ALASKA WORKERS' COMPENSATION BOARD

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

MANUEL HERNANDEZ, Employee, Claimant, v. OCEAN BEAUTY SEAFOODS, LLC, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201711427 AWCB Decision No. 22-0005 Filed with AWCB Anchorage, Alaska on January 21, 2022

Employee Manuel Hernandez's March 16 and December 26, 2018, January 8, May 20 and December 23, 2019, March 18 and August 17, 2021 claims, and Employer's October 25, 2021 petition to strike were heard on December 22, 2021, in Anchorage, Alaska, a date selected on December 2, 2021. An April 14, 2021 hearing request gave rise to this hearing. Attorney Justin Eppler appeared and represented Employee. Attorney Krista Schwarting appeared and represented Ocean Beauty Seafoods, LLC, and its insurer Liberty Insurance Corporation (collectively Employer). Employee and Jon Van Ravenswaay, M.D., appeared and testified for Employee. The record closed at the hearing's conclusion on December 22, 2021. Prior to deliberation, member Sara Faulkner disclosed to the panel that she had a potential conflict of interest and was recused. Member Faulkner did not deliberate or participate in any way in preparing this decision and order.

ISSUES

Employer contends Employee's September 23, 2021 email should be stricken because it "discusses a confidential mediation held in September 2021," and is irrelevant and inflammatory.

Employee contends his email does not disclose confidential mediation terms and is not inflammatory; thus, it should not be stricken from the record.

1) Should Employee's September 23, 2021 email be stricken from the record?

Employee contends on August 11, 2021, Employer agreed to pay him $21,261 in temporary total disability (TTD) benefits plus $3,540 in permanent partial impairment (PPI) benefits to postpone the merits hearing on the same date; however, the next day it unilaterally reduced the TTD amount to $15,483. Employee contends the August 11, 2021 agreement should be enforced.

Employer contends it made an honest mistake; it had agreed to pay TTD benefits from May 17, 2020, through June 17, 2021, at $273 per week, totaling $15,483, not $21,261. Employer contends it satisfied the agreement by issuing a payment of $15,483 plus $3,540.

2) Is the August 11, 2021 agreement enforceable?

Employee contends he sustained a compensable injury while working for Employer, is not medically stable, and is entitled to TTD benefits from June 21, 2018, and continuing.

Employer contends it already paid TTD benefits Employee is entitled to. It contends the work injury is not the substantial cause of his current need for medical treatment or disability.

3) Is Employee entitled to TTD benefits?

Employee contends he is entitled to temporary partial disability (TPD) benefits; however, he did not provide specific dates, benefit amounts, income information or any other evidence to determine TPD benefits.

Employer contends TPD benefits should be denied because Employee failed to provide any supporting evidence.

4) Is Employee entitled to TPD benefits?

Employee contends he is entitled to PPI benefits for his "psychological and chronic pain, and thoracic conditions." Employee also contends he is entitled to a PPI rating for his hernias.

Employer contends Paul Murphy, M.D., conducted a second independent medical evaluation (SIME) and gave Employee a two percent PPI rating for his orthopedic conditions, and it paid PPI benefits accordingly. Employer contends presently, there is no other work-related PPI rating; it will not oppose a PPI rating for Employee's hernias.

5) Is Employee entitled to additional PPI benefits?

Employee contends his earnings history does not fairly and accurately reflect his earning capacity and lost earnings during his post-injury disability. However, he did not provide any evidence to support his compensation rate adjustment claim.

Employer contends Employee's request for a compensation rate adjustment should be denied because he did not provide any supporting evidence.

6) Is Employee entitled to a compensation rate adjustment?

Employee contends he was off work for more than 90 days but Employer did not refer him for vocational reemployment evaluation; he requests an evaluation and the §041(k) stipend.

Employer does not dispute or offer any defenses on this issue. At hearing, Schwarting stated she will notify the adjuster to address it.

7) Is Employee entitled to a reemployment evaluation?

Employee contends he needs continuing medical care for his work injury.

Employer contends Employee's medical benefits or related transportation costs should be denied because his disability or need for medical treatment is unrelated to his work injury.

8) Is Employee entitled to medical benefits and related transportation costs?

Employee contends Employer unfairly or frivolously controverted his benefits; he seeks an appropriate finding.

Employer contends it did not unfairly or frivolously controvert any benefits; it contends it paid Employee all benefits to which he is entitled.

9) Did Employer unfairly or frivolously controvert any benefit?

Employee contends he is entitled to interest on unpaid benefits. He contends his attorney provided valuable services that will result in the award of benefits; consequently, he should be awarded attorney fees and costs.

Employer contends Employee is entitled to limited benefits; thus, attorney fees and costs award should also be limited.

10) Is Employee entitled to interest, attorney fees or costs?

Employee contends he is entitled to a penalty because Employer's controversions were not supported by substantial evidence.

Employer contends Employee is not entitled to a penalty because evidence or law support its controversion notices.

11) Is Employee entitled to a penalty?

FINDINGS OF FACT

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

1) On August 7, 2017, Employee injured his upper back pushing a large cart of canned salmon while working for Employer, which also caused inguinal, umbilical and epigastric hernias. (First Report of Injury, August 10, 2017; Janet Abadir, M.D., report, May 8, 2018). He continued to work light duty operating a salmon egg processing machine until October 3, 2017. (Arthur Williams, PhD, report, June 17, 2021).

2) On October 4, 2017, Dr. Abadir repaired bilateral inguinal hernias, umbilical and epigastric hernias. (Abadir report, October 4, 2017).

3) On October 12, 2017, Dr. Abadir released Employee to "regular work without restrictions" on November 1, 2017. (Certificate to Return to Work/ Excuse from Work, October 12, 2017).

4) On December 22, 2017, Kayla Gordon, PA-C, reported a cervical x-ray showed "mild scoliosis but no obvious injuries or acute changes." (Gordon report, December 22, 2017).

5) On January 2, 2018, Employer denied all medical benefits related to Employee's cervical spine based on PA-C Gordon's December 22, 2017 report. (Controversion Notice, January 2, 2018).

6) On January 9, 2018, Laura Creighton, DC, opined Employee's low back, neck and thoracic pain were "consistent with the injury he had" on August 7, 2017, and expected full recovery from those musculoskeletal complaints in two or three visits. (Creighton report, January 9, 2018).

7) On January 24, 2018, Curtis Mortensen, M.D., emergency room physician, diagnosed Employee with an anxiety attack and referred him to a counselor. Dr. Mortensen reported Employee "was feeling exceptionally anxious because he felt that maybe his employer may send someone to 'get him.' It sounds like he may have watched something like this on a movie recently. . . . [Employee] also has significant financial stressors and social stressors as he is trying to petition for his wife to come to the United States from Mexico. He is worried that his current issues with his employer may keep him from being able to do this. [Employee] has no history of severe mental illness. Anxiety is a relatively new complaint which has pretty much been around the issues discussed above." (Mortensen report, January 24, 2018). Employee explained:

> I actually had an anxiety attack because I had some problems with the doctor because she wouldn't give me or she didn't want to give me excuse or a note for work. And then the note that she gave me -- the first note that she gave me for

> light duty doesn't have -- that didn't have a date, so I have problem at work where I brought it there because they actually were requesting that I had a note, because the doctor who had done the surgery had -- or the doctor who had seen me had said that I would be ready for work after -- after January. (Deposition of Manuel Hernandez, Volume II at 52).

8) On January 30, 2018, PA-C Gordon released Employee "for full duty from his previous injury." She noted that "he may still have some recurrent flares" and requested accommodation "with breaks during very strenuous work or less strenuous duties as needed and as available." (Gordon letter, January 30, 2018).

9) On February 13, 2018, a cervical computerized tomography (CT) showed "loss of the normal cervical lordosis" that is nonspecific, which "may be positional or could indicate muscle spasm." No significant degenerative changes were present. (Wendell Wilmoth, M.D., report, February 13, 2018). A thoracic CT showed normal vertebral disc spaces, spinal canal, neural foramina and paravertebral soft tissues; the impression was an unremarkable thoracic CT. (Wilmoth report, February 13, 2018).

10) On February 25, 2018, Steven Smith, M.D., emergency physician, saw Employee, opined his anxiety was being made worse from depression, and reported:

> Patient states that he came here this morning because he has been awake part of the night thinking about his current situation. He states that he is worried about finances, trying to work with ongoing back pain, worried about obtaining a visa for his wife in El Salvador. He tells me that his tax return was not enough to allow him to have his wife come to the United States. He relates his financial worries started when [. . .] he "had an injury at work 6 months ago." He tells me that he had surgery on his hernias and is doing well from that standpoint. He describes his pain as being the mid to upper back more on the right than the left. He states that it became worse when he tried to go back to work 2 weeks ago. . . . He has significant financial stressors and that he is worried he is not working and is worried because he is paying for rent and is expensive to live [in] Kodiak and he is not making any money. [He is] also concerned about finances and the ability to bring his wife to the United States. He is worried about what his employer will do if he is not able to work and whether he will have a job. (Smith report, February, 25, 2018).

11) On March 16, 2018, Employee claimed a compensation rate adjustment, a finding of unfair or frivolous controversion, and transportation costs for his groin, abdomen and back pain. (Claim for Workers' Compensation Benefits, March 16, 2018).

12) On April 30, 2018, John Koller, M.D., opined "from a work-comp stand point," Employee's thoracic back strain had resolved. Any residual pain or discomfort could be caused by a previous stab injury. His umbilical hernia was repaired and resolved. Dr. Koller said Employee was "ripe for return to work [. . .] at light duty with limited hours," but also noted there may be "some psychosocial issues not relevant to work comp injury that might be precluding his return to work. Dr. Koller stated, "I did determine during this interview that he has had the back pain issue prior to the work comp injury and also anxiety and insomnia issues as well prior and these seem to have been exacerbated by the injury." (Koller report, April 30, 2018).

13) On May 4, 2018, Dr. Koller released Employee to light duty work. (Return to Work/School Release, May 4, 2018).

