the work injury is the substantial cause of his disability and need for treatment.

Employer contends his pre-existing condition is the substantial cause.

1) Is the work injury the substantial cause of Employee's current disability and need for medical treatment?

Employee contends his work injury caused his disability and he is entitled to temporary total disability (TTD) benefits.

Employer contends any continuing disability after August 2019 was not substantially caused by his claimed injury.

2) Is Employee entitled to TTD benefits?

Employee contends he should be found eligible for permanent partial impairment (PPI) benefits based on his treating provider's anticipation of a PPI rating greater than zero percent.

Employer contends Employee has not suffered a compensable work injury so he is not entitled to PPI benefits. Alternatively, it contends its employer's medical evaluation (EME) provided a zero percent PPI rating.

3) Is Employee entitled to PPI benefits?

Employee contends his work injury caused his need for medical treatment.

Employer contends any continuing need for treatment after August 2019 was not substantially caused by his claimed injury.

4) Is Employee entitled to medical benefits?

Employee contends Employer stopped paying benefits on receipt of the EME report, but did not timely file a controversion notice. He seeks an associated late-payment penalty.

Employer concedes it stopped paying disability payments on September 26, 2019 and that its controversion was not timely filed. However, Employer asserts all benefits owed were paid through the November 13, 2019 controversion, so no late-payment penalty is owed.

5) Is Employee entitled to a penalty for failure to timely pay or controvert?

Employee contends Employer did not timely pay benefits and compensation, and he should prevail at hearing, thus entitling him to interest, attorney's fees, and costs.

Employer contends all applicable benefits have been paid, Employee should not prevail in this matter, and Employee should not be entitled to interest, attorney's fees, and costs.

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

FINDINGS OF FACT

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

1) On July 3, 2008, Employee was examined by William K. Hartman Jr., PA-C. Chart notes indicate Employee was injured in a training exercise for his job. He had been seen by Dr. Keller, was prescribed Toradol/Medrol, and was undergoing physical therapy. Employee noted he "has had a history of problems with tight Achilles in the past." Employee was diagnosed with a resolving plantaris tendon rupture with gastroc strain, advised to use over-the-counter pain relievers, and was released to light duty. At follow-up, Employee was released to regular duty; physical therapy was recommended for a few weeks to improve strength. Diagnosis was a resolving plantaris tendon rupture with mild Achilles tendonitis. Employee was released without need for follow up on August 18, 2008; he had "no post-injury sequelae or impairment." (Hartman records, July 3 and 10, 2008 and August 18, 2008).

2) On March 12, 2010, Employee underwent x-rays of his right foot. Findings included spurring at the Achilles tendon insertion at "considerably greater than expected" for age; diagnosis was calcaneal spurs with no acute injury. (Fairbanks Memorial Hospital record, March 12, 2010).

3) On April 23, 2019, Anna M. Fath, FANP examined Employee three days after an injury at work where Employee missed the last of a series of steps and stumbled, hyperextending his toes. Initial bruising and swelling had resolved. Employee reported right shoulder pain subsequent to breaking his fall with his right hand. Employee was released to work with instructions to return if pain did not improve. (Fath record, April 23, 2019).

4) Right ankle x-rays taken on April 23, 2019 were compared with right foot radiographs of October 3, 2010 and July 1, 2015. The recent x-rays showed mild vascular and soft tissue calcifications, but no "acute osseous abnormality." (Fairbanks Memorial Hospital report, April 23, 2019).

5) On June 6, 2019, FANP Fath examined Employee in relation to a right ankle deceleration injury "one week" prior while playing volleyball at work. Worsening symptoms included ankle pain, swelling, and difficulty weight-bearing. Examination noted painful ankle with sensation of clicking; Achilles tendon curved out, right swelling of retrocalcaneal bursa, and severe pes planus (flatfoot). Employee was diagnosed with Achilles bursitis or tendinitis. Employee was referred to an orthopedist. (Fath record, June 6, 2019).

6) On June 6, 2019, Employee was examined by Robert Wood, PA-C, at Sportsmedicine Fairbanks (Tanana Valley Clinic). X-rays indicated large calcific changes at the insertion of the Achilles tendon that appeared to be chronic. Employee was diagnosed with right enthesopathy of ankle and partial tear of right Achilles tendon. PA-C Wood ordered magnetic resonance imaging (MRI) and prescribed prednisone, with activity limited to pain tolerance. PA-C Wood explained "his pain is likely resulting from chronic tendinitis exacerbated by his acute injury." History taken at the time of the visit indicated an injury sustained on April 23, 2019. Employee presented to clinic complaining of right ankle pain. "He was walking down stairs at his work and missed the last step, causing him to fall forward with a good portion of his weight landing on flexed right ankle." Employee reported a separate injury in May during which he was playing volleyball that exacerbated his symptoms. "He does present a protrusion of his right calcaneus today. He is unsure how long this has been present. He is able to walk and weight bear on the affected foot, but this is painful . . . He denies history of gout. He does admit history of chronic Achilles injury from wildland firefighting years ago." Employee was advised to remain in a fracture boot and was referred to physical therapy. (Wood record, June 6, 2019).

7) On June 13, 2020, a First Report of Injury (FROI) was filed with the division, noting a May 22, 2019 date of injury; Employee's job title was Juvenile Justice Officer II. The method of injury was described as

> During a unit P.E. session, residents & staff were playing volleyball. Stepping forward with my right foot, I leaned to my far right to get a ball. I immediately felt a 'stinging' and somewhat painful sensation at my right heel and above my ankle. I stopped playing and stepped out.

(FROI, June 13, 2020; original in all caps).

8) Magnetic resonance imaging (MRI) undertaken on June 19, 2019 noted

> Generalized thickening of Achilles tendon which measures 10-11 mm AP dimension on axial images with mildly increased intrasubstance signal in distal fibers. Exuberant ossification about distal Achilles tendon at calcaneal insertion, projecting into Kager's fat pad, and producing a prominent Haglund type deformity. Curvilinear fluid signal interposed between inserting fibers of Achilles and posterior calcaneal tuberosity, involving approximately 70% of [the] tendon insertion footprint. This suggests presence of partial-thickness tear at ossification and superior margin of the calcaneus likely relating to fluid within the pre-Achilles bursa. Mild peritendinous edema.

Diagnoses included Achilles tendinosis with partial-thickness tear at tendon insertion on calcaneus, bulky paratendinous ossification into Kager's fat pad producing prominent Haglund type deformity, fibrous calcaneonavicular coalition, and plantar fascia enthesopathy without tear or edema. (Fowler record, June 19, 2020).

9) Employee attended physical therapy on various dates between June 26, 2019 and December 24, 2019. Contained within the chart notes are various references to his improvements with range of motion, strength, soft tissue mobility, flexibility, edema, balance, gait, weight bearing, lifting mechanics, and impairments relating to strength and pain. Employee was noted to present with "signs and symptoms consistent with physician's diagnosis of (R) Tear/Rupture Achilles." (ATI records, various dates).

10) On August 23, 2019, x-rays showed no fractures or dislocations, mild ankle and midfoot degenerative changes, a large Achilles calcaneal enthesophyte with heterotopic ossification progressive compared to prior 2010 and 2011 examinations, moderate plantar calcaneal enthesophyte, and progressive superficial soft tissue calcifications. (Panko final report, August 23, 2019).

11) On August 23, 2019, Employee's pain was located in the medial ankle and whole ankle on right side. Employee reported slipping on a flight of stairs three days prior while wearing his brace and was having increased pain. A tall cam boot was prescribed, with activity limited to pain tolerance, and weight bearing as tolerated. X-rays were reviewed and pain noted to be likely due to soft tissue injury. If pain had not resolved in one week's time Employee would be referred to Anchorage for a surgical consultation. Employee was limited to seated work only. Icing and over-the-counter pain remedies were recommended. (Wood record, August 23, 2019).

12) On August 30, 2019, PA-C Wood referred Employee to an orthopedic specialist, and advised him to continue physical therapy and remain in the walking boot. Activity was limited to pain tolerance and weight bearing as tolerated. (Wood record, August 30, 2019).

