ALASKA WORKERS' COMPENSATION BOARD

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

TODD CHRISTENSEN, Employee, Claimant, v. KINROSS GOLD USA, INC., Employer, and LIBERTY MUTUAL FIRE INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 202005328 AWCB Decision No. 21-0061 Filed with AWCB Fairbanks, Alaska on July 16, 2021

Todd Christensen's (Employee's) August 12, 2020 worker's compensation claim was heard on June 3, 2021 in Fairbanks, Alaska, a date selected on March 26, 2021. A February 23, 2021 hearing request gave rise to this hearing. Attorney Justin Eppler appeared and represented Employee. Attorney Rebecca Holdiman Miller appeared and represented Kinross Gold USA, Inc. and its insurer (Employer). Witnesses included Todd Christensen and Michelle Christensen (Employee's spouse). The record was held open to receive supplemental filings regarding attorney's fees and temporary total disability payment information from Employer and closed after the hearing's conclusion on June 11, 2021.

ISSUES

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

Employer contends Employee's 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 he is entitled to temporary total disability (TTD) benefits.

Employer contends that Employee's preexisting cervical spine condition caused his disability and he is not entitled to TTD benefits after June 5, 2020.

2) Is Employee entitled to TTD benefits?

Employee contends he is entitled to permanent partial impairment (PPI) benefits when a PPI rating is received.

Employer contends Employee is not entitled to PPI benefits.

3) Is Employee entitled to PPI benefits?

Employee contends he is entitled to medical treatment for his work injury.

Employer contends Employee is not entitled to medical treatment because the need for medical treatment was caused by his preexisting condition.

4) Is Employee entitled to medical benefits and transportation costs?

Employee contends Employer stopped paying benefits upon receipt of the EME report, but did not timely file a controversion notice, entitling him to late-payment penalty.

Employer concedes it stopped paying TTD benefits in July 2020, but denies that Employee is entitled to any benefits after June 5, 2020, and asserts a right to recoup overpayment.

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 or overpaid, Employee should not prevail in this matter, and he 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) Employee sought chiropractic care in early 2018 for aching, throbbing, tightness and discomfort in his mid and upper back. He was noted to be "of good health and is expected to make good progress and recovery with few residuals. He has no complicating factors and no noted contraindications to chiropractic care." Diagnoses included cervicalgia, cervical segmental dysfunction, thoracic segmental and somatic dysfunction, pain in thoracic spine, myositis, rib cage segmental and somatic dysfunction, lumbar segmental and somatic dysfunction, low back pain, muscle spasm of back, and sacral segmental and somatic dysfunction. (Riverstone Chiropractic Records, January 31 and February 7, 2018).

2) On May 1, 2020, Employee was assaulted by a coworker at work. (Record). Shortly after the assault he was assessed by EMT Brooke Eifling (Charge Medic) and Morgan Renney (Medic). The prehospital report noted a traumatic incident, spine cleared by protocols, and provided for over-the-counter painkiller as needed. Facial swelling and tenderness was noted; ice was applied to facial and hand swelling. Employee complained of pain radiating from L lower scapula to anterior intercostals. (Prehospital Report, May 1, 2020).

3) On May 5, 2020, Sandra Speerstra, PA-C diagnosed right rotator cuff strain and elbow and rib contusions. Chart history provided on May 5, 2020 states:

> [P]atient was at work when he was pushing down the nose of a thunder bolt gun, that is a liner removal tool that is a hyrdolic (sic) tool that weighs … 1000 pounds. It was suspended with a crane, when he pushed down with is (sic) right arm he felt immediate pain in his right shoulder and then was able to use his left elbow to push down the tool. . . . He also was in an altercation on Friday 05/01/2020 where another employee hit him multiple times in the ribs [and] face with closed fists, the patient thinks about 10 times in the ribs and he thinks he

> may have hit his elbow and hand on something. He told security immediately and then went home for the rest of the day. His ribs were hurting as well as his face and his hand. He has had a claim back in 1993 for his back.

Examination provided positive Hawkins, Neer, drop arm, and crank tests, but a negative empty can test. The right shoulder and elbow had limited range of motion on all planes with pain. Diagnoses were right rotator cuff strain and contusions of the rib and elbow. A physical therapy referral was provided. X-rays were ordered for the right shoulder, ribs, and elbow. Employee worked his full schedule the previous day without any issues. Employee was released to full work/activity with full participation in essential job functions, working to tolerance and "[i]f the right shoulder starts to hurt he needs to stop what he is doing immediately." (Speerstra Record, May 5, 2020).

4) On May 5, 2020, Employee consulted Derrick Cannon, PT who noted:

> [H]e was putting a large tool (1000 lb) suspended from a crane back into its box when he noticed a very sharp, burning pain in the R shoulder/shoulder blade when pushing on it. He reports the pain was a 7/10 and he is unable to lift the R arm afterward. Pt. reports no problems beforehand other than what felt like a 'pinched nerve' under the R shoulder blade following an altercation with a co-worker on Friday. He reports being punched multiple times on Friday in the ribs and face during the altercation which further complicates his injuries and functional mobility.

PT Cannon diagnosed rotator cuff strain, generalized muscle weakness, and abnormal posture. (Cannon Records, May 5, 2020).

5) On May 5, 2020, bilateral rib x-rays were unremarkable for fractures, dislocations, bony lesions, or acute cardiopulmonary pathology. (Liu Records, May 5, 2020).

6) On May 5, 2020, right elbow x-rays were unremarkable. (Malan Records, May 5, 2020).

7) On May 7, 2020, Sandra Speerstra, PA, charted right shoulder and left rib pain. Condition was noted to be work related with an estimated length of disability of four weeks. Employee could not raise his right arm above his head. Finger tingling was noted on the right hand. Examination showed tenderness in the right AC joint, with positive painful arc, positive Hawkins test, positive Neer test, positive drop arm test, and positive crank test. Steroids were provided. Employee "has significant difficulties with the physical requirements of the job" but was released to regular duty with no restrictions with a note "work to tolerance of pain in the right shoulder." (Speerstra Records, May 7, 2020).

8) On May 11, 2020, Employee underwent physical therapy with PT Cannon, and said his right shoulder was doing better but reported pain in his left shoulder. Employee was released to full work with full participation in essential job functions. (Cannon Record, May 11, 2020).

9) On May 13, 2020, Carl Thomas, M.D. recorded Employee was struck about 20 times to his face and trunk by a coworker's fists without loss of consciousness. He continued to work and on May 5 began having pain to his right upper back and shoulder and his arm began to feel weak due to pain. X-rays had been taken; diagnosis was cervical radicular pain. Employee reported several days of tingling to his right thumb and first finger, with occasional sharp pain down left inner upper arm. Employee could not raise his arms due to upper back pain. He appeared to be in acute distress. Vertex compression was negative for radicular pain but caused pain to the lower neck; there was cervical pain with rotation of the cervical spine. Need for cervical x-ray was noted including possible C5 radicular symptoms on left. "We will have him off work until work up completed as not able to lift arms without pain and poor sleep can make his (sic) a hazard driving. He was told he might have some underlying spine issues that [were] aggravated by the trauma. The cervical x-ray shows severe degenerative changes at C5/6 and moderate at C6/7. No acute changes seen." Employee was referred to Cary Keller, M.D., orthopedic surgeon. (Thomas Records, May 13, 2020).

10) On May 13, 2020, Dr. Thomas sent a message to Nilima Misra, CMA regarding Employee's x-ray: "The cervical x-ray shows severe degenerative changes at C5/6 and moderate at C6/7. No acute changes seen. Will refer him to Dr. Keller. I do not see anything that was causes (sic) by the assault but certainly his underlying cervical spine problem could be badly aggravated by it." (Thomas Message, May 13, 2020).

11) May 13, 2020, was the last day Employee was paid wages in May 2020. (Timesheet, May 16, 2020).

12) On May 14, 2021, Employee filed an unsigned request for reimbursement for mileage for medical treatment, with entries totaling 53 miles. (Reimbursement Request, May 14, 2021).

13) On May 15, 2020, Kevin Pust, PT, charted Employee's work assault on May 1, 2020. "His symptoms have been getting worse. He now has numbness that is progressing farther and farther down both arms. He is concerned he has a neck injury. He scheduled an appointment with an ortho surgeon (Carl Thomas) for Monday. He is having pain with lifting his arm away from his

side." Employee was released to return to full work with full participation in essential job functions. (Pust Record, May 15, 2020).

14) On May 18, 2020, Employee underwent a computerized tomography (CT) scan of his cervical spine. The scan noted the C1/2 relationship appeared symmetric without significant degenerative change. No fractures were detected. (Waite Report, May 18, 2020). The CT scan was compared with x-rays of May 13 and 18, 2020 by David Evans, M.D., who found no visible fracture, normal vertebral heights, moderate degenerative disc disease, facet and atlantodental arthrosis. Dr. Evans diagnosed moderate cervical spondylosis without acute fracture or subluxation, canal narrowing greatest C3-C4 and C5-C6, and foraminal narrowing greatest right C3-C4, C5-C6, and C7-T1. (Evans Report, May 18, 2020).