14) On June 9, 2018, in response to an inquiry from the adjuster, Dr. Koller responded:

> (1) [Employee's] mid-thoracic back strain resolved, and any further pain is attributed to previous impalement in area (pre-existing); (2) hernia (multiple) likely preexisting – unusual to have multiple hernias develop over one incident. However, all are repaired and stable – no further treatment needed. Likely aggravation of previous existing condition (multiple herniation).

Dr. Koller also said Employee became medically stable on May 9, 2018, and will not have any impairment. (Koller response, June 9, 2018).

15) On June 22, 2018, David Bauer, M.D., saw Employee for an employer medical evaluation (EME) and diagnosed (1) inguinal and epigastric hernias, substantially caused by the August 7, 2017 work injury, surgically treated; (2) thoracic spine strain, substantially caused by the August 7, 2017 work injury, resolved; and (3) admitted history of anxiety and panic attacks. He stated Employee "suffers from an unrelated anxiety and panic attack condition that is not substantially caused by work." Dr. Bauer opined Employee had pre-existing spinal degenerative changes but they were not aggravated by the work injury, and he reached medical stability by January 22, 2018, without any impairment. He stated further medical treatment would not be reasonable or necessary, and Employee was physiologically capable of performing a job he held at the time of injury. Employee's ongoing complaints are probably related to his anxiety and psychological condition. (Bauer report, June 22, 2018).

16) On June 26, 2018, Employer denied disability and medical benefits related to the spine condition based on Dr. Koller's June 9, 2018 response. (Controversion Notice, June 26, 2018).

17) On July 3, 2018, Employee reported left shoulder pain consistent with probable left shoulder impingement, negatively impacted by poor tolerance for scapular and thoracic muscle activation. (Roxann White, P.T., report, July 3, 2018).

18) On July 5, 2018, Employer denied disability, PPI, medical and reemployment benefits based on Dr. Bauer's June 22, 2018 report. (Controversion Notice, July 5, 2018).

19) On July 10, 2018, Employee reported his left shoulder had been bothering him more than his back. (Kalen Pederson, P.T., report, July 10, 2018).

20) On September 6, 2018, Dr. Van Ravenswaay, family physician, saw Employee and diagnosed depressive disorder, anxiety and tension-type headache. (Van Ravenswaay report, September 6, 2018).

21) On September 12, 2018, a thoracic magnetic resonance imaging (MRI) was unremarkable except for "very slight disc desiccation and disc space narrowing at T4-5." (Marc Beck, M.D., report, September 12, 2018).

22) On December 26, 2018, Employee claimed TTD benefits, a finding of unfair or frivolous controversion, and medical and transportation costs for his groin, abdomen and back pain. (Claim for Workers' Compensation Benefits, December 26, 2018).

23) On December 29, 2018, Dr. Van Ravenswaay saw Employee and diagnosed chronic low back pain and depressive disorder. (Van Ravenswaay report, December 29, 2018).

24) On January 8, 2019, Employee claimed TTD benefits, a finding of unfair or frivolous controversion, medical and transportation costs, interest and a penalty. (Claim for Workers' Compensation Benefits, January 8, 2019).

25) On January 26, 2019, Dr. Van Ravenswaay reviewed Employee's medical records from September 28, 2018, through January 26, 2019, and opined his left shoulder injury was work-related, unrelated to a prior stabbing to the left upper back, and "still active." He did not comment on Employee's thoracic injury. (Van Ravenswaay letter, January 26, 2019).

26) On February 13, 2019, Employer denied disability, PPI, medical and reemployment benefits claims based on Dr. Bauer's June 22, 2018 report. (Controversion Notice, February 13, 2019).

27) On February 15, 2019, Dr. Van Ravenswaay saw Employee and diagnosed a depressive disorder. (Van Ravenswaay report, February 15, 2019).

28) On February 19, 2019, Dr. Van Ravenswaay saw Employee and diagnosed pain in thoracic spine. (Van Ravenswaay report, February 19, 2019).

29) On February 28, 2019, Dr. Van Ravenswaay saw Employee and diagnosed bursitis of the left shoulder. He stated the left shoulder MRI was normal but there was a subacromial subdeltoid bursitis. (Van Ravenswaay report, February 28, 2019)

30) On April 10, 2019, Dr. Van Ravenswaay stated a left shoulder MRI showed a subacromial subdeltoid bursitis and no other abnormality or evidence of injury. (Van Ravenswaay report, April 10, 2019).

31) On May 16, 2019, Dr. Van Ravenswaay reported: "[Employee] has persistent pain and persistent left subacromial bursitis. He will require multiple treatments, perhaps several times over the course of his life." (Van Ravenswaay letter, May 16, 2020).

32) On May 20, 2019, Employee claimed TTD benefits, a finding of unfair or frivolous controversion, transportation costs, and a penalty for his groin, abdomen and back pain. (Claim for Workers' Compensation Benefits, May 20, 2019).

33) On June 7, 2019, Employer denied disability, PPI, medical and reemployment benefits claims based on Dr. Bauer's June 22, 2018 report. (Controversion Notice, June 7, 2019).

34) On September 4, 2019, Dr. Van Ravenswaay saw Employee and diagnosed (1) acute thoracic back pain, chronic back pain and a depressive disorder. (Van Ravenswaay report, September 4, 2019).

35) On December 23, 2019, Employee claimed TTD, TPD, PPI, reemployment and medical benefits, a compensation rate adjustment, and attorney fees and costs for shoulder, thoracic and low back injuries, hernias and anxiety. (Claim for Workers' Compensation Benefits, December 23, 2019).

36) On January 10, 2020, Employer denied disability, PPI, medical and reemployment benefits claims based on Dr. Bauer's June 22, 2018 report. (Controversion Notice, January 10, 2020).

37) On April 21, 2020, Dr. Murphy, orthopedic surgeon, saw Employee for an SIME and diagnosed (1) inguinal and epigastric hernias substantially caused by the August 7, 2017 work injury, surgically treated; (2) thoracic spine strain substantially caused by the August 7, 2017 work injury, medically stable; and (3) history of anxiety, depression and panic attacks. Dr.

Murphy opined (1) Employee's August 7, 2017 injury did not aggravate his preexisting condition; (2) his anxiety and panic attacks are not substantially caused by the August 7, 2017 injury; (3) his work-related disability is no longer present; (4) he reached medical stability and his disability ended on September 17, 2018; (5) his physical examination is essentially normal with no evidence of neurological deficit, motor weakness or structural abnormalities; (6) no further medical treatment will relieve or cure his ongoing complaints; (7) he did not sustain a work-related injury to his left shoulder; (8) there is no structural damage to his left shoulder; based on Employee's "lack of response to the cortisone injection . . . further ongoing treatment to the left shoulder is also not indicated"; (9) the August 7, 2017 injury is the substantial cause of Employee's current condition; (10) except for anti-inflammatory medication to treat subjective complaints, there is no indication for any treatment or modality; and (11) there is not any structural abnormality to warrant work restrictions. Dr. Murphy gave a two-percent PPI rating on the thoracic spine. (SIME report, April 29, 2020).

38) On May 17, 2020, Dr. Van Ravenswaay opined "the August 7, 2017 injury is the most likely cause of [Employee's] anxiety, panic attacks, depression, chronic pain, shoulder and spine complaints and his inability to work." (Van Ravenswaay letter, May 17, 2020).

39) On May 27, 2020, Employer denied all benefits related to the left shoulder claim, disability benefits claim for thoracic strain after September 17, 2018, medical and reemployment benefits claims based on Dr. Murphy's April 21, 2020 report. (Controversion Notice, May 27, 2020).

40) On September 16, 2020, Dr. Murphy testified he is "well-versed in psychiatric illnesses, including anxiety, panic attacks and depression," but would "defer the psychology discussion to an expert in that field." He said while Employee had chronic pain, the condition was medically stable, and it was unlikely to change with further treatment. Dr. Murphy said his prior opinion regarding Employee's ability to return to work remained unchanged but "[w]ith regards to anxiety, depression and panic attacks," he would defer that to a psychologist. Dr. Murphy reiterated that orthopedically, Employee required no further treatment. (Zoom Deposition of Paul C. Murphy, M.D., September 16, 2020).

41) On December 2, 2020, a functional capacity evaluation determined that Employee is able to perform full-time light duty work. Employee showed self-limiting behavior. (Physical Work Performance Evaluation, December 2, 2020).

42) On March 11, 2021, Dr. Van Ravenswaay admitted he did not know the legal definition of "the substantial cause" despite opining on causation issues. He said, "I would guess that it would the main reason for the condition." Also, he did not review the SCORDOTS despite opining on Employee's physical capacity evaluation and the light duty classification. When he was asked whether he knew of any research about chronic pain and its connection with depression, Dr. Van Ravenswaay responded, "I probably am. But not at the front of my mind." (Deposition of Jonathan Van Ravenswaay, M.D., March 11, 2021).

43) On March 18, 2021, Employee claimed TTD, TPD, PPI benefits, a finding of unfair or frivolous controversion, medical and transportation costs, a compensation rate adjustment, interest, a penalty, and attorney fees and costs. (Amended Claim for Workers' Compensation Benefits, March 18, 2021).

44) On June 17, 2021, Dr. Williams, psychologist, saw Employee for an EME and diagnosed unspecified anxiety disorder and somatic symptom disorder, which involves excessive thoughts, feelings, or behaviors related to the somatic symptoms or associated health concerns as manifested by at least one of the following: (1) disproportionate and persistent thoughts about the seriousness of one's symptoms; (2) persistently high level of anxiety about health or symptoms; and (3) excessive time and energy devoted to these symptoms or health concerns. Dr. Williams opined the work injury was not the substantial cause of Employee's current condition, and "[f]rom a psychological perspective, he has been stable since 1/30/2018 when Ms. Gordon release him for full duty." He stated, "Any psychological treatment would be unrelated to [the work injury]." Dr. Williams opined Employee's symptoms were "excessive and disproportionate based on the lack of objective findings." He stated Employee has no work restrictions from a psychological perspective. (Williams report, June 17, 2021).