13) On September 12, 2019, Employee was examined by Eugene Chang, M.D. of Orthopedic Physicians Alaska. Chart history indicates Employee injured his posterior heel and Achilles at work in June 2019, and then re-aggravated it at rehab in August 2019. Employee was diagnosed with Achilles tendinosis of the right lower extremity. X-rays and MRI showed bony overgrowth and partial tear and high signal in distal Achilles tendon. Impression was of distal Achilles calcification with partial destabilization of bony overgrowth. The Achilles tendon had good continuity to the posterior heel despite bony overgrowth. Dr. Chang did not recommend surgical reconstruction, and discussed the risks of tendon failure at a future date. Employee would follow up with the sportsmedicine clinic in four to six weeks, and hopefully be medically stable then and able to work toward vocational rehabilitation. (Chang record, September 12, 2019).

14) On September 16, 2019, Employee's physical therapy treatment plan was set for 2x per week for 5 weeks, including therapeutic exercises, manual therapy, neuromuscular re-education, gait training, therapeutic activities, PT evaluation, cold pack, ultrasound, and electrical stimulation. Longterm goal set for completion by October 28, 2019 included increased strength for completion of physical acivities including exercising and golfing. The treatment plan was not signed off on by a physician. (ATI progress note, September 16, 2019).

15) On September 26, 2019, Employee's diagnoses included partial tear of right Achilles tendon and right ankle enthesopathy. Employee activity was limited to pain tolerance; over-the-counter pain killers and icing treatments were discussed. He was not medically stable. (Wood record, September 26, 2019).

16) On September 30, 2019, Employee underwent an orthopedic EME with R. David Bauer, M.D. As part of the EME, Dr. Bauer conducted a chart review, noting that on June 6, 2019

> [Employee] was walking downstairs at work and missed the last step, causing him to fall forward with a good portion of his weight landing on his flexed right ankle. He points to his heel as the greatest source of pain. He feels as though there is a "rock stuck" at the base of his heel. He feels as though he has "shin splints" on the distal aspect of his posterior right calf and Achilles, which resolved following massage therapy the week prior. He had a separate incident in May during which he was playing volleyball which exacerbated his symptoms. He has a protrusion of his right calcaneus, and he is unsure how long that has been present. He has a history

> of chronic Achilles injury from wildland firefighting years prior. On exam, he is tender and has an ecchymosis of the Achilles insertion and posteromedial ankle. He has a full, painless range of motion.

X-rays were taken "demonstrating large calcific changes at the insertion of the Achilles" and an MRI was ordered. A June 19, 2021 MRI revealed in part

> There is a generalized thickening of the Achilles tendon, which measures 10 to 11 millimeters anterior-posterior dimension on axial images, with mildly increased intrasubstance signal in the distal fibers. Exuberant ossification about the distal Achilles tendon at the calcaneal insertion projects into Kager fat pad and produces a prominent Haglund type deformity. There is a curvilinear fluid signal interposed between inserted fibers of the Achilles and posterior calcaneal tuberosity involving approximately 70 percent of the tendon insertion footprint. This suggests the presence of a partial-thickness tear at the tendon insertion. . . . IMPRESSION: Achilles tendinosis with partial-thickness tear at the tendon insertion on the calcaneus. Bulky paratendinous ossification extending into Kager fat pad producing a prominent Haglund type deformity.

Dr. Bauer diagnosed right Achilles tendinitis, with temporary aggravation on May 22, 2019. He noted no evidence of any traumatic change to the structure of the right foot and ankle. Dr. Bauer found Employee "does NOT have a tear or rupture of the Achilles; the findings on the MRI are consistent with a longstanding and chronic condition."

> Although [Employee] may have had some symptoms after the incidents in April or May of 2019, the substantial cause of this condition is the degenerative changes within the right Achilles tendon. There is no evidence of trauma or acute change. There is no evidence of edema or other condition. This condition is wholly caused by aging and is more common in obese individuals.

Dr. Bauer found the substantial cause of Employee's symptoms to be pre-existing, longstanding degeneration within the Achilles tendon, and that Employee's work on May 22, 2019 was not the substantial cause of his conditions or symptoms. "The examinee has returned objectively to the preinjury status. His objective condition at this time is consistent with a chronic condition without any acute findings." Dr. Bauer opined the May 22, 2019 incident would have been the substantial cause of "the initial x-rays, MRI, and the physical therapy. It would not be the substantial cause of the need for evaluation by Dr. Chang or any treatment in the future." Treatment rendered to the time of the EME was reasonable and necessary for the acute aggravation and increase in symptoms. Dr. Bauer opined Employee "does not have a tear of the Achilles tendon, and therefore surgical

intervention at this time is not necessary." Dr. Bauer later opined the May 22, 2019 incident was "the substantial cause of the treatment that he has received." He found Employee reached medical stability on September 12, 2019, having "completed physical therapy" and having been seen by Dr. Chang. Dr. Bauer found:

> [N]o evidence of any permanent partial impairment that arises from the incident in question . . . He has a history of Achilles tendinitis, which is described as a Class Zero impairment given the absence of objective abnormalities on examination. While there are structural abnormalities, these were neither caused by nor aggravated by the incident in question.

Dr. Bauer opined that Employee "does have a condition that predisposes him to the possibility of injury in the future, and the use of force or forced dorsiflexion of the ankle could cause the tendon to rupture. However, any restrictions are due to a pre-existing condition and would not be due to the incident in question." Dr. Bauer agreed with Dr. Chang that Employee had a risk to his right foot and ankle by returning to work, however "there is nothing specific about returning to work that would be prevented by the incident of May 22, 2019, or the asserted incident in April . . . regarding the incident of May 22, 2019, alone, [Employee] could return to work without restrictions." (Bauer EME, September 30, 2019; emphasis in original).

17) On October 24, 2019, Employee was diagnosed with a partial tear of the right Achilles tendon and right enthesopathy of ankle. The physician report contained conflicting evidence regarding medical stability, with a fill-in circle for "medical stability" marked "no," but a date of October 24, 2019 provided for date of medical stability. Difficult-to-read notes on the report provide (1) Date of stability today on follow up (2) Rec PCE, then rating, (3) Re-train occupationally (4) (illegible) provided denies physical needs of job. Plan orders provided "Activity to pain tolerance. Call for any worsening of symptoms. Treatment Discussed: NSAIDs and RICE." Comments further provided "Patient is attending PT while remaining in a walking boot." (Wood records, October 24, 2019).

18) On October 25, 2019, physical therapy notes provide "Patient reports feeling the same. Patient reports he feels as though he has gained strength and function, but since doing SLS activities he has noticed and (sic) imbalance in his hips and knees." Objective measures included poor squatting mechanics and R>L hip abduction and extension weakness. Assessment included struggles with dynamic proprioception activities secondary to ankle, knee and hip weakness as

well as overall core weakness. Plan provided progress as tolerated next visit, with progress hip and knee strength in order to assist with improvements in proprioception. (ATI record, October 25, 2019).

19) On October 29, 2019, physical therapy notes include "Patient reports feeling better. PT reports making improvements." Assessment included progressed SL activities to address relative weaknesses R v L with good tolerance. Continued fatigue was noted. Plan was to progress as tolerated next visit with progress hip and knee strength in order to assist with improvements in proprioception. (ATI record, October 29, 2019).

20) On October 30, 2019, Employee filed a claim including TTD and PPI benefits, medical costs, penalty for late-paid compensation, interest, and attorneys' fees and costs. The reason for filing claim was listed as "ER stopped paying indemnity in September, 2019 without filing a controversion notice. ER owes TTD plus penalty. Adjuster has notified EE that it intends to deny all benefits. EE seeks indemnity benefits, PPI when stable and rated, medical benefits, continued reemployment benefits." (Claim for Workers' Compensation Benefits, October 30, 2019).

21) On November 1, 2019, physical therapy notes provided "Patient reports feeling better. Pt reports continued improvements with no pain." Assessment indicated steady progress being made, will continue to progress as tolerated. Plan included progress of hip and knee strength in order to assist with improvements in proprioception. (ATI record, November 1, 2019).

22) On November 15, 2019, Employer answered Employee's claim. (Employer's Answer, November 15, 2020).

23) On November 25, 2019, Employer paid Employee TTD benefits through November 13, 2019. (ICERs database).

24) On December 20, 2019, Employer filed a notice denying benefits based on Dr. Bauer's EME report, including TTD, Temporary Partial Disability (TPD), PPI, reemployment, and medical treatment after September 30, 2019. The controversion notice certifies that a copy was mailed to Employee and the division on November 13, 2019; however no mailed copy of the notice apepars in the ICERs database. (Controversion Notice, November 13, 2019; ICERs database).

