ALASKA WORKERS' COMPENSATION BOARD

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

JOHN J. BREYER, Employee, Claimant, v. CHUGACH ELECTRIC COMPANY, Employer, and BROADSPIRE SERVICES, INC., Its adjuster, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201602305 AWCB Decision No. 21-0083 Filed with AWCB Anchorage, Alaska on September 10, 2021.

Employee John Breyer's February 23, 2018 claim was heard on August 4, 2021, in Anchorage, Alaska, a date selected on June 15, 2021. A January 27, 2021 hearing request gave rise to this hearing. Attorney Joseph Kalamarides represented Employee. Attorney Robert McLaughlin represented Employer Chugach Electric Company and its adjuster Broadspire Services, Inc. Employee and Kurt Adams, D.C., testified for Employee; Alizon White testified for Employer. All participants appeared telephonically. The record remained open for additional filings and responses and closed on August 11, 2021.

ISSUES

Employee contends he sustained a compensable injury on February 6, 2016, while working for Employer and is entitled to temporary total disability (TTD) benefits. He contends he is still disabled and not medically stable and seeks ongoing TTD benefits from June 26, 2016.

Employer contends it should not pay TTD benefits after June 25, 2016, because Employee has been medically stable, and his disability or need for medical treatment did not arise out of and in the course of his employment.

1) Is Employee entitled to ongoing TTD benefits?

Employee requests an order for a permanent partial impairment (PPI) rating; he contends he could not obtain one because Employer controverted his case.

Employer contends there is no medical evidence Employee's February 6, 2016 work injury caused any PPI; thus, his rating request should be denied.

2) Is Employee entitled to a PPI rating?

Employee contends he needs continuing medical care for his work injury. He seeks an order requiring Employer to pay for all medical benefits necessitated by his February 6, 2016 injury.

Employer contends Employee's medical benefits should be denied because his disability or need for medical treatment from June 26, 2016, is unrelated to his February 6, 2016 injury.

3) Is Employee entitled to medical benefits?

Employee contends he was off work for more than 90 days but Employer did not refer him for vocational reemployment evaluation as set forth in 8 AAC 45.522(a); he requests an evaluation.

Employer contends Employee obtained his law degree post-injury and has never intended to obtain reemployment benefits. It contends Employee worked for Employer to accumulate savings to attend law school, and his reemployment plan to become a lawyer exceeded both time and costs as set forth in AS 23.30.041. Thus, his request for a reemployment evaluation should be denied.

4) Is Employee entitled to a reemployment evaluation?

Employee contends his attorney provided valuable services that will result in the award of benefits; consequently, he should be awarded attorney fees and costs.

Employer contends attorney fees and costs, if awarded, should be commensurate with the benefits awarded.

5) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) In 2015, Employee was accepted to New England Law of Boston, Massachusetts, for August 2016 admission. (Employee).

2) On February 8, 2016, Employee reported he sustained a low back injury while working as a lineman for Employer on February 6, 2016. (Agency file). On the same date, he saw Dr. Adams for chiropractic treatment. The last time Employee saw Dr. Adams prior to February 6, 2016, was November 14, 2013. (Adams reports, November 14, 2013, February 8, 2016).

3) Employee sustained several low back injuries prior to the February 8, 2016 injury. (Employee; Deposition of John J. Breyer, Jr., at 17).

4) Employer paid TTD benefits from June 4, 2016, through June 25, 2016. (Agency file).

5) Employee continued to work physically for Employer until May 2016; however, he remained on its payroll until August 2016 "burning some leave time." (Employee; Deposition of John J. Breyer, Jr., at 9).

6) On May 26, 2016, Larry Kropp, M.D., saw Employee and diagnosed lumbar disc displacement with radiculopathy. (Kropp report, May 26, 2016).

7) On June 1 and 8, 2015, Dr. Kropp performed lumbar nerve root blocks. (Kropp report June 1, 2015). Employee was restricted from work until June 22, 2016, or "when cleared by the surgeons." (Kropp letter, June 8, 2016).

8) On June 15, 2018, Dr. Kropp reported:

> Excellent result from the Selective Nerve Root Block - Lumbar L4/5 RIGHT and Psoas LEFT. He's about 30 to 50% better now. I think he may require surgery, and will give this another few weeks, but if he's not better after that then I want the surgeons to take a look at him. (Kropp report, June 15, 2018).