45) On July 27, 2021, Dr. Williams opined Employee did not have injury depressive disorder and noted the difference between the lack of objective findings and his responses to the pain disability questionnaire and the catastrophizing scale. Dr. Williams opined that Employee's pain and functioning scores were inconsistent at every evaluation and noted that unverified subjective complaints were not ratable under the AMA *Guides*. He testified:

> **Q**: Could you describe what the pain disability questionnaire is meant to elicit in terms of what information it is meant to give you?

A: [. . .] The pain disability questionnaire is included in the AMA *Guides*, the evaluation of permanent impairment in Chapter 3, and it is meant to look at various everyday functions, everyday activities. And [there] is a scale from one to ten rating, from normal to unable to do the function at all. . . .

Q: How did Mr. Hernandez respond to those items?

A: He was in the severe range. His scale -- his number was 129.

Q: What did he endorse that drove his score on that up, so to speak?

A: Well, many of the scales were ten, which is the highest, unable to work at all, unable to lift overhead. But one that particularly stood out to me, because I didn't do a physical examination, was does your pain affect your ability to walk or run. And he said he could not walk or run at all, which would indicate to me that he needed to be in a wheelchair. He had no gait problems. He seemed to walk normally, from my perspective as a psychologist. He also said that he had severe depression. Well, I have seen people with severe depression, and they -- and he did not function like someone with severe depression in terms of psychomotor retardation, very slow movement and speech, crying throughout the interview, et cetera. And he didn't meet the criteria for major depressive disorder. So for him to give himself a ten on that scale was very concerning. And then he said emotional problems caused by pain interfered with family, social, and work activity to a severe degree. Again, that's a ten. So, this is all at the highest you can be. And I have evaluated and treated hundreds of people with chronic pain, and this is a very severe score. It is the highest score you can have. The other thing -- I don't know if you want me to compare his score with me to the other scores. If you want me to do that, I can do that.

Q: Yes, I think that would be helpful. Thank you.

A: So on the same questionnaire with Dr. Bauer, his score was 95. And with Dr. Murphy, it was 107. Now, this scale has very good reliability, which means it is consistent over time. It is called test, retest, and reliability. So if you give it at one point, it should be very similar the next time you give it. But in this case the scale increases from 95 to 107, which is a big leap, and then it increases to 129, which is a sizable leap, especially from 95. Now, pain usually does not get dramatically worse unless there's some sort of intervening factor. So I was concerned again about the discrepancy between his previous performances, the type of injury that he had, and the lack of objective findings. And so going back to the AMA *Guides*, this is something that you want to look at in terms of consistency.

Q: What does the lack of consistency among those various scores tell you, if anything?

A: Well, it raises concern about his self-report. In Chapter 2 of the AMA *Guides*, it says subjective complaints are not usually ratable, are not generally ratable without -- I can quote it directly, but -- I can, it is right here. . . . "Number 13: Subjective complaints that are not clinically verifiable are generally not ratable under the *Guides*."

. . . .

Q: [. . .] You said Mr. Hernandez did not meet the criteria for major depressive disorder. . . . Could you please tell us [about] that?

A: [. . .] For major depressive disorder, the first one is that he needs to be depressed most of the day. . . . So it is five or more of the following symptoms have been present during the same two-week period and represent a change from previous functioning. At least one of the symptoms is either depressed mood or loss of interest and pleasure. But it is depressed mood most of the day, nearly every day, as indicated by either subjective report or observation by others. Markedly diminished interest or pleasure in all or almost all activities. Significant weight loss or decrease or increase in appetite nearly every day. Insomnia or hypersomnia. Psychomotor agitation or retardation. And he didn't exhibit any of that nearly every day, observable by others. Not merely subjective feelings of restlessness. Continual loss of energy nearly every day. Feelings of worthlessness or excessive or inappropriate guilt. Diminished ability to think or concentrate. Recurrent thoughts of death. And then the symptoms cause clinically significant distress or impairment in social occupation or other important areas of functioning. . . . So infrequently in cases of chronic pain, depressive symptoms are secondary to the medical condition, and so we would not diagnose a depressive disorder if chronic pain was the primary complaint, which [it] is for him. And he made a point of saying that depression and anxiety were not the cause of his inability to work and that both of those emotional factors followed pain rather than precipitated it.

Q: And the other scale you mentioned, the pain catastrophizing scale, what exactly is that? What information is that meant to elicit?

A: [. . .] So what we're looking at is do these various pain symptoms rise to the level of catastrophizing or immediately goes to an extreme emotional or cognitive response to the pain. So there are a number of items here. There are 13 items, and he ranks them from zero, not at all, to four, all the time. His score was 38, which was elevated. 30 is the cutoff for elevation. So he does engage in catastrophizing, which would only exacerbate his pain level, or his pain perception, I should say. So it is a very maladaptive way of dealing with pain.

. . . .

Q: Do you agree or disagree with Dr. Van Ravenswaay's conclusion, that the causation of Mr. Hernandez's psychological issues is related to his work injury?

> **A**: I disagree.
>
> **Q**: And could you state the basis for that, please?
>
> **A**: Well, he didn't do the sort of systematic evaluation of depression and anxiety and chronic pain that I did. . . .
>
> **Q**: Based on your review of Dr. Van Ravenswaay's records, does he state how he came to that conclusion?
>
> **A**: I didn't see it. I didn't understand it.
>
> **Q**: Did Dr. Van Ravenswaay, based on your review of his records and deposition, do any testing, the sort of testing you did to arrive at your diagnoses?
>
> **A**: I didn't see any.
> . . . .
> (Videoconference Deposition of Arthur D. Williams, PhD, July 27, 2021).

46) On August 5, 2021, Employer denied all benefits related to somatic symptom and anxiety disorders based on Dr. Williams' June 17, 2021 report. (Controversion Notice, August 5, 2021).

47) On August 11, 2021, the parties agreed to settle the case and set the terms on the record as follows: Employer will pay $3,540 based on a two percent PPI rating plus $21,261 in TTD benefits from May 17, 2020, through June 17, 2021. (Record).

48) On August 12, 2021, Employer noticed Employee that the total TTD benefit from May 17, 2020, through June 17, 2021, should have been $15,483, not $21,261, as it had agreed to pay. It stated that it would pay $15,483 in TTD benefits and $3,540 in PPI benefits instead. (Notice of Correction, August 12, 2021).

49) On August 17, 2021, Employee claimed a finding of unfair or frivolous controversion, a penalty, interest, and attorney fees and costs contending Employer unilaterally changed the terms of the August 11, 2021 agreement. (Claim for Workers' Compensation Benefits, August 17, 2021).

50) On December 2, 2021, the parties identified the following as the December 22, 2021 hearing issues: TTD, TPD, PPI and reemployment benefits, a compensation rate adjustment, a finding of unfair and frivolous controversion, medical and transportation costs, a penalty, interest, attorney fees and costs. The parties also identified Employer's October 25, 2021

petition to strike as an issue for the December 9, 2021 written record hearing. (Prehearing Conference Summary, December 2, 2021).

51) On October 25, 2021, Employer sought to strike Employee's September 23, 2021 email from the record. The email stated:

> I have received a notice about a hearing, the board should know that the board should not forget that my employer was given the last chance to resolve this in a good way but my employer did not make a fair offer therefore the arrangement does not work in my case and due to my medical condition (musculoskeletal disorder and Fibromyalgia and my mental condition). My request is that the board do the necessary investigations and act on the infractions that my employer has committed by not following the laws of Alaska regarding my injury. I want my employer to be sanctioned, I want my compensation for disability, if the board cannot make that decision I want to be referred to a compensation court and have my case determined by an injured workers' compensation judge. I won't take offer from my employer because they don't have good offer to me. All those hearings are time wasters. Thanks. (Email, September 23, 2021).

52) On December 17, 2021, Eppler billed $80,992.25 for 190.57 attorney hours, $20,562.75 for 111.15 paralegal hours, and $1,803.94 in litigation costs, totaling $103,358.94. (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021). At hearing on December 22, 2021, Eppler testified he is entitled to $425 per hour based on the quality of his legal work, and contended hours spent on this case were reasonable. He requested six hours at $425 per hour for the time he spent between December 17 and 22, 2021, bringing the total to $105,908.94. (Eppler).

53) On December 17, 2019, Jackey Hess testified affied she (1) works as a paralegal for Eppler, (2) has 30 years of experience in Alaska workers' compensation as a paralegal or adjuster; (3) handled over 1200 claims; (4) taught Alaska Workers' Compensation Act courses to adjusters, self-insured entities, national insurance companies and employers; (5) provided claims auditing services to self-insured entities; and (6) testified as an expert witness in workers' compensation in superior courts. (Amended Affidavit of Paralegal Costs, December 17, 2021).

54) On December 17, 2021, Eppler billed 4.4 paralegal hours: (1) .6 hours for "Draft entry of Appearance" on "12/19/2019"; (2) .6 hours for "Draft Amended WCC" on "12/19/2019"; (3) .6 hours for "Draft AWCB medical summary" on "12/19/2019"; (4) .6 hours for "Draft Request for Conference" on "12/19/2019"; and (5) two hours to "Finalize WCC, AWCB M/S, Req. for Conference, Entry of Appearance" on "12/20/2019." (Amended Affidavit of Attorney's Fees

and Costs, December 17, 2021; Entry of Appearance; Request for Conference; Workers' Compensation Medical Summary; Claim for Workers' Compensation Benefits, December 23, 2017).

55) On December 17, 2021, Eppler billed a total of .8 paralegal hours and .2 attorney hours to file a "Request for Prehearing Conference" as follows: .6 paralegal hours for "Draft Request for Prehearing Conference" on "3/6/2020," .2 paralegal hours for "Revise/finalize Request for Conference" on "3/24/2020," and billed .2 attorney hours to "Review, revise, finalize and file Request for Prehearing Conference" on "03/24/2020." (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021).

56) On December 17, 2021, Eppler billed .4 paralegal hours on "02/10/2021," .3 paralegal hours on "4/13/2021" for "Draft ARH," and billed .2 attorney hours to "Review, revise, finalize, file and serve Affidavit of Readiness for Hearing. E-mail to Client" on "04/14/2021." (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021).