25) On December 24, 2019, physical therapy notes indicate "Patient reports feeling the same. Pt reports his ankle and Achilles are very sore, ranking it at a 4/10. He stated he is not sure why he has increased pain." Assessment included good tolerance to treatment with reported fatigue. Pt

demonstrated improved proprioception with SL dynamic balance. (ATI record, December 24, 2019).

26) On December 26, 2019, Employee was noted to have reached "maximum benefit" and was discharged from physical therapy. (Mandalapa record, December 26, 2019).

27) Employee was medically stable as of December 26, 2019. (Judgment, observations, facts of case, and interences drawn therefrom).

28) On March 26, 2020, Employee was the subject of a State of Alaska Americans with Disabilities Act (ADA) Accommodation Request which appears to have been completed in part by ATI physical therapy. In response to the question of whether Employee has a physical or mental impairment, the response was "Yes. Partial Tear and Chronic Achilles Tendonitis (R)". The impairment was marked as long-term or permanent. Life activities affected were noted as walking, performing manual tasks, and working, and included a note that "running, jumping, climbing cause pain, swelling and risk tendon failure." (Request, March 26, 2020).

29) On April 16, 2020, Employer again denied benefits based on Dr. Bauer's EME report: TTD, TPD, PPI, reemployment, and medical treatment after September 30, 2019. (Controversion Notice, April 16, 2020).

30) On April 19, 2020, Jennifer Carlson, MSPT noted among other things that Employee attended five months of physical therapy following a right Achilles tendon rupture at work on May 22, 2019, and that at the time of Employee's discharge from physical therapy she "would not have recommended" he return to work full time and full duty as a juvenile justice officer. (Carlson letter, April 19, 2020).

31) On April 24, 2020, PA-C Wood completed portions of an ADA request as follows:

> Part B: If the employee has an ADA qualifying disability noted in Part A, please answer the following questions. These questions help to determine whether a workplace accommodation is needed because of the disability.
>
> 1. What limitation(s) is (are) interfering with job performance or accessing a benefit of employment?
>
> Run, jump, tactical responsiveness
>
> 2. What job function(s) or benefit(s) of employment is the employee having trouble performing or accessing because of the limitation(s)?

> Employment of restraint
> Running Rapid Response
>
> 3. How does the employee's limitation(s) interfere with his or her ability to perform the job function(s) or access a benefit of employment?
>
> As above
>
> Part C: If the employee has an ADA qualifying disability noted in Part A, please answer the following questions. These questions help to determine effective, reasonable accommodation options.
>
> 1. Based on your professional judgment, do you have any suggestions regarding possible workplace accommodations that would allow the employee to perform the functions of the job? If so, what are they?
>
> Seated admin work with NO requirement to respond tactically or engage in restraint
> No squatting no lift >40 lbs
>
> 2. How would your suggestions allow the employee to perform the functions of the job?
>
> Seated, walk only

(ADA request, April 24, 2020; emphasis in original).

32) On June 30, 2020, PA-C Wood indicated he would not release Employee to any of the jobs Employee held in the prior ten years. He predicted Employee would have a ratable PPI at the date of medical stability. (Eligibility Evaluation, July 2, 2020).

33) On July 23, 2020, Employee requested a hearing on his October 20, 2019 claim. (Affidavit of Readiness for Hearing, July 23, 2020).

34) On October 28, 2020, a prehearing conference scheduled an oral hearing on Employee's workers' compensation claim for TTD, PPI, attorney's fees and costs, medical costs, penalty for late-paid compensation, and interest. (Prehearing Conference Summary, October 28, 2020).

35) Employer paid TTD benefits to Employee from June 7, 2019 through November 13, 2019, at the rate of $1,018.93 per week. (ICERs database).

36) On November 30, 2020, Employee filed an Affidavit of Attorneys' Fees and Costs, listing 31.8 hours of attorney time at $450 per hour, and 6.7 hours of paralegal time at $195 per hour for a total of $15,616.50. (Affidavit of Attorney Fees and Costs, November 30, 2020).

37) The parties confirmed at hearing that no specific determination was to be made by the panel regarding reemployment benefits other than a determination of whether or not the work incident was the substantial cause of Employee's disability and need for treatment. (Record).

38) At hearing on December 3, 2020, Employee testified: He had received a right Achilles tendon strain while performing wildland firefighting in the 1996-1998 timeframe. He was treated by a medical provider, the issue resolved, and he was released to return to work. Employee treated with Dr. Dingman for approximately three months in the 1996-1998 timeframe; Dr. Dingman told him he had a tight Achilles tendon and recommended biking and walking to keep it smooth. Dr. Dingman mentioned something about Achilles tendonitis around 1996 or 1998; he had recommended Employee cease wildland firefighting but saw nothing to stop him from being a municipal structural firefighter. (Employee).

39) Employee began working for the State of Alaska in February 2000. In April 2019, he injured his right foot and ankle when he missed the last stair going down stairs and "went to the floor" with his foot fully extended; his knee hit his sternum. No one witnessed the April 2019 fall. Employee had no symptoms prior to the April work incident. Prior to April 2019 he had no mobility issues, no problems with running or jumping, did not walk with a limp, and did not have problems with stairs. He did not recall complaining to coworkers regarding pain in his lower extremity. Pain in Employee's right Achilles tendon started after the April 2019 fall. Employee started physical therapy and to his recollection was released to return to work after a couple of days. (Employee).

40) Employee had an incident in May 2019 where he was playing volleyball "with the kids" during PE, he planted his right foot and leaned out in a sort of lunge to the side. As soon as he had done that it kind of zapped him from heel to mid-calf; he could feel that he had done something. Employee's co-worker Mr. Harris was outside with him; Employee asked the other officer on duty to step outside with Mr. Harris. Employee rested, took ibuprofen, and finished his shift. He had not been experiencing any pain in his heel prior the incident playing volleyball. Employee was not aware of any pre-existing Achilles tendon conditions, or of receiving any medical treatment for his Achilles tendon other than the treatment when wildland firefighting. He was in constant pain after the May incident but did not see his regular medical provider until about two weeks later as she was on vacation. Once he saw his provider, she referred him to Sportsmedicine Fairbanks, placed him in a hard plastic l-shaped cam boot, and sent him to physical therapy. The cam boot

goes from just below the knee over the foot, it has a hard plastic base, and has four straps to maintain the leg and foot in an l-shaped position. While wearing the cam boot at a later date going to an appointment, Employee fell going down stairs at his residence and hyperextended. (Employee).

41) Employee received treatment for his Achilles tendon following the May 22, 2019 injury until benefits were controverted by the Employer. Regarding his return to work, Employee testified PA-C Wood did not see him returning to work unless it was a sit-down job. He was advised by Dr. Chang that he could not go back to work as a juvenile justice officer without risking serious complications. (Employee).

42) Regarding his continued performance as a criminal justice officer, Employee can no longer support other officers, if they have an issue he can no longer run, and is not supposed to be jumping. He is able to walk and go up and down stairs. He doesn't help move furniture right now as he doesn't want to risk further injury. Employee does not believe he could ever return to work as a juvenile justice officer. At the time of his discharge from physical therapy, he had limitations in his abilities to: flex his right ankle, do deep squats, jump, run, or perform quick lateral movements. Employee had increased swelling with long periods of standing. His condition has improved to a moderate degree over the passage of time while he has been inactive. (Employee).

43) Before the May 2019 work incident, Employee had no pain or chronic conditions other than skin cancer. Since the injury, pain has been an issue; when trying to do things with the cam boot off, at some point the pain becomes significant. There has been no time since the May 2019 work incident when he has had no pain associated with his right foot, ankle, or Achilles tendon. Employee testified he has a high pain tolerance, and his PA at Fairbanks Clinic would write down a higher number than what Employee stated as the PA treated people with much higher pain reports than Employee for the same injuries. Employee's pain as reported is accurate to his perception. He did not recall telling Dr. Bauer at the EME that he had no pain in his ankle or Achilles; he still had pain at that time. To Employee's recall, he did not tell Dr. Bauer he was not having any problems walking, because he was still bumping into things. Employee indicated a circle and "5" on the right-hand figure, along with a handwritten sentence, on a pain diagram attached to the EME. Employee wrote the handwritten sentence, which said "I feel sensation intermittently at the right heel and 1 or 2 inches above the heel." Employee used the term "sensation" because to him it is not pain, but he felt something abnormal there. (Employee).