On the same date, Dr. Kropp explained the reason for Employee's work restriction:

> I have not given Mr. Breyer a diagnosis consistent with total disability, however, I don't feel at this time that he [sic] can return him to work as a lineman until he's been cleared by the surgeons. I think there's a high likelihood he's going to require spine surgery. In addition, he's worked as a lineman for 26 years, and with his current spinal condition I don't think he's going to be able to continue in that capacity. I would recommend that we start looking at job retraining options for him. (Kropp letter, June 15, 2016).

9) On June 21, 2016, Dr. Kropp further explained the reason for Employee's work restriction:

> By taking Mr. Breyer off work I have not, in fact, declared him totally incapacitated. I have merely stated that he needs to be cleared by the surgeons before returning to work. . . . [The MRI] shows sizable disc protrusions, and I'm concerned that this is going to require surgery to fix. I need him surgically evaluated before we return him to work. (Kropp letter, June 21, 2016).

10) On June 17, 2016, Employee saw Dr. Adams for the last time before he left Alaska to start law school in Boston. Employee rode a motorcycle cross-country from Prince Rupert, British Columbia, Canada, to West Roxbury, Massachusetts, for 30 days off and on under 300 miles per day. (Employee). The distance between Prince Rupert and Boston is approximately 3,500 miles. Riding a motorcycle for 3,500 miles in 30 days can be physically strenuous even for a healthy person. (Experience; knowledge; observation).

11) On June 25, 2016, Eric B. Harris, M.D., conducted a records review employer medical evaluation (EME) and diagnosed (1) multilevel lumbar degenerative disc disease/spondylosis, a preexisting arthritic condition; (2) multilevel cervical degenerative disc disease/spondylosis, a preexisting condition; (3) history of morbid obesity; (4) history of multiple back injuries, resulting in years of treatment for chronic back pain; (5) cervical and lumbar strains due to the February 6, 2016 work injury based on chiropractic record; and (6) ongoing back pain more likely a result of preexisting degenerative disc disease than any work event. He opined:

> Substantial causes of ongoing pain are limited to the preexisting condition. Causes of need for treatment for the eight weeks or so immediately following the work event would include the lumbar strain diagnosis that would have been related to the work event but would have been medically stationary eight weeks later with no permanent partial impairment. I am unable to identify a specific mechanism that can explain his ongoing pain complaints. . . . [T]hese are more likely related to the preexisting degenerative condition, as it has been present and symptomatic for over a decade now. . . . Mr. Breyer is stable, as there is no objectively measurable

> improvement over the course of the last 45 days, and no further treatment such as surgery, injections, etc. is indicated as a result of the work event.

Dr. Harris further opined ongoing chiropractic treatment would be unrelated to the work injury as of April 6, 2016, and noted:

> Review of the records reveal that Dr. Kropp seems to typically remove people from work completely after performing [spinal injections]. In my practice, the pain management specialists that I work with do not take people off work completely, and it is not my opinion that that is necessary in any case unless there is a significant complication following said injection.

(Harris report, June 25, 2016).

12) On July 6, 2016, Employer denied all benefits based on Dr. Harris' June 25, 2016 opinion. (Controversion Notice, July 6, 2016).

13) On July 22, 2016, Dr. Kropp wrote a "To Whom It May Concern" letter stating, "Mr. Breyer is to remain off of work until cleared by the surgeons. His records are currently being reviewed by the Neurosurgery department at Harvard University, and he expects to hear from them early next week." (Kropp letter, July 22, 2016).

14) There is no record that Employee's records have been reviewed by the Neurosurgery department at Harvard University. (Agency file).

15) There is no medical evidence showing Employee had surgical intervention for the February 6, 2016 injury. (Agency file).

16) On June 19, July 18, August 29, and October 3, 2017, Employee visited Tuft Medical Center to treat his neck and lumbar pain. (Medical Summary, July 12, 2018).

