ALASKA WORKERS' COMPENSATION BOARD

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

MIGUEL C. TORRES, Employee, Claimant, v. CONSOLIDATED ENTERPRISES, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 202007818 AWCB Decision No. 22-0021 Filed with AWCB Anchorage, Alaska on March 24, 2022

Miguel Torres' (Employee) May 7, 2021 claim and Consolidated Enterprises' and Northern Adjusters, Inc. (Employer) February 11, 2022 petition to strike Employee's brief and travel logs were heard on February 17, 2022, in Anchorage, Alaska, a date selected on January 6, 2021. A December 9, 2021 hearing request gave rise to this hearing. Attorney Keenan Powell appeared and represented Employee, who appeared and testified. Attorney Jeffrey Holloway appeared and represented Consolidated Enterprises and Northern Adjusters, Inc. (Employer). The record remained open to receive Employee's supplemental attorney fees and Employer's response. It closed on March 10, 2022, after deliberation.

ISSUES

As a preliminary issue, Employee requested penalties and an unfair or frivolous controvert finding be added as hearing issues. He contended penalties and interest should be heard to ensure quick

and efficient case resolution. Employee contended Employer would not be denied due process because he had notice of the issues because Employer denied penalties and an unfair and frivolous controversion in its June 1, 2021 answer to his claim and he timely requested modification of the June 6, 2022 prehearing conference summary.

Employer contended penalties and an unfair and frivolous controversion finding cannot be heard because the January 6, 2022 prehearing conference summary did not identify that issue for hearing.. It also contended the June 2, 2021 prehearing conference summary amended Employee's May 7, 2021 claim and removed penalties and an unfair and frivolous controversion finding. Employer contended it would be denied due process if those issues were heard. An oral order denied Employee's request to add penalties and an unfair or frivolous controversion finding as issues.

1) Was the oral order denying Employee's request to add penalties and an unfair and frivolous controversion finding as hearing issues correct?

Employer contends Employee's brief contains substantial arguments over two issues which were neither claimed nor identified for hearing by the board designee as an issue for hearing at the prehearing conference. It contends Employee failed to timely file and serve the travel logs. Employer requests Employee's brief and travel logs be stricken.

Employee contends only a few paragraphs of his brief addressed penalties and an unfair or frivolous controversion finding. He contends striking the entirety of his hearing brief would deny him due process and the opportunity to be heard. Employee contends he timely filed and served travel logs. He requests Employer's petition to strike be denied.

2) Should Employee's brief and travel logs be stricken?

Employee contends the parties' settlement negotiation communications submitted as evidence by Employer cannot be considered. He seeks an order this information will not be considered.

Employer contends the parties' settlement negotiation communications were not submitted to prove liability or invalidity of Employee's claim or its amount or to impeach Employee. Rather,

it submitted the parties' communications to demonstrate there is no justiciable issue and Employee's attorney performed unnecessary and unreasonable work after Employer withdrew its controversion.

3) Should the parties' settlement negotiation communications be considered?

Employer contends it paid all benefits due, including medical costs, temporary total disability (TTD) benefits, job dislocation benefit and interest. It contends there is no justiciable dispute because it admitted Employee was injured in the course and scope of employment, withdrew its defenses, accepted and paid benefits based upon the second independent medical evaluation (SIME) physician's opinion. Employer contends medical benefits are open and billable because it does not dispute Employee is entitled to the ongoing medical treatment recommended by the SIME physician. It contended an order awarding surgery is not warranted, would be speculative and not based on substantial evidence because neither the pathology nor the surgery needed have been determined. It contends it continues to pay TTD benefits in accordance with the Act and there is no authority to award unlimited future TTD benefits. It requests an order denying ongoing medical and TTD benefits.

Employee contends he is entitled to an order finding work is the substantial cause of his need for bilateral shoulder medical treatment and disability. He contends Employer relied upon Employer's medical evaluation (EME) report to controvert all benefits, which opined the work injury is not the substantial cause of his bilateral shoulder medical treatment and disability. Employee contends he is entitled to a prospective determination the injury is compensable, regardless of any pending claim for medical care or other benefits. He requests an order awarding past and continuing medical and TTD benefits.

