



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

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

Employer contends any need for medical treatment is unrelated to work.

**2) Is Employee entitled to medical benefits?**

Employee contends he is entitled to past and future transportation costs, including lodging and per diem.

Employer contends Employee is not entitled to transportation costs, lodging, or per diem.

**3) Is Employee entitled to past transportation costs, lodging, or per diem?**

Employee contends he incurred a work-related disability and is entitled to disability benefits.

Employer contends Employee did not incur a work-related disability and is not entitled to benefits.

**4) Is Employee entitled to disability benefits?**

Employee contends he is entitled to permanent partial impairment benefits.

Employer contends Employee is not entitled to permanent partial impairment benefits.

**5) Is Employee entitled to permanent partial impairment (PPI) benefits?**

Employee contends his compensation rate should have been set using his anticipated future earnings from his post-injury employer and he is entitled to a compensation rate adjustment.

Employer contends the compensation rate was properly calculated according to the financial information Employee provided, and no compensation rate adjustment is warranted.

**6) Is Employee entitled to a compensation rate adjustment?**

Employee contends he is entitled to a referral for reemployment benefits.

Employer contends Employee was released to the job of injury or has the physical capacity to work in a job he held within the past 10 years, and is not entitled to a referral for reemployment benefits.

**7) Is Employee entitled to an eligibility evaluation for reemployment benefits?**

Employee contends Employer's medical evaluator's (EME) report did not match the medical records or the physical examination and should not be used to support a controversion of benefits. He seeks a finding that Employer made an unfair or frivolous controversion.

Employer contends the EME's report on its face supports the controversion of benefits and a finding of unfair or frivolous controversion is not warranted.

**8) Did Employer make an unfair or frivolous controversion?**

Employee contends Employer's unfair or frivolous controversion warrants a penalty for failure to pay benefits.

Employer contends its controversion was not unfair or frivolous and no penalty is warranted.

**9) Is Employee entitled to a penalty?**

Employee contends Employer did not pay benefits when due and he is entitled to interest.

Employer contends no benefits are due; therefore Employee is not entitled to any interest.

**10) Is Employee entitled to interest?**

FINDINGS OF FACT

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

- 1) Employee received chiropractic treatment, acupuncture, and massage therapy relating to pain and muscle spasms including cervical, thoracic, and lumbar therapy from November 6, 2017

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through December 30, 2017. Intake paperwork indicated chief complaints of neck pain, mid back pain on palpation, and left arm numbness, tingling, and pain. Diagnoses included cervicothoracic radiculopathy, myalgia, muscle contracture - multiple sites, and thoracic spine pain. (Pairmore & Young records, assorted dates). Diagnostic imaging on November 6, 2017 showed multilevel disc space narrowing with early marginal osteophyte formation, marked disc space narrowing at L4-5, moderate narrowing at L2-3, and “disc degenerative changes are present, notably at L5-A1.” (McCormick report, November 6, 2017).

2) On or about October 28, 2019, Employee reported he received an adjustment from a chiropractor at work; he received a second adjustment on October 30, 2019. (Employee Report of Occupational Injury or Illness to Employer, December 2, 2019). Chart notes documented a chiropractic adjustment on October 29, 2019. Employee was asymptomatic and returned to be examined, and possibly adjusted for subluxations; status was asymptomatic and receiving maintenance care. Chiropractic manipulative treatment (CMT) was provided to the C2, C4, T5, T6, L4, and L5 spinal levels. “Treatment rendered without incident and responding as expected.” (Buckley chart notes, October 29, 2019, electronically signed October 30, 2019 at 6:22 p.m.).

3) On November 8, 2019, Employee emailed Employer to inquire about a permanent job in Barrow (Utqiagvik), including “The team is good here!” Employee requested a raise to \$85-90 per hour and noted “I’m exceptional at rebooking and would like to keep the books full for both of us!”. (Employee emails to/from Foster, November 8, 2019).

4) November 8, 2019 was Employee’s last day of work for Employer. (Foster wage complaint response, January 10, 2020).

5) On December 2, 2019, Employee notified Employer he received a work-related injury arising on October 28 and 30, 2019, “due to force applied during [chiropractic] adjustment.” (Employee Report of Occupational Injury or Illness to Employer, December 2, 2019).

6) On December 4, 2019, Employee established care with Curtis Mina, M.D. Employee reported significant back pain the day after a chiropractic adjustment at work approximately six weeks prior. Pain radiated down his left side to his left lateral thigh, with some numbness involving his lateral left thigh and lower leg. Symptoms had not improved in six weeks. Employee was not in acute distress; his gait was non-antalgic. He had moderate restriction of lumbar extension, rotation, and flexion. Sensation was decreased in the left L5 and S1 distributions. Left straight leg raise was positive. X-rays revealed “probable transitional anatomy with an L5 segment which appears to be

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auto fused to the sacrum. He does have some degenerative disk disease as well as foraminal stenosis at the next adjacent level, . . . L4-5.” Additional imaging was ordered and an analgesic and steroid were prescribed. Diagnoses included lumbar disc herniation, lumbar degenerative disc disease, and low back pain. (Mina record, December 4, 2019).

7) On December 10, 2019, Employee underwent magnetic resonance imaging (MRI) of his lumbar spine. Imaging showed:

- a. A moderate mid-sized midline protrusion at L3-4;
- b. Protrusion of the left of midline causing mass effect on the left S1 nerve at the lateral recess;
- c. Chronic endplate changes at L5-S1, with disc desiccation at the 2 lowest levels; and
- d. Normal disc spacing from T12-L4.

(McCormick MRI report, December 10, 2019).

8) On December 18, 2019, Dr. Mina examined Employee and referred him for physical therapy. (Mina records, December 18, 2019). Employee was placed on modified duty until January 29, 2020 with restricted bending, lifting, twisting, and a 25 pound lifting limitation. (Work/School Status Note, December 18, 2019).

9) On December 19, 2019, Employee contacted Dr. Mina’s office. He was “wondering if it is [Dr. Mina’s] opinion that his injury was due to his work injury DOI 10/28/19. MRI findings were chronic/acute . . . He [was] wondering if his work disability note can be retro-dated for the DOI to 10/28/19 since he has been working part time since the injury . . .” (Mina note, December 19, 2019).

10) On February 5, 2020, Dr. Mina examined Employee. Numbness continued involving his left lateral thigh and lower leg. He had been in physical therapy and attempted treatment with Prednisone and Diclofenac, reporting slow improvement. The L5-S1 disk herniation was acute; Dr. Mina opined Employee should have been on light duty since the injury. Employee was to remain on light duty and continue physical therapy. An acupuncture referral was provided. If symptoms continued, a left transforaminal epidural injection would be considered. (Mina record, February 5, 2020). Employee was released to modified work and was to “[m]inimize bending, lifting, twisting . . . Avoid lifting greater than 25 lbs.” (Work/School Status note, February 5, 2020).

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11) On March 18, 2020, Employee participated in a telehealth appointment with Dr. Mina. He was scheduled for an EME and wanted to hold off on epidural injections. Employee's December 10, 2019 lumbar spine MRI showed a clear left L5-S1 disc herniation "causing mass effect as well as posterior displacement of the left S1 traversing nerve root." There was a chronic central disc protrusion at L3-4 which did not cause significant neurologic impingement. No other significant neurologic impingement was seen. (Mina record, March 18, 2020). Employee was taken off work until April 15, 2020. (Work/School Status Note, March 18, 2020).

12) On April 14, 2020, Employee participated in a telehealth appointment with Dr. Mina. He was feeling quite a bit better over the last several weeks. (Mina record, April 14, 2020). Employee was placed in off work status until June 2, 2020. (Work/School Status Note, April 14, 2020).

13) On April 29, 2020, Dr. Mina responded to an inquiry from Employer's nurse case manager, indicating Employee was not able to return to full duty and had not reached medical stability. Return to work recommendations indicated Employee could return to modified "light" duty on May 14, 2020, and a full return to work with no limitations on June 1, 2020. (Mina response to Tuccillo, April 29, 2020).

14) On May 26, 2020, Employee participated in a telephone call with Dr. Mina. He continued to have some numbness in his left anterior thigh and lower leg. Employee was feeling "quite a bit" better but continued to have some activity-related back pain. Physical therapy was ordered. Employee was anticipated to be able to return to duty in approximately four weeks. (Mina record, May 26, 2020). Dr. Mina placed Employee in off work status until he could be evaluated on June 23, 2020. (Mina work release, May 26, 2020).