17) On July 14, 2018, Todd Fellars, M.D., saw Employee for an EME and diagnosed (1) cervical strain, work-related, medically stable; (2) cervical spondylosis and ongoing cervical pain, preexisting condition, not work-related; (3) lumbar strain, work-related, medically stable; (4) lumbar spondylosis, pain and intermittent radiculopathy, preexisting condition, not work-related. Dr. Fellars stated there can be several potential causes for Employee's diagnoses such as the work event, overall work activities, genetics, age and body habitus. He stated "some studies suggest up to 74% of disc degeneration and resulting arthritis in the lumber spine is genetic in nature." Dr. Fellars opined because Employee "was able to continue working after the reported incident, it is not medically probable that the 02/06/16 incident is the substantial cause of the claimant's reported

inability to work. Genetics is the substantial cause, according to current medical science." He also stated that Employee "did not likely have a ratable impairment according to the 6th Edition of the AMA *Guides* based on the injury sustained. He sustained a sprain or stain type of injury. This typically resolves without impairment." Dr. Fellars concluded: "[Employee] may have intermittent periods of back pain throughout his life; that is expected, given the amount of degeneration he has. However, as he had demonstrated previously, he would be able to get back to full-duty work despite having a significantly degenerative spine." (Fellars report, July 14, 2018).

18) Dr. Adams treated Employee's neck, back and shoulder injuries off and on for 20 years; some were work-related and others were not. For all injuries prior to the February 6, 2016 work injury, he released Employee to work full-time as a lineman because they had been resolved. However, Dr. Adams opined the February 6, 2016 work injury has not been resolved yet, and Employee is not medically stable because "there is treatment that can be done that will improve his condition." Further, Dr. Adams stated "ongoing treatment" that Employee needs is not "palliative care," which is "just basically feeling good"; this "ongoing treatment" "would prevent deterioration" of Employee's condition. In short, Dr. Adams disagreed with EME Drs. Harris and Fellars; he stated the substantial cause of Employee's disability or need for medical treatment was the February 6, 2016 work injury. Dr. Adams is currently treating Employee free of charge; thus, no bills or reports have been generated. (Adams).

19) Employee testified that during law school, he sought chiropractic treatment for his work injury as frequently as he could afford. Although he had no treatment in 2017, he had two to three treatments per month during late spring 2018, and three to four treatments per month during the 2019-2020 school year. (Employee). There is no medical record in Employee's agency file reflecting any of these visits. (Agency file; record).

20) During the summer of 2017 and in 2018, he worked as a paid law intern; from mid-2019 through August 2020, he worked as a golf ball gatherer at a driving range. (Employee).

21) On February 23, 2018, Employee claimed TTD and PPI benefits, medical and transportation costs, interest, attorney fees and costs, and a reemployment evaluation. (Claim for Workers' Compensation Benefits, February 23, 2018).

22) On March 28, 2018, Employer denied all claims based on Dr. Harris' June 25, 2016 opinion. (Controversion Notice; March 28, 2018).

23) In May 2020, Employee graduated from law school and obtained Juris Doctor Degree. (Employee).

24) On August 6, 2021, Employee asked for $14,627.50 in attorney fees and $521.97 in costs, totaling $15,149.47. The itemization of these charges does not describe the time spent on each issue. (Amended Affidavit of Attorney Fees, August 6, 2021).

25) White provided a reemployment eligibility analysis at Employer's request; she opined Employee is not eligible for reemployment benefits because (1) he previously waived reemployment benefits; (2) his retraining plan to become an attorney exceeds time and cost limits in AS 23.30.041; (3) he has Bachelor's Degree that would give him transferable skills into a less strenuous job; and (4) there is no PPI rating required for reemployment eligibility. (White).

26) There are no outstanding medical bills in this case. (Record).

27) Review of the parties' briefs and evidence presented support the conclusion that time spent on TTD and PPI rating issues would be similar to that spent on medical benefits and reemployment evaluation issues. (Observation; judgment; inferences).

PRINCIPLES OF LAW

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

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
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> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles' for:
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> (1) the employee's job at the time of injury; or
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> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete

> in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles.'

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

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

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

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000).

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

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

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

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. *Bignell* required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id*. at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id*. at 973, 975. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), held "attorney's fees in workers' compensation cases should be fully compensatory and reasonable," so injured workers have "competent counsel available to them." Nonetheless, when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed. Fees incurred on lost, minor issues will not be reduced if the employee prevails on primary issues. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011). *Rusch & Dockter v. SEARHC*, 453 P.3d 784, 803 (Alaska 2019), held an award of attorney fees will only be reversed if it is "manifestly unreasonable" and explained "[a] determination of reasonableness requires consideration and application of various factors that may involve factual determinations, but the reasonableness of the final award is not in itself a factual finding." *Rusch & Dockter*. The board must consider the following non-exclusive factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining the reasonableness of a fee:

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

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

Vetter v. Alaska Workmen's Compensation Bd., 524 p.2d 264 (Alaska 1974) held the concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment.