15) On May 18, 2020, Employee told PT Pust his new physician did not want any physical therapy done on his neck until the CT scan results were back; he was to continue physical therapy for his shoulders and upper extremities. He appeared "to be hyper focused on his pain experience and possibly catastrophizing his situation." (Pust Record, May 18, 2020).

16) On May 18, 2020, Employee was examined by Robert Wood PA-C. Employee had pain in the right AC joint, anterior shoulder and whole shoulder bilaterally. He was unable to place his hand behind his head. A CT scan was ordered and pain medication prescribed. PA-C Wood completed an initial physician's report, providing a May 1, 2020 injury date due to physical assault from a co-worker. Portions of the report are illegible but appear to note lessened cervical range of motion with pain and shoulder pain. Diagnosis were cervical and shoulder strains. Employee was not medically stable and was not released to work. (Wood Report, May 18, 2020).

17) On May 20, 2020, PA-C Wood referred Employee to neurologist James Foelsch M.D. and ordered nerve conduction testing. An osteopathic referral was provided. (Wood Record, May 20, 2020).

18) On May 21, 2020, Employee was examined by Milton Wright, D.O. Employee had "sustained what appears to be in (sic) neurologic damage. Cervical x-ray as well as CT demonstrate not only degenerative disc issues but moderate spinal canal compromise." Dr. Wright's ability to treat Employee was limited because of his acute distress; he had a pending neurology referral. Diagnoses included bilateral shoulder pain, left arm pain, and segmental and somatic dysfunction of the head, cervical, thoracic, upper extremity, rib cage, and abdominal

regions. The encounter was stated to be related to Employee's workers' compensation claim. He reported constant bilateral neck pain following the May 1, 2020 assault, with left arm pain radiating down from his armpit. Employee was experiencing right arm spasms that radiated into his chest, as well as numbness in his bilateral shoulders, left arm, right index finger, and right thumb. (Wright Record, May 21, 2020).

19) On May 28, 2020, temporary total disability (TTD) and temporary partial disability (TPD) benefits were denied by the Employer, on the basis of no medical evidence being received to support time loss from work beyond the statutory three-day waiting period. Medical treatment related to the claim or disability "that is medically authorized" would be paid upon submission of physician report and billing. (Controversion Notice, May 28, 2020).

20) On May 28, 2020, Employee was re-evaluated by Dr. Wright with no improvement since his prior appointment May 21. Employee reported neck pain was "constant pain that fluctuates in intensity throughout the day and with some ROM. He was driving yesterday and 'snapped his head to the left' when he saw an animal which he states caused a great increase in his pain." Dr. Wright was concerned regarding Employee's neurologic status and would re-evaluate following his neurology appointment. (Wright Record, May 28, 2020).

21) On May 29, 2020, Employee was examined by PA-C Wood, who diagnosed neck and shoulder pain. A CT scan was ordered. Activity was limited to pain tolerance. A prescription for pain medication was provided. Employee reported muscle spasms across his right chest muscles that radiated into his right armpit. Numbness was noted in the left elbow to arm pit, and in the right pectoral area with pain at times. (Wood Record, May 29, 2020).

22) On June 1, 2020, Employee was examined by Dr. Foelsch, who diagnosed mild bilateral median neuropathies at the wrist, nonspecific findings on electromyography but suggestive of irritation to the lower cervical roots, – probable C8, and right C6 and C7 radiculopathy. (Foelsch Record, June 1, 2020).

23) On June 4, 2020, Employee provided a recorded statement to Employer's Adjuster. Employee was injured May 1, 2020 when a co-worker punched him around the head and ribs, estimated at 20 to 30 strikes. He was taken to the onsite medic who gave him an ice pack. At that time Employee felt like he had a pinched nerve feeling, but with what he thought was a bruised rib, face, and sprained hand, it did not seem there was any urgency involved and there was a pandemic. His supervisor sent him home the rest of the day and he came back Monday

morning. Employee had asked if he could receive medical attention later if the situation became worse and received an affirmative reply. By the time he went back to work on Monday, he was still in pain, he could go to work but couldn't do much there. The following day he was trying to do light work, he used his right arm to push a piece of equipment into a particular position and his shoulder started burning. He was eventually able to push it down with his left elbow. The injury really flared up then, so Employee went to his supervisor to indicate it had gotten worse. He was taken to the urgent care facility. He was examined, x-rays were taken, and he was prescribed physical therapy, an oral steroid for inflammation, and pain pills. Employee did not like how he felt the provider was guiding his care. After the May 5 pushing incident, his left arm started to become numb, the pain increased over the next few days, and he felt something was wrong. At that point he chose to go to his own family doctor and received referrals for treatment. He underwent various imaging and physical therapy; traction was helpful for about 10 minutes afterward. Employee's pain had been in his back, both shoulders, his shoulder blades, and his neck, like a stiff neck. Employee was not getting any real sleep at night. Employee was off work, he continued to go to work for a few days, though he was exhausted. He recalled his last day of work was May 5th. Employee provided information about prior unrelated hospitalizations and surgeries. (Recorded statement, June 4, 2020).

24) On June 5, 2020, Employee consulted PA-C Wood because he had been going to osteopathic manipulation but it had not helped. He reported burning and stiffness in his neck when he drove, looking side to side at traffic. Orthopedic diagnoses included bilateral carpal tunnel syndrome and neck and shoulder pain. Imaging indicated some nerve irritation on the right side, but no indication of nerve damage. Employee was instructed to continue physical therapy including traction and encouraged to adjust his posture and avoid contracting the muscles in his neck and shoulders. Referral was provided to Dr. Everson at McKinley Orthopedics. (Wood Record, June 5, 2020).

25) On June 9, 2020, Employee was examined by Dr. Wright who diagnosed cervicalgia, bilateral shoulder pain, and segmental and somatic dysfunction of the upper extremity, cervical, and thoracic regions. Dr. Wright believed Employee's symptoms "stem from neurologic process." Employee had trouble sleeping due to pain, which was aggravated with the use of his neck. He has been experiencing nerve burning with some range of motion of his arms, the left greater than the right. He denied numbness, tingling and weakness. Superficial fascia was

treated. Dr. Wright "would feel better about treating him deeper only after he has been cleared by neurology." (Wright Record, June 9, 2020).

26) On June 10, 2020, Employee consulted PA-C Wood who referred him to Neal Everson, D.O. for a second opinion regarding neck and shoulder pain. (Wood Record, June 10, 2020).

27) On June 12, 2020, Employee was evaluated by Dr. Everson. The chief complaint was bilateral shoulders. History included report of an attack by a coworker and "previous evaluators have told him that his pain is coming from his neck and not his shoulders. Pt also reports that he experiences muscle spasms in chest, back, and arms." Pain was reported at "7/10," radiating down both arms to the wrist and into the neck. Extension was restricted with posterior neck pain and radicular pain on the left. Employee had a positive Lhermitte's and negative Phalen bilaterally. Spurlings Maneuver was positive with reproduction of pain into right and left upper extremities. A May 18, 2020 CT scan was reviewed and indicated cervicalgia and strain of muscle, fascia and tendon of the right upper arm. There was moderate degenerative disc disease, facet and atlantodental arthrosis. The impression was moderate cervical spondylosis without acute fracture or subluxation, canal narrowing greatest at C3-C4 and C5-C6, and foraminal narrowing greatest right C3-C4, C5-C6 and C7-T1. X-rays taken May 18, 2020 were reviewed and indicated central cord syndrome at C6 and an assault by unarmed brawl or fight. Employee reported progressive pain of bilateral upper extremities, with weakness, numbness, tingling, and shock-like symptoms down both arms. "Patient has numbness and tingling in a C6-C7 distribution." Dr. Everson believed Employee had cervical radiculopathy with possible myelopathic symptoms, and urged him to see a neurosurgeon as soon as possible. Employee was provided prescriptions for an anti-inflammatory, steroid Dosepak, muscle relaxer, and a pain reliever. (Everson Record, June 12, 2020).

28) On June 13, 2020, Dr. Everson referred Employee to John Lopez, M.D. listing an initial assessment of central cord syndrome at C6 level of cervical spinal cord. (Everson Referral, June 13, 2020).

29) On June 16, 2020, intake documentation for an unknown entity signed by Employee noted his chief complaint was neck pain with radiation to arms aggravated by sitting, lying, bending, walking, twisting, standing, coughing/sneezing, pushing/pulling, flex/extending, and other, with pain ranging from 4/10 to 9/10. A symptom diagram showed aching on the neck, back of head, and shoulders in the front; bilateral burning on the shoulders and across the back, burning and

numbness in his left arm, spasm/twitch on the right back and back of right arm, and numbness in his right fingertips. (Intake Documentation, June 16, 2020).