15) On June 5, 2020, Employee underwent an EME with R. David Bauer, M.D. He reviewed Employee's medical records and conducted an examination. X-rays dated December 4, 2019 showed degenerative changes with significant disc space narrowing at the L5-S1 level. Dr. Bauer diagnosed lumbar strain asserted to be secondary to a manipulative motion, without any objective harm or change to the structure of the body, morbid obesity, and degenerative changes at L5-S1, neither aggravated nor accelerated by the incident in question. There was no evidence of radicular pain or other condition that would require invasive treatment. "If the chiropractic manipulation did anything, it caused no more than a sprain of his back. The ongoing complaints in his lower back would be extraordinarily unusual for chiropractic manipulation." The chiropractic manipulation would at most cause a muscle strain, which "would have been present for no greater

than six weeks.” No further diagnostic studies or tests were recommended. Employee was medically stable as of the examination, June 5, 2020. He was not a candidate for epidural injections or surgical intervention as he did not have radicular pain. No permanent partial impairment was identified. No additional treatment was reasonable or necessary. “There is no objective or physiologic reason [Employee] is not capable of doing his job, other than his obesity and deconditioning. If [he] was capable of medium or heavy work before the incident in October, he remains capable of doing so.” (Bauer EME report, June 5, 2020). Dr. Bauer was provided December 10, 2019 MRI of the lumbar spine and provided an update on June 24, 2020. The MRI revealed “chronic age-related degenerative changes, with no evidence of any acute change or anything brought about by the manipulative events described in this claim.” Dr. Bauer’s opinion was unchanged from his June 5, 2020 report. (Bauer update, June 24, 2020).

16) On June 16, 2020, Employee continued to have numbness in his anterior thigh and lower leg and had initiated physical therapy which was providing some relief. Prescriptions were provided for a muscle-relaxer and pain-killer as needed. Employee was anticipated to return to full duty in approximately six weeks. (Mina record, June 16, 2020). Employee was provided with a work release until his next appointment on July 28, 2020. (Mina work release, June 16, 2020).

17) On June 29, 2020, Employer denied temporary total disability (TTD) and temporary partial disability (TPD) after medical stability on June 5, 2020; medical treatment after June 29, 2020, permanent partial impairment (PPI) greater than zero percent; and vocational reemployment benefits based on Dr. Bauer’s EME report. (Controversion Notice, June 29, 2020).

18) On July 13, 2020, Employee dated a rebuttal to the Bauer IME report, listing errors including Dr. Bauer reported he had no hobbies, whereas he had “stated an inability to participate in . . . hobbies due to lack of range of motion and pain caused by the work[-]related injury.” Employee disagreed with Dr. Bauer’s statement that he was not in acute distress. He asserted Dr. Bauer did not request he perform walking motions or walk on his heels as noted in the EME report, and disputed the EME report finding that he had “good lumbar range of motion” as his motion was extremely limited. Employee noted Dr. Bauer failed to identify two disc protrusions shown in imaging. He stated he was taking two prescription medications to manage his pain symptoms but Dr. Bauer stated he was not taking any medication. Employee stated he had an audio recording of the session. (Rebuttal, filed 12/18/2020). Employee did not file either the recording or a transcript. (Agency file).

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19) On July 29, 2020, Employee was released from work until September 8, 2020. (Mina work release, July 29, 2020). Employee contacted Dr. Mina's office to obtain a cost estimate for surgery; Dr. Mina advised he did not need surgery. (Mina Communication Note, July 30, 2020). On August 11, 2020, Employee had been in physical therapy and reported slow but progressive improvement. He could transition to a work hardening program and hopefully return to baseline in four to six weeks. Employee was placed on a 25-pound lifting restriction. (Mina record, August 11, 2020).

20) On September 8, 2020, Employee was searching for different work as his job exacerbated his symptoms "considerably." He had transitioned from physical therapy to a home exercise program and reported slow but progressive improvement. Diclofenac and Tizanidine were prescribed. Employee was near maximum medical improvement; he might benefit from a L5-A1 left transforaminal epidural injection if symptoms persisted. A microdiscectomy could be considered if his symptoms worsened over time. Employee was released to follow up on an as-needed basis. (Mina record, September 8, 2020).

21) On November 25, 2020, Employee filed a claim seeking TTD, TPD, PPI, a compensation rate adjustment, a finding of unfair or frivolous controversion, medical costs in the amount of \$125,000, transportation costs, a penalty for late-paid compensation, interest, and "other" - "past & future compensation as well as . . . therapy for pain reduction." (Workers' Compensation Claim, November 16, 2020).

22) On December 4, 2020, Employer denied specific benefits on the basis of Dr. Bauer's June 5, 2020 EME report: TTD and TPD benefits after June 5, 2020; PPI greater than zero percent; medical benefits and transportation costs which were unnecessary, unreasonable, and/or unrelated to the October 28, 2019 injury; a compensation rate adjustment; penalties; interest; and unfair or frivolous controversion. (Controversion Notice, December 4, 2020). Issues set for hearing included Employee's November 16, 2020 claim and the RBA referral on eligibility. The parties confirmed these were the issues to be heard. (Prehearing Conference Summary, August 2, 2021; Record).

23) On January 20, 2021, Dr. Mina responded to questions from Employer's attorney. He disagreed with Dr. Bauer that changes on the December 10, 2019 MRI were degenerative; rather, he said Employee had an acute disc herniation. Dr. Mina agreed the October 28, 2019 work injury was medically stable and Employee had physical capacities to return to his job as a massage therapist. Dr. Mina disagreed the work injury did not result in a ratable permanent partial



impairment. (Mina response to Paddock, January 20, 2021). Dr. Mina also observed the EME report did not include a diagnosis of lumbar disc herniation, which was the substantial cause of Employee's condition. He would release him to light duty as of January 20, 2021, and hopefully to full duty in the next four to six weeks. (Mina "To Whom it May Concern" letter, January 20, 2021).

24) On January 27, 2021, Employee testified he had social media accounts on Facebook and Instagram. Employee had lived in Glenallen, Alaska since October 1, 2020; immediately prior to that he lived in Wasilla, Alaska. Employee said had never been married and did not have any children. Employee testified he received an Associate of Arts Degree with a pre-emphasis in nursing, a certification in massage therapy, and Associate and Bachelor's degrees in Human Service as well as a certificate of occupational endorsement for conflict resolution; he is a certified advanced myofascial technician. Employee fishes and hunts, most recently in 2020. He is a licensed massage therapist in Alaska. Employee said he previously owned his own massage business in downtown Anchorage since 2009 called Space Within Alaska. He testified other massage therapists rented space with him or worked for him; they were not employees. Employee still holds the business license but asserted he has not done any work under the Space Within Alaska business name since the work injury. He said the last time he received income from Space Within Alaska was August 2019. (Wilson deposition, January 27, 2021).

25) Employee testified he holds another business license in the name Polar Remedy. It is a health and wellness related business he said he was going to start in January 2020, primarily vending at shows, selling crystals, rocks, metaphysical-type tools, essential oils, and natural healing remedies. According to Employee, he has not derived any income from Polar Remedy; it does not have a storefront and he has not had any online sales. Employee stated he previously had business licenses for Collecting Links, Medical Massage Alaska, and the Alaska Massage Institute. (Wilson deposition, January 27, 2021).

26) Immediately prior to Arctic Chiropractic in 2019, Employee testified he worked fulltime at Alaska Massage Clinic as the director of licensed massage from October 2018 to December 2018. Prior to Alaska Massage Clinic, Employee said he was a full-time life skills instructor for Cook Inlet Tribal Counsel in Anchorage from approximately October 2017 to October 2018. As a life skills instructor, Employee developed an "urbanization curriculum" and taught it, involving things like how to sign up for a bank account, get an apartment, and grocery shopping. Employee testified

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he had also worked at Alaska Career College as a massage therapy instructor from August 2014 to October 2017. He said he had worked as a part-time fill-in massage therapist for Arctic Chiropractic for about four months in 2015; he had also worked for Arctic Chiropractic in Valdez for about a month in 2016, filling in while a therapist was on vacation, and a few weeks in August of 2019. (Wilson deposition, January 27, 2021).

27) Employee said prior to October 2019 he had never had any low back problems, or any problems with his thoracic or cervical spine; he had never sought any type of treatment for his spine prior to October 2019. Employee testified he had previously seen Drs. Ross and Marshall at Excellence in health for chiropractic and acupuncture treatment of his shoulder around September of 2018. He said he had not seen any other chiropractors other than Dr. Willis when he was a teenager. Employee did not have a primary care provider. (Wilson deposition, January 27, 2021).

28) Employee began working for Employer in Barrow (Utqiagvik) around the end of October 2019. It was a two-week position and they negotiated permanency but Employer found somebody else. He said he worked approximately 55 hours per week, six days a week, nine and a half hour days; that employment ended November 9 or the second week in November. (Wilson deposition, January 27, 2021).