57) On December 17, 2021, Eppler billed (1) 7.15 paralegal hours consisting of .8 hours on "06/09/2020," .6 hours on "06/24/2020," 4.5 hours on "08/05/2020," and 1.25 hours on "08/07/2020," and (2) 2.57 attorney hours consisting of .6 hours on "06/24/2020" and 1.97 hours on "08/19/2020" for the written record SIME hearing. (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021).

58) On December 17, 2021, Eppler billed 8.9 attorney hours consisting of 3.2 hours on "12/06/2021," 3.4 hours on "12/13/2021," and 2.3 hours on "12/15/2021," in preparation for "Employee's Supplemental Hearing Brief" related to the enforcement of the August 11, 2021 agreement. (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021; Employee's Supplemental Hearing Brief, December 15, 2021).

59) On December 17, 2021, Eppler billed 36.9 attorney hours and 28.7 paralegal hours for Employee's August 6, 2021 hearing brief. (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021). This 23-page long brief did not cover all hearing issues; it provided insufficient assistance to fact-finders to ascertain factual or legal bases to support Employee's claims. (Judgment).

60) An "Entry of Appearance" is a one-page document with boilerplate language. A "Claim for Workers' Compensation Benefits," commonly referred as "WCC," is a one-page form with fillable fields and checkboxes. Employee's December 23, 2019 medical summary contains a

cover page and four pages of scanned documents. A "Request for Conference" is a one-page document with fillable fields and checkboxes. An "Affidavit of Readiness for Hearing," commonly referred as an "ARH," is a one-page form with fillable fields and checkboxes. (Observation). These documents do not require specific training, expertise, research or analysis to be completed. A legal assistant, paralegal or attorney may adequately complete such a document in five to 10 minutes without further reviews or revisions. (Knowledge; judgment).

61) In Paragraph 1 of the December 17, 2021 Amended Affidavit of Attorney's Fees and Costs, Eppler states, "I am the owner and manager of the Law Office of Justin S. Eppler, LLC, the attorney of record for Todd Christensen, the employee in the above claim." (Amended Affidavit of Attorney's Fees and Costs, December 17, 2021). Christensen is not Employee; this editing error shows that Eppler uses templates. Lawyers regularly use document templates to save time and money. (Observation; knowledge).

62) At hearing on December 22, 2021, the panel noted a lack of evidence supporting Employee's compensation rate adjustment or TPD benefit claims. Eppler said Employee was withdrawing his compensation rate adjustment claim, but Employee orally disagreed. After a brief discussion with his client, Eppler said Employee was still seeking a compensation rate adjustment. Employee did not did not provide any evidence to support his compensation rate adjustment claim. (Agency file; record). When the panel inquired about Employer's position regarding reemployment benefits, Schwarting responded that she would communicate with the adjuster, but it did not dispute the claim or offer any defenses. Employee said he could not obtain a PPI rating for his hernias because Employer declined payment. Employer admitted the compensability of Employee's hernias. Employee provided no evidence or argument for the medical transportation costs issue. (Record).

63) Employee agreed to participate at hearing in English and said he did not need a Spanish interpreter. (Record).

64) Dr. Van Ravenswaay practices family medicine and does not specialize in internal, pain, psychiatric or orthopedic medicine. He diagnosed Employee with depression using PHQ-9. Addressing the connection between Employee's depression and the work injury, Dr. Van Ravenswaay said, "It wasn't exactly super clear at the beginning but as I got to know him and as I continued to speak with him he always said that it was directly related. He felt like he wouldn't be depressed if he could have a normal life if he wasn't experiencing limitations. . . . Every time

I say you have depression [Employee] will say 'no, it's all because of this pain or my inability to have a normal life.'" (Van Ravenswaay).

65) Eppler appeared in two merits hearings and several procedural hearings; he has no experience in workers' compensation appellate proceedings. (Eppler). He was awarded $385 per hour in *Cohen-Barce v. Vanstrom*, AWCB Decision No. 21-0010 (February 2021), an uninsured employer case. In such cases, reasonableness of attorney fees are rarely challenged. (Knowledge; observation).

66) Experienced claimants' attorneys get awarded $425 per hour. (Knowledge).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
>
> > (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . employers. . . .

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

> **AS 23.30.010(a). Coverage**. (a) . . . compensation or benefits are payable under this chapter for . . . the need for medical treatment of an employee if . . . the employee's need for medical treatment arose out of and in the course of the employment. When determining whether or not the . . . 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 . . . the need for medical treatment. Compensation or benefits under this chapter are payable for . . . the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the . . . need for medical treatment.

> **AS 23.30.012. Agreements in regard to claims.** (a) At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter, but a

> memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose. . . .

In *Municipality of Anchorage v. Stenseth*, 361 P.3d 898 (Alaska 2015), the Supreme Court held the employer's fraud petition settlement did not have to be "in a form prescribed by the director" under §012(a) because it was not "a claim for injury or death."

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . . .
>
> (c) . . . . 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 unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.
> . . . .
>
> (k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total

> disability rate. If permanent partial disability or permanent partial impairment benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability or permanent partial impairment benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. . . .

Carter v. B & B Const., Inc., 199 P.3d 1150, 1160 (Alaska 2008), held "AS 23.30.041(k) 'provides a fall-back source of income.' Given this purpose, [. . .] the legislature did not intend that there should be a gap between the expiration of PPI benefits and the commencement of reemployment benefits for employees who are vigorously pursuing eligibility evaluations before their PPI benefits expire." Thus, "the reemployment process begins when the employee begins his active pursuit of reemployment benefits." *Id*. The employee in *Carter* "began to actively pursue reemployment benefits [. . .] when he requested an eligibility evaluation[.]" *Id*.

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . The board may authorize continued treatment or care or both as the process of recovery may require. . . .

Bockness v. Brown Jug, Inc., 980 P.2d 462, 466 (Alaska 1999), held employers are responsible only for providing that medical care and those services "which the nature of the injury or the process of recovery requires," and the board has to determine whether the care paid for by employers under the Act is reasonable and necessary. It explained "the state's interests in passing the Act and associated regulations include the 'legitimate interest in curbing abuse by health providers and claimants, discouraging needless or fruitless treatments . . . and, in general, ensuring the delivery of reasonable and necessary medical benefits to injured workers.'" *Id* at 466. An employer's responsibility is limited to medical care that is reasonable and necessary; making an employer pay for any and all treatment chosen by an employee would be inconsistent with the Act's goal of keeping medical costs stable and reasonable. *Bockness*.

The Alaska Workers' Compensation Board has consistently held that a PPI rating is a medical benefit. *Nunn v. Lowe's Co*., AWCB Decision No. 08-0241 (December 2008), found the work injury was the substantial cause of the employee's disability and need for medical treatment, and the cost of the PPI rating is a medical cost and should be paid by the employer.

In *Stonebridge Hospitality Associates v. Settje*, AWCAC decision No. 10-017 (June 14, 2011), a self-represented injured worker filed a claim for PPI benefits. The injured worker reiterated her PPI request at a prehearing conference and said she understood "the concept of a PPI rating" and said she wanted to assert her right to PPI "when and if a rating became appropriate." An EME performed an examination and said the injured worker had not suffered a work-related injury and therefore, a PPI rating was "not applicable." The injured worker reiterated her PPI claim thereafter, and the employer controverted based upon its EME report. A board-ordered second independent medical evaluation (SIME) opined the injured worker had not sustained any PPI from her work injury. At a subsequent prehearing conference, the injured worker stated there was no PPI rating but believed "there should be." Settje's claim went to hearing and she presented no medical evidence demonstrating a PPI rating greater than zero percent. The board held the legal issue whether Settje was entitled to PPI benefits was not ripe for decision because the law accorded her a rating from her physician, which she had not yet obtained. The commission disagreed and noted the parties repeatedly identified PPI benefits as an issue for hearing. In the commission's view, the PPI issue was ready to be decided at hearing. Settje said she understood she needed a PPI rating and two doctors, an EME and an SIME, stated she had no ratable PPI attributable to her work injury. The commission determined the board's decision to not decide the PPI issue created a "hardship" for the employer who had continued exposure for PPI and related reemployment benefits and had incurred attorney's fees and costs addressing these issues. In short, the commission decided the PPI issue was not a "hypothetical claim," was ripe for adjudication and Settje needed a PPI rating to obtain a PPI benefit award. *Id*. at 13.

> **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. . . .

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

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

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

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

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

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

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

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

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

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, in a format prescribed by the director, stating
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> . . . .
>
> (5) the type of compensation and all ground on which the right to compensation is controverted.
>
> . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment.
>
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

AS 23.30.155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). An employee is also entitled to penalties on compensation due if compensation is not properly controverted by the employer.

Williams v. Abood, 53 P.3d 134 (Alaska 2002). If 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. *Id.* For a controversion to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the board would find that the claimant is not entitled to benefits. *Id*.

In *Vue v. Walmart Associates, Inc*., 475 P.3d 270, 292 (Alaska 2020), the Alaska Supreme Court held "[a] controversion of all medical benefits that are not reasonable or necessary fails to provide notice to anyone what specific benefit is disputed and therefore does not fulfill the basic function of providing notice of what part of a claim is disputed." It explained the controversions give notice of disputed issues, which an employee can use to evaluate whether to pursue a claim. *Id*. Further, "an insurer has a continuing obligation to consider new evidence that comes to its attention and to modify or withdraw controversions based on that new evidence." *Vue* at 289. An opinion without a basis is speculation and cannot be the foundation of a valid controversion. *Vue*.

AS 23.30.155(o) requires referral to the Division of Insurance upon a determination that an employer's controversion has been unfair or frivolous. *Vue* applied the Commission's definitions of "frivolous" and "unfair" because the legislature did not define them and the parties did not seek review of their meaning; under the Commission's definition, a controversion is "frivolous" if it lacks a plausible legal defense or lacks the evidence to support a fact-based controversion; it is "unfair" if it is the product of dishonesty, fraud, bias, or prejudice.

> **AS 23.30.185. Compensation for temporary total disability**. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.
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> **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. . . .
> . . .
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> **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.
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> **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:
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> . . . .
>
> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, 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. . . .