30) On June 16, 2020, a cervical spine MRI indicated central cord syndrome at C6, with multiple levels of degenerative changes, most prominent at C5-6. The report provides "C5-C6: Moderate loss of disc height and signal are seen. Moderate to prominent disc osteophyte complex is seen, which is eccentric to the right, as on series 6 image 21. There is at least moderate bilateral facet hypertrophy seen. Moderate to severe right-sided and at least moderate left-sided neuroforaminal narrowing can be seen. There is moderate to severe central canal narrowing, with associate mass effect upon the ventral spinal cord . . . . C6-C7: Mild loss of disc height and disc signal are seen. Moderate disc osteophyte complex is seen, which is eccentric to the right, with a central/right disc osteophyte protrusion. Mild to moderate facet hypertrophy is seen. There is moderate bilateral neuroforaminal narrowing seen, right worse than left. Moderate canal narrowing is seen. Associated mass effect is seen upon the ventral spinal cord." (NorthStar Radiology Record, June 16, 2020).

31) From May 29, 2020 to July 20, 2020, Employee attended physical therapy at ATI, where he underwent mechanical traction, manual therapy, hot packs, electrical stimulation, neuromuscular reeducation, and therapeutic exercises. He reported relief from cervical traction. At various times Employee reported significant debilitating pain including burning arm pain. Objective observations included significant bilateral guarding of UT (believed to be upper trapezius), significant guarding of cervical spine with right shoulder elevated greater than the left, limited active shoulder elevation secondary to pain and guarding, significant tightness of anterior cervical musculature/scalenes and SCM, pain with right cervical rotation, fair tolerance to Graston technique, significant forward head and rounded shoulder posture, left lateral shift of cervical spine with right lumbar lateral shift, centralized symptoms with cervical extension, limited cervical and shoulder range of motion. Treatment records from June 11, 2020 noted poor tolerance to treatment with concerns of symptom aggravation. (ATI records, various dates).

32) On June 22, 2020, Employee was examined by Dr. Lopez. History taken at that visit noted neck pain after an assault by a co-worker on May 1, 2020. Employee was seen by the medics on-site and did not go to the emergency room the same day; he was told he had probable bruised ribs and he had a black eye. Employee was seen at Urgent Care on May 5, 2020 due to increasing pain and discomfort as well as weakness in his shoulders and arms. Pain was noted to

be in bilateral shoulders, intermittent in either right or left, and right shoulder spasm. "He was concerned especially when he noted that his left arm from the exilla to the ulnar aspect had a dense area of numbness along with radiation of pain into his hand with involvement of the thumb, index, and long finger being numb such that he would have to shake them at night to . . . get some sensation back . . . the right fingertips are numb at times as well." Pain was rated "9/10" at its worst, and at a "5" during examination. He had been attending physical therapy but the only thing that seemed to help was traction. Employee had a prior microdiscectomy and L4-5 and S1-2. (Lopez Record, June 22, 2020).

33) On June 25, 2020, Employee had a telephonic consultation with Alena Anderson, M.D. He was "still very miserable with regards to neck pain and bilateral radiating arm pain. Sometimes he has pain in his right shoulder. When he flexes his neck, he can get pain in his left shoulder. He also has bilateral arm and hand numbness that comes and goes. This has all been since he was assaulted by a coworker in early May. He feels like neck traction has helped with therapy, but he is nowhere as good as he would like to be. He is interested in surgery." The plan was for anterior cervical discectomy and fusion from C5 to C7, possibly from C3 to C7 due to multilevel foraminal stenosis and symptoms. Imaging showed multiple levels of degenerative disc disease, most prominent at C5-6. Employee was noted to have "significant degenerative disc disease as well as neuroforaminal narrowing that is severe on the right as well as severe central canal narrowing noted at the C5-6 level with almost an hourglass appearance." (Anderson record, June 25, 2020).

34) On June 25, 2020, Employee was examined by Dr. Lopez and was miserable with neck pain and bilateral radiating arm pain. He also has bilateral arm and hand numbness that came and went since he was assaulted by a coworker in early May. He felt like neck traction has helped with therapy. Discectomy and fusion surgery would help him "given the amount of degenerative disease of his neck combined with the disc bulging and pressure on his spinal cord . . . we will start planning for anterior cervical discectomy and fusion at least from C5 to C6 and potentially from C3 to C7 given the multilevel foraminal stenosis from C3 to C7 and his symptoms." (Lopez Record, June 25, 2020).

35) On June 26, 2020, Employee did not feel he had improved in functional tasks or symptom improvement. (ATI Record, June 26, 2020).

36) On June 29, 2020, Employee completed a pain diagram indicating numbness down both arms and in specified fingers, burning pain in his neck (bilateral) and down through the left shoulder past the elbow, with aching pain across both shoulders, upper back, and back and sides of the neck. (OMAC Pain Diagram, June 29, 2020).

37) Employee underwent a cervical motion x-ray study on July 7, 2020. Dr. Lopez reviewed the images for motion assessment of the cervical spine, and found "[n]o radiographic evidence of subluxation or instability at any level." (Spine Care Specialists Record, July 7, 2020).

38) On July 9, 2020, Employee underwent a preoperative exam by Dr. Thomas who found cervicalgia, cervical radiculopathy due to degenerative joint disease of spine, and sleep apnea. He noted pending lab results and cleared Employee for surgery. (Thomas Record, July 9, 2020).

39) On July 9, 2020, R. David Bauer, M.D. conducted an employer's independent examination (EME) of Employee. Dr. Bauer diagnosed: 1. Victim of an assault, with bruises to the head, face, and ribs; 2. Cervical spondylosis and cervical stenosis; and 3. Symptoms out of proportion to the objective findings. Dr. Bauer noted the following

> [Employee] is a difficult diagnosis. It has been asserted that he has cervical central cord syndrome which is the most common form of an incomplete spinal cord injury. It is characterized by impairment in all four extremities, though usually the arms to a greater degree than the legs. It usually is manifested by weakness and difficulty with use of the upper extremities, as well as burning and numbness. Sensory loss usually occurs only below the level of the injury. If [Employee] does indeed have a central cord syndrome, it is mild and manifests only by diffuse sensory changes. The difficulty with this diagnosis is that he does have normal motor function, which is quite unusual, in my experience, for an individual who has significant central cord syndrome. Further, his sensory changes are out of proportion to the injury at C6-7; he has sensory that are true above the level of the injury, which is extremely unusual.
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> A. If [Employee] had sustained a hyperextension injury at the time of his beating and IF he had the relatively rapid onset of symptoms (*they usually occur within the first 24-48 hours)*, the diagnosis of central cord syndrome could be entertained. However, [Employee] was seen at Concentra on May 5, 2020, and the Physician Assistant, Sandra Speerstra, noted a normal neurological examination. Had there been a central cord syndrome, on a more-probable-than-not basis, [Employee] would have had symptoms either noted by Physician Assistant Speerstra or Dr. Thomas on May 13, 2020. At that time, [Employee] was complaining of some midscapular pain but no objective neurological findings. The later imaging demonstrated age-appropriate degenerative changes. Cervical spondylosis and cervical stenosis are caused by aging and not by the incident in question.

> B. The substantial cause of his current disability is NOT the beating of May 1, 2020. The time course of symptom onset is not consistent with an acute central cord syndrome. The onset of symptoms is inconsistent with the ultimate diagnosis. The current findings appear exaggerated, with a significant sensory response that is non-physiological. Therefore, it is my medical opinion that none of the current symptoms are due to the beating of May 1, 2020. If there is an objective or physiological source for his disability and need for medical treatment, it is, in my opinion, the cervical spondylosis and the progression of radiculopathy and not the incident in question.

Dr. Bauer did not recommend additional medical treatment as a result of the work incident, noting that while "[a] cervical decompression may be necessary for his stenosis . . . that is not due to the May 1, 2020 incident . . . ." Dr. Bauer found Employee to be medically stable on June 5, 2020, when he was evaluated by PA-C Wood. Dr. Bauer found "no evidence of any [permanent partial] impairment due to the beating that [Employee] sustained at work." Dr. Bauer found that if "[Employee] was capable of full-time heavy-duty work prior to the incident in question, he remains capable of doing so. His subjective complaints are noted, but, in my opinion, are not the result of the incident in question nor are they the cause of any ongoing disability." The report indicated "no identifying scars or tattoos"; the intake paperwork completed by Employee was marked positive for tattoos and Employee had undergone multiple previous surgeries (back, knee, hernia). (Bauer EME, July 9, 2020) (emphasis in original).

40) On July 10, 2020, Dr. Everson provided a diagnosis of central cord syndrome at C6 level of cervical spinal cord in response to a query from the insurer's adjuster. He listed central cord syndrome at C6 level as the substantial cause of the work injury. (Everson response to Hlavinka, July 10, 2020).