29) Employee contends he was injured when the chiropractor adjusted him “[r]eally hard on both sides.” When he sat up he “had to . . . catch [himself] because there was this new sharp, shooting sensation pain, and I let him know, and he was like oh, well, sometimes you need to stretch it out and walk it off.” Employee said he asked for the adjustment to understand what the people he was working on were going through regarding treatment and care; more like looking for his quality of touch. Employee was adjusted twice. He testified he mentioned he had some pain to the office manager on Monday, then told her on Wednesday about the pain and sharp sensation and Employee contends she “just kind of shrugged her shoulders.” Employee did not complete a report of injury at the job site and did not seek any other medical care in Barrow. Employee said the chiropractor told him it could take six weeks for his pain to dissipate and to walk and stretch. When the six weeks were up Employee went to see Dr. Mina because the pain had not gone away. Dr. Mina had prescribed Tizanidine, Diclofenac, and Prednisone. (Wilson deposition, January 27, 2021).

30) Employee worked for Excellence in Health beginning in January 2020 and ending in September of 2020. He started out full-time, then went to part-time 20 hours per week for about

six weeks before being taken completely off work by Dr. Mina. He stated the last time he actually worked at Excellence in Health was March 2020. Employee said he had not worked for another employer since the October 2019 work injury and had not received any income from his own businesses. He testified he had applied for work at Crossroads Medical Center, Tazlina Native Village, AHTNA, and Copper River Native Association. His applications were mainly for administrative work. Employee said he has not had an interview for any of those jobs. He testified he has not had any source of income since the work injury other than benefits he received and Excellence in Health. He testified he received unemployment benefits for three to four weeks before the deposition. (Wilson deposition, January 27, 2021).

31) On January 29, 2021, Employee was examined by Sean Taylor, M.D. for a permanent partial impairment rating. He was going to physical therapy once per month and doing an independent exercise program three times per week. Employee was taking prescription Diclofenac, and Tramadol; Prednisone and Tizanidine were prescribed. He denied prior electrodiagnostic studies. Employee's numbness resolved two to three months prior. Employee denied a prior history of low back pain or treatment for low back pain prior to the October 28, 2019 work injury. He had a normal gait and was not in acute distress. Prior medical records were reviewed and Dr. Taylor diagnosed low back pain radiating down Employee's leg and provided a nine percent whole person PPI rating as a result of the work-related injury. (Taylor record, January 29, 2021).

32) On February 23, 2021, Employee had responded well to conservative treatment and was released to full duty without limitations as of January 29, 2021. (Mina record, February 23, 2021). On March 4, 2021 Dr. Mina answered questions from Employer's attorney, listing January 29, 2021, as the date of medical stability, and the need for six weeks of additional non-palliative treatment. (Mina answer to Paddock, March 4, 2021).

33) On June 22, 2021, Employee underwent a second independent medical examination (SIME) with Paul C. Murphy, M.D. At the time of the SIME, Employee was taking Tizanidine and Diclofenac. Dr. Murphy reviewed provided medical records and examined Employee, who was noted to be 6 feet, 10 inches tall and weighing 440 pounds. Employee was in no acute distress and "his gait and ambulation appear[ed] to be intact." Dr. Murphy opined Employee "sustained an industrial injury to his lower back as a result of . . . manipulative therapy that he received on two occasions." Dr. Murphy noted no medical evidence of pre-existing lower back injury or imaging showing a herniated disc or protrusion and L3-4 or L5-S1. The MRI did not demonstrate

significant degenerative changes. Low back pain and lower extremity radiculopathy complaints were substantiated by the MRI. Dr. Murphy diagnosed musculoligamentous sprain/strain of the lumbar spine, disc protrusion at L3-4 and L5-S1, mild degenerative disease of the lumbar spine, and morbid obesity. He opined Employee's lower back injury was a result of chiropractic manipulation and that was the substantial cause of his current complaints, injury, disability, and permanent impairment; Employee's pre-existing morbid obesity and mild degenerative changes were aggravated by the October 28, 2019 injury, thus the work injury was the substantial cause of Employee's disability and need for treatment. Dr. Murphy agreed Employee was medically stable on January 29, 2021. Employee should see Dr. Mina three to four times per year and receive muscle relaxants, pain medication, and non-steroidal anti-inflammatories. One to two epidural steroid injections should be provided. Physical therapy visits should be provided to treat flare-ups, up to 12-24 visits per year. While Employee is a candidate for surgical microdiscectomy, due to his size chances of surgical success are not great; avoiding surgery is preferable. Weight reduction would be a "critical factor" in alleviating the herniated disks. Employee was not able to resume his normal occupation of massage therapist, but should "avoid lifting, pushing, pulling or carrying of no greater than 20 pounds . . . bending, twisting, standing or walking for no greater than four hours in an eight-hour day. . . [and] sitting for no greater than four hours in an eight-hour day." Dr. Murphy provided a nine percent PPI rating. (Murphy SIME report, June 22, 2021).

34) Employee underwent physical and massage therapy and other hands-on treatments on various dates between January 7, 2020 and March 12, 2020; July 23, 2020 and November 9, 2020; January 29, 2021 through March 4, 2021, and on June 3, 2021, reporting partial pain relief after treatment. An October 6, 2020 record indicates Employee was "still experiencing lumbar pain and numbness and pain sensations down his leg since his accident." (Excellence in Health/Davis/Arkell records, assorted dates).

35) Employee is a massage therapist licensed in Alaska, holding License No. 101229 issued on February 17, 2016, and expiring on September 30, 2023. (State of Alaska License detail printout, undated).

36) Employee worked at Excellence in Health Chiropractic & Rehabilitation clinic beginning on November 20, 2019. His initial hourly wage was \$48.50 per hour. He was placed on limited work duty with no more than 20 hours of massage per week from February 5, 2020 through March 8, 2020. Employee was off work beginning March 8, 2020 due to "doctors' orders." Excellence in

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Health was closed from March 23, 2020 through April 20, 2020. (Wage Statement from Caprice Simmons, Office Manager, Excellence in Health, undated). A separate employment verification indicated Employee would work full time beginning November 20, 2019, at a rate of \$48.75 per hour plus bonuses and tips. (Email from Caprice Simmons, Clinic Administrator, to Tracy Bale, November 15, 2019).

37) Employee held multiple business licenses in 2019-2021, with some lapses:

- a. Space Within Alaska January 25, 2017 - December 31, 2021
- b. Polar Remedy June 30, 2020 - December 31, 2021
- c. Alaska Manual Therapy July 23, 2020 - December 31, 2021

38) Assorted banking statements from September 2019 through March 2021 contained payments or deposits not identified as payroll or sales of stock, including:

9/19/2019	Paypal Deposit	\$980.78
9/20/2019	Paypal Deposit	\$.01
9/20/2019	Paypal Deposit	\$.03
11/22/2019	Transfer from Space within Alaska	\$111.11
11/25/2019	Paypal Deposit	\$109.71
11/25/2019	Paypal Deposit	\$164.77
11/26/2019	Paypal Deposit	\$296.59
11/29/2019	Paypal Deposit	\$99.24
11/29/2019	Paypal Deposit	\$129.06
12/2/2019	Paypal Deposit	\$19.12
12/2/2019	Paypal Deposit	\$38.09
12/9/2019	Paypal Deposit	\$.09
12/9/2019	Paypal Deposit	\$.20
12/9/2019	Paypal Deposit	\$554.56
12/10/2019	Etsy Deposit	\$.01
12/13/2019	Paypal Deposit	\$55.13
12/16/2019	Paypal Deposit	\$.12
12/16/2019	Paypal Deposit	\$.12
12/24/2019	Paypal Deposit	\$214.84
12/25/2019	Transfer from Space Within Alaska	\$52.51

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12/25/2019	Transfer from Space Within Alaska	\$30.00
12/26/2019	Paypal Deposit	\$250.57
1/6/2020	Paypal Deposit	\$380.84
1/28/2020	Etsy Deposit	\$110.44
2/4/2020	Etsy Deposit	\$461.14
3/4/2020	Paypal Deposit	\$203.42
3/6/2020	Paypal Deposit	\$199.42
3/9/2020	Paypal Deposit	\$99.71
3/16/2020	Paypal Deposit	\$124.55
3/16/2020	Paypal Deposit	\$22.83
3/17/2020	Etsy Deposit	\$128.55
3/24/2020	Etsy Deposit	\$1014.04
4/14/2020	Alaska Department of Labor UI Payment	\$786.00
4/21/2020	Alaska Department of Labor UI Payment	\$972.00
4/27/2020	Alaska Department of Labor UI Payment	\$786.00
5/1/2020	Paypal Deposit	\$150.45
5/4/2020	Alaska Department of Labor UI Payment	\$786.00
5/8/2020	Alaska Department of Labor UI Payment	\$786.00
5/18/2020	Alaska Department of Labor UI Payment	\$786.00
5/27/2020	Alaska Department of Labor UI Payment	\$786.00
5/28/2020	Alaska Department of Labor UI Payment	\$786.00
6/3/2020	Alaska Department of Labor UI Payment	\$786.00
6/10/2020	Alaska Department of Labor UI Payment	\$786.00
6/11/2020	Paypal Deposit	\$134.22
6/17/2020	Alaska Department of Labor UI Payment	\$786.00
6/24/2020	Alaska Department of Labor UI Payment	\$786.00
7/6/2020	Alaska Department of Labor UI Payment	\$786.00
7/8/2020	Alaska Department of Labor UI Payment	\$786.00
7/15/2020	Alaska Department of Labor UI Payment	\$786.00
8/3/2020	SBAD Treas Misc. Pay	\$3100.00
8/24/2020	Paypal Deposit	\$31.53