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.**
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> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment.
> . . .

Unisea, Inc. v. Morales de Lopez, 435 P.3d 961, 972 (February 2019), held §190 is "silent about the timing for both rating of and payment for a permanent impairment." It explained §190(b) "provides that '[a]ll determinations of the existence and degree of permanent impairment shall be

made strictly and solely' under the Guides; the legislature did not direct that an injured worker be evaluated for a permanent impairment at medical stability." *Id.*

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

Runstrom v. Alaska Native Medical Center, 280 P.3d 567 (Alaska 2012) stated "'[o]nce an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary[.]'"

> **8 AAC 45.180. Costs and attorney's fees**. . . .
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> (b) A fee under AS 23.30.145 (a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145 (a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

. . . .

(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. . . .

8 AAC 45.522. Ordering an eligibility evaluation without a request.

(a) For injuries occurring on or after November 7, 2005, if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation, unless the employer controverts on grounds identified under AS 23.30.022, 23.30.100, 23.30.105, and 23.30.250, or 8 AAC 45.510(b). If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference and hold a hearing in accordance with 8 AAC 45.510(b). . . .

ANALYSIS

1) Is Employee entitled to ongoing TTD benefits?

Employee sustained a compensable injury on February 6, 2016, while working for Employer. Employer paid him TTD benefits from June 4, 2016, through June 25, 2016. It has not paid TTD benefits since; Employer contends Employee has not been disabled and has been medically stable June 26, 2016 forward. Employee contends he is disabled and entitled to ongoing TTD benefits.

This issue raises factual questions to which the presumption analysis applies. AS 23.30.120; *Meek*. Without regard to credibility, Employee raises the presumption that he is entitled to TTD benefits through his lay testimony and Dr. Adam's opinion that he is disabled and is not medically stable. *Tolbert*; *Wolfer*.

Employer must rebut the raised presumption with substantial evidence to the contrary. *Runstrom*; *Tolbert*. Credibility is not weighed at this stage. *Saxton*. Drs. Harris and Fellars opined Employee was not disabled and became medically stable in eight to twelve weeks after the work injury. Both doctors opined the substantial cause of Employee's disability or need for medical treatment was preexisting degenerative changes due to genetics; this conclusion was supported by Employee's

lengthy history of back injuries and the fact that he continued working for three more months after the work injury. Therefore, Drs. Harris and Fellars' opinions provide substantial evidence to overcome the presumption. *Tolbert*.

Employee has to prove his claim by a preponderance of the evidence. *Steffey*; *Saxton*. Dr. Adams has treated Employee's neck, back and shoulder injuries off and on for 20 years, of which some were work-related and others were not. Dr. Adams said unlike his previous injuries, Employee's February 6, 2016 work injury has not been resolved yet, and he is disabled. Dr. Kropp, a pain specialist on referral from Dr. Adams, restricted Employee from work until June 22, 2016, or "when cleared by the surgeons." Though he had not given Employee "a diagnosis consistent with total disability," he would have not released Employee to work as a lineman without clearance by a surgeon. On July 22, 2016, Dr. Kropp stated, Employee "is to remain off of work until cleared by the surgeons. His records are currently being reviewed by the Neurosurgery department at Harvard University, and he expects to hear from them early next week." Nevertheless, there is no record of such review or surgery in Employee's agency file.

The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. *Vetter*; AS 23.30.395(16). Employee continued to work as a lineman until May 2016, three months after the work injury. Also, he remained on Employer's payroll until August 2016 "burning some leave time." During the summer of 2017 and in 2018, he worked as a paid law intern; from mid-2019 through August 2020, he worked as a golf ball gatherer at a driving range. Moreover, he rode a motorcycle for 3,500 miles in 30 days before the start of law school, which can be physically strenuous even for a healthy person. *Rogers & Babler*. These facts indicate Employee did not lose his earning capacity. Thus, Employee does not prove his temporary total disability by a preponderance of the evidence.