41) On July 20, 2020, Dr. Lopez placed Employee on significant restrictions, including no lifting over 10 lbs, occasional bending/twisting, no squatting, no kneeling, no climbing, no crawling, no reaching over shoulder, occasional pushing/pulling/grasping, occasional driving, frequent repetitive hand motion, standing/walking, and no restrictions regarding sitting. The release provided an injury date of May 1, 2020 and noted Employee would be re-evaluated on August 13, 2020. (Lopez Release, July 20, 2020).

42) On July 22, 2020, Employee had a telephone consultation with Dr. Lopez and complained of pain in the middle and upper right portion of his neck with occasional radiation to his lower

jaw. Employee had bilateral shoulder pain, with pain sometimes radiating to his left triceps and to his wrist, and occasional hand numbness. Physical therapy had not been helpful. Employee's MRI showed bilateral foraminal narrowing ranging from severe to moderate, and canal narrowing from severe to moderate. Dr. Lopez recommended anterior cervical discectomy and fusion from C3 to C7. (Lopez record, July 22, 2020).

43) On July 23, 2020, Jennifer Carlson MSPT provided a recommendation for a surgical consult with discontinuation of physical therapy. (Carlson recommendation, July 23, 2020).

44) On July 23, 2020, Employer denied TTD benefits, medical costs, transportation expenses, and permanent partial impairment (PPI) benefits, citing the July 9, 2020 EME report by Dr. Bauer. (Controversion Notice, July 23, 2020).

45) On August 5, 2020, Employee underwent anterior cervical discectomy and fusion surgery C3-C7 with interbody implant by Dr. Lopez. Preoperative assessment included cervicalgia and cervical spondylosis with radiculopathy. Surgical notes indicate Employee had "cervical spondylosis, multilevel foraminal stenosis and radiculopathy significantly worse after an incident at work. He has failed conservative management . . . ." Postoperative diagnosis was cervical spondylosis with stenosis and radiculopathy. (Fairbanks Memorial Hospital Records, August 5-6, 2020).

46) On August 12, 2020, Employee filed a workers' compensation claim for benefits, including TTD, PPI, medical costs, transportation costs, penalty for late-paid compensation, interest, and attorney's fees and costs. Employee amended this claim on August 26, 2020 to include vocational rehabilitation benefits. (Workers' Compensation Claims, August 12 and 26, 2020).

47) On September 1, 2020, Employee was examined by Dr. Lopez. "[Employee] basically has none of the symptoms that he had prior to surgery so he is very pleased. He has a very small amount of some cape-like sensation in his left arm on the dorsal lateral portion around the elbow." (Lopez Record, September 1, 2020).

48) On September 1, 2020, Employer answered Employee's claims, admitting specified medical and transportation costs through June 5, and denied claims for TTD, PPI, reemployment benefits, penalty, interest, attorney's fees and costs, and specified medical costs/transportation. Enumerated defenses included lack of entitlement to TTD or TPD after medical stability, causation, no PPI rating, ineligibility for reemployment benefits, all benefits timely paid or

controverted so no interest due, overpayment of benefits and right of recoupment, no nexus between benefits paid and work performed by Employee's attorney so no attorney's fees and costs due. (Answer, September 1, 2020).

49) On September 1, 2020, Employer denied benefits based on Dr. Bauer's EME report: TTD, PPI, and specified medical costs/transportation. (Controversion Notice, September 1, 2020).

50) On or about September 16, 2020, Dr. Lopez responded to a set of August 17, 2020 questions provided by Employee's attorney (excerpt below):

> The employer/insurer conducted an IME with Dr. Bauer on July 7, 2020. This report is enclosed for your review. As a result of Dr. Bauer's report of examination, the workers' compensation insurer has denied all medical costs on the basis of Dr. Bauer's opinion that [Employee] incurred only bruises to his head, face and ribs as a result of the assault on May 1, 2020 and that condition resolved as of June 5, 2020. Dr. Bauer opined that regarding the cervical spine and right shoulder complaints, the substantial cause was not the May 1, 2020 assault, as the time course of symptom onset was not consistent with an acute cervical cord syndrome. Dr. Bauer found the employee's disability and need for medical treatment to be solely a result of his pre-existing cervical spondylosis and stenosis as well as the progression of his radiculopathy.
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> **Questions:**
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> 1. What is your current diagnosis regarding [Employee's cervical spine conditions(s)?
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>   [Answer] cervical spondylosis with radiculopathy
>
> 2. The Alaska Workers' Compensation Act requires that a determination [of] "the substantial cause" must be made relative to the contribution of different causes. To apply the statute, all causes of disability or need for medical treatment must first be identified. The substantial cause must then be determined relative to the contribution of the different causes. Alaska law requires that employment be "more than any other cause, the substantial cause of the employee's disability, death or need for medical treatment."
>
>   Furthermore, the courts have stated that, "[A] preexisting infirmity does not disqualify a claim under the work-connection requirement if the employment aggravated, accelerated, or combined with the infirmity to produce the disability for which compensation is sought." DeYonge v. Nana/Marriott, Alaska Supreme Court, 1 P.3d 90 (2000). Additionally, the court stated, "We explicitly declined to differentiate between the aggravation of symptoms and the aggravation of an underlying condition in the context of a claim for occupational disability benefits. "We reject the distinction between the

worsening of the underlying disease process and worsening of the symptoms of a disease." DeYonge, Id.

While the diagnostics taken after the injury revealed that [Employee] had some pre-existing degeneration to his cervical spine, he never had any symptoms until they appeared acutely within a few days directly after the assault, as noted by several medical professionals.

a. Considering the above, is it your opinion that the May 1, 2020 injury, whereby the employee was beaten about the face, head and upper body with fists which caused the acute symptomology and acute need for surgery, is the substantial cause for his disability and the need for the cervical spine medical procedures you are recommending? Please explain your response.

[Answer] caused accute (sic) changes in his symptoms

b. Dr. Bauer found the employee's disability and need for medical treatment to be solely a result of his pre-existing cervical spondylosis and stenosis as well as the progression of his radiculopathy. Do you disagree with this opinion by Dr. Bauer as to causation of the need for surgery? Please explain.

[Answer] mostly pre-existing condition exacerbated by assault

3. After reviewing Dr. Bauer's report, please respond to the following:

a. Do you disagree with Dr. Bauer's finding that [Employee] incurred only bruises to his head, face and ribs as a result of the assault on May 1, 2020, and that condition resolved as of June 5, 2020? Please explain your response.

[Answer] cannot comment

b. Do you disagree with Dr. Bauer's findings that, regarding the cervical spine and right shoulder complaints, the substantial cause was NOT the May 1, 2020 assault, as the time of symptom onset was not consistent with an acute cervical cord syndrome? Please explain your response.

[Answer] I do not know if the substanial (sic) cause, assult (sic) contributed to need for surgery, he dose (sic) not have central cord syndrome

Employee's counsel requested clarification on September 24, 2020:

To question 2a, you responded that [Employee's] work injury of May 1, 2020 "caused acute changes in his symptoms." Prior to his May 1st injury, [Employee] maintains that he received no medical treatment to his cervical spine *and was*

> *completely asymptomatic prior to the assault and was able to work full time without restrictions*. To question 2b, you responded that [Employee's] need for surgery was due "mostly [to] preexisting condition exacerbated by assault." Under Alaska Workers' Compensation law, the worsening of symptoms which leads to an employee's inability to return to work or results in the need for medical treatment is deemed compensable even if there was no aggravation of the underlying condition. Given this legal standard, please answer the following questions and comment, if necessary:
>
> Was it the increase in symptomatology directly after the May 1st assault that led you to recommend surgery on [Employee's] cervical spine?
>
> [Answer] Yes
>
> In other words, would you have recommended surgery on [Employee's] cervical spine if he was asymptomatic?
>
> [Answer] No

(Lopez Replies, September 16 and 24, 2020).

51) On September 28, 2020, Dr. Lopez examined Employee and released him to modified duty effective October 26, 2020. Employee was doing well with residual symptoms of left dorsal forearm and hand numbness, which had improved after surgery. (Lopez Records, September 28, 2020).

52) On October 23, 2020, Dr. Lopez had a telephonic consultation with Employee, who was ready to go back to work with some precautions including wearing his surgical collar whenever he was up from his desk. Employee's neck felt much better and his symptoms were gone. X-rays looked good with signs of bone fusion with just normal movement in flexion and extension. A work release was completed. (Lopez Record, October 23, 2020).

53) On November 24, 2020, Dr. Lopez had a telephonic consultation with Employee, who was "doing awesome" and was ready to go back to work. A full work release was prepared. (Lopez Records, November 24, 2020).