44) Intermittent walking is not painful, but extended walking becomes an issue. As he is trying to do more things, after three-quarters to one mile walking the lower leg and ankle are overworked. Standing is acceptable for short periods. At the time of hearing Employee was not seeing a doctor as he was unemployed and had no insurance. He likes to walk and to be outside. (Employee).

45) After the May 2019 incident, Employee slipped in summer of 2019 going to physical therapy. He was going downstairs at his residence in his cam boot and had to hyperextend against the cam boot to maintain his balance and keep from falling. That incident caused an uptick in pain and swelling that eventually subsided. Employee did not have pain in his right leg at the time of his testimony. Thirty minutes of continuous standing would probably be okay, 45 minutes would be pushing it. He can walk three-quarters to one mile before his leg starts "talking" to him. Employee does virtual yoga at home three days per week, does his exercise bike at home, and goes to the gym when he can. He tries to go swimming but those options are limited with Covid. (Employee).

46) Regarding the bony bump on the back of his right foot, Employee thought it appeared after the April or May work incidents. If it was there before, it was not an issue and was not painful. It was prominent and painful after the April or May 2019 work incidents. (Employee).

47) Employee is six feet two inches in height and wears a 16 EEEE shoe. Due to Employee's feet being so long and wide, if he tried to step normally he would trip on stairs; the "duck walk" as described in other testimony makes it safe for him to get up and down stairs. Prior to the work injury he was able to perform all of the control tactics for his position. His physician has advised him not to continue in the juvenile justice officer position as a result of the work injury. (Employee).

48) Prior to his work injury, no one told him he had a partial tear of his Achilles tendon or that continuing to work as a juvenile justice officer risked tendon failure. Prior to the work injury Employee had no limitation for running, jumping, employing restraints, or tactical responses. His work injury now prevents employing restraint tactics, running, and rapid response. Employee believes his current limitations are directly related to the work injury. None of his providers told him his condition is the natural progression of an underlying chronic tendon problem. (Employee).

49) Employee could not perform control tactics now including lunges and taking on a person's body weight. He would not be able to do it at 100 percent and would not feel comfortable. There

is a risk he might injure himself or lose his balance and cause injury to someone else. Prior to this injury he was stable on his feet. (Employee).

50) At hearing, Cassandra Champagne-Christian, Employee's unit supervisor, testified she had worked with Employee from approximately 2008 until he stopped working after his injury. Champagne-Christian started out as a Juvenile Justice Officer and Employee was already working at the facility. They worked shifts together when she first started and since her promotion to unit supervisor has had regular contact with Employee. She testified Employee had mobility problems, that his ability to go up and down stairs was limited, and that he had struggled with control tactics since she started at the facility. Employee had a stiff walk or a limp with a foot that stuck out like a "duck walk." Employee could walk, just not like an average person. He would be out of breath after going up and down the stairs, and used a rail for balance. Champagne-Christian testified that while Employee sat the majority of the time, she did not remember him saying he had any difficulties standing. She had never seen Employee run or jump, but had seen him walk quickly. Champagne-Christian did not think she was working on the May 2019 incident date or that she saw him that day. She had seen Employee before and after that day, and did not see any difference in mobility. Employee did not complain about chronic pain prior to May 2019; their medical conversations primarily involved his cancer and related appointments. Champagne-Christian would usually sign off on performance evaluations for Employee as well as Brian Jones; she would have to check her files to see if she signed an August 2019 evaluation (Champagne-Christian).

51) At hearing, Brian Jones, Juvenile Justice Officer III, Employee's immediate supervisor, testified, describing the juvenile justice officer (JJO) job as maintaining safety and security for juveniles waiting to be adjudicated at court. JJOs are not considered law enforcement, though Jones is a retired police officer. He had been in his current position just shy of five years, and has worked with Employee and been his direct supervisor for the same amount of time. He worked with Employee on the same shift from approximately May 2018 to May 2019. Employee always seemed to have mobility issues, either sitting down or using handrails for support. He walked with a limp and complained about pain in his ankles in a roundabout way, playing it off saying he was having difficulties but not that it was painful. Employee said he had a different pain scale than others due to his military service. Jones worked with Employee a couple of days before, and a couple of days after, the alleged May 22, 2019 work injury. He saw no change, nothing led him to believe there was an issue. He had never seen Employee run; when Employee was going

through control tactics training he did not seem as capable as some of the other officers. Jones had seen video of a restraint Employee was involved with in the gym. Jones testified Employee had difficulty walking up and down stairs, and would rely on the handrail and took an abnormal amount of time making his rounds; he would almost always be out of breath when done. Employee rarely stood for long periods. Jones thought Employee's mobility had worsened over five years; he had known Employee 20 years before, he was not the same person. Jones had seen some Facebook posts showing Employee working security in bars since the work incident; he thought Employee might have been volunteering at the food bank. Jones had spoken to Employee approximately two months prior to the hearing, Employee had been applying for jobs and had used Jones as a reference. Jones is familiar with the JJO II job description. He prepared Employee's August 2019 evaluation, which did not include improving physical abilities in the goals section; Employee received a mid-acceptable (average) rating overall. Officer Jones clarified he had never said Employee was not a good JJO, but Jones was not generally able to rate physical abilities or provide goals for fixing physical performance on evaluations because physical fitness goals or tests were not part of the job. Employee's counsel questioned Jones regarding essential duties of the job including physical restraints of violent offenders, completing annual control tactics training, and walking, standing, or running; no deficiencies in any of these areas had been noted on Employee's 2019 evaluation. Climbing stairs was not noted as an essential job function. Jones agreed that if someone could not do a physical restraint, they should not be in the JJO II job. (Jones).

52) R. David Bauer, M.D. testified via deposition. He is an orthopedist and maintains an office in Garland, Texas; 80 to 90 percent of what is does is forensic medicine or independent medical examinations and evaluation of workers' compensation patients. Dr. Bauer had an active surgery practice until 2017, mostly performing spinal surgeries. He testified that the examination, process, and decision making remains the same regardless of who hires him; in this case, he was hired by the Employer to examine Employee and was being paid for his deposition testimony. Dr. Bauer provides hundreds of workers' compensation examinations per year. Prior to an examination, he prepares a medical records summary, which is available at the examination. Once an examinee is satisfied the history has been covered, Dr. Bauer proceeds with the physical examination. After the examination, he dictates the response to provided questions; once it is transcribed, he will review and edit the report. In Employee's case, the history of present illness was dictated in front of him, and Employee had the opportunity to provide clarifications. Dr. Bauer testified that if

Employee had significant difficulties with his Achilles tendon at the time of the exam, "he would have had a shortened push-off phase. He would have had difficulty in actually plantar flexing the foot." If Employee had been having Achilles problems, Dr. Bauer would have expected "either antalgia or pain reaction as he was pushing off, or . . . a shortened stance phase on that side as he was trying to unweight it." Dr. Bauer noted a bony spur called a Haglund's deformity (among other names) in the x-rays and MRI, consistent with chronic inflammation in the area; it takes years for that condition to develop.

> That deformity is a chronic condition indicative of the length of time that he's been having difficulties with it. He had admitted to one of his prior providers that he had a history of Achilles injury from wildland firefighting in the past. That Haglund's deformity with that bony exostosis is not substantially caused by this incident but clearly preexists it.

Inflammation at the calcaneal insertion noted in the chart review is actually in the tendon.

> [T]he exostosis of the bone behind it is the Haglund's deformity. The indications of chronicity here are the thickening of the Achilles tendon. It's 10 to 11 millimeters. I think normal is between five and six. The exuberant ossification is also an indication of the chronicity . . . Achilles tendinosis, tendinosis is inflammation within the tendon or another chronic condition.