Wilson v. Eastside Carpet Co., AWCAC Decision No. 106 (May 4, 2009), held 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 in most cases. 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 the injury. The board "must look at the

evidence and decide the facts in each case" when determining the spendable weekly wage. *Id*. at 4.

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
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> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. . . .
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> **8 AAC 45.065. Prehearings**. . . .
> . . . .
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> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issue for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.
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> **8 AAC 45.070. Hearings**. . . .
> . . . .
>
> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary . . . governs the issues and the course of the hearing.
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> **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.
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> (b) Transportation expenses include
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> (1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;
> (2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and
> (3) ambulance service or other special means of transportation if substantiated by competent medical evidence or by agreement of the parties.
>
> (c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means

of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.

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

(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 45.180. Costs and attorney's fees. . . .
. . . .

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

8 AAC 45.507. Notice of employee rights to reemployment benefits.
. . . .

(b) If the employee has been totally unable to return to the employee's employment at the time of injury for 90 consecutive days, as a result of the injury, the employer shall notify the administrator, in writing, on the 91st day. The notification must be completed on a form prescribed by the administrator.

8 AAC 45.522. Ordering an eligibility evaluation without a request. (a) For injuries occurring on or after November 7, 2005, if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation. . . .

In *Egemo v. Egemo Const. Co.*, 998 P.2d 434, 441 (Alaska 2000), an injured worker claimed disability benefits for future surgery when he was not yet disabled. *Egemo* held the board was wrong to dismiss a prematurely filed a claim and said:

> In our view, when a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice that it may be refiled when it becomes timely. (Footnote omitted).

ANALYSIS

1) Should Employee's September 23, 2021 email be stricken from the record?

Employer contends Employee's September 23, 2021 email should be stricken because it "discusses a confidential mediation held in September 2021," and is irrelevant and inflammatory. However, this email states that there was an attempt to settle the case that failed, asks "the board do the necessary investigations" to make sure the Act is followed, and seeks a sanction against Employer. It does not discuss any settlement terms, and it is not inflammatory. *Rogers & Babler*. In short, there is no factual or legal basis to strike Employee's September 23, 2021 email from the record. Thus, Employer's petition to strike Employee's September 23, 2021 email will be denied.

2) Is the August 11, 2021 agreement enforceable?

Employee contends on August 11, 2021, the parties entered into a binding contract, and Employer is equitably estopped from denying full payment. He contends it agreed to pay him $21,261 in TTD benefits; however, on the following day, Employer unilaterally reduced the TTD amount to $15,483. Relying on *Stenseth*, Employee contends Employer must be ordered to pay $21,261, the TTD amount that the parties originally agreed to.

AS 23.30.012(a) states that "at any time after 30 days subsequent to the date of the injury," the parties "have the right to reach an agreement in regard to a claim for injury . . . but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose." The main question is not whether there was an agreement, but whether the agreement pertains to "a claim for injury or death." The

parties in *Stenseth* had a fraud petition settlement, which arose from Employer's petition to recover money from the employee; it was not based on "a claim for injury or death," so it did not have to be "in a form prescribed by the director." Here, on August 11, 2021, more than 30 days after Employee's August 7, 2017 work injury, the parties agreed to settle TTD and PPI benefits, which arose from Employee's numerous workers' compensation claims pending for his injury. However, because the parties failed to file an agreement in a form prescribed by the director, the August 11, 2021 agreement is void for any purpose and will not be enforced. AS 23.30.012(a).

3) Is Employee entitled to TTD benefits?

Employee contends he sustained several work-related injuries. Employer paid TTD benefits from October 4, 2017, through June 20, 2018. On August 12, 2021, it also paid lump-sum TTD benefits from May 17, 2020, through June 17, 2021. Employee contends he is disabled and entitled to ongoing TTD benefits from June 21, 2018, and continuing. This issue raises factual questions to which the presumption analysis applies. AS 23.30.120; *Meek*.

a) Hernias

Without regard to credibility, Employee raises the presumption that he is entitled to TTD benefits due to work-related hernias through his lay testimony that he is disabled by pain and is not medically stable. *Tolbert*; *Wolfer*. Employer must rebut the raised presumption with substantial evidence to the contrary. *Tolbert*. Credibility is not weighed at this stage. *Saxton*.

Dr. Koller opined Employee's hernias were all repaired and "stable – no further treatment needed." He stated Employee became medically stable on May 9, 2018. Dr. Bauer opined Employee's hernias were substantially caused by the August 7, 2017 work injury but were surgically repaired, and there was "no physiologic evidence that [Dr. Abadir's release] would not be appropriate." He opined Employee became medically stable by January 22, 2018. Therefore, Drs. Koller and Bauer's opinions provide substantial evidence to overcome the presumption. *Tolbert*.

Employee has to prove his claim by a preponderance of the evidence. *Steffey*; *Saxton*. Dr. Abadir, who had repaired Employee's hernias, released him to "regular work without

restrictions" on November 1, 2017. Dr. Koller and Bauer opined Employee's hernias were repaired and resolved, and he became medically stable. SIME Dr. Murphy agreed Employee's hernias were repaired and resolved. Employee did not present contrary evidence to rebut Drs. Abadir, Koller, Bauer, and Murphy's opinions; thus, these doctors' opinions are given the greatest weight with regard to Employee's hernias. AS 23.30.122; *Smith*.

Employee cannot receive TTD benefits for his hernias after the date his hernias became medically stable. AS 23.30.185. All medical opinions stated his hernias became medically stable before June 21, 2018. Employee presented no medical evidence that (1) his hernias later became medically unstable and (2) he is disabled due to his hernias. Thus, he failed to prove by a preponderance of the evidence that his hernias were medically unstable during the times for which he seeks TTD benefits relative to this hernia injuries; his TTD benefit claim based on hernias will be denied. *Steffey*; *Saxton*.

b) Thoracic pain or conditions

Without regard to credibility, Employee raises the presumption that he is entitled to TTD benefits due to his work-related thoracic pain or conditions through his lay testimony and Dr. Van Ravenswaay's opinion that this injury is disabling and not medically stable. *Tolbert*; *Wolfer*.

By contrast, without weighing credibility, Dr. Koller opined Employee's thoracic back strain resolved, and any residual pain or discomfort could be caused by a previous stab injury. He stated Employee's thoracic spine became medically stable on May 9, 2018. Dr. Bauer opined Employee's thoracic pain was substantially caused by the August 7, 2017 work injury, but it resolved. He stated Employee had pre-existing spinal degenerative changes, but they were not aggravated by the work injury, and he reached medical stability by January 22, 2018. Drs. Koller and Bauer's opinions provide substantial evidence to overcome the presumption. *Tolbert*.

Employee has to prove his claim for TTD benefits from June 21, 2018, and continuing, arising from his thoracic injury by a preponderance of the evidence. *Steffey*; *Saxton*. Dr. Van Ravenswaay opined "the August 7, 2017 injury is the most likely cause of [Employee's] [. . .]

spine complaints and his inability to work." But Dr. Van Ravenswaay admitted he did not know the legal definition of "the substantial cause" despite opining on causation issues; he said, "I would guess that it would the main reason for the condition." He did not review the SCODDOTS in opining on Employee's capacity to work. Dr. Van Ravenswaay's opinion is given no weight. AS 23.30.122; *Smith*.

By contrast, Dr. Creighton opined on January 9, 2018, Employee's thoracic pain was expected to resolve in two or three visits. A thoracic CT showed normal vertebral disc spaces, spinal canal, neural foramina and paravertebral soft tissues; it was unremarkable. In addition to Drs. Koller and Bauer's opinions, Dr. Murphy opined Employee reached medical stability on September 17, 2018, three months after the date Employer stopped paying TTD benefits, and said there was no structural abnormalities to warrant work restrictions. Drs. Creighton, Koller, Bauer and Murphy's opinions are given the greatest weight regarding causation of Employee's thoracic strain. AS 23.30.122; *Smith*. Dr. Murphy's opinion is given the greatest weight with regard to medical stability of Employee's thoracic spine and on the associated disability question because he is the SIME doctor selected to give unbiased opinions and evaluated Employee after Drs. Koller and Bauer, which allowed him to provide a better assessment of Employee's conditions. *Id*.

Dr. Murphy said there was nothing wrong with Employee's thoracic spine to warrant work restrictions; in other words, there was no objective basis for disability arising from Employee's thoracic spine. AS 23.30.395(16). Employee must prove he was both medically stable and disabled to receive TTD benefits. AS 23.30.185. Based on this medical evidence analysis, Employee reached medical stability on September 17, 2018, for his thoracic strain but failed to prove he was "disabled" by it from June 20 through September 17, 2018.

In short, based on this same analysis, Employee also failed to prove by a preponderance of the evidence that he was disabled and not medically stable from his thoracic strain from June 21, 2018, and continuing. His TTD benefit claim related to the thoracic spine will be denied. *Steffey*; *Saxton*.

c) Left shoulder pain or conditions

Without regard to credibility, Employee raises the presumption that he is entitled to TTD benefits from June 21, 2018, and continuing due to work-related left shoulder pain or conditions through Dr. Van Ravenswaay's opinion that he is disabled and is not medically stable. *Tolbert*; *Wolfer*.

Without considering credibility, Dr. Murphy opined Employee did not sustain a work-related injury to his left shoulder; there is no structural damage to his left shoulder. Dr. Murphy' opinion provides substantial evidence to overcome the presumption. *Tolbert*.

Employee has to prove his left shoulder TTD claim by a preponderance of the evidence. *Steffey*; *Saxton*. To do so, he must prove his left shoulder pain or conditions arose out of and in the course of his employment with Employer and his employment was the substantial cause of his disability; he must prove a compensable left shoulder injury. AS 23.30.010(a).