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8/24/2020	Paypal Deposit	\$50.55
9/10/2020	Alaska Department of Labor UI Payment	\$786.00
9/16/2020	Alaska Department of Labor UI Payment	\$2088.00
9/23/2020	Alaska Department of Labor UI Payment	\$186.00
9/30/2020	Alaska Department of Labor UI Payment	\$186.00
10/7/2020	Alaska Department of Labor UI Payment	\$186.00
10/14/2020	Etsy Deposit	\$52.63
10/20/2020	Alaska Department of Labor UI Payment	\$186.00
10/20/2020	Etsy Deposit	\$44.52
10/28/2020	Alaska Department of Labor UI Payment	\$186.00
11/9/2020	Alaska Department of Labor LWA Payment	\$1800.00
11/9/2020	Paypal Deposit	\$600.00
11/10/2020	Etsy Deposit	\$22.87
12/1/2020	Etsy Deposit	\$36.55
12/9/2021	Alaska Department of Labor UI Payment	\$186.00
12/10/2021	Paypal Deposit	\$50.00
12/15/2020	Etsy Deposit	\$187.42
12/16/2020	Alaska Department of Labor UI Payment	\$186.00
12/22/2020	Etsy Deposit	\$66.15
12/23/2020	Alaska Department of Labor UI Payment	\$186.00
12/30/2020	Alaska Department of Labor UI Payment	\$186.00
1/7/2021	Alaska Department of Labor UI Payment	\$486.00
1/13/2021	Alaska Department of Labor UI Payment	\$486.00
1/21/2021	Alaska Department of Labor UI Payment	\$486.00
1/27/2021	Alaska Department of Labor UI Payment	\$486.00
2/1/2021	Paypal Deposit	\$465.00
2/5/2021	Paypal Deposit	872.68
2/6/2021	Venmo Deposit	\$0.12
2/8/2021	Venmo Deposit	\$0.81
2/9/2021	Etsy Deposit	\$59.45
2/24/2021	Alaska Department of Labor UI Payment	\$486.00

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2/28/2021	Payment/Transfer Credit, FACEBK	\$50.00
2/28/2021	Alaska Department of Labor UI Payment	\$486.00
3/5/2021	Alaska Department of Labor UI Payment	\$486.00

Multiple other unidentified deposits were also made, including remote and cash deposits. (Credit Union 1/Alaska USA statements, assorted dates).

39) Employee filed a spreadsheet with his hearing brief, requesting compensation and benefits as follows:

a. Temporary Disability Benefits	\$46,135.00
b. PPI	\$771,998.40
c. Comp Rate Adjustment	
d. Unfair/Frivolous Controversion	
e. Transportation	
1. 3,868 Miles	
2. per diem	\$2,340
3. hotel	\$7,920
f. Medical	\$93,280.00
g. Penalty for Late Paid Compensation	
h. Interest	

(Compensatory Items, filed October 14, 2021).

40) At hearing, Employee testified Dr. Mina was his main care provider in this matter. He had received two work-related chiropractic adjustments while he was working a limited contract at Employer's Utqiagvic office. He said it was standard procedure for massage therapists to receive some type of chiropractic manipulation from the overseeing doctor to understand the quality of care patients are receiving. (Employee)

41) Employee received sacroiliac adjustment on both sides and said when he stood up, it was "a little spicy" back there; he testified he was advised to let it rest for a day and try again on Wednesday. Employee said he was in pain but continued to work. It was the same thing with the next adjustment. Employee finished his contract with Employer and then went to work at Excellence in Health in Anchorage with little time off. (Employee)



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42) Employee said after six weeks his issues had not resolved; he contacted Dr. Mina who had a cancellation and was able to see him the same day. Employee underwent x-rays and an MRI. Dr. Mina diagnosed a disc herniation and placed Employee on work restrictions - initially part-time, light duty. Eventually he was placed on full work release due to pain exacerbation; Employee said the job made the pain worse due to the functionality of being a massage therapist, leaning and bending over the table and applying force. Employee was prescribed pain killers, nerve blockers, and anti-inflammatories and said he continued to take some of those medications as of the hearing date. (Employee).

43) Employee initially saw a massage therapist regularly, which assisted in decreasing the pain for up to 48 hours. He saw an acupuncturist and a physical therapist. After his second or third appointment for physical therapy, the pandemic shut everything down. During the pandemic Employee testified he was doing at-home exercises provided by assorted therapists to decrease pain. He said it was excruciatingly painful to get out of bed, dress himself, and address personal care needs. Eventually he was able to receive physical and massage therapy and acupuncture again. (Employee).

44) Employee was given a nine percent PPI rating; he testified it was the first time he had been diagnosed with an impairment. He said he still has pain in his low back and his ability to balance and stand in a single stationary position is nearly impossible. According to Employee, he was fully functional before. Employee no longer resides in an urban area; treatment providers in his area are very limited. He would either have to wait for a provider to come to his area about every six weeks or travel for treatment. (Employee).

45) Employee said he entered into a 40-hr per week contract with Excellence in Health after working with Employer. He testified he has multiple ventures in which he will become trained once he is able to concentrate on them and not the workers' compensation case. He said he is looking into two career fields now because of the work limitations from Dr. Murphy: construction logistics and internet security. (Employee).

46) Employee testified his work had significantly decreased in the past two years. He said he had not been doing massage and had not been working through his business Space Within Alaska (SWA) due to the pandemic. He testified SWA is accredited through the National Certification Board for Therapeutic Massage and Body Work (NCTMB); they are approved to provide continuing education classes for massage therapists. Pre-pandemic, Employee said they shut down

their brick and mortar presence as they were not able to keep up with regulatory measures. Employee stated SWA has not been providing any training or education for two years as it is a hands-on practice and his credentials do not qualify him to educate people on what is considered safe touch because of pandemic issues. Employee testified the income production capacity for SWA has decreased to zero. (Employee).

47) Employee has another business called Polar Remedy; its interest is in vending. He testified pre-pandemic it was doing festivals in various vending avenues to sell crystals, metaphysical tools, and similar items. Employee testified in the last two years the ability to provide those services and set up shop has decreased to zero. (Employee).

48) Employee said his financial stability has relied solely on his savings. He received some unemployment but that ran out. He testified there were “additional measures that he could file for but [he] didn’t do that.” (Employee).

49) Employee testified he had traveled to Laos and Kuala Lumpur; he traveled for approximately five weeks, housesitting at a B&B or guest house. He said he was not providing massage therapy. Before Laos, he said he had traveled to Wisconsin to be a guest presenter at a health and wellness summit, to Los Angeles, and to Kuala Lumpur. His return travel included flights to Thailand, China, Seattle, and Anchorage. He visited Glenallen before heading back to Anchorage and Barrow. He testified he returned to Alaska on October 22nd, flew to Barrow on October 25<sup>th</sup>, and was injured on October 28<sup>th</sup>. (Employee).

50) Employee asserted his first chiropractic adjustment was on the 28<sup>th</sup> around lunchtime. Employee was the only massage therapist in the office. He did not have to cancel providing any massage therapy appointments after either the first or second adjustment. Employee said he had been healthy before the adjustments and didn’t experience any pain when traveling. (Employee).

51) Employee testified he has personal and business social medial accounts listed as Kay B Dub, Polar Remedies, and Kapt Kirky. He said he is the only one who has access to or can post on these accounts. Employee did not remember having a YouTube page for Polar Remedies, but if he does he contended he does not utilize it and did not think he had ever posted anything on it. He said he does not create posts for any other social media accounts. (Employee).

52) Employee confirmed business social media pages exist for Space Within Alaska and Polar Remedies. There is also a page for Alaska Manual Therapy; Employee said he is the person who does the posts for that page. (Employee).

53) Employee testified the Space Within Alaska page had been used previously to advertise classes and upcoming shows. On review of the screenshot of that page, Employee said the text of “Always Open” was not accurate and the phone number was incorrect; he had not been utilizing the business since January 2020. Additional screenshots showing courses for “Milestones in Oncology” were posts created by Employee. According to Employee, all of the classes posted on the Space Within Alaska page did not happen, and none of the courses that he listed were conducted. (Employee).

54) Alaska Manual Therapy (AMT) was another social media page Employee was responsible for; he said he hasn’t used it. He testified AMT was set up to be a third-party insurance biller for massage therapists but the business model did not work out. Employee said it is not an ongoing business. (Employee).

55) When presented with video evidence of training he presented on February 28, 2021, Employee recalled it. He testified he had posted the video under Polar Remedies. Employee said he has not continued presenting the classes; he knows insurance billing logistics and wants to help people do that but at this time it is not something he feels comfortable doing as an educator. (Employee).