Other than a note from a physician's assistant from a visit on June 2nd, Dr. Bauer did not receive any medical reports indicating Employee had been complaining of pain in his Achilles tendon prior the May 2019 incident. When asked if that meant Employee never had problems or pain with his Achilles tendon, Dr. Bauer testified "Well, number one, he knew he had problems with the Achilles tendon when he was firefighting, enough to mention it to Mr. Wood on June 6th. And he probably had intermittent symptoms, just not enough – of enough severity where he decided to get medical care for it." Dr. Bauer testified that there was a partial thickness tear through the tendon which was degenerative in nature. Additional direct testimony indicated

> **Q So at the end of the day, there is a tear in his Achilles tendon. It's just not an acute tear.**
>
> A There was no evidence of hemorrhage. There was no evidence of edema within the bone or something to suggest that there was an acute condition. There was some small fluid surrounding the edema. When I looked at it myself, I was not

convinced that there were any acute conditions, and I concurred with the reading of the radiologist.

Q Is it possible for this - a partial thickness tear as was described here to be acute versus degenerative?

A Is it possible? Yes. Is it probable? No.

Q And when we are talking probable, I mean, highly improbable or can you - can you –

A As I said, it favors this being a degenerative condition. If you have ever watched a rope fray, it breaks a little bit at a time. So could there be some traumatic component to this? Yes, but it – you know, substantially it's caused by the degeneration and not by the incident in question.

Q And if [Employee] had suffered a traumatic injury to his Achilles tendon, what would that look like?

A He would have had a very severe initial reaction. He would have had difficulty walking. When he walked into the office, he would have had that deformity that we are talking about, inability to push off. He had pain, which is an indication of an aggravation of the preexisting condition, but not a complete tear.

. . .

Q Okay. In terms of the MRI and these chronic – or as you characterized, chronic tears in [Employee's] Achilles tendon, to reiterate, your opinion is that that was substantially caused by a chronic condition rather than by the work incident of May 2019, right?

A That was the opinion I stated in my report, yes.

Q And it's your opinion today, as well, right?

A Correct.

Q Okay. Is there any way for you to tell whether there was an aggravation of a chronic condition from the work incident?

A There was no evidence of acute change or harm to the structure of his ankle on that date. He did become more symptomatic. So when I concluded there is a temporary aggravation that's an increase in symptoms, I probably should have put the word "symptomatic aggravation," which then returned to baseline.

Q And what symptoms – what do you mean by "more symptomatic"?

A He had symptoms at the back of his foot and ankle going up into his calf. There is no questions in the report that he did – in my mind he did have some symptoms coming from this area. What in my mind is also true is that, even thought he had symptoms following May 22, 2019, it does not change the ultimate course of what's going to happen to that Achilles tendon in [Employee's] leg.

On cross-examination, Dr. Bauer testified in part:

Q Is there any evidence in the record, in the medical record, of what [Employee's] symptoms were prior to the date of injury?

A No, which is why I concurred that he did have an injury at that time because his previously symptomatic condition – I'm sorry – asymptomatic condition, or at least certainly something that he did not seek medical care for, did require medical care at that time. So that qualifies as an injury, but does not change the ultimate history of the injured area.

Q And you said that – you mentioned the word "baseline" here at some point. Have his symptoms returned to preinjury status where he no longer has symptoms?

A No. His injuries have returned to what we would expect from somebody who does have chronic tendinosis.

Q The answer to my question is no, correct? His symptoms have not returned to his preinjury status?

A I gave you that answer, sir.

Q The answer is that his symptoms have not returned to his preinjury asymptomatic status, is that correct?

A But the symptoms have continued to be what we would expect from the chronic condition.

Q To develop at some point?

A Correct.

Q So in – so in – on May 21 he has no symptoms, right?

A None that required him to go to the doctor.

Q And on May 22 he has symptoms, correct?

A Correct.

Q And you would have expected him to have those symptoms whether or not there was an injury; is that what you are saying?

A That's not what I'm saying. And I have said to you that there is an injury here, but [Employee] has returned to the baseline that we would expect from his underlying condition. Substantially – substantially his current conditions are from the chronic condition and not the acute symptomatic aggravation.

Q Okay. So please listen to my questions and answer the ones that I ask. Okay?

On May 23rd, would he have had the symptoms that he is having now, had there not been an injury?

A Probably not.

Q In June would he have had the symptoms that he is having now if he had not had the injury?

A Unknown.

Q You cannot rule out the work injury as the cause of the symptoms that he might have had – might have developed in June?

A Again, which is why I said that there is evidence of an injury, but the issue that I'm most concerned about here is the chronicity of symptoms would occur regardless of the May 22, 2019 incident.

Q What do you mean by "chronicity"?

A The ongoing symptoms that develop and his symptoms – remember, this is a progressive and degenerative condition in a morbidly obese male with poor vascularity to his lower extremities. So I would have expected at some time in this 50-plus-year-old gentleman that he would have this condition and that it would continue to progress.

Q But you can't say when exactly the symptoms that he's experiencing now might have developed if there had not been a work injury; is that a fair statement?

A That is correct, but I would expect them to worsen over time anyway, regardless of the injury.

. . .

Q Did you see anything – I thought you had mentioned that some five months after the incident, weren't you still seeing some swelling, some edema, something surrounding the tendon –

A No. That was the –

Q - when you examined him, or was that the MRI?

A That was the MRI that was obtained within the month after the incident. There was peritendinous edema. That goes away within six to eight weeks. It was certainly within the time frame that I would have examined. That's one of the reasons I said that there was a symptomatic aggravation or a temporary aggravation.

Q And so when you are talking about pain that goes away, you are talking about in an average patient, are you not?

A Yes. We are talking about what would be expected in the average population in a nonworkers' compensation case, which is where the majority of the data comes from.

. . .

A I can tell the reader of this transcript that on a physiologic basis it is not – the injury is not the substantial cause of his ongoing subjective complaints. There is no new objective data to suggest that he has continued to tear it. There is no objective data to suggest that the incident May 22 or the MRI of June 29 explains his ongoing pain. That's what I'm telling the reader of this transcript.

Q Okay. And if he were your patient, would you recommend that he go back to a job, a physical job, that might require him to restrain other individuals?

A I would tell him that his risk in doing that job is no greater because of the incident in question and that it was a choice on his part.

If I was asked, then, to testify to that recommendation, as I'm being asked today, I would say that the recommendation not to work is substantially caused by the chronic and preexisting condition and not the incident.

. . .

I would say, again, that because of [Employee's] size and preexisting condition, he has risk. We are talking now about the causation of that risk, the substantial cause of that risk, and it's not the injury.

That's all I'm saying to the reader of this transcript.

Q Has any of the treatment that [Employee] received after the incident been unreasonable or unnecessary?

A No.

Q Do you think that he was – do you think that he was medically stable as of the date of the injury?

A Yes.

Q I'm sorry. As of the date of your examination?

A Correct.

Q Okay. And did you perform a PPI evaluation using the sixth edition of the AMA guides, or did you forgo it because you did not think that it was – the work injury was the substantial cause of his pain?

A On page 13 and 14 I'm asked to provide an impairment rating. There was no objective abnormality on the examination. The structural abnormalities which do not cause an impairment, according to the sixth edition, were noted. So I was asked and I did do it, and it was my opinion that it was zero. The definition of an impairment in the sixth edition is a structural change.

. . .

Q Okay. So I'm curious now about your statement that there is no structural change since you have described several structural changes over – that [Employee] has, as opposed to an individual with no injury or illness to his Achilles tendon.

A The top of page 15: While there are structural abnormalities, these were neither caused by nor aggravated by the incident in question.

Q So they are there; you are just not attributing them to the injury; correct?

A You and I have gray hair. It is there. It does not cause an impairment.

Q And I think we are – we may be arguing in circles here. But I think the way I am interpreting your testimony – and please correct me if I'm wrong – is the reason it doesn't cause an impairment is because it's not caused by the work is your testimony. Is that a fair summary?

A No, it's not. What I'm saying, again, to the trier of fact is, there was no change in that preexisting objective condition at the time of the May 22, 2019 incident.

> Therefore, there is no impairment, even though there is a preexisting physical change. All right. It was not causing an impairment. There was no structural change in that impairment; ergo, I did not assign any change. The sixth edition talks about structural and objective findings, not subjective ones.
>
> **Q You have a – you have an objective finding. You have an objectively demonstrable condition in this Achilles tendon, correct?**
>
> A Yes. And what I'm telling the trier of fact is that the findings on that MRI, which were within a month of the injury, would have been there before. That's called the practice of medicine is knowing what was there and what changed. Nothing objectively changed despite his subjective complaints.
>
> **Q I think I understand your testimony. Do you have an opinion about whether [Employee] needs any medical treatment today?**
>
> A As of September 30, 2019, I did not think that any further medical care would change either his subjective or objective condition.
>
> . . .
>
> **Q So just because [Employee] didn't seek treatment for pain or complain of pain prior to the work injury doesn't mean it didn't – wasn't occurring, right?**
>
> A That's correct. It means that he may not have had a mechanism to seek treatment or it wasn't bad enough to seek treatment until he was injured at work.
>
> **Q Or a desire to seek treatment?**
>
> A Correct.