Dr. Van Ravenswaay opined "the August 7, 2017 injury is the most likely cause of [Employee's] . . . shoulder . . . complaints and his inability to work." By contrast, Dr. Murphy stated Employee did not sustain a work-related left shoulder injury. He said the MRI "simply shows bursitis," and based on Employee's "lack of response to the cortisone injection . . . further ongoing treatment to the left shoulder is also not indicated." Dr. Murphy reiterated Employee's ability to return to work remained unchanged, and orthopedically, he required no further treatment. These opinions are weighed. Dr. Van Ravenswaay is a general practitioner. As noted above, he did not know the legal definition of "the substantial cause" despite opining on causation; he did not review the SCODDOTS in opining on Employee's capacities. SIME Dr. Murphy was selected to give unbiased opinions. Dr. Van Ravenswaay's opinion is given no weight; Dr. Murphy's opinion is given the greatest weight. AS 23.30.122; *Smith*. Employee failed to prove by a preponderance of the evidence that his left shoulder pain or conditions are work-related. AS 23.30.010. Consequently he is not entitled to TTD benefits from June 21, 2018, and continuing, for his left shoulder pain or conditions, and his left shoulder disability claim will be denied. *Steffey*; *Saxton*.

d) Psychological conditions

Employee claims his physical injury caused or aggravated a mental condition; this is a "physical-mental" claim to which the standard presumption analysis applies. AS 23.30.120. Without regard to credibility, Employee raises the presumption that he is entitled to TTD benefits from June 21, 2018, and continuing, due to work-related psychological conditions through Dr. Van Ravenswaay's opinion that he is disabled and is not medically stable. *Tolbert*; *Wolfer*.

Without regard to credibility, Dr. Williams diagnosed unspecified anxiety disorder and somatic symptom disorder, which involves excessive thoughts, feelings, or behaviors related to the somatic symptoms or associated health concerns. He opined the work injury was not the substantial cause of Employee's psychological or pain conditions and said, "[f]rom a psychological perspective, [Employee] has been stable since 1/30/2018 when Ms. Gordon release him for full duty," and "[a]ny psychological treatment would be unrelated to [the work injury]." Dr. Williams' opinion provides substantial evidence to rebut the presumption. *Tolbert*.

Employee has to prove his claim for TTD benefits based on psychological conditions by a preponderance of the evidence. *Steffey*; *Saxton*. Dr. Van Ravenswaay opined "the August 7, 2017 injury is the most likely cause of [Employee's] anxiety, panic attacks, depression, chronic pain . . . and his inability to work." He said, "It wasn't exactly super clear at the beginning but as I got to know him and as I continued to speak with him he always said that it was directly related. He felt like he wouldn't be depressed if he could have a normal life if he wasn't experiencing limitations. . . . Every time I say you have depression [Employee] will say 'no, it's all because of this pain or my inability to have a normal life.'" Dr. Van Ravenswaay does not specialize in psychology or psychiatry. When he was asked whether he was aware of any research about chronic pain and its connection with depression, Dr. Van Ravenswaay responded, "I probably am. But not at the front of my mind." His opinion on this issue is given little weight. AS 23.30.122; *Smith*.

On the other hand, Dr. Murphy opined Employee's anxiety and panic attacks are not substantially caused by the August 7, 2017 injury. He said he is "well-versed in psychiatric illnesses, including anxiety, panic attacks and depression," but would "defer the psychology

discussion to an expert in that field." Dr. Murphy reiterated Employee's ability to return to work remained unchanged but "[w]ith regards to anxiety, depression and panic attacks," he would defer that to a psychologist.

Dr. Williams, a psychologist, opined Employee's symptoms were "excessive and disproportionate based on the lack of objective findings." He stated Employee has no work restrictions from a psychological perspective. Dr. Williams opined Employee did not have injury depressive disorder and noted the difference between the lack of objective findings and his responses to the pain disability questionnaire and the catastrophizing scale. Dr. Williams said Employee's pain and functioning scores were inconsistent at every evaluation.

Dr. Williams said Employee scored 129, within the "severe range," in the pain disability questionnaire. However, with Dr. Bauer, he scored 95; with Dr. Murphy, 107. Dr. Williams explained this questionnaire gives consistent results over time, so the score obtained at a particular time is very similar to the next one or the one prior. But Employee's scores went from 95 to 107, and then to 129. Dr. Williams said pain usually does not get dramatically worse unless there is some sort of intervening factor, and this discrepancy raises concern about Employee's self-report. He noted Employee said (1) he could not walk or run at all, but he had no gait problems and seemed to walk normally; (2) he had severe depression but did not exhibit psychomotor retardation, very slow movement and speech, crying throughout the interview, or any other symptoms; and (3) depression and anxiety were not the cause of his inability to work and that both of those emotional factors followed pain rather than precipitated it. Dr. Williams said in the pain catastrophizing scale, Employee scored 38, so "he does engage in catastrophizing, which would only exacerbate his pain level, or his pain perception . . . a very maladaptive way of dealing with pain."

Dr. Williams' assessment of Employee's psychological condition is supported by Dr. Mortensen's report, which states Employee "was feeling exceptionally anxious" because Employer may send someone to "get him." Employee also had significant financial and social stressors as he was trying to petition for his wife to come to the United States. He was worried that his current issues may keep him from being able to get her here. Employee testified he had

an anxiety attack in January 2018 because the doctor "wouldn't give . . . or . . . didn't want to give [him] [an] excuse or a note for work," and the release for light duty did not have a date, so he encountered problems at work because the surgeon said he would be ready to work after January. Dr. Smith opined his anxiety was being made worse from depression due to significant financial stressors; Employee was worried about finances, his ability to bring his wife to the United States, what Employer would do if he is not able to work, and whether he would have a job.

Dr. Williams provided a "systematic evaluation of depression and anxiety and chronic pain," which Dr. Van Ravenswaay did not do. Consequently, Dr. Williams' opinion is given the greatest weight. AS 23.30.122; *Smith*. Thus, Employee failed to prove by a preponderance of the evidence that his psychological conditions are work-related; he is not entitled to TTD benefits for his psychological conditions. *Steffey*; *Saxton*. In summary, based on the above analysis, Employee is not entitled to TTD benefits from June 21, 2018, and continuing.

4) Is Employee entitled to TPD benefits?

Employee contends he is entitled to TPD benefits, which were identified as a hearing issue on the December 2, 2021 Prehearing Conference Summary. AS 23.30.200; *Settje*. Unless modified, the prehearing conference summary will "limit the issues" at hearing and "governs the issues and the course of the hearing." 8 AAC 45.065(c). This requirement helps avoid misunderstandings and allows all parties to properly prepare their evidence and arguments. Once the parties are at the hearing, absent "unusual and extenuating circumstances," that have not been shown to exist in this case, the prehearing conference summary still "governs the issues and the course of the hearing." 8 AAC 45.070(g). TPD benefits are based on an injured worker's earnings post-injury. Employee did not provide any dates, income or evidence to support his TPD claim. AS 23.30.200. At hearing, when asked for evidence, Employee said he could not find it. Because Employee did not provide any basis to award TPD benefits, his TPD benefit claim will be denied. AS 23.30.135(a).

5) Is Employee entitled to additional PPI benefits?

Employee contends he is entitled to PPI benefits for his psychological conditions. As analyzed above, his psychological condition is not work-related; thus, Employee is not entitled to a PPI rating or PPI benefits for those conditions.

Dr. Murphy gave a two-percent PPI rating for Employee's thoracic conditions, and Employer paid lump-sum PPI benefits accordingly. There is no other PPI rating in this case. However, Employee sustained work-related hernias that became medically stable on September 17, 2018. Employer admitted Employee's hernias are work-related. A PPI rating would determine whether Employee is entitled to PPI benefits for these hernias.

Employer is responsible for providing medical care and services "which the nature of the injury or the process of recovery requires." *Bockness*. A PPI rating is a medical benefit under AS 23.30.095. *Nunn*. Unlike *Settje*, there is not PPI rating for Employee's hernias and he tried to obtain one but did not get it because Employer declined payment. Therefore, Employer will be ordered to pay for a PPI rating for Employee's hernias, and the PPI benefit claim for his hernias will be held in abeyance. AS 23.30.135(a); *Egemo*. The parties' rights in respect to the PPI rating for Employee's hernias are reserved. AS 23.30.190(a).

6) Is Employee entitled to a compensation rate adjustment?

Employee bears the burden of proving he is entitled to a higher disability rate. AS 23.30.220(a); *Wilson*. At hearing on December 22, 2021, the panel noted the lack of evidence supporting a compensation rate adjustment claim. Eppler responded that Employee was withdrawing this claim, but Employee disagreed with him. After a brief discussion with his client, Eppler said the compensation rate adjustment claim will not be withdrawn, yet Employee did not provide any supporting evidence or argument. This claim was identified as a hearing issue on the December 2, 2021 Prehearing Conference Summary, which was unmodified and governed the issues and the course of the December 22, 2021 hearing. 8 AAC 45.065(c); 8 AAC 45.070(g). Employee had sufficient time to prepare his evidence and arguments to litigate the compensation rate adjustment issue, yet he failed to do so. Because Employee did not provide any basis to grant a compensation rate adjustment, it will be denied. *Settje*.

7) Is Employee entitled to a reemployment evaluation?

Employee contends he was off work for more than 90 days but Employer did not refer him to a vocational reemployment eligibility evaluation. AS 23.30.041(c). Employer had a duty to do so. 8 AAC 45.507(b). "If an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation. . . ." 8 AAC 45.522(a). Employee was disabled from October 4, 2017, through June 20, 2018, for more than 90 consecutive days, but he was not referred for an eligibility evaluation; he is entitled to a reemployment evaluation. AS 23.30.041(c).

Employee also contends he is entitled to the §041(k) stipend. "Reemployment benefits" was listed in the December 2, 2021 Prehearing Conference Summary as a hearing issue; the §041(k) stipend is a reemployment benefit. 8 AAC 45.065(c); 8 AAC 45.070(g). Employer paid TTD benefits from October 4, 2017, through June 20, 2018. Employee's reemployment process began when he actively pursued reemployment benefits by requesting an eligibility evaluation on December 23, 2019. *Carter*. Because his reemployment process is pending since December 23, 2019, and he is not entitled to TTD benefits from June 20, 2018, and continuing, Employee is entitled to the §041(k) stipend from December 23, 2019, and continuing, until the reemployment process is complete.

However, on August 12, 2021, Employer paid PPI benefits and TTD benefits from May 17, 2020, through June 17, 2021. Thus, TTD benefits Employer paid from May 17, 2020, through June 17, 2021, will be reclassified as §041(k) stipend and be credited accordingly. Also PPI benefits paid on August 12, 2021, must be prorated and exhausted before Employee receives the §041(k) stipend. AS 23.30.041(k).