56) Employee testified Space Within Alaska had offered other courses; Employee has over eighty hours of accredited material that he developed. He said course topics covered are listed on the Space Within Alaska website and include training on different segments of the body. Employee asserted he took out most of the current courses; the only courses listed were for April, May, and June of 2021. Employee contended none of those classes happened, however Employee had not removed them from the website. He said he is accredited to teach billing medical insurance, oncology, sports certification, bloodborne pathogens, reflexology, marketing, and special populations. The protocol of how to approach services today is something he is not comfortable practicing as a professional. He stated he is not currently able to do so due to the injury but even if he was able, he would be doing a limited amount because of the issue of Covid transmission. He said does not feel it is ethical to teach information he does not feel comfortable providing himself. He testified he is the only person involved in providing training at SWA. Employee said he is an approved provider through NCTMB, which also approves his curriculum and the associated continuing education credits. Employee stated it was not something he was doing at the time of the hearing though it had potential in the future. He testified he just got re-

credentialed as an approved provider for the next four years. He said the website had a blanket post that SWA was closed due to the COVID-19 pandemic. (Employee).

57) Employee confirmed Polar Remedies has an Etsy website available for people to purchase items. Employee could not remember why he did not mention his Etsy site in relation to questions about online sales during his deposition. He could not remember whether his Etsy site was open in January of 2021. He did not consider Etsy a social media account. He testified he made the pottery shown on that page; he said he last made pottery in June or July of 2020 in rented studio space. Employee testified it is a costly hobby, which he has been doing for about ten years, and he has not recouped the costs of making the pottery from sales. (Employee).

58) The pottery wheel is usually operated with a foot pedal; Employee said he has to operate it with his hand due to his injury. He put the pedal on the table and shaped the pottery with his other hand. He testified it takes him about 15 minutes and one to two pounds of clay to form a coffee mug; crockpots are 30-45 minutes to form and use five to six pounds of clay. There are hours of work beyond that per piece. You can start and stop whenever you want. He said seventy-five to eighty-five percent of what he made in the six-week period had to be discarded due to safety concerns from bubbles in the fired glaze. Employee testified he put the pots in the kilns himself. He said he was there some days an hour or two, and some days in and out all day, 8 to 10 hours, and no one was there helping him. (Employee).

59) Employee testified he went to the Alaska Whole Life Festival approximately six weeks before the hearing. He had previously attended the festival four or five times. Employee stated he participated as a vendor and an unpaid lecturer, the same as the previous one in March 2020. He was selling pottery, crystals, rocks, and metaphysical tools. He contends he did healing work, without any bending or stretching or straining. He said he was paid on a donation basis but did not recall the suggested amount. (Employee).

60) Since the work injury, Employee said he had done limited massage therapy as an employee, and had done some healing work. Employee testified he tried to do massage therapy on his own but there was no space available, and he could not perform massage therapy or conduct a sole proprietorship due to land covenants at his residence. (Employee).

61) Employee testified he had worked for Alaska Career College for nearly four years as an instructor providing preliminary education classwork for licensed massage therapists. The majority was classroom lecture, it eventually became more hands-on teaching. (Employee).

62) Employee testified he had been a life skills instructor for Cook Inlet Tribal Council. He said he has a Bachelor's degree in Human Services with an emphasis in Cultural Diversity and Substance Abuse Counseling, a certificate or occupational endorsement for conflict resolution, and was sent to Native Wellness Institute's training for life skills instructors. The Institute did pop-up type training; his training was less than a week. He said he developed his own curriculum for that job and presented materials daily in a classroom. Classes ranged from one to four hours; sometimes it would be a lecture series, up to six hours per day. If not in the classroom, Employee recalled he was developing curriculum, calling clients, and going to board meetings. (Employee).

63) Employee did not remember the basis of the April 14, 2020 deposit from the Department of Labor; he only received unemployment benefits from them. Employee believed his unemployment benefits ceased shortly after March 2021, which was part of an extension of benefits. Employee thought he had advised the State of Alaska of the February 8, 2021 training he conducted; he did not remember whether he derived any income from that training. (Employee).

64) Employee said he had applied for several positions. He testified he was offered a job at Copper River Native Association doing what he had done at Cook Inlet Tribal Council - teaching life skills. He said he did not accept that position due to the pay scale and the commute (within a 35-mile radius). Employee testified he was physically able to do the work. (Employee).

65) Employee asserted the bank statements provided were for all accounts Employee had, either business or personal. He said there are multiple deposits from PayPal; people would gift him, and his savings were maintained on PayPal. He testified purchases are made on his Etsy site only via Paypal. He did not initially remember applying for any type of Covid relief through the SBA. On cross-examination, Employee recalled \$3,100 for an SBA Covid-19 economic injury disaster loan (EIDL) sounded familiar, as he had to close his business down. He believed he would have to pay the money back, but he was not in the repayment process yet. Employee testified the funds were used for the closing of the physical location, for storage and moving costs. (Employee).

66) Employee testified he has his hunting license but has not been able to go hunting. In 2020, he said he went moose hunting; it was road hunting, not ATV or hiking out to moose camp. He did not recall if he stayed overnight. He said he got to his moose hunting area by truck and would drive up and down the road looking for animals. Employee testified he would stop and get out at the river and other places and walk around regularly. He did not remember how many times he went out hunting or whether it was always in the same area. (Employee).

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67) Employee testified he has not applied for Medicaid or Social Security disability benefits. He said he does not have any other health insurance coverage than workers' compensation. (Employee).

68) In addition to applying force and longitudinal strokes during massage work, Employee said bending and applying pressure causes pain. He testified the work in between clients, re-dressing the table and getting ready for the next person, is also painful. He did not believe he would physically be able to do 20 hours per week of massage therapy due to the pain. He had not applied for any jobs in the three months prior to hearing because he had been preparing for hearing. (Employee).

69) Employee testified he has high-speed internet access in his area but not at his residence, which is still restricted to copper wire. Star Link satellite services are anticipated to be available in mid 2022. He said he was able to provide the February 2021 zoom training in the YouTube video from his home in Glenallen though he turned the video off so it was just audio; that is really the only class he is certified for that could be taught with just audio. Employee said the majority of trainings require hands-on touch instruction; typically he requires at least four people in the class, with a person to be the "body" on which to demonstrate the techniques he is lecturing about. The students will then pair off and demonstrate with him observing and making corrections as needed. (Employee).

70) Employee explained his spreadsheet of requested benefits filed with his hearing brief. TPD listed as \$46,135 is the weekly amount Employer sent him from the controversion to the time medical stability was reached, plus a penalty for late payment. He said his receipt of unemployment benefits was not included in the calculation. (Employee).

71) PPI was listed on the spreadsheet at over \$771,000; Employee indicated it represents an estimated \$20 per hour income difference after retraining, 40 hours per week, until the age of retirement, beginning at medical stability. Unfair or frivolous controversion was listed because Employer based its denial on Dr. Bauer's medical opinion, which Employee contends was totally unreasonable and negated the fact that there is a new injury. Transportation costs on Employee's spreadsheet included past and future mileage, per diem, and hotel costs. Employee did not file any receipts for food or hotel. (Employee).

72) Employee requested a compensation rate adjustment asserting his rate should be based on what he would have earned from full-time employment at Excellence in Health. He testified that

they would have continued to provide him with work had he not been on work release. (Employee).

73) Employee's testimony regarding his income and ability to generate income after March 2020, including from self-employment, had a significant number of discrepancies when compared to the documentary and rebuttal evidence, and was not credible. (Employee; experience, judgment, observations, facts of the case, and inferences drawn therefrom).

74) Employee did not take reasonable steps to mitigate his damages, including not seeking employment in the three months prior to hearing, and not accepting an offer of employment within his physical capabilities. (Employee; evidence, experience, judgment, observations, facts of the case, and inferences drawn therefrom).