(Bauer Deposition, November 11, 2020; emphasis in original).

53) On December 3, 2020, Employee filed an affidavit including 4.7 hours attorney time for the hearing. (Supplemental Affidavit of Attorney Fees and Costs, December 3, 2020).

54) On December 4, 2020, Employee filed an affidavit including $125.40 for Dr. Bauer's deposition transcript. (Supplemental Affidavit of Costs, December 4, 2020).

55) Neither party addressed factors for consideration in determining attorney's fees set out in *Rusch*. Employer did not file objections to Employee's attorney's fees and costs. (Agency file).

56) Employee's attorney fee filings include a total of 13.4 hours of attorney time relating to reemployment benefits. (Observations).

57) No affidavit was filed regarding Employee's paralegal costs. (Agency file).

58) Employee, Champagne-Christian, Jones, and Dr. Bauer were all credible witnesses. (Experience; judgment; observations; inferences drawn therefrom).

59) Employee was medically stable on December 26, 2019. (Judgment; observations; specific facts; inferences drawn therefrom).

60) The work injury of May 22, 2019 aggravated Employee's preexisting Achilles tendonitis and associated symptoms, and was the substantial cause of Employee's disability and need for treatment. (Inferences drawn from the above).

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 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 this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
>
> (3) this chapter may not be construed by the courts in favor of a party;
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The Board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." That some persons "may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987)(further citations omitted).

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation and benefits are payable under this chapter for disability or death or or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A

> presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
>
> . . . .

A preexisting condition does not rule out benefits under the Alaska Workers Compensation Act if the employment aggravated, accelerated, or combined with the condition to produce disability. *DeYonge v. NANA/Marriott*, *1 P.3d 90 (Alaska 2000) (further citation omitted).* In the context of a worker's compensation claim aggravation of symptoms or aggravation of the underlying condition are equally persuasive in determining compensability. *Id.*

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has the knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
> . . .
>
> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter . . . .

The application of the presumption involves a three-step analysis; for injuries occurring after 2005, if an employee establishes a preliminary link between the injury and the employment, the presumption "may be overcome at the second stage when the employer presents substantial evidence, which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment." *Runstrom v. Alaska Native Med. Ctr.*, AWCAC Dec. No. 150 at 7 (March 25, 2011). The employee need only provide minimal relevant evidence to establish the preliminary link between the injury and employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.,* 742 P.2d 339, 244 (Alaska 1987). Credibility is not weighed at this stage. *Resler v. Universal Services, Inc.,* 778 P.2d 1146 (Alaska 1989). In claims arising after November 5, 2005, employment must be the substantial cause of the disability or need for medical treatment. AS 23.30.010(a). If the employer's evidence is sufficient to rebut the presumption, the employee must then prove his case by a preponderance of the evidence. *Runstrom* at 8. Credibility is not weighed at the second step. *Resler.* An employer can rebut the presumption by showing that the injury did not arise out of the employment. *Huit v. Ashwater Burns, Inc.,* 372 P.3d 904 (Alaska 2016). To do so, the employer needs to show the work injury could not have caused the condition requiring treatment or causing disability (the negative-evidence test) or that another, non-work-related event or condition caused it (the affirmative-evidence test). *Id.*; *Corona v. State of Alaska,* AWCB Dec. No. 20-0032 (May 21, 2020). Simply pointing to other factors that may have aggravated a preexisting condition is not a sufficient alternative explanation, *DeYonge*; however, "[t]he mere possibility of another injury is not 'substantial' evidence sufficient to overcome the presumption." *Huit.* Similarly, an unknown cause is not substantial evidence to rebut the presumption.

Credibility questions and the weight accorded evidence is deferred until after it is decided if Employer produced sufficient evidence to rebut the presumption that Employee's injury entitles him to benefits. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994) (further citation omitted).

In the third step, if the employer has successfully rebutted the presumption, it drops out and the employee must prove their claim by a preponderance of the evidence. *Runstrom* at 8. When determining whether the disability or need for treatment arose out of and in the course of employment, the factfinders in step three of the analysis must evaluate the relative contribution of different causes of the disability or need for treatment. *Huit*. The board must review the different causes of the benefits sought and identify one cause as "the substantial cause."

> The statutory language does not require the Board to look at the type of injury in identifying the substantial cause of the need for medical treatment. Alaska Statute 23.30.010(a) requires the Board to "evaluate the relative contribution of different causes of . . . the need for medical treatment". That subsection then provides, "Compensation or benefits under this chapter are payable for . . . medical treatment if, in relation to other causes, the employment is the substantial cause of the . . . need for medical treatment." (Citation omitted). When read together, these sentences do not reflect an instruction to consider the type of *injury* when evaluating compensability; instead, they require the Board to look at the *cause* of the injury or symptoms to determine whether "the employment" was a cause important enough to bear legal responsibility for the medical treatment needed for the injury.

Morrison v. Alaska Interstate Constr., Inc., 440 P.2d 224, 233-34 (Alaska 2019) (emphasis in original).

"Inconclusive or doubtful medical testimony must be resolved in the Employee's favor. Less weight may be given to a physician who appears to be advocating for a party." *Hanson v. Municipality of Anchorage*, AWCB Dec. No. 12-0031 (February 21, 2012) (further citations omitted). The Alaska workers' compensation system favors the production of medical evidence in the form of written reports. *Wise v. Wolverine Supply, Inc.,* AWCB Dec. No. 20-0095 (October 13, 2020).

In construing AS 23.30.010(a), the board must consider different causes of the "benefits sought" and the extent to which each cause contributed to the need for benefits. *Morrison v. Alaska Interstate Constr., Inc*., 440 P.2d 224 (Alaska 2019). The statute does not require the substantial cause to be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." *Morrison* at 238. The board need only find, which of all causes "in its judgment is the most important or material cause to that benefit." *Id.* Preexisting conditions which a work

injury aggravates, accelerates, or combines with to cause disability or need for medical treatment may still constitute a compensable injury. *Id.* at 234, 238-39. The board's decision need only be supported by "substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 239.

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness . . . .
>
> **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. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation 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 or 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.
> . . . .
>
> **AS 23.30.155. Payment of Compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
> . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after 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.
> . . . .

> (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. . . .

Where an employer neither controverts employee's right to compensation, nor pays compensation due, subsection .155 imposes a penalty. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352 (Alaska 1992). To avoid a penalty, a controversion must be filed in good faith. *Id.* 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.*

A workers' compensation award, or any part thereof, accrues lawful interest from the date it should have been paid. *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187 (Alaska 1984).

> **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 a period of disability occurring after the date of medical stability.

> **AS 23.30.190. Compensation for permanent partial impairment: rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . . .

Where a claim for PPI is contested, the employee has the duty to obtain a PPI rating either if he does not agree with a rating by the employer's physician, or where a PPI rating has not already been obtained. *Stonebridge Hospitality Associates, LLC v. Settje,* AWCAC Dec. No. 153 (June 14, 2011).

> **AS 23.30.395. Definitions.** . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected

to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;
. . .

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in . . . AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

. . . .

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

(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.

(c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed.

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

> (1) A request for a fee under AS 23.30.146(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by

> testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
>
> (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.
> . . . .
>
> (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. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:
> . . .
>
> (14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk
> (A) is employed by an attorney licensed in this or another state,
> (B) performed the work under the supervision of a licensed attorney;
> (C) performed work that is not clerical in nature;
> (D) files an affidavit itemizing the services performed and the time spent in performing each service; and
> (E) does not duplicate work for which an attorney's fee was awarded;
> . . .
>
> (17) other services as determined by the board.
>
> . . . .

Attorney's fees in Alaska workers' compensation cases should be "fully compensatory and reasonable" to ensure injured workers have "competent counsel available to them." *Childs v. Copper Valley Elec. Ass'n*, 860 P.3d 1184, 1190 (Alaska 1993); *Wise Mechanical Contractors v. Bignell,* 718 P.3d 971 (Alaska 1986). The factors set out in ARPC 1.5(a) are reviewed to determine attorney's fee awards. *Rusch v. Southeast Alaska Regional Health Consortium,* 453 P.2d 784, n. 51 (Alaska 2019). Those factors are:

> (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.