8) Is Employee entitled to medical benefits and related transportation costs?

Employee suffered a compensable injury on August 7, 2017: hernias and a thoracic spine sprain. As analyzed above, Employee's hernias resolved on November 1, 2017; his thoracic spine sprain became medically stable on September 17, 2018, three months after the date Employer stopped

paying medical benefits. Under AS 23.30.095(a), Employer must provide medical treatment "which the nature of the injury or the process of recovery requires." Thus, if Employee received medical treatments for his thoracic spine injury from June 20, 2018, through September 17, 2018, Employer must pay for them directly to providers according to the Alaska Fee Schedule so long as those treatments were reasonable and necessary. AS 23.30.155(a); *Bockness*.

In the event any body part injured in the August 7, 2017 work injury becomes symptomatic and needs additional care or treatment in the future, Employee retains his right to seek future medical benefits and Employer retains its defenses.

Also, Employee claimed transportation costs for work-related medical treatments. "Transportation costs" was identified as a hearing issue on the December 2, 2021 Prehearing Conference Summary. AS 23.30.200. Unless modified, the prehearing conference summary will "limit the issues" at hearing and "governs the issues and the course of the hearing." 8 AAC 45.065(c). Because Employee did not provide any evidence to award past medical transportation costs, this claim will be denied. AS 23.30.135(a); *Settje*. Employee retains his right to seek future transportation expenses and Employer retains its defenses. 8 AAC 45.084.

9) Is Employee entitled to a penalty?

Penalties are imposed when employers fail to controvert in good faith and fail to pay compensation when due. AS 23.30.155(e); *Haile*. To avoid a penalty, a controversion must be filed in good faith. *Abood*; *Harp*. For a controversion to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the claimant would not be entitled to benefits. *Id*. "An insurer has a continuing obligation to consider new evidence that comes to its attention and to modify or withdraw controversions based on that new evidence." *Vue*. The Act requires that a controversion notice state "the type of compensation and all grounds on which the right to compensation is controverted." AS 23.30.155(a)(5). Controversions thus give notice of disputed issues, which an employee can use to evaluate whether to pursue a claim. *Vue*.

a) The January 2, 2018 Controversion Notice

Employer's January 2, 2018 Controversion Notice denied "all medical treatment and benefits related to cervical spine" based on PA Gordon's report that a cervical x-ray showed "mild scoliosis but no obvious injuries or acute changes." This controversion notice informed Employee about the types of compensation being controverted and the bases of the controversion; it gave notice of disputed issues. AS 23.30.155(a)(5); *Vue*.

At the time this controversion notice was filed, PA Gordon's report taken in isolation was sufficient evidence to controvert benefits for cervical spine conditions because she treated Employee's upper back injury and concluded an x-ray showed "no obvious injuries or acute changes" in his cervical spine. *Harp*. In other words, Employee would not be entitled to any benefits for his cervical spine if the panel relied solely on PA Gordon's report on January 2, 2018. *Id.* Employer's January 2, 2018 Controversion Notice was filed in good faith, and Employee is not entitled to a penalty based on it. AS 23.30.155(e); *Harp*.

b) The June 26, 2018 Controversion Notice

Employer's June 26, 2018 Controversion Notice denied "time-loss benefits and medical benefits related to the spine condition" based on Dr. Koller's June 9, 2018 opinion that Employee's "back strain had resolved and that any further pain was attributable to [his] pre-existing condition." He opined Employee became medically stable on May 9, 2018, and needed no further treatment. This controversion notice informed Employee about the types of compensation being controverted and the bases of the controversion; it gave notice of disputed issues. AS 23.30.155(a)(5); *Vue*.

At the time this controversion notice was filed, Dr. Koller's report taken in isolation was sufficient evidence to controvert benefits for spine conditions because he was Employee's treating physician and determined the "mid-thoracic back strain resolved" and needed no further treatment. *Harp*. In other words, Employee would not be entitled to any benefits for his spine if the panel relied solely on Dr. Koller's report on June 26, 2018. *Id.* Therefore, Employer's June 26, 2018 Controversion Notice was filed in good faith, and Employee is not entitled to a penalty based on it. AS 23.30.155(e); *Harp*.

c) The July 5, 2018, February 13 and June 7, 2019 Controversion Notices

On July 5, 2018, February 13, 2019, and June 7, 2019, Employer's controversion notices denied disability, PPI, medical and reemployment benefits based on Dr. Bauer's June 22, 2018 opinion that Employee's hernias were substantially caused by the August 7, 2017 work injury, but they were surgically treated, and his thoracic spine strain was work-related but resolved. He also opined Employee "suffers from an unrelated anxiety and panic attack condition that is not substantially caused by work," became medically stable on January 22, 2018, and was "physiologically capable of performing a job he held at the time of injury." This controversion notice informed Employee about the types of compensation being controverted and the bases of the controversion; it gave notice of disputed issues. AS 23.30.155(a)(5); *Vue*.

At the time these controversion notices were filed, Dr. Bauer's report taken in isolation was sufficient evidence to controvert benefits for Employee's hernias, thoracic spine strain, anxiety, and panic attacks because he reviewed existing medical records and examined Employee to conclude as above. *Harp*. In other words, Employee would not be entitled to any benefits for these conditions if the panel relied solely on Dr. Bauer's report on July 5, 2018, February 13, 2019, and June 7, 2019. *Id.* Therefore, the July 5, 2018, February 13 and June 7, 2019 Controversion Notices were filed in good faith, and Employee is not entitled to a penalty based on them. AS 23.30.155(e); *Harp*.

d) The January 10, 2020 Controversion Notice

Employer's January 10, 2020 Controversion Notice denied time-loss, PPI, medical and reemployment benefits based on Dr. Bauer's June 22, 2018 opinion that Employee (1) reached medical stability for his work-related conditions by January 22, 2018; (2) did not have any impairment as a result of his work-related conditions; (3) needed no further medical treatment as a result of the work injury; and (4) was physically capable of performing the job held at the time of injury with no objective evidence for any limitations. This controversion notice informed Employee about the types of compensation being controverted and the bases of the controversion; it gave notice of disputed issues. AS 23.30.155(a)(5); *Vue*.

At the time this controversion notice was filed, Dr. Bauer's report taken in isolation was sufficient to controvert benefits for Employee's hernias, thoracic spine strain, anxiety, and panic attacks because Dr. Bauer gave express opinions regarding medical stability, impairment, medical care and disability. *Harp*. In other words, Employee would not be entitled to any benefits for these conditions if the panel relied solely on Dr. Bauer's report on January 10, 2020. *Id.* Therefore, the January 10, 2020 Controversion Notice was filed in good faith, and Employee is not entitled to a penalty based on it. AS 23.30.155(e); *Harp*.

e) The May 27, 2020 Controversion Notice

Employer's May 27, 2020 Controversion Notice denied all benefits related to the left shoulder, time-loss benefits for the thoracic strain after September 17, 2018, medical and reemployment benefits based on Dr. Murphy's April 21, 2020 opinion that (1) Employee's work injury did not aggravate his pre-existing condition; (2) his anxiety and panic attacks were not substantially caused by the work injury; (3) his work-related disability was no longer present; (4) he reached medical stability and his disability ended on September 17, 2018; (5) there was no evidence of neurological deficit, motor weakness or structural abnormalities; (6) no further medical treatment was necessary; (7) his left shoulder was not work-related; (8) there was no structural damage to his left shoulder; and (9) there was no structural abnormality to warrant work restrictions. This controversion notice informed Employee about the types of compensation being controverted and the bases of the controversion; it gave notice of disputed issues. AS 23.30.155(a)(5); *Vue*.

At the time this controversion notice was filed, SIME Dr. Murphy's report taken in isolation was sufficient evidence to controvert the benefits listed in the controversion notice because he reviewed existing medical records, weighed different medical opinions, examined Employee, and gave explicit opinions addressing the relevant issues. *Harp*. In other words, Employee would not be entitled to any benefits for these conditions if the panel relied solely on Dr. Bauer's report on July 5, 2018, February 13, 2019, and June 7, 2019. *Id.* Therefore, the May 27, 2020 Controversion Notice was filed in good faith, and Employee is not entitled to a penalty based on it. AS 23.30.155(e); *Harp*.

f) The August 5, 2021 Controversion Notice

Employer's August 5, 2021 Controversion Notice denied all benefits related to somatic symptom and anxiety disorders based on Dr. Williams' June 17, 2021 opinion that Employee's work injury is not the substantial cause of these conditions. This controversion notice informed Employee about the types of compensation being controverted and the bases of the controversion; it gave notice of disputed issues. AS 23.30.155(a)(5); *Vue*.

At the time this controversion notice was filed, Dr. Williams's report taken in isolation was sufficient evidence to controvert benefits for Employee's psychological conditions because he reviewed existing medical records, examined Employee, provided a "systematic evaluation of depression and anxiety and chronic pain" and expressed opinions addressing the issue. *Harp*. Therefore, the August 5, 2021 Controversion Notice was filed in good faith, and Employee is not entitled to a penalty based on it. AS 23.30.155(e); *Harp*.

g) Late-payment penalty

As analyzed above, PPI benefits for Employee's thoracic sprain became due in April 2020, but Employer paid them in August 2021. Thus, Employee is entitled to a late-payment penalty on those benefits. AS 23.30.155(a); (e). Employee is entitled to a late-payment penalty on medical costs he incurred for reasonable and necessary medical treatments of his thoracic sprain from June 20, 2018, through September 17, 2018, if any, because Employer stopped paying medical benefits on June 20, 2018. *Id*. Employee's reemployment process began in December 2019, but Employer has not paid the §041(k) stipend. TTD benefits Employer paid from May 17, 2020, through June 17, 2021, are reclassified as the §041(k) stipend and credited accordingly, but these were paid in August 2021. Thus, Employee is entitled to a late-payment penalty on those benefits. *Id*.

10) Did Employer unfairly or frivolously controvert any benefits?