In addition, "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. EME Drs. Harris and Fellars opined Employee became medically stable in eight to twelve weeks after the work injury due to the "absence of objectively

measurable improvement for greater than 45 days." By contrast, Dr. Adams opined Employee is still not medically stable because "there is treatment that can be done that will improve his condition." This "ongoing treatment," in Dr. Adams' view, "would prevent deterioration." Nevertheless, the test is "objectively measurable improvement," not "deterioration." Employee did not offer any clear and convincing evidence showing his condition improved from May 12, 2016, onward, which is 45 days prior to June 25, 2016, the date Employer stopped paying TTD benefits; thus, the presumption that Employee became medically stable on June 25, 2016, stands. AS 23.30.395(28).

Because Employee has been medically stable and has not been disabled since June 26, 2016, he is not entitled to ongoing TTD benefits.

2) Is Employee entitled to a PPI rating?

Employee requests an order for a PPI rating; he contends he could not obtain one because Employer controverted his case. Employer contends there is no medical evidence to support Employee's February 6, 2016 work injury caused any PPI; thus, his rating request should be denied.

A PPI rating must be made solely under the AMA *Guides*. AS 23.30.190(a)(b). There is no PPI rating in this case. EME Fellars opined Employee "did not likely have a ratable impairment according to the 6th Edition of the AMA *Guides* based on the injury sustained." However, "did not likely have a ratable impairment" is not the same as a zero rating. Thus, Employer will be ordered to pay for a PPI rating related to Employee's February 6, 2016 work injury. *Lopez*. He may seek PPI benefits in the future if the rating is greater than zero.

3) Is Employee entitled to medical benefits?

Based on the above analysis, Employee sustained a compensable injury on February 6, 2016, and became medically stable on June 25, 2016. However, Employer contends Employee's work injury was completely resolved in eight to twelve weeks from the date of the injury and no longer needs medical treatment.

This issue raises factual questions to which the presumption analysis applies. AS 23.30.120; *Meek*. Without regard to credibility, Employee raises the presumption that he is entitled to medical benefits through his lay testimony and Dr. Adam's opinion that he needs medical treatment for his ongoing pain. *Tolbert*; *Wolfer*.

Employer must rebut the raised presumption with substantial evidence to the contrary. *Kramer*; *Tolbert*. Credibility is not weighed at this stage. *Saxton*. EME Drs. Harris and Fellars opined Employee's work injury was resolved in eight to twelve weeks after the work injury; Employee's need for medical treatment is caused by preexisting degenerative changes due to genetics; this conclusion was supported by Employee's lengthy history of back injuries and the fact that he continued working for three more months after the work injury. Therefore, Drs. Harris and Fellars' opinions provide substantial evidence to overcome the presumption. *Tolbert*.

Employee has to prove his medical claim by a preponderance of the evidence. *Steffey*; *Saxton*. Dr. Adams said unlike with his previous injuries, Employee's February 6, 2016 work injury has not resolved. Prior to the February 6, 2016 work injury, Employee last visited Dr. Adams on November 14, 2013; he did not seek chiropractic treatment for almost 26 months. However, after his February 6, 2016 work injury, he sought chiropractic treatment for his work injury as frequently as he could afford. In 2017, Employee visited Tuft Medical Center to treat his neck and lumbar pain on June 19, July 18, August 29, and October 3, 2017. He had two to three chiropractic treatments per month during late spring 2018, and three to four treatments a month during the 2019-2020 school year. His testimony was credible and given greater weight. *Smith*; AS 23.30.122. Presently, Dr. Adams continues to treat him; Dr. Adams' opinion was also credible and given considerable weight given his long experience treating Employee. *Id*. Less weight is given to Drs. Harris and Fellars' opinions because they discounted Employee's credible account of his ongoing symptoms, which Dr. Adams opined come from his subject work injury. Based on these facts, Employee proves he needs ongoing medical treatment for his February 6, 2016 work injury by a preponderance of evidence. *Saxton*.

Dr. Adams' misconceived that "palliative care" is "just basically feeling good" and is not the same as ongoing treatment. However, Employee's chiropractic and pain treatments since June 25, 2016, have assisted in managing pain, exactly in line with the definition of "palliative care," which is medical care rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition. AS 23.30.395(29). Employee's ongoing pain is work-related and he is entitled to palliative care.