Each factor is to be considered and findings or explanation made as to why the factor was not relevant. The presumption of compensability does not apply to the amount of fees and their reasonableness. *Rusch*.

ANALYSIS

1) Is the work injury the substantial cause of Employee's current disability and need for medical treatment?

A three-part test determines whether Employee's employment is the substantial cause of any disability or need for treatment. A.S. 23.30.010(a); AS 23.30.120. Employee attached the presumption of compensation to a May 22, 2019 work injury by his testimony that he had been in constant pain since the May 22, 2019 event playing volleyball as part of his job duties, and via the written report of injury. *Cheeks*. Credibility is not weighed at this stage. *Resler.*

Employer rebutted the presumption of compensability via the EME report and deposition testimony of Dr. Bauer, who opined after examination and a review of Employee's medical records that the work was not the substantial cause of any disability or need for treatment beyond the initial x-rays, MRI, and physical therapy. *Huit; Corona.* Credibility is not weighed at this step. *Resler.* Dr. Bauer found that Employee's pre-existing degenerative condition within the Achilles tendon caused Employee's ongoing disability and need for treatment.

As Employer successfully rebutted the presumption of compensability, Employee must prove his claim by a preponderance of the evidence. *Runstrom.* Credibility and the weight of the evidence are considered at this third stage. *Norcon.*

Employee's records show he had a tight Achilles, mild tendinosis, and calcaneal spurs at the Achilles tendon insertion pre-dating the work events of April 2019 (stairs) and May 2019 (volleyball). No medical evidence was provided indicating Employee had sought treatment regarding this pre-existing condition for years prior to the 2019 work events.

Employee stumbled on stairs at work in April, 2019. He was examined three days later, and returned to work with instructions to return if there was no improvement in pain. X-rays taken at that time showed mild vascular and soft tissue calcifications, no ankle effusion, and no acute osseous abnormality.

Employee's immediate supervisor Jones testified regarding his prior mobility issues, gait, and pain reporting. Jones prepared Employee's August 2019 evaluation which was noted not to contain any information regarding improving physical abilities or noting any deficiencies in performing essential job duties. His testimony was consistent with other indicators regarding Employee's pre-existing condition. Jones is not a medical specialist; while he was a credible witness, no particular weight is given to his testimony. AS 23.30.122.

Employee's unit supervisor Champagne-Christian testified consistently with other indicators regarding Employee's preexisting condition. She is also not a medical specialist; while she was a credible witness, no particular weight is given to her testimony. AS 23.30.122.

Dr. Bauer's primary practice is forensic medicine or independent medical evaluations. While he was a credible witness, he provided evidence that conflicted with medical records and at times, his own EME report. Though he cited to a June 19, 2021 MRI which noted a partial-thickness tear at the tendon insertion on the calcaneus, Dr. Bauer found that Employee "does NOT have a tear or rupture of the Achilles . . . ." His report found that Employee had objectively returned to pre-injury status as of his examination, despite no imaging prior to either of the April or May 2019

work incidents showing that a partial Achilles tear was present to any degree; Dr. Bauer testified at deposition that Employee had not returned to preinjury status where he no longer had symptoms, but "[h]is injuries have returned to what we would expect from somebody who does have chronic tendonitis." Dr. Bauer found that Employee had symptoms after the April and May 2019 work incidents consistent with a chronic condition "without any acute findings." He admitted it is possible for Employee's partial-thickness tear to be acute versus degenerative, but it was not probable. Dr. Bauer found the May 22 volleyball incident would have been the substantial cause of the need for initial treatment including x-rays, MRI, and physical therapy, but not the consultation by Dr. Chang or any future treatment; later in the same report Dr. Bauer opined that treatment up to the time of his examination was reasonable and necessary for the acute aggravation and increase in symptoms (compare to his statement elsewhere in the report that there were no acute findings).

Dr. Bauer testified Employee has probably had prior symptoms, just not of sufficient severity to seek treatment, and that he probably should have noted that Employee had "symptomatic aggravation" which Dr. Bauer believed had returned to baseline. Dr. Bauer testified ". . . he did have some symptoms coming from this area. What in my mind is also true is that, even though he had symptoms following May 22, 2019, it does not change the ultimate course of what's going to happen to that Achilles tendon . . . ." He testified Employee probably would not have the symptoms he currently has had there not been an injury; there was evidence of an injury but he was most concerned about the symptoms that would eventually occur regardless of the May 22, 2019 incident. He could not say when the symptoms might have developed had there not been a work injury. Contrary to his statement that there was no Achilles tear in his EME report, at deposition Dr. Bauer testified that there was a partial thickness tear, which was degenerative.

Regarding a PPI rating, Dr. Bauer found there were structural abnormalities, but they were "neither caused by nor aggravated by" the work incidents; he provided a zero percent PPI rating. He clarified at deposition that despite the tendon tear he now admitted was present there was no change in the preexisting condition, therefore there was no impairment.

Dr. Bauer's report and testimony provided conflicting evidence, and did not clearly address Alaska law that acceleration or aggravation of an underlying condition or symptoms could be a compensable injury when determining causation. *DeYonge.* Inconclusive or doubtful medical testimony must be resolved in the Employee's favor. *Hanson*; *Rawls*. Dr. Bauer's report and testimony, to the extent that they conflict with themselves, other medical evidence, and prevailing law, are given very little weight. AS 23.30.122.

Employee was a credible witness and provided substantial testimony supporting a determination that while he may have had preexisting Achilles tendinosis, it was not significantly symptomatic prior to the May 22, 2019 work injury. Despite Employee's preexisting Achilles tendinosis, he was able to perform the functions of his job prior to the May 22, 2019 incident. AS 23.30.122.

Greatest weight is given to the written medical records. *Wise*. Taken as a whole, these records indicate Employee had preexisting Achilles tendinosis with limited associated symptoms; any symptoms present prior to the work injury did not interfere with his ability to do his job, and did not equate to a disability under the Act. Also important is what the records did not show; the April 23, 2019 medical records do not reveal acute osseous abnormality, nor is there notation of a prominent Haglund's defect. After slipping on stairs at work in April, Employee was released to full work duty. Two weeks after the May 2019 work incident, he was in pain and had difficulty with weight-bearing; a curve was noted in his Achilles tendon. Orthopedic examination and imaging after the May work injury showed calcific changes at the Achilles tendon, likely chronic, with a partial-thickness tear of the Achilles tendon. Pain was attributed to "chronic tendinitis exacerbated by his acute injury." MRI approximately one month after the May 2019 work incident showed thickening of the Achilles tendon, "exuberant ossification," prominent Haglund deformity, and a partial-thickness tear. Physical therapy records over several months noted Employee's symptoms were consistent with the diagnosis of right Achilles tear or rupture. Two months after the May 2019 work injury, Employee's activity was limited by his pain tolerance and he was placed in a restrictive "cam" l-shaped boot to aid healing. Dr. Chang diagnosed distal Achilles calcifications with partial destabilization of bony overgrowth; a partial thickness Achilles tendon tear; and good tendon continuity to the posterior heel. Surgical reconstruction was not

recommended, and the risk of future tendon failure was noted. As of October 24, 2019, medical records continued to note right ankle pain.

ADA and other records support a finding of work-related disability. In March 2020 Employee was noted to have a long-term or permanent impairment due to partial tear and chronic Achilles tendonitis. Employee's physical therapist PT Carlson did not recommend that he return to work as a juvenile justice officer. PA-C Wood did not release Employee to return to work at any job he had held in the prior ten years as of June 30, 2020.

The lay and medical evidence, including Employee's preexisting Achilles tendonitis, shows that Employee suffered a work-related disability under the Act. AS 23.30.395(16). Employee's May 22, 2019 work injury aggravated his underlying Achilles tendon condition and associated symptoms. The work injury is the substantial cause of Employee's disability and need for treatment. AS 23.30.010; *Morrison*; *Huit*.

2) Is Employee entitled to TTD benefits?