Because this decision finds Employer's controversions were in good faith, Employee's request for a finding of unfair or frivolous controversion will be denied. AS 23.30.155(o); *Harp*.

11) Is Employee entitled to interest, attorney fees or costs?

Employee is entitled to interest on unpaid or late-paid benefits. AS 23.30.155(p). Employer will be directed to calculate interest on (1) PPI benefits for Employee's thoracic sprain, (2) medical costs for Employee's thoracic sprain from June 20, 2018, through September 17, 2018, if any, and (3) the §041(k) stipend from December 23, 2019, and continuing, and pay directly to the person entitled to it in accordance with the Act and regulations.

Employee requests attorney fees and costs. AS 23.30.145(a). Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. *Childs*. This is a complex case with voluminous medical records. *Rogers & Babler*. Employer controverted Employee's claim, which allows this decision to award actual attorney fees under §145(a). Employee has to comply with 8 AAC 45.180(b), which requires an attorney requesting fees in excess of statutory fees to file an affidavit "itemizing the hours expended as well as the extent and character of the work performed."

Eppler billed $80,992.25 for 190.57 attorney hours at $425 per hour, $20,562.75 for 111.15 paralegal hours at $185 per hour, and $1,803.94 in litigation costs, totaling $103,358.94. Also, he requested six hours at $425 per hour for the time he spent between December 17 and 22, 2021, bringing the total to $105,908.94. Employer objects to Eppler's fees based on his limited experience in workers' compensation law; the paralegal rate of $185; concurrent work between Eppler and Hess; and charges for issues on which Employee did not prevail. Eppler contends this decision should award him the attorney fees and costs requested based on the quality of his work. Among the eight factors set out in Alaska Rule of Professional Conduct 1.5(a) to determine the reasonableness of a fee, factors 1.5(a)(1), (3), (4) and (7) need to be addressed in this case. *Rusch.*

Experienced claimants' attorneys get awarded an hourly rate of $425. *Rogers & Babler*. Eppler contends he was awarded $385 per hour in *Cohen-Barce*, he "gained extensively" since *Cohen-Barce* was issued, and this decision should look at the quality of his work, rather than his experience in workers' compensation, and award him $425 per hour. *Cohen-Barce* is an uninsured employer case; in such cases, the reasonableness of attorney fees are rarely

challenged. *Rogers & Babler*. *Cohen-Barce* an uninsured employer case; in such cases, the reasonableness of attorney fees are rarely challenged. *Rogers & Babler*. In any event, Eppler's request for $425 per hour is not supported by facts. Employee claimed a compensation rate adjustment, but Eppler did not present any evidence to support it. At hearing, Eppler initially withdrew the adjustment claim but reinstated upon Employee's protest. Employee also claimed TPD, but Eppler did not provide specific dates or amounts for this claim; he said he could not provide information relevant to TPD, but they were in the record. Employee claimed transportation costs but Eppler did not present any evidence or argument at hearing. Also Eppler billed 36.9 attorney hours and 28.7 paralegal hours for the August 6, 2021 hearing brief. However, this 23-page long brief did not cover all hearing issues; it provided insufficient assistance to fact-finders to ascertain factual or legal bases to support all of Employee's claims. In short, Eppler lacks experience and his work in this case does not suggest he is entitled to $425 per hour; based on the *Rusch* factors 1.5(a)(1) and (3), $350 per hour would be reasonable. *Rusch*; *Rogers & Babler*.

Further, Eppler's fee and cost itemizations raise questions about the trustworthiness of his billing practice. He billed 4.4 paralegal hours in preparing (1) a "Workers' Compensation Claim"; (2) a "Request for Conference"; and (3) an "Entry of Appearance," all of which are one-page documents; plus (4) a medical summary consisting of a cover page and four scanned pages. These four documents are less than 10 pages in total, require minimal drafting, and involve no research or analysis, and can all be processed in less than one hour. *Rogers & Babler*. Hess affied she has an extensive experience and knowledge in the Alaska workers' compensation. It is inconceivable to conclude that a paralegal of Hess' caliber spent 4.4 hours preparing such documents. Based on the *Rusch* factors 1.5(a)(3) and (7), requested paralegal costs will be reduced accordingly.

An editing error naming "Todd Christensen" as Employee in his fee affidavit shows Eppler uses templates to save time, as do most attorneys. Yet, not much time saving is evident in his fee affidavit. Eppler billed .8 paralegal hours and .2 attorney hours to file another "Request for Conference," which can easily be completed in .1 hours. He billed 0.7 paralegal hours and 0.2 attorney hours to file an ARH, which can be done in .2 hours including its notarization. The

Alaska Supreme Court routinely held attorney fees should be reasonable and fully compensatory to promote adequate representation of injured workers; yet, it did not encourage unreasonable or excessive billing. AS 23.30.001(1); *Bignell*. Eppler's itemizations show overbilling; his charges are unreasonable and excessive. Eppler and Hess are not credible. AS 23.30.122; *Smith*.

Employee prevailed on his claims for a PPI rating, a reemployment evaluation, a late-payment penalty, interest, and §041(k) stipend, and on Employer's petition to strike his email from the record. Also, he partly prevailed on his medical benefit and late-payment penalty claims. However, Employee was not successful on claims for transportation costs, a compensation rate adjustment, a finding of unfair and frivolous controversion, TTD and TPD, an SIME petition, and the request to enforce of the August 11, 2021 agreement. Together these are not minor issues that can be disregarded; Employee did not prevail on the majority of his claims. *Porteleki*. He prevailed on approximately 30 percent of all pending issues. *Rogers & Babler*. Based on the *Rusch* factor 1.5(a)(4), requested attorney fees will be reduced accordingly.

Eppler billed 7.15 paralegal hours and 2.57 attorney hours for the written record SIME hearing, and 8.9 attorney hours for Employee's brief regarding enforcement of the August 11, 2021 agreement, on which Employee did not prevail. Further, Employee's August 6, 2021 brief and the December 22, 2021 hearing presentation were mostly focused on claims for a finding of unfair and frivolous controversion and TTD benefits based on Employee's psychological conditions. Yet, it is virtually impossible to determine whether other specific tasks were related to issues Employee prevailed upon or not due to block-billing. *Rogers & Babler*. Also, Eppler's overbilling and failure to provide reliable itemizations detailing his time and costs prevents this decision from awarding full fees he requested.

Thus, based on the percentage of issues Employee prevailed and Eppler's reasonable fee rate as analyzed above, attorney fees will be reduced from $80,992.25 (190.57 hours at $425 per hour) to $20,639.85 ((190.57 hours + 6 hours) x $350 per hour x 30 percent = $20,639.85). *Rusch*. Paralegal costs will be reduced from $20,562.75 (111.15 hours x $185 per hour = $20,562.75) to $5,140.69 (111.15 hours / 4 x $150 = $5,140.69) based on inefficiency and consistent overbilling of tasks at four to five times the reasonable time to complete them. *Rogers & Babler*; *Rusch*.

Employer will be ordered to pay Eppler $20,639.85 in attorney fees and $6,944.63 in costs ($5,140.69 paralegal costs + $1,803.94 litigation costs = $6,944.63), totaling $27,584.48.

CONCLUSIONS OF LAW

1) Employee's September 23, 2021 email will not be stricken from the record.
2) The parties' August 11, 2021 agreement is not enforceable.
3) Employee is not entitled to TTD benefits.
4) Employee is not entitled to TPD benefits.
5) Employee is entitled to a PPI rating for his hernias.
6) Employee is not entitled to a compensation rate adjustment.
7) Employee is entitled to a reemployment evaluation.
8) Employee is entitled to past medical benefits. He is not entitled to past transportation costs.
9) Employee is entitled to a penalty.
10) Employer did not unfairly or frivolously controverted any benefits.
11) Employee is entitled to interest, attorney fees and costs.

ORDER

1) Employee's September 23, 2021 email will not be stricken from the record.
2) The parties' August 11, 2021 agreement is void and unenforceable.
3) Employee's TTD claim is denied; he is not entitled to TTD benefits from June 20, 2018, and continuing.
4) Employee's TPD claim is denied.
5) Employee's request for a PPI rating or PPI benefits for his psychological conditions is denied.
6) Employer shall pay for a PPI rating for Employee's hernias.
7) Employee's compensation rate adjustment claim is denied.
8) Employee is hereby referred to the Rehabilitation Benefits Administrator for a vocational reemployment eligibility evaluation.
9) Employee shall be deemed to be in reemployment process beginning December 23, 2019, and continuing until the reemployment process is complete in accordance with the Act and regulations.

10) Employer shall pay Employee the §041(k) stipend from December 23, 2019, through August 11, 2021. Employer shall reclassify the TTD benefits paid from May 17, 2020, through June 17, 2021, as §041(k) stipend. From August 12, 2021, forward, the §041(k) stipend will be suspended until TTD and PPI benefits are prorated and exhausted, respectively.

11) Employer shall pay Employee's past medical benefits for his thoracic spine injury from June 20, 2018, through September 17, 2018, subject to the Alaska Medical Fee Schedule, the Act and applicable regulations.

12) Employee retains his right to seek future medical benefits for his work injury that are necessary and reasonable; Employer retains its defenses.

13) Employee's claim for past transportation costs is denied.

14) Employee retains his right to future medical transportation expenses for the work injury to the extent he provides appropriate documentation; Employer retains its defenses.

15) Employee's request for a finding of unfair or frivolous controversion is denied.

16) Employer shall pay a late-payment penalty on (1) past medical benefits for his thoracic spine injury from June 20, 2018, through September 17, 2018; (2) the §041(k) stipend from December 23, 2019, through August 11, 2021; and (3) PPI benefits commensurate to a two-percent rating, all in accordance with the Act and regulations.

17) Employer shall pay Employee interest on unpaid benefits pursuant to the Act and regulations.

18) Employer shall pay Eppler $20,639.85 in attorney fees and $6,944.63 in costs, totaling $27,584.48.

Dated in Anchorage, Alaska on January 21, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Bronson Frye, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Manuel Hernandez, employee / claimant v. Ocean Beauty Seafoods, LLC, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201711427; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail on January 21, 2022.

/s/
Nenita Farmer, Office Assistant