75) Employer provided rebuttal evidence at hearing, including:

- a. August 11 [2021] social media post of "Alaska Whole Life Festival" showing Employee seated next to a treatment table with an individual lying upon it, a table with jewelry and a small rack of bottles or tubes of gels and liquids, and a five-shelf stand displaying ceramics (approximately 44 pieces);
- b. August 1 [2021] social medial post of "Alaska Whole Life Festival" including text "Kirk Wilson, of Polar Remedy in Glenallen, will be participating in the August 6, 7 & 8, 2021 Alaska Whole Life Festival in Palmer. He will be doing Hands-on-Healing, talking about DNA activation and selling pottery and beads. Check out his beautiful beaded necklaces and pottery by clicking on his ceramics link at [www.polarremedy.com](http://www.polarremedy.com)";
- c. January 19, 2021 social media posts of "Space Within Alaska" listing training sessions or lectures for Bloodborne Pathogens, Billing Medical Insurance, and Milestones in Oncology;
- d. September 19, 2020 social media post of "kaptkirky" including a photo of ceramic pieces and text "Pots pots and more pots. Ready to get the glaze on!" (approximately 44 pieces);
- e. September 16, 2020 social medial post of "kaptkirky" including a photo of four shelves of ceramic bowls (approximately 17 pieces);

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- f. August 31, 2020 social media post of “kaptkirky” including a photo of a board or table covered with ceramics (over 40 pieces);
- g. August 18, 2020 social media post of “kaptkirky” including a photo of a kiln full of ceramics (approximately 37 pieces);
- h. August 15, 2020 social media post of “kaptkirky” including a photo of a kiln full of ceramics (approximately 25 pieces);
- i. August 13, 2020 social media post of “kaptkirky” including a photo of three shelves of bowls or containers and lids;
- j. March 10, 2020 social media post of “Alaska Whole Life Festival” including a photo of Sunday Lectures listing “3:30 PM: KIRK WILSON of Polar Remedy . . . ‘DNA ACTIVATION’ Kirk will describe DNA & it’s (sic) functions in evolution, past, present and future” and text “. . . Make time to listen in as vendors talk about their areas of expertise. It’s a wonderful learning experience!”;
- k. August 5, 2020 social media post of “kaptkirky” including approximately nine bowls or containers on a board or table and referencing multiple hashtags such as “#ThrowingMyLifeAway”;
- l. July 31, 2020 social media post of “Alaska Manual Therapy” noting the ability of private practitioners to “bill insurance. AKMT’s 3<sup>rd</sup> party Billing Services through Alaska Manual Therapy is the gold standard and will work hard for your maximum regional allowables . . . If you would like more information, please feel free to DM Me!” The printout also includes “Alaska Manual Therapy is a 3<sup>rd</sup> part (sic) insurance billing and administrative service, offered to Licensed Massage Therapists in Private Practice”;
- m. March 4, 2020 social media post of “Alaska Whole Life Festival” noting that Employee “will be participating in the March 14-15, 2020 Alaska Whole Life Festival. [He] will be offering astrology readings which are birth time specific . . . also doing body work sessions using Light Body Activations for 5th dimension reality . . . he will also be selling crystals. . . .”;
- n. November 3, 2019 social media post of “Space Within Alaska” that “At this time all courses are postponed until SOA complete (sic) their development of education



regulations . . . We look forward to fulfilling all of your educational needs in the near future.”

- o. Two printed pages for an Etsy store at <https://www.etsy.com/shop/Polar-Remedy>, revealing 26 sales, photos of ceramics, a listing indicating 65 items were available (ceramics, beads, and other), and a last update on October 3, 2020;
- p. Social media page (undated) for “Space within Alaska” including text “Always Open” and “Space Within Alaska provides reliable massage therapy services! Now facilitating for special populations in Alaska & NCBTMB Approved Provider - #1290.”
- q. YouTube Video under name Polar Remedies, <https://www.youtube.com/watch?v=9mJZPARWZIM>. Video recorded via live Zoom meeting February 28, 2021.

(Documentary rebuttal evidence filed at hearing and a portion of YouTube video rebuttal evidence played at hearing, October 16, 2021). Only a portion of the YouTube video was viewed at hearing due to its length of over four hours; Employee was identified as the instructor in the video. (Record).

76) Covid-19 EIDL are available through the SBA until December 31, 2021. EIDL loans “must be repaid; low-interest, fixed-rate, long-term loan[s] to help overcome the effects of the pandemic by providing working capital to meet operating expenses” and were to be used “to make regular payments for operating expenses, including payroll, rent/mortgage, utilities, and other ordinary business expenses, and to pay business debt incurred at any time. . . .” (<https://www.sba.gov/funding-programs/loans/covid-19-relief-options/eidl/covid-19-eidl>).

77) Employee filed a transportation log documenting 2,884 miles driven between July 23, 2020 and March 4, 2021. (Agency file).

78) Employer paid TPD to Employee from December 18 to December 24, 2019, in the amount of \$17.74. It paid TTD at the rate of \$536.11 per week from March 18, 2020 through June 24, 2020, totaling \$7,582.13. (Agency file).

79) The parties stipulated that Employee began receiving unemployment benefits effective March 21, 2020. (Stipulation, November 1, 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;

....

(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 23.30.041. Rehabilitation and reemployment of injured workers.**

. . . .

(c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation. . . [and] select . . a rehabilitation specialist . . . to perform the eligibility evaluation. . . .

(d) . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits . . . The board shall uphold the decision of the administrator except for an abuse of discretion . . . .

(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 Revised Dictionary of Occupational Titles" for

(1) the employee's job at the time of injury; or

(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 the 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 Revised Dictionary of Occupational Titles.”

(f) An employee is not eligible for reemployment benefits if . . . .

(4) at the time of medical stability, no permanent impairment is identified or expected.

. . . .

In determining eligibility for reemployment benefits, the Rehabilitation Benefits Administrator (RBA) must consider the opinion of Employee’s treating physician. *Irvine v. Glacier Gen’l Const.*, 984 P.2d 1109 (Alaska 1999).

**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 . . . 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. . . . .

. . . .

**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. 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). 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). Credibility is not weighed at this stage. *Resler v. Universal Services, Inc.*, 778 P.2d 1146 (Alaska 1989). An employer can also rebut the presumption by showing 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.*

In the third step, if the employer has successfully rebutted the presumption, it drops out and the employee must prove their claim by a preponderance of the evidence. *Runstrom* at 8. When determining whether the disability or need for treatment arose out of and in the course of employment, the factfinders in step three of the analysis must evaluate the relative contribution of different causes of the disability or need for treatment. *Huit*. The Board must review the different causes of the benefits sought and identify one cause as “the substantial cause.” *Morrison v. Alaska Interstate Constr., Inc.*, 440 P.2d 224, 233-34 (Alaska 2019) (emphasis in original). 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. 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).

**AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness . . . .

**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.

. . . .

(j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

....

(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 an employee's right to compensation, nor pays compensation due, § .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, meaning the employer must possess sufficient evidence in support of the controversion that, if Employee does not introduce evidence opposing the controversion, the Board would find that the claimant was 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 23.30.187. Effect of unemployment benefits.** Compensation is not payable to an employee under AS . . . 23.30.185 for a week in which the employee receives unemployment benefits.

**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 if he does not agree with a rating by the employer's physician, or a PPI rating has not already been obtained.

*Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC Dec. No. 153 (June 14, 2011).

**AS 23.30.200. Temporary Partial Disability.** (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

(b) The wage-earning capacity of an injured employee is determined by the actual spendable weekly wage of the employee if the actual spendable weekly wage fairly and reasonably represents the wage-earning capacity of the employee. The board may, in the interest of justice, fix the wage-earning capacity that is reasonable, having due regard to the nature of the injury, the degree of physical impairment, the usual employment and other factors or circumstances in the case that may affect the capacity of the employee to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future.

The Board has wide discretion in fixing the average daily wage-earning capacity of the injured employee. Discretion is not limited to wages currently being earned daily by employee at the time he sustained injuries. *Vannev v. Alaska Packers Ass'n*, 12 Alaska 284 (D. Alaska 1949).

TPD is determined by comparing an employee's actual weekly earnings with his spendable weekly wage. *Lubov v. McDougall Lodge, LLC*, AWCAC Dec. No 257 (March 7, 2019). The burden is on the employee to provide evidence to support the benefits he seeks; where the employee fails to provide evidence of his actual earnings, there is no evidence to determine a TPD calculation. *Id.* Employees also have a duty to mitigate damages. *Hays v. Boart Longyear*, AWCAC Dec. No. 03-0011 (January 15, 2003).

**AS 23.30.220. Determination of Spendable Weekly Wage.** (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

....

(4) if at the time of injury the employee’s earnings are calculated by the . . . hour, . . . then the employee’s gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;

....

An employer may presume that for an hourly worker AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the employee’s wages at the time of injury. The hourly employee has the burden to challenge the compensation rate established under § 220(a) if it does not represent the equivalent wages at the time of injury. *Wilson v. Eastside Carpet Co.*, AWCAC Dec. No. 106 (May 4, 2009). Evidence must be reviewed and the facts decided in each case when determining the spendable weekly wage. *Id.* at 4. Though income tax records may be used to prove reported income, the Board is not limited to federal tax returns as proof of an employee’s earnings; once a compensation rate adjustment is claimed by an injured worker, “the board must conduct a broader inquiry” to obtain sufficient evidence to determine the spendable weekly wage. *Id.* The compensability presumption does not apply to compensation rate adjustment claims; the party seeking deviation from the statutory rate must present substantial evidence that past wages will lead to an irrational workers’ compensation award. *Williams v. Abood*, 53 P.3d 134 (Alaska 2002). The burden is on the employee to provide sufficient evidence of what his future earning capacity would have been but for the work injury. *Straight v. Johnston Construction & Roofing, LLC*, AWCAC Dec. No. 231 (November 22, 2016).