Employee suffered a compensable injury and is entitled to TTD benefits until he is medically stable where his disability is total in character but temporary in quality. AS 23.30.185. Employee has attached the presumption of disability total in character but temporary in quality via his own testimony, the recommendation of PT Carlson that he not return to work as a JJO, and PA-C Wood's indication that Employee would not be released to work any of the jobs he had held in the prior ten years. AS 23.30.120.

Without regard to credibility, Employer rebutted the presumption when Dr. Bauer opined Employee reached medical stability on September 12, 2019 when he had "completed physical therapy" and seen Dr. Chang. Dr. Bauer opined that "his injuries have returned to what we would expect from somebody who does have chronic tendinosis." *Huit; Corona.*

The burden shifts back to Employee to prove with clear and convincing evidence that he was not medically stable and remained disabled after the last date Employer paid him TTD benefits. AS

23.30.395(28). Dr. Chang anticipated Employee would be medically stable four to six weeks after his examination and follow-up with the sports medicine clinic. PA-C Wood found Employee medically stable on October 24, 2019 but noted Employee continued to attend physical therapy. Physical therapy notes after October 24, 2019 provide evidence that objectively measurable changes from the effects of the work injury occurred via physical therapy after October 24, 2019. Employee was found to have received maximum benefit from physical therapy and was released from it on December 26, 2019. Physical therapy records from October 24, 2019 through December 24, 2019 provide clear and convincing evidence that Employee was not medically stable prior to that date. Consquently, Employee was medically stable on December 26, 2019. *Id.*

Employee is entitled to unpaid TTD benefits from November 14, 2019 to December 26, 2019 (6 weeks x $1,018.93) in the amount of $6,113.58 before any applicable offsets.

3) Is Employee entitled to PPI benefits?

Employee has been found to have a continuing, compensable work injury. Employee's treating physician indicated he would likely have a PPI of greater than zero percent. Dr. Bauer did not address Alaska law regarding aggravation of preexisting conditions and symptoms as the basis for his PPI rating; accordingly his opinion is disregarded for this purpose. AS 23.30.010(a); *Morrison*; *DeYonge*.

No PPI rating has been provided other than the zero percent rating provided in Dr. Bauer's EME. If Employee wanted an award of PPI benefits and disagreed with Dr. Bauer's zero percent rating, the onus was on Employee to obtain a PPI rating and present it at hearing. *Settje*. Employee is not entitled to PPI benefits.

4) Is Employee entitled to medical benefits?

Employee is entitled to medical benefits if his work injury is the substantial cause for his need for treatment. AS 23.30.010(a); AS 23.30.095. This issue was analyzed as issue 1), *supra*, and is incorporated herein. Employee is entitled to medical benefits from Employer according to the provisions of the Act.

5) Is Employer entitled to a penalty for failure to timely pay or controvert?

For a controversion notice to be filed in good faith, Employer must possess sufficient evidence in support of the controversion that, absent contrary evidence, Employee is not entitled to benefits. *Harp.* At the time Employer filed the controversion notice, Dr. Bauer's report indicated that Employee's disability and need for treatment was not work related. On this evidence alone, a panel would have found Employee was not entitled to medical care or other benefits relating to the work injury. Thus, Employer's controversion was issued in good faith. *Id.* Employee is not entitled to any penalty relating to good faith controversion. AS 23.30.155(a). However, Employer also may be liable for penalty for any time in which it did not either timely pay compensation due or controvert Employee' right to compensation. AS 23.30.155(e). Employer paid Employee TTD benefits through November 13, 2019 on November 25, 2019 and late-filed its November 13, 2019 controversion on December 20, 2019. Employee is entitled to penalty for TTD benefits untimely paid up to the filing of the controversion on December 20, 2019. *Id.*

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

Interest on unpaid compensation is mandatory. AS 23.30.155(p). Employee is entitled to accrued interest on unpaid benefits. *Id*.; 8 AAC 45.142(a); *Rawls*. Employee is entitled to TTD and other benefits as set out in this decision from May 22, 2019 to the date of medical stability, December 26, 2019, which remain unpaid. Employee is entitled to interest according to statute. AS 23.30.155(p).

Employee requests attorney fees and costs. AS 23.30.145. Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. *Id*; *Childs*. Employer controverted Employee's claim. Employee successfully prosecuted his claim. 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." Employee submitted itemized fee affidavits totaling $16,425.00 in attorney fees and $1,431.90 in costs, for a total

requested of $17,856.90. Pursuant to *Rusch*, the eight factors of Alaska Rule of Professional Conduct 1.5(a) are as follows:

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

The questions involved in this case were moderately complex and required a high degree of attention. Counsel's skill was helpful in pursuing Employee's claim. *Rogers & Babler*.

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

To some extent, the acceptance of any case would preclude the attorney involved from using that time for another matter. Employee did not submit any specific information regarding this issue. *Rogers & Babler*.

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

Fees are commonly awarded by Fairbanks hearing panels to attorneys of like experience. Employee provided a specified hourly rate of $450 per hour, which was not contested by Employer's counsel. *Rogers & Babler.*

4. *The amount involved and the results obtained.*

The amount involved is unknown at this time but are anticipated to be significant. Employee's counsel obtained a positive result for his client. *Rogers & Babler*.

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

No information was provided regarding time limitations imposed by the client or the circumstances; nothing within the record stands out as being extraordinary. *Rogers & Babler.*

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

The fee affidavit indicated that approximately 13 months passed from the first meeting to the date of hearing. This is a moderate length relationship. *Rogers & Babler*.

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

The attorney performing the service is highly experienced and has a good reputation. He regularly obtains positive results for clients in workers' compensation matters. *Rogers & Babler*.

8. *Whether the fee is fixed or contingent.*

This matter, like nearly all workers' compensation cases, is based on a contingent fee.

After consideration of the above factors, no objections or information having been provided to indicate that an hourly fee other than the $450 per hour requested by Employee's attorney is fully compensatory, and the Alaska Supreme Court's guidance regarding full compensation to Employee attorneys, fees will be awarded at the rate of $450 per hour.

Employee prevailed on all issues at hearing except PPI benefits. A review of the fee affidavits filed by Employee does not reveal specific time entries pertaining to these issues; based on a review of the record as a whole, a reasonable estimate of time dedicated to these issues to date is 2.0 hours. Two hours will be removed from Employee's fee award at the rate of $450 per hour, for a fee reduction of $900.00.

Reemployment benefits were not an issue for hearing. The following entries are related to reemployment benefits and will be removed from the attorney fee award:

Date	Time Entry
11/12/19	.2
11/27/19	.2
5/28/2020	1.0
7/23/2020	.7
7/27/2020	3.1
7/28/2020	2.5
7/29/2020	2.4
8/4/2020	.6
8/4/2020	.3
8/24/2020	.6

10/9/2020	.3		
10/9/2020	.1		
10/14/2020	.2		
11/3/2020	--		(No Charge)
11/9/2020	1.1		
11/19/2020	.1		
Total:	13.4	@$450/hour	$6,030.00

Employee's affidavit included paralegal costs, but no paralegal affidavit was filed as required by 8 AAC 45.180(f)(14). Paralegal costs in the amount of $1,306.50 will be removed from the award of attorney's fees and costs.

Employee incurred $125.40 in cost to obtain a copy of Dr. Bauer's deposition testimony, which is directly relevant to this hearing. Employee will be awarded this cost.

Employee's total award of attorney's fees and costs after stated reductions is $10,520.40.

CONCLUSIONS OF LAW

1) The work injury is the substantial cause of Employee's current disability and need for medical treatment.
2) Employee is entitled to TTD benefits.
3) Employee is not entitled to PPI benefits.
4) Employee is entitled to medical benefits.
5) Employee is entitled to a penalty for failure to timely pay or controvert.
6) Employee is entitled to interest and attorney fees and costs.

ORDER

1) Employee's May 22, 2019 work injury is the substantial cause of his disability and need for treatment.

2) Employer shall provide benefits awarded, namely: unpaid medical benefits if any, TTD, penalty, interest, and attorney's fees and costs, in accordance with this decision.

3) A copy of this decision shall be provided to the RBA.

Dated in Fairbanks, Alaska on May 4, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Cassandra Tilly, Designated Chair

/s/

Robert Weel, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of ALAN PAUL MITCHELL, employee / claimant v. STATE OF ALASKA, employer and insurer / defendants; Case No. 201907686; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on May 4, 2021.

/s/
Ronald C. Heselton, Office Assistant II