54) On December 11, 2020, Employee testified by deposition. Employee's deposition testimony supported the reports of injury at work on May 1, 2020 to his head, neck, shoulders, left hand, and ribs, as well as the rapid onset of symptoms after the assault. At the time of the on-site medic examination, he complained of feeling "like I just had a really bad pinched nerve . . . in my shoulder and in my neck." His neck hurt on both sides, and his left arm and shoulder also

hurt. Employee undertook only light work duties on May 4, 2020. A few days after his injury, the pain ended up radiating from his shoulders all the way down his left arm into his forearm, wrist, and hand. Employee was greatly improved following surgery but had limited burning pain remaining in his left arm; he felt that everything else had been taken care of, and he was 100 percent physically able to perform his job. He received short-term disability benefits for a period of time after workers' compensation payments ceased. He did not apply for social security or Medicaid benefits. Employee has private health insurance, which paid at least some of his medical bills relating to the work injury. (Employee Deposition, December 11, 2020). Employee testified at hearing; his testimony was consistent with his recorded statement, his deposition, and medical records including the mechanism of injury, symptom history taken by medical providers, and the onset of symptoms shortly after the work incident. Employee had not treated for cervical spine issues prior the May 1, 2020 work incident, other than limited chiropractic treatments in 2018 as part of full-body adjustments related to thoracic spine issues. Employee's symptoms worsened over the weekend after the assault. Employee thought he first learned of his cervical condition from Dr. Lopez. Employee testified that he would not have sought surgery for his condition had he known of it prior to May 1, 2020. Employee was released to work by Dr. Lopez at the end of November; he took things slow when he returned to work, his job had been rearranged and he spent some time in shipping and was now in the planning department. Employee is no longer performing very physical tasks at work and he does not believe he could do them. He previously led a crew that used a hydraulic hammer; he could no longer do that or use the impact gun. He had not considered those things when completing his return to work documents. Planning and shipping was added to his job duties, the more physical duties have not officially been removed, he just hasn't been asked to do them. He had not been instructed by any medical provider that he could not do those duties. Employee received some short term disability benefits until he was released to return to work by Dr. Lopez. Employee was a credible witness. (Employee Testimony, June 3, 2021).

55) On December 16, 2020, Dr. Lopez testified by deposition. He is a board certified neurosurgeon. He first examined Employee in June 2020. Dr. Lopez ordered a cervical MRI and cervical x-rays of Employee; imaging showed multiple discs with bulges, bone spurs, and pressure on the spinal cord and nerves. He diagnosed cervical spondylosis with stenosis and radiculopathy. His diagnostic impression did not change from his observations during surgery or

afterward. Dr. Lopez ruled out central cord syndrome as a diagnosis. Prior to the assault on May 1, 2020, he understood Employee was able to work full time without restrictions; to his recall, Employee had not had a prior history of complaints or treatment to his cervical spine.

> A: . . . I would say it's accurate to say that he may have - - he probably was having some symptoms, but they were not at the point where he needed treatment.
>
> Q: And when you say that he was probably having symptoms, do you say that based on what he reported to you in his clinical evaluation?
>
> A: No. I just know that the natural history of this disease, people can find a way to live with pressure on the nerves and spinal cord until at some - - there's something that causes someone to become symptomatic or just not be able to tolerate the symptoms. But you just have to live. You know, you just learn to live with issues even if you may not be aware that you even have the issues. But I'm sure, at some level, he was having some issues.

Employee did not know he had a diagnosis of cervical spondylosis with stenosis and radiculopathy before he saw Dr. Lopez in June 2020. Employee presented with neck pain and radiating arm pain at the first examination; the symptoms persisted until the August 5, 2020 surgery. Physical therapy had not alleviated his symptoms.

Dr. Lopez opined that the assault caused acute changes in Employee's symptoms.

> Well, it inflamed the nerves, and it may or may not have put some extra pressure on his spinal cord . . . it just threw him over the edge with regards to being able to deal with his - - his pain in his neck and down his nerves. The nerves were - - all of a sudden became acutely inflamed, I can say . . . I wouldn't call it an acute need for surgery, but he did have acute symptoms with nerve inflammation related to the pressure he had on his nerves that may or may not have - - it could have been that . . . slightly increased pressure that caused extra inflammation or (indiscernible) his neck or all those things.
>
> . . . .
>
> [H]e was probably symptomatic at some level, whether he realized it or not, and then it became much worse after the incident, thereby necessitating treatment.
>
> . . . .
>
> Q: . . . So is it accurate to say that it was the presence and the types and the severity of symptoms that [Employee] was experiencing, combined with the

> diagnostic impression, in other words what you were seeing on the films, that led to your recommendation for surgery?
>
> A: Absolutely. I just don't operate on an MRI. The patient has to be significantly symptomatic.
>
> . . . .
>
> If somebody can live with the symptoms and they're fine and can live the rest of their life like that then I would not recommend surgery in this situation.

Dr. Lopez did not anticipate that Employee would have a permanent partial impairment (PPI) rating. The symptoms Employee was experiencing after May 1, 2020 prevented him from being able to return to work. Dr. Lopez did not see any evidence of trauma that resulted from the assault on the imaging alone. Employee needed the surgery because of the multi-level degeneration in the cervical spine when combined with his symptoms. In Dr. Lopez's opinion the assault affected Employee's underlying degenerative condition to alter the course of his medical care, based on his symptoms, the MRI, and the clinical examination.

> Q: And can you explain to me how the assault accelerated the underlying condition:
>
> A: Well when you get punched . . . in the face, which is my understanding of what happened, it's like having - - being in a car accident, being hit from behind, there's an acute jerking of the neck. And when you have a neck that doesn't move well, pressure on the nerves, it's quite easy to irritate and inflame those nerves. And then it's difficult for the nerves to heal themselves when there's chronic pressure on them.
>
> Q: And when - - if an assault like that would cause an injury to the nerve - - or affect the nerves, what symptoms would you see immediately after an assault like that?
>
> A: You can see neck pain frequently and then it begins to radiate down the arms, one arm or both arms. Symptoms can change. But neck pain is usually something that's there right away or happens in a day or two. Usually right away.
>
> Q: . . . When would you see the onset of the symptoms?
>
> A: It may not be immediate unless there's like a fracture or, you know, spinal cord damage or a nerve root damage, but it could - - it usually manifests quickly, within days.

. . . .

Q: And then your opinion on causation, it wouldn't affect your opinion if he didn't have those symptoms and those progressed until the time he saw you? Would that affect your opinion on causation?

A: if he didn't - - you mean like a month later he developed the symptoms?

Q: Yes.

A: Well I would think it would affect but . . . I'd be more skeptical. I would be skeptical. Not that I am skeptical, but I would be.

Q: And then if we look at the substantial cause of the need for the fusion and we look at the traumatic incident versus the degeneration, which is the substantial cause . . . for the need for the fusion that you performed in August?

A: Degeneration.

Dr. Lopez agreed that Employee's symptoms after the assault as noted in Employee's deposition were consistent with an aggravation or acceleration to the underlying cervical spine condition. He further clarified his opinion:

Q: . . . for clarification purposes, is it your opinion that it was the (indiscernible) assault that caused the acute changes and sent the acute symptoms that then prevented him from being able to return to work, and then also led to the need for the surgical intervention on August 5th. Is that your opinion?

A: My opinion is that this is a patient that was functional and not needing surgery. When I saw him in my office, there was a change, an acute change, in his symptoms that he told me was related to this incident. So I believe the guy, and I'm going to say that it's that incident that caused the acute changes in the inflammation in the nerves, necessitating the surgery. But I don't know that for certain.

. . . .

A: There was - - within a high medical degree of probability, there was some - - something that happened that caused this patient to become symptomatic to the point where he needed surgery.

Dr. Lopez did not believe that there would be a permanent impairment related to the assault; Employee has less motion in his neck following a four-level neck fusion but he wouldn't call it an impairment unless you were an NFL quarterback or similar.

Q: So you think that the assault caused the symptoms, correct?

A: I think [it] exacerbated the symptoms, yeah.

Employee's symptoms such as neck pain, pain between the shoulder blades, difficulties with neck movements, and inability to raise arm(s) overhead were consistent with an aggravation or acceleration to an the underlying cervical spine condition. The fusion stopped all degeneration and disease at the surgical levels. Any aggravation or acceleration of the degenerative condition in the cervical spine from the assault is resolved. (Lopez Deposition, December 16, 2020).

56) On February 5, 2021 and March 2, 2021, Employee filed assorted medical statements on Notices of Intent to Rely. (Notices of Intent to Rely, February 5 and March 2, 2021).

57) On February 19, 2021 Dr. Bauer testified by deposition: He had reviewed Employee's medical records and obtained a history before conducting the EME. Dr. Bauer found no evidence of damage to the spinal cord. He found no evidence of radiculopathy; Employee had a negative Spurling's test and a negative Lhermitte's sign. Employee had no evidence of spasm, did not complain of increase in pain with palpation, and his neurological exam was unremarkable. Employee stated he had diffuse numbness that covered all the dermatomes. The only way that could be explained was with significant spinal cord damage, which would have shown as an abnormal motor examination and abnormalities in reflex testing. The MRI showed multilevel degenerative changes, with spinal stenosis at C5 and compression on the spinal cord. Employee had no signs or symptoms of spinal cord compression, but compression can exist without symptoms. There was no acute disc herniation, but the disc bulging was connected to bony osteophytes, indicating chronicity or long-lasting changes. His conclusion was that the MRI only demonstrated chronic changes. Dr. Bauer did not note any preinjury symptoms, nor did he note any records that show symptoms prior to the assault. It did not change his opinion in any way.