. . . the Alaska Supreme Court has, on numerous occasions, indicated that a fair compensation rate must take into consideration the injured worker’s probable future earnings capacity. This doctrine may be what the legislature intended when it adopted AS 23.30.220(a)(5) which provides for calculating an injured worker’s spendable weekly wage ‘if at the time of injury the employee’s earnings have not been fixed or cannot be ascertained, the employee’s earnings for purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees. . . . It is not clear how or when the Legislature intended this provision to be used. It is, nonetheless, evident that in some circumstances an injured worker’s earnings ‘for the purpose of calculating compensation’ may not be readily ascertainable under the preceding sections of AS 23.30.220 . . . .’



*Straight v. Johnston Construction & Roofing, LLC*, AWCAC Dec. No. 231 at 10 (November 22, 2016). AS 23.30.001 and the mandates from the Alaska Supreme Court require looking into an employee’s probable future earnings capacity before determining whether AS 23.30.220(a)(4) is the proper method for determining the correct compensation rate. *Id.* at 11.

Where past wage levels are an accurate predictor of losses due to the injury, the Alaska Workers’ Compensation Board must apply the statutory formula of this section. The decision to depart from the statute must be based on substantial evidence supporting the conclusion that past wage levels will lead to an irrational workers’ compensation award. *Justice v. RHM Aero Logging, Inc.*, 42 P.3d 549 (Alaska 2002); *Abood*.

**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 . . . .

(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.

(e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.

**8 AAC 45.120. Evidence. . . .**

(e) . . . Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

. . . .

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Alaska Evid. R. 801(c).

**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 45.510. Request for reemployment benefits eligibility evaluation.**

. . . .

(b) The administrator shall consider a written request for an eligibility evaluation for reemployment benefits, unless the employer controverts on grounds the employee’s injury did not arise out of and in the course of employment, on grounds the employee’s total inability to return to the employee’s employment at the time of injury is not a result of the injury, or on grounds identified under AS 23.30.022, 23.30.100, 23.30.105, or 23.30.250.

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 . . . If a claim is filed . . . the board will conduct a hearing . . . limited to the grounds set out in this subsection.

....

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 October 28, 2019 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 with the EME Dr. Bauer’s report, which stated after examination and a review Employee’s medical records that work was not the substantial cause of his disability or need for treatment. *Huit*. Dr. Bauer reviewed the work incident and Employee’s asserted degenerative disc changes, morbid obesity, and deconditioning as possible causes, and opined Employee’s pre-existing morbid obesity and deconditioning were 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 weight given to the evidence are considered at this third stage in the presumption analysis. *Norcon*; AS 23.30.122.

Dr. Bauer is an orthopedic surgeon who conducts independent medical evaluations for Employers. His report failed to acknowledge disc herniations shown in imaging and noted by multiple other physicians. Dr. Bauer found no radiculopathy. His report is given little weight due to his failure to acknowledge and explain the disc herniations and Employee’s asymptomatic status prior to the work event. AS 23.30.122.

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Dr. Mina diagnosed acute disc herniations, low back pain with radiculopathy, and lumbar degenerative disc disease. His records consider Employee's height, weight, asymptomatic status, and the lack of prior low back treatment. Dr. Mina's opinion generally comports with the medical records as a whole and the opinions of SIME Dr. Murphy and Dr. Taylor. Dr. Mina's opinion is credible and given great weight as Employee's treating physician. AS 23.30.122.

Dr. Taylor reviewed Employee's available medical records and examined him. His opinion comported with the medical records and the opinion of Dr. Mina. Dr. Taylor provided a nine percent PPI rating, which was confirmed by the SIME physician. Dr. Taylor's opinion is credible but given less weight as he examined Employee on a single occasion. AS 23.30.122.

SIME Dr. Murphy reviewed all of Employee's medical records and provided the most recent physical examination prior to hearing. His opinion generally comported with Drs. Mina and Taylor. He too provided a nine percent PPI rating. Dr. Murphy provided specific recommendations for future treatment of Employee's work injury. Dr. Murphy's opinion is credible. Significant weight is given to his opinion as a neutral examiner, his comprehensive review of medical records, and the recency of his in-person examination. AS 23.30.122.

Greatest weight is given to the written medical records. *Wise.* Employee's records and imaging do not show any significant degenerative changes pre-dating the October 2019 work injury. No medical evidence was provided indicating Employee had sought treatment regarding low back pain prior to the work event(s) other than a limited reference to lumbar chiropractic adjustment approximately two years prior to the October 28, 2019 injury. The medical records as a whole indicate Employee had limited preexisting degenerative changes and had not sought any significant lower back treatment prior to the work injury. He was asymptomatic and any symptoms that may have been present prior to the work injury did not interfere with his ability to do his job. Employee's prior condition did not equate to a disability under the Act. AS 23.30.395(16).

A preponderance of evidence shows Employee suffered a work-related disability under the Act. AS 23.30.395(16). His October 28, 2019 work injury is the substantial cause of Employee's disability and need for treatment beginning October 28, 2019. AS 23.30.010; *Morrison; Huit.*

**2) Is Employee entitled to medical benefits?**

As Employee suffered a work-related disability, he is entitled to past and future medical benefits relating to the work injury. AS 23.30.095(a). Dr. Mina had released Employee from care on September 8, 2020 to follow up on an as-needed basis and did not provide specific future treatment recommendations at that time. SIME Dr. Murphy, after examination, indicated that the following would be reasonable and necessary continued treatment: follow-up visits to Dr. Mina (three to four) per year, physical therapy to treat flare-ups (maximum of 24 visits per year), and one to two epidural injections. Surgery was not recommended.

Employer will be ordered to pay Employee's work-related medical care in accordance with the Act from October 28, 2019 through the date of this decision. Immediate future medical care for the work injury will be limited to that recommended by Dr. Murphy absent agreement by the parties. Employee reserves his right to seek additional medical care; Employer reserves its right to object subject to further adjudication.

**3) Is Employee entitled to past transportation costs, lodging, or per diem?**

Employee is entitled to receive transportation costs for medical treatment related to the work injury. Mileage reimbursement is payable when 100 miles or more have accumulated, or upon completion of medical treatment. 8 AAC 45.084(d). Employee filed a transportation log showing 2,884 miles relating to medical treatment; Employer made no objection. Transportation costs will be awarded pursuant to the filed transportation log. Employee did not file any receipts for hotel or meal costs; accordingly, none are awarded. Employee remains eligible for future transportation expenses, lodging, and per diem related to medical care for the work injury pursuant to the Act.

**4) Is Employee entitled to disability benefits?**

Without regard to credibility, Employee attached the presumption of disability total in character but temporary in quality via his own testimony. *Cheeks; Resler.*

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Without regard to credibility, Employer rebutted the presumption via Dr. Bauer's opinion, which said Employee had not received a work-related injury, but even if he had, it would have resolved within six weeks. *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 March 18, 2020 through June 24, 2020. Clear and convincing evidence exists supporting continued disability after June 24, 2020 in medical records and the opinions of Drs. Mina and Dr. Murphy. This credible evidence includes examinations of Employee on May 26, June 16, August 11, and September 8, 2020 by Dr. Mina; referral to physical therapy on May 26, 2020 by Dr. Mina; and review of imaging, medical records, and Dr. Bauer's report by Dr. Mina and his responses to Employer on January 20, 2021. AS 23.30.122. It also includes a full records review including imaging, and physical examination by Dr. Murphy on June 22, 2021. AS 23.30.122. With slightly greater weight being provided to Dr. Mina as Employee's attending physician, Employee was medically stable on January 20, 2021. AS 23.30.122; AS 23.30.395(28).

Employee is entitled to TTD benefits to the date of medical stability. AS 23.30.185. Absent any other considerations, he would be entitled to TTD benefits from March 18, 2020 through January 20, 2021. However, Employee is not entitled to TTD benefits for any week during which he received unemployment benefits. AS 23.30.187. He began receiving unemployment benefits on March 21, 2020; the last deposit of unemployment benefits evidenced on banking statements was entered as of March 5, 2021, after the date of medical stability. Employee would be eligible for TTD benefits only from March 18, 2020 to March 20, 2020. Consequently, Employer overpaid benefits from March 21, 2020 through June 24, 2020 and is entitled to recoup its overpayment with an offset against future indemnity benefits. AS 23.30.155(j). As a significant portion of Employer's overpayment was due to Employee's receipt of unemployment benefits, and where Employee is not anticipated to incur significant additional benefits in the future, Employer may wish to file a petition for a greater offset than allowed by statute.

Employee requested TPD benefits, which can be awarded where his wage-earning capacity has been reduced due to a partial disability. He was placed on modified work by Dr. Mina from February 5, 2020 to March 18, 2020; he worked 20 hours per week at \$48.50 per hour during that timeframe (\$970.00 per week). TPD benefits are paid as the difference between Employee's post-injury, part-time work income and his spendable weekly wage calculated under the Act. AS 23.30.200(a); 23.30.220(a)(4); *Lubov*. Employee's spendable weekly wage was \$536.11. As Employee's weekly earnings from part-time work between February 5 and March 18, 2020 exceed his spendable weekly wage, no TPD is due for that time period.