4) Is Employee entitled to a reemployment evaluation?

Employee contends he was off work for more than 90 days but Employer did not refer him to a vocational reemployment evaluation as set forth in 8 AAC 45.522(a). Employer contends Employee obtained his law degree and never intended to obtain reemployment benefits. It contends Employee worked for Employer to accumulate savings to attend law school, and his reemployment plan to become a lawyer exceeded both time and costs as set forth in AS 23.30.041.

Pertinent regulation states "if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation." 8 AAC 45.522(a). Employee remained on Employer's payroll, though on leave, until August 2016 and voluntarily left employment to attend law school in August 2016. The question is whether he could have returned to his employment at the time of work injury had he not gone to law school. Dr. Fellars explained, "[Employee] may have intermittent periods of back pain throughout his life; that is expected, given the amount of degeneration he has. However, as he had demonstrated previously, he would be able to get back to full-duty work despite having a significantly degenerative spine." Employee continued to work as a lineman until May 2016, three months after the work injury. Thus, greater weight is given to Dr. Fellars' opinion. *Smith*; AS 23.30.122. In short, Employee's February 6, 2016 work injury was not the reason he was totally unable to return to his job with Employer for 90 days. Thus, his request for a reemployment evaluation under 8 AAC 45.522(a) will be denied.

5) Is Employee entitled to attorney fees and costs?

Employee contends his attorney provided valuable services resulting in benefits; thus, he should be awarded attorney fees and costs. AS 23.30.145(a); 8 AAC 45.180. Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the claim. AS 23.30.145(a); *Childs*. Reasonable and necessary costs may be awarded to Employee if the costs relate to the issues upon which he prevailed at hearing. 8 AAC 45.180(f). Attorney fees in these cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Bignell*. Fees incurred on lost minor issues will not be reduced if he prevails on primary issues. *Porteleki*. Nonetheless, if Employee did not prevail on all issues, his attorney fees should be based on the issues on which he prevailed. *Childs*.

Kalamarides' representation in this case was instrumental in prevailing two major issues: medical benefits and PPI rating request. However, Employee did not prevail on the other two major issues: TTD benefits and the reemployment evaluation request. Thus, Employee is entitled to some attorney fees and costs requested, but not all. Employee asks $14,627.50 in attorney fees and $521.97 in costs, totaling $15,149.47. Employer did not object to the time Kalamarides spent on this case or his hourly rates. The itemization of these charges does not show the time spent on each issue, so it is not possible to calculate fees and costs per issue. However, as the two prevailing issues are as important as the two losing issues, this decision finds Employee is entitled to 50 percent of the fees and costs requested. *Bignell*; *Childs*. Employee's brief and evidence presented also supports 50/50 distribution of time spent on those issues. *Rogers & Babler.*

Kalamarides did not address the required factors supporting his request for reasonable fees from Alaska Rule of Professional Conduct 1.1(a). *Rusch*. However, based on his representations via affidavits, and lack of any contrary evidence from Employer, it is undisputed Kalamarides' time spent and hourly rate are reasonable. *Id*. Employee's request for attorney fees and costs will be granted in part; Employer will be ordered to pay $7,313.75 in attorney fees and $260.99 in costs, totaling $7,574.74.

CONCLUSIONS OF LAW

1) Employee is not entitled to ongoing TTD benefits.
2) Employee is entitled to a PPI rating.
3) Employee is entitled to medical benefits.
4) Employee is not entitled to a reemployment evaluation.
5) Employee is entitled to attorney fees and costs.

ORDERS

1) Employee's request for ongoing TTD benefits is denied.
2) Employee's request for a PPI rating is granted.
3) Employer shall provide continuing medical care for Employee's work injury in accordance with this decision and pay providers pursuant to the Alaska medical fee schedule.
4) Employee's request for a reemployment evaluation is denied.
5) Employee is awarded $7,313.75 in attorney fees and $260.99 in costs, totaling $7,574.74.

Dated in Anchorage, Alaska on September 10, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Bob Doyle, 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 John Breyer, employee / claimant v. Chugach Electric Company, employer; Broadspire Services, Inc., adjuster / defendants; Case No. 201602305; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on September 10, 2021.

/s/
Nenita Farmer, Office Assistant