> [F]irst of all, because the pattern of his symptoms was not consistent with the incident substantially causing his later radicular symptoms. The time frame of his symptoms, when I reviewed the medical records, was not consistent with an acute

> radiculopathy happening right after the injury. It was delayed. His symptoms were changing in progression over months.
>
> By the time he was seen by Dr. Lopez, he had different symptoms than had been seen originally.
>
> In my medical opinion, that's consistent with the ongoing development of a degenerative disease rather than something acutely traumatic caused by the incident that we are talking about.

In response to questioning by Employer's counsel, Dr. Bauer opined the substantial cause of the need for the fusion performed by Dr. Lopez was degeneration and not the assault. Dr. Bauer had reviewed Dr. Lopez's deposition testimony prior to this deposition. He also reviewed his report and Employee's treatment records after the EME including the operative report and physical therapy. Employee did not have cervical central cord syndrome.

Dr. Bauer found no evidence of radiculopathy at the time of his examination. Radiculopathy has a rapid symptom onset

> If you have a substantial injury to the nerve root, for example, a hyperextension injury closing down the foramen, the inflammation peaks at 48 hours. So if there had been a traumatic response to the assault, we would have seen a very good definition of symptoms within the first 48 hours, and that was not seen.
>
> . . . .
>
> [H]ad there been objective evidence of radiculopathy at the time of my exam, I would have addressed that . . . I'm not limited to the diagnoses that are found in the chart. As a doctor, I'm obligated to make the appropriate diagnosis, and there was no objective diagnosis at the time of my examination. There was a lot of symptom exaggeration at the time of my examination . . . the substantial cause of his need for treatment is the spondylosis or the arthritis and not the incident that we're here for.

Inflammation of the nerve would not show up on an MRI, but you would have a "reproducible pattern of symptoms. In other words, either sensory deficits, sensory changes or pain complaints in the same distribution as a nerve root . . . that was not present." The written medical records "did not confirm the onset of radiculopathy symptoms until weeks and possibly months after the incident in question."

> [E]ven though [Employee] had these vague complaints of neck pain, he then had complaints of shoulder pain, it was not until weeks later that he began to develop any symptoms that could be remotely considered to be radicular. That's not the right time course.
>
> So had he had acute onset of symptoms after the beating, then I would have said yes, there is a causal relationship between this incident and his need for surgery. That time course does not exist.
>
> . . . .
>
> I went by the symptoms as they were expressed in the medical records and not the subjective recall of the claimant.
>
> There is something in medicine called recall bias, which means that your memory changes as time goes on. It's very common that claimants remember things differently than the way they said it in the medical records. That's normal human behavior. That's normal memory . . . that's why I depend upon the medical records in making my decision and not upon his subjective recall.

(Bauer Deposition, February 19, 2021). Dr. Bauer's medical report and testimony provided conflicting evidence that did not comport with the overall medical records, and were not credible. (Experience; judgment).

58) At hearing on June 3, 2021, Michelle Christensen, Employee's spouse, testified; her testimony generally supported his testimony and the history contained in the medical records. Ms. Christensen observed her husband's pain and physical limitations. She provided care and assistance with his grooming and self-care, particularly in the first 48 hours after the assault and up until surgery. She was a credible witness. (Christensen, June 3, 2021).

59) No evidence was provided at hearing clarifying when Employer received medical records dated between May 13, 2020 and July 23, 2020. (Record).

60) On June 3 and 4, 2021, Employee filed Affidavits of Attorney Fees and Costs and Paralegal costs. His counsel had timely attempted to file the initial affidavits of fees and costs on May 28, 2021 at 3:56 p.m. but at the time of hearing on June 3, 2021 this filing had not yet appeared in the agency file. Employee requested 102.98 hours of attorney time at $385 per hour. He requested 56.85 hours of paralegal time at $185 per hour, as well as other costs in the amount of $3,936.12. Time entries included in the Affidavits for unidentified individual(s) also included

0.2 hours for "WM" and 0.8 hours for "WKM" for a total of 1.0 additional hour at $150 per hour. (Affidavits of Attorney Fees and Costs and Paralegal Costs, June 3 & 4, 2021; Record).

61) Employee's attorney was previously awarded uncontested attorney's fees at $385 per hour in the Anchorage case of *Cohen-Barce v. Vanstrom*, AWCB Dec. No. 21-0010 (February 8, 2021). (Affidavit of Attorney's Fees and Costs, June 3, 2021).

62) On June 10, 2021, Employer opposed the attorney fee request and requested a rate reduction to $350 per hour and that certain time entries be reduced due to excessive time for the stated tasks, and reduction of fees due to time overlap and duplication of tasks and billing entries. (Opposition to Affidavit for Attorney Fees, June 10, 2021).

63) On June 11, 2021, Employee replied Employer's Opposition regarding attorney's fees. (Reply to Employer's Opposition to Affidavits for Attorney Fees and Costs, June 11, 2021).

64) This case had a moderate number of medical records, was not unduly complex, and did not require an unusually high quality of legal skill to pursue to hearing. (Record; Experience; Judgment).

65) Employee's compensation rate was calculated as $1,255.00 per week, which was not contested by Employer. (ICERs database; Record).

66) Employer objected to treatment received by Employee on the basis of causation, the perceived elective nature of the surgery, and no recommendation for future medical treatment. (Record).

67) Employer paid Employee $13,984.44 in TTD benefits through July 30, 2021. (TTD Payment Ledger, June 11, 2021).

68) The parties stipulated at hearing that vocational rehabilitation benefits were not an issue for hearing. (Record, June 3, 2021).

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 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). 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*. They 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). 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. *Id.* 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.

"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).

> **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. . . .
>
> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. . . .

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 45.084. Medical travel expenses.** (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.
>
> (b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its statutory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

. . . .

(c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.

(d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or more have accumulated, or upon completion of medical care, whichever occurs first.

. . . .

8 AAC 45.122. Rating of permanent impairment. (a) The board will give public notice of the edication of the American Medical Association Guides to the Evaluation of Permanent Impairment and effective date for using the edition by publishing a notice in a newspaper of general circulation . . . as well as issue a bulletin for the "Workers' Compensation Manual", published by the department.
. . . .

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 disability and need for medical treatment?**

Whether Employee's employment is the substantial cause of his disability or need for treatment is determined by a three-part presumption analysis. AS 23.30.120. Employee attached the presumption of compensation to the May 1, 2020 work injury by his testimony and the written report of injury. *Cheeks*. Credibility is not weighed at this initial stage. *Resler*.

Employer rebutted the presumption of compensability via the EME report and deposition testimony of R. David Bauer, M.D., who opined after examination and a review Employee's medical records that work was not the substantial cause of Employee's disability or need for treatment. *Huit; Corona*. Dr. Bauer reviewed the work incident of May 1, 2020 and Employee's cervical spondylosis and stenosis as possible causes, and opined that Employee's pre-existing cervical spondylosis and the progression of radiculopathy was the substantial cause of Employee's ongoing disability and need for treatment. Credibility is not weighted at this step. *Resler.*

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 and final stage. *Norcon.*

Employee's records show that he had cervical degenerative changes pre-dating the work events of May 1, 2020 and May 5, 2020. No medical evidence was provided indicating Employee had sought treatment regarding this pre-existing condition prior to the work event(s) other than two chiropractic adjustments in 2018.

Employee was struck about the face and upper body at work on May 1, 2020. He was examined by on-site medical personnel shortly after the incident and released from work for the remainder of the day. Employee returned to work on May 4, 2020; Employee's testimony indicated that he pursued lighter duties on that day. He also testified that his symptoms increased following the May 1, 2020 injury over the weekend and prior to a May 5, 2020 work incident; this is supported by the medical records.

Dr. Lopez is a practicing neurosurgeon who examined Employee on multiple occasions prior to performing the C3-C7 decompression and fusion surgery on August 5, 2020. Dr. Lopez found that Employee's disability and need for treatment arose from the work injury. Dr. Lopez found that symptoms such as neck pain, pain between the shoulder blades, difficulty with range of motion, and an inability to raise arms overhead were consistent with an aggravation or acceleration of Employee's preexisting cervical spine condition. Consistent symptoms appeared shortly after the assault, and were noted by the work medic in the pre-hospital report. Symptoms progressed over time. Dr. Lopez testified that the natural course of the underlying condition would be for the patient to live with nerve and spinal cord pressure until something caused the patient to become symptomatic or unable to tolerate the symptoms. He considered the pre-existing cervical condition as well as the work assault, and determined that the assault caused acute changes in Employee's symptoms. Symptoms usually manifest quickly, within days. Employee's symptoms were consistent with an aggravation or acceleration to the underlying spine condition. The presence, types, and severity of the symptoms Employee experienced after the assault, combined with the diagnostic imaging, led to the need for surgery. Dr. Lopez was a credible witness. Significant weight is given to Dr. Lopez's testimony due to his extensive medical record review, multiple examinations of Employee, observations during surgery and recovery, and substantiation via medical records.