Employee remains eligible for future TTD and TPD benefits under the Act, and Employer retains its defenses.

**5) 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.

Employee provided PPI ratings of nine percent from both Dr. Taylor and SIME physician Murphy. He requested PPI benefits in his claim, and that claim was ripe as of the hearing date. Employee pursued an award of PPI benefits, disagreed with Dr. Bauer, and provided two nine percent PPI ratings at hearing. *Settje*. Employee's current claim for PPI benefits will be awarded at nine percent, or \$15,930 ( $\$177,000 \times .09$ ). AS 23.30.190.

**6) Is Employee entitled to a compensation rate adjustment?**

Employee contends the statutory rate does not reflect his actual or future earning capacity. Employer contends the compensation rate was appropriately calculated under AS 23.30.220(a)(4) at \$536.11. Employee bears the burden to prove he is entitled to a higher weekly compensation rate. Relevant evidence must be reviewed to determine the spendable weekly wage. *Wilson*.

Employee began a temporary job with Employer shortly before his injury in October 2019. He had earned \$37,423 in 2017 and \$40,380 in 2018. Employee's compensation rate under AS

23.30.220(4) using his higher 2018 income provides for gross weekly earnings of \$807.60 (1/50 of \$40,380). Entering this information into the Alaska Workers' Compensation online benefits calculator along with Employee's filing status of single and one dependent provides a weekly compensation rate of \$536.11, as paid by Employer. An injured worker's weekly compensation rate is presumed to be a fair approximation of their probable future earning capacity. *Wilson*.

Employee has the burden of providing substantial evidence of his future earning capacity but for the work injury. *Abood; Straight*. Employee requested an increased compensation rate based on his work at Excellence in Health, where he was hired to work full-time shortly before the Covid-19 pandemic. The clinic closed for approximately one month during the pandemic, after Dr. Mina had taken Employee off work. Employee testified that Excellence in Health would have continued to provide ongoing full-time employment if it were not for his work injury. He could only have known this if a representative of Excellence in Health had told him that information or shown him written confirmation; thus, the statement would be hearsay. No testimony or direct evidence was presented from an Excellence in Health representative or other employer that continued employment at a heightened hourly rate would have been provided into the future but for the work injury. Employee's testimony on its own cannot be considered absent direct evidence it would support or explain. 8 AAC 45.120(e). Further, Employee's testimony regarding his income and ability to generate income after March 2020 is not credible and will not be relied upon.

It is not reasonable to conclude from the evidence provided that application of the statutory formula will lead to an irrational result. As substantial evidence was not presented to support an increased award based on anticipated future income, the statutory formula will be applied. *Justice*.

Employee is not entitled to a compensation rate recalculation.

**7) Is Employee entitled to an eligibility evaluation for reemployment benefits?**

Employer controverted Employee's requested benefits based on Dr. Bauer's EME report, which said Employee did not receive a work injury, or if he did, his inability to return to his employment at the time of injury is not a result of the work injury. 8 AAC 45.510. Employee is entitled to reemployment benefits if a physician predicts he will have permanent physical capacities less than



(1) the physical demands of Employee's job at the time of injury or (2) a job employee held or received training for within 10 years before the injury. AS 23.30.041(e)(1)-(2). In considering whether to award reemployment benefits, the RBA must consider the opinion of Employee's attending physician. *Irvine*.

Dr. Bauer found that Employee had the physical capacity to return to full-time work as a massage therapist. Dr. Murphy predicted that Employee could not return to work as a massage therapist, but could work with lifting, bending, twisting, standing and sitting limitations. Dr. Mina, Employee's primary treating physician found that Employee could return to his job at the time of injury without limitation.

However, the RBA is mandated to order an evaluation where an employee is found to have suffered a work-related injury and has been totally unable to return to his occupation at the time of injury for a period of 90 days following the work injury. AS 23.30.041(c). The RBA shall then select a rehabilitation specialist to perform an eligibility evaluation. *Id.* After the receipt of the evaluation, the RBA shall determine Employee's eligibility for reemployment benefits. AS 23.30.041(d). As Employee has been found to have a work-related injury, was unable to return to his occupation at the time of injury for a period of 90 consecutive days after the injury, and received a PPI rating at the time of medical stability, Employee is entitled to receive an eligibility evaluation. AS 23.30.041(c), (d), (f)(4).

**8) Did Employer make an unfair or frivolous controversion?**

Controversions must be filed in good faith, meaning Employer must possess sufficient evidence in support of the controversion that, if Employee does not introduce evidence opposing the controversion, he would be found not entitled to benefits. *Harp*. Employer based its June 29 and December 4, 2020 controversions on the opinion of its EME physician Dr. Bauer. Standing alone and assuming Employee did not introduce evidence opposing the denial of benefits, Dr. Bauer's opinion would have been sufficient to find Employee was not entitled to benefits. Accordingly, Employer's controversions were neither frivolous nor unfair. *Harp*.

**9) Is Employee entitled to a penalty?**

Employer may be liable for a penalty on benefits it did not either timely pay or controvert. AS 23.30.155(e). Even where timely filed, a 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 June 29, 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. *Harp*; AS 23.30.155(a).

However, Dr. Mina placed Employee on full work release effective March 18, 2020. Employer did not pay TTD until June 25, 2020 and did not controvert benefits until June 29, 2020. Employee is entitled to a penalty for failing to timely pay or controvert those limited TTD benefits from March 18 - 20, 2020. AS 23.30.155(e).

**10) Is Employee entitled to interest?**

Interest will be awarded on unpaid benefits as mandated by statute. AS 23.30.155(p); *Rawls*.

CONCLUSIONS OF LAW

- 1) The work injury is the substantial cause of Employee's disability and need for medical treatment.
- 2) Employee is entitled to medical benefits.
- 3) Employee is entitled to past transportation costs but not past lodging and per diem.
- 4) Employee is entitled to disability benefits.
- 5) Employee is entitled to PPI benefits.
- 6) Employee is not entitled to a compensation rate adjustment.
- 7) Employee is entitled to a referral for a reemployment benefits eligibility evaluation.
- 8) Employer did not make an unfair or frivolous controversion.

- 9) Employee is entitled to a penalty.
- 10) Employee is entitled to interest.

ORDER

- 1) Employee's claim for medical benefits is GRANTED. Employer will pay Employee's work-related medical expenses through the date of this decision in accordance with the Act. Employer will pay work-related medical expenses in the immediate future only for the treatment set out by Dr. Murphy (3-4 appointments with Dr. Mina per year, up to 24 physical therapy appointments per year, and a maximum of 2 injections). Employee retains his right to request additional medical benefits and Employer retains its defenses.
- 2) Employee's claim for past transportation costs is GRANTED. Employer will pay past transportation costs for 2,884 miles pursuant to the transportation log. Employee's request for past lodging and per diem is DENIED. Employee reserves his right to submit requests for future transportation, lodging, and per diem if necessary; Employer reserves its right to oppose.
- 3) Employee's claim for disability benefits is GRANTED. Employer will pay Employee any future TTD and TPD in accordance with the Act; Employer retains its defenses.
- 4) Employee's claim for PPI benefits is GRANTED. Employer will pay Employee PPI benefits in the amount of \$15,930.
- 5) Employee's request for a reemployment benefits eligibility evaluation is GRANTED. The RBA is directed to promptly begin the evaluation process.
- 6) Employee's claim for a compensation rate adjustment is DENIED.
- 7) Employee's claim for unfair or frivolous controversion is DENIED.
- 8) Employee's claim for a penalty is GRANTED IN PART. Employer will pay penalty on TTD not timely paid or controverted from March 18, 2020 through March 20, 2020.
- 9) Employee's claim for interest on unpaid benefits is GRANTED.
- 10) Employer overpaid TTD benefits from March 21, 2020 through June 24, 2020. Employer is instructed to promptly:
  - a. Prepare a calculation of each benefit awarded payable to Employee;
  - b. Calculate the applicable penalty for each benefit, if any;
  - c. Calculate the interest due on each unpaid benefit, if any;
  - d. Calculate the amount of TTD overpayment; and

- e. Provide a copy of its calculations to Employee.

Dated in Fairbanks, Alaska on December 17, 2021.

ALASKA WORKERS' COMPENSATION BOARD

\_\_\_\_\_  
/s/  
Cassandra Tilly, Designated Chair

\_\_\_\_\_  
/s/  
Lake Williams, Member

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 KIRK WILSON, employee / claimant v. ARCTIC CHIROPRACTIC, employer; MARKEL INS. CO., insurer / defendants; Case No. 201916876; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on December 17, 2021.

/s/

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Ronald C. Heselton, Office Assistant II