Dr. Bauer is a practicing orthopedic surgeon who conducts independent medical evaluations for Employers. His report and testimony provided conflicting evidence, did not comport with the overall medical records, and provided unclear evidence regarding the application of Alaska law that acceleration or aggravation of an underlying condition or symptoms can 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 found there was "no evidence" of radiculopathy, as "the time frame of the symptoms . . . was not consistent with an acute radiculopathy happening right after the injury. It was delayed. . . ." Dr. Bauer testified that "if there had been a traumatic response to the assault, we would have seen a very good definition of symptoms within the first 48 hours, and that was not seen." If Employee had an acute onset of symptoms, then Dr. Bauer would have found a causal relationship between the incident and the need for surgery. In his report Dr. Bauer found that the imaging supported age-related

degenerative changes. In considering the preexisting cervical changes and the assault, Dr. Bauer found that the assault was not the substantial cause of the current disability or need for treatment. Dr. Bauer's EME report and testimony did not address the May 1, 2020 prehospital report showing rapid symptom onset, and did not record Employee's noted surgical scars and tattoos; this calls into question the thoroughness of his examination. Dr. Bauer's report and testimony, because they conflict with themselves, other medical evidence, and prevailing law, are not generally credible and are given little weight. AS 23.30.122.

Employee was a credible witness and provided testimony supporting a determination that his preexisting cervical degenerative condition was not significantly symptomatic prior to the May 1, 2020 work injury and the sudden onset of symptoms after being struck multiple times by a coworker. Despite his preexisting condition, he had been 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.* These records as a whole indicate Employee had preexisting cervical degenerative changes 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. AS 23.30.395(16). After the work incident on May 1, Employee was off work for a short period of time, when his symptoms progressively worsened. Multiple records starting with the May 1, 2020 date of injury and continuing until the August 5, 2020 surgery indicate concerns of radiating pain, nerve irritation, and neurologic pathologies. Dr. Thomas felt that Employee's underlying cervical condition could be "badly aggravated" by the assault. Dr. Wright found Employ had sustained "what appears to be" neurologic damage. Dr. Foelsch's examination suggested irritation of the cervical roots at C8 and right C6 and C7. Employee's symptoms increased dramatically while performing work duties on May 5, 2020 and progressively afterward including radiating pain and numbness until after his August 5, 2020 surgery.

The lay and medical evidence shows Employee suffered a work-related disability under the Act. AS 23.30.395(16). Employee's May 1, 2020 work injury aggravated his underlying cervical

condition and associated symptoms. The work injury is the substantial cause of Employee's disability and need for treatment beginning May 1, 2020. AS 23.30.010; *Morrison; Huit.*

2) Is Employee entitled to TTD benefits?

Without regard to credibility, Employee attached the presumption of disability total in character but temporary in quality via his own testimony and his employment records that indicate Employee's last day of work was May 13, 2020. *Cheeks; Resler*.

Without regard to credibility, Employer rebutted the presumption when Dr. Bauer opined Employee reached medical stability on May 5, 2020 when he was evaluated by PA-C Wood. *Huit; Corona*.

The burden shifts back to Employee to provide clear and convincing evidence that he was not medically stable and remained disabled after the last date Employer paid TTD benefits. *Runstrom*; AS 23.30.395(28). Employer paid TTD benefits to Employee from May 14, 2020 through July 30, 2020. Employee met his burden of proof regarding the date of medical stability and continued disability after July 16, 2020 via medical records and the testimony of Dr. Lopez which said that the symptoms Employee suffered after the May 1, 2020 work injury prevented his return to work and included a work release effective November 24, 2020. Employee was medically stable on November 24, 2020. AS 23.30.395(28).

Employee is entitled to TTD benefits from May 14, 2020 to November 24, 2020 in the amount of $34,960.71 ($1,255 x 27 weeks and 6 days). Employer has paid $13,984.44 in TTD benefits to Employee through July 30, 2020. Limited evidence was provided that Employee received short term disability benefits but no arguments were provided to support an offset on this basis. Employer will be ordered to pay $20,976.27 in unpaid TTD benefits.

3) Is Employee entitled to PPI benefits?

Employee was found to have a compensable work injury. Dr. Bauer did not find Employee to have a PPI based on his opinion that Employee's need for treatment was not work related. Dr. Lopez did not anticipate that Employee would have any permanent impairment; experience in Alaska workers' compensation law would suggest that he did not understand PPI under the Act. Nevertheless, in the seven months following Dr. Lopez's deposition and Employee's medical stability, Employee did not obtain a PPI rating under AS 23.30.190 and 8 AAC 45.122.

No PPI rating greater than zero percent has been provided by Employee. He requested PPI benefits in his claim, and that claim was ripe as of the hearing date. If Employee wanted to pursue an award of PPI benefits and disagreed with Drs. Lopez and Bauer, Employee was required to obtain a PPI rating and present it at hearing. *Settje*. Employee's claim for PPI benefits will be denied.

4) Is Employee entitled to medical benefits and transportation costs?

Employee is entitled to medical benefits if his work injury is the substantial cause of his need for treatment. AS 23.30.010(a); AS 23.30.095. Employee filed an assortment of medical bills and statements but did not provide an index or summary, or otherwise provide detailed testimony regarding medical billings or treatment frequency. Dr. Bauer's report appeared to find that cervical compression surgery would be necessary and reasonable, though in his opinion not related to the work injury; he did not recommend any additional medical treatment related to the work injury. Employer raised objections regarding the medical treatment Employee received as being unrelated to the work injury or being unnecessary (i.e. "elective" surgery). This opinion finds that the Employee's cervical fusion surgery was necessary and reasonable and related to the work injury, and therefore should be paid. Employee is entitled to medical benefits from Employer in accordance with the Act. Therefore, Employer will be ordered to pay Employee's work-related medical care in accordance with the Act and the workers' compensation fee schedule.

Employee is entitled to transportation expenses to receive medical treatment. 8 AAC 45.084. He provided an unsigned request for mileage reimbursement for 53 miles filed on May 14, 2021.

Employer did not object. Mileage reimbursement is payable when 100 miles or more have accumulated, or upon completion of medical treatment. 8 AAC 45.084(d). Employee's past medical treatment concluded on November 24, 2020. Employer will be ordered to pay Employee mileage reimbursement for 53 miles for treatment dates May 1 – November 24, 2020. 8 AAC 45.084(b).

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

Employer may be liable for a penalty on benefits, which it did not either timely pay when due, or controvert. AS 23.30.155(e). Even if timely filed, controversion must be made in good faith and supported by either the law or the facts. For a controversion notice to be filed in good faith, Employer must possess evidence sufficient to support the controversion by showing that absent contrary evidence, Employee is not entitled to benefits. *Harp*. At the time of Employer's May 28, 2020 controversion notice denying TTD and TPD benefits, Employer stated no medical evidence had been received to support time loss beyond the statutory 3-day waiting period; medical treatment would be paid related to the claim or disability that is medically authorized upon submission of physician report and billing. The medical records show that Dr. Thomas removed Employee from work on May 13, 2020, and that PT Pust was aware of this at least by May 18, 2020 as it is reflected in the chart notes. No evidence was provided regarding the dates applicable medical records were received, and Employee's brief did not provide adequate information to determine the applicability of penalty for failure to timely pay or controvert; penalty will be denied for TTD and TPD payments prior to the July 23, 2020 controversion.

At the time of Employer's July 23, 2020 controversion notice, Dr. Bauer's EME report indicated Employee's disability and need for treatment was not work related. On this evidence, Employee would have been found not entitled to medical care or other benefits relating to the work injury. Therefore, Employer's controversion was issued in good faith and Employee's request for a penalty for failure to timely pay or controvert will be denied on this basis. AS 23.30.155(a).

Employer paid Employee TTD benefits through July 30, 2020, beyond the date of its July 23, 2020 controversion. Employee is not entitled to penalty for TTD or PPI benefits, medical costs,

or transportation untimely paid from July 23, 2020 through November 24, 2020. *Id.* Employer did not deny related medical treatment in its May 28, 2020 controversion notice; medical treatment was not denied until the July 23, 2020 controversion notice. Employee is entitled to penalty for any medical and transportation costs not timely paid prior to the July 23, 2020 controversion.

6) Is Employee entitled to interest, attorney's 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 benefits as set out following the May 1, 2020 injury date to the date of medical stability, November 24, 2020, and other benefits awarded which remain unpaid. AS 23.30.155(p).

Employee requests attorney's fees and costs. AS 23.30.145. Attorney fees may be awarded when an employer controverts or avoids payment of compensation, and an attorney is successful in prosecuting the employee's claim. *Id*.; *Childs*. Employer controverted Employee's benefits. Employee generally successfully prosecuted his claim, excepting PPI benefits. 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." He submitted itemized fee affidavits totaling $36,043 in attorney's fees (at $385 per hour), $150.00 in unidentified fees or costs, $10,517.25 in paralegal costs (when billed at $185.00 per hour), and $3,936.12 in other costs, for a total request of $50,646.37. Pursuant to *Rusch*, the eight factors of the 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 of average complexity and involved a moderate amount of medical records. An average degree of attorney skill and attention was required to shepherd the case through hearing. *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 representation of another client or on another matter. Employee's counsel indicated that he turned down approximately ten other clients in order to pursue this matter; without additional information regarding the complexity of those cases, no specific inferences can be drawn from this information. *Rogers & Babler.*

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

Fees commonly awarded by Fairbanks hearing panels to attorneys of like experience range from $300-350 per hour depending on the complexity of the case and other specific circumstances. Employee requested an hourly rate of $385 per hour, which is outside the usual range and was opposed by Employer. *Rogers & Babler.* Employee cited to a single, unopposed Anchorage fee award to support this request.

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

The specific benefit amounts involved were not set out by Employee's counsel; for at least one item where it was set forth (TTD benefits), the amount identified as previously paid was in error. This could have been resolved before hearing through informal discovery with Employer's counsel. Employee did not compile an estimated monetary amount of other benefits sought.

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

No information was provided regarding any unusual 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 10 months had passed from the first meeting to the date of hearing. This is a short to moderate length attorney-client relationship. *Rogers & Babler*.

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

The attorney performing the service has a moderate amount of experience in probate and family law matters and is relatively new to Alaska Workers' Compensation (approximately two years of experience). He has only recently begun appearing before this panel and no specific reputation evidence was provided for this panel's review. He obtained a positive result for his client in this matter. *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, objections from Employer, the fee customarily charged in Fairbanks for similar services, the Alaska Supreme Court's guidance regarding full compensation to attorneys representing injured workers, and the Employer's request that the hourly rate be reduced to $350 per hour, fees will be awarded at the rate of $350 per hour. An award at a higher rate is not supported by a review of factors in this case as mandated by *Rusch*. A lowered hourly rate is further supported by actions or inactions that a more experienced attorney would otherwise consider, such as not attaching exhibits to the hearing brief, confirming payments made to Employee through the discovery process, failing to separate paralegal costs from attorney's fees in approximately 13 pages of billing entries, and the inclusion of time entries for unidentified individuals in the request for fees and costs.

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 is 10.0 hours. Ten hours will be removed from Employee's fee award at the rate of $350 per hour, for a fee reduction of $3500.

Numerous entries for attorney time are duplicative or unduly long for the stated task(s) when the complexity of the issues for hearing are considered:

Date	Item	Billed Time	Other
9/15/2020	Review, finalize, file and serve AWCB medical summaries. Review records from Client. Review Medical Summaries filed by Employer.	1.20	Duplicative at least in part with JH time entry of same day, 0.30 hours to Finalize 4 AWCB medical Summaries for service
11/18/2020	Review and revise Petition to Compel.	1.30	Excessive; JH had previously billed 3.6 hours on 11/17 for time entries "Draft Petition to Compel Discovery," "Draft Memorandum in Support of Petition to Compel Discovery versus Reply to Answer to Petition to Compel Discovery," and "Legal research re: attorney/client privilege, discovery rules and discovery case law re: Petition to Compel Discovery." Additional time entries by JSE on 11/18 and 11/19/2020, "Review and revise Petition to Compel" and "Revise, revise, finalize, and serve Petition to Compel Discovery, Memorandum in Support, and Request for Conference."
12/7/2020	Review and reply to e-mail from Erica Ivy.	0.20	Duplicate time entry
4/26/2020	Review and Revise Hearing Brief (and) Review and revise Hearing Brief.	1.30	Significant additional time spent drafting, reviewing, and revising hearing brief by experienced paralegal and billing attorney.
5/10/2020	Review file to confirm documents needed to produce for evidence.	2.00	Total time spent drafting straightforward hearing brief with no unusual circumstances was approximately 25 hours.

Accordingly, five hours will be removed from Employee's fee award at the rate of $350 per hour, for a fee reduction of $1,750.

A paralegal affidavit was filed as required by 8 AAC 45.180(f)(14). Employee's paralegal Jackey Hess identified as "JH" on filed billings is highly qualified per her affidavit, and Employer made no objection regarding the $185 hourly rate generally charged by the paralegal. Certain fee entries, however, were listed for services provided by JH but charged at $385 per hour; these items are listed below and will be considered at the rate of $185 per hour:

	Date	Item	Time	Rate	Total
JH	12/11/2020	Review medical records received from ER atty via AWCB M/S	0.20	$385.00	$77.00
JH	02/03/2021	Draft Notice of Intent to Rely and prepare medical statements and bills w/Bates numbering for attachment to Notice of Intent to Rely.	0.80	$385.00	$308.00
JH	02/15/2021	Draft letters to providers re: cannot bill IW, need to file WCC	0.70	$385.00	$269.50
JH	02/15/2021	TCs to multiple providers re: billing information, advise of w/c status of claim, provide W/C insurer information and claim numbers, addresses, obtain correspondence addresses for letters to advise in writing of claim status.	0.60	$385.00	$231.00

Employee requested 56.85 hours of paralegal billings. Certain paralegal time entries were either duplicative or unduly large based on the task(s) listed and the complexity of the case:

Date	Item	Time	Other
8/4/2020	Review IME and medical records – draft letter to Dr. Lopez w/medical	1.80	Duplicative; IME reviewed 7/31/2020 by same biller.

	history chronology and questions re: legal standard for causation and rebut IME physician questions.		
8/12/2020	Draft Workers' Compensation Claim	0.80	Large amount of time to complete standardized form
8/12/2020	Draft Entry of Appearance	0.80	Large amount of time to prepare basic pleading
11/4/2020	Draft deposition notice – Dr. Lopez	0.60	Large amount of time to prepare basic notice
11/17/2020	Draft Request for Conference	0.60	Large amount of time to complete standardized form
2/23/2021	Draft ARH	0.50	Large amount of time to complete standardized form

Accordingly, five hours of paralegal time will be reduced from the fee award. Paralegal costs will be awarded for 51.85 hours of paralegal time at $185 per hour, for a total of $9,592.25.

Four billing entries were provided for "WM" and "WKM" totaling 1.0 hours at $150 per hour. Neither of these individuals were identified nor did they provide affidavits as required by 8 AAC 45.180. No explanation was provided to clarify whether these individuals are contract attorneys, law clerks, or paralegals. No fees or costs will be awarded for these time entries.

Employee incurred $3,936.12 in other costs including copying costs, deposition fees, postage, transcription services, airfare, parking, and ground transportation. Employer did not object to these costs; they are related to Employee's claim and the June 3, 2021 hearing. Employee requested copy costs for 1,240 pages at $.25 per page for a total of $310. Duplication fees are limited by 8 AAC 45.180(f)(15) to $.10 per page "unless justification warranting awarding a higher fee is presented." No justification for an increased copying cost was provided. Copy costs are awarded in the amount of $124.00, for a total costs reduction of $186. Total costs will be awarded in the amount of $3,750.12.

Calculation for attorney's fees awarded is as follows:

Requested:	102.98 hours at the awarded rate of $350 per hour	$ 36,043
	<less> Reduction regarding PPI (10 hours)	$ 3,500
	<less> Reduction regarding excessive hours (5 hours)	$ 1,750
	Total Attorney's Fees	$31,793.00

Employee's total award of attorney's fees and costs after stated reductions will be $45,135.37 ($31,793.00 attorney's fees + 9,592.25 paralegal costs + $3,750.12 in other costs).

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 transportation costs.
6) Employee is entitled to a penalty for failure to timely pay or controvert medical benefits and transportation not paid before July 23, 2020.
7) Employee is entitled to interest and attorney fees and costs.

ORDER

1) Employee's May 1, 2020 work injury is the substantial cause of his disability and need for treatment.
2) Employee's August 12, 2020 claim is granted in part.
3) Employer shall pay TTD as awarded and in accordance with the Act.
4) Employer shall pay medical and related transportation costs for the work injury as awarded and in accordance with the Act.
5) Employer shall pay penalty as awarded pursuant to AS 23.30.155(e).
6) Employer shall pay interest pursuant to 8 AAC 45.142(a).
7) Employer shall pay $31,793.00 in attorney's fees and $13,342.37 in costs.

8) Employee's claim for PPI benefits is denied.

Dated in Fairbanks, Alaska on July 16, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Cassandra Tilly, Designated Chair

/s/

Sarah Lefebvre, Member

/s/

Lake Williams, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of TODD CHRISTENSEN, employee / claimant v. KINROSS GOLD USA, INC., employer; LIBERTY MUTUAL FIRE INSURANCE COMPANY, insurer / defendants; Case No. 202005328; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified US Mail on July 16, 2021.

/s/

Ronald C. Heselton, Office Assistant II