4) Is Employee entitled to an order finding work is the substantial cause of his need for bilateral shoulder medical treatment and disability?

Employer contends Employee failed to timely provide travel logs; it seeks an order denying transportation costs.

Employee contends he timely filed travel logs. He seeks an order awarding past and continuing transportation costs.

5) **Is Employee entitled to transportation costs?**

Employee contends he is entitled to permanent partial impairment (PPI) benefits based upon the seven percent PPI rating provided by the SIME physician if the board finds him medically stable.

Employer contends a PPI rating is not appropriate because the SIME physician opined Employee has not reached medical stability. It contends it prematurely paid Dr. Taylor's four percent PPI rating.

6) **Is Employee entitled to PPI benefits?**

Employer contends it paid interest on all benefits due, including TTD and PPI benefits and the job dislocation benefit.

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

Employee contends work performed after Employer's settlement offer was vital to his claim's success. He contends a hearing was necessary to obtain an order finding the work injury compensable. Employee contends an order awarding benefits is valuable because Employer will be required to petition to stop benefits rather than simply filing a controversion. He contends Employer controverted benefits and resisted paying benefits. Employee requests full fees and costs and fees on any benefits paid in the future.

Employer contends fees and costs should not be awarded after it withdrew its controversion notices and paid benefits as further litigation was not reasonable or necessary. It contends Employee's counsel performed unnecessary and unreasonable work after January 18, 2022, to "generate more fees." Employer contends Employee's pursuit of penalties and an unfair or frivolous controversion finding violated Civil Rule 11. It contends awarding fees after all benefits were paid by Employer contravenes the legislative intent. Employer contends Employee's attorney should be awarded a lower hourly rate because she made multiple mistakes, including failing to timely file travel logs,

requesting cross-examination of Employee's own physician and failing to timely provide Social Security documentation, resulting in a an overpayment of over $11,000 in TTD benefits.

8) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On July 16, 2020, Employer reported Employee injured his shoulders while working for Employer tearing off a roof on June 15, 2020. (First Report of Occupational Injury or Illness, July 16, 2020).

2) On July 15, 2020, Employee reported experiencing bilateral shoulder pain and weakness for the last month and his right shoulder hurt more than his left. He noticed the pain after clearing off a roof, which was laborious. PA-C Brian O'Loughlin diagnosed acute left and right shoulder pain and ordered MRIs. (O'Loughlin chart note, July 15, 2020).

3) On July 22, 2020, Employee's right shoulder magnetic resonance (MR) arthrogram found a central partial thickness rim-rent tear involving a large portion of the supraspinatus insertion, a subacromial spur, edema in the subacromial/subdeltoid bursa, a complex but non-displaced superior labrum from anterior to posterior (SLAP) tear and a non-displaced posterior labrum tear. His left shoulder MR arthrogram showed a non-displaced but "fairly complex" SLAP tear involving the entire superior labrum, blunting of the posterior labrum, partial thickness articular sided rim-tear at the insertion of the supraspinatus, an os acromiale and a subacromial spur. (MR Arthrogram reports, July 22, 2020).

4) On July 27, 2020, Elisha Powell, M.D., recommended light duty restrictions, physical therapy and rehabilitation strengthening. (Powell chart note, July 27, 2020).

5) On September 23, 2020, Employee reported pain limited his activities, including overhead lifting. He was trying to take it easy at work and wanted to avoid surgery. PA-C O'Loughlin performed a right shoulder subacromial injection. (O'Loughlin chart note, September 23, 2020).

6) On September 30, 2020, Employee did not notice "much relief from his right shoulder injection." He wanted to proceed with the left shoulder injection. PA-C O'Loughlin noted Employee was trying to avoid surgery and could look into doing ultrasound-guided intra-articular injections if these injections did not provide relief. He performed a left shoulder subacromial injection. (O'Loughlin chart note, September 30, 2020).

7) On October 26, 2020, Employee reported continued shoulder pain, right greater than left and overhead and "out to side activities." He said physical therapy helped a lot and still wanted to avoid surgery. O'Loughlin discussed possible surgical intervention and the possibility Employee would not be able to work as a roofer anymore. He continued the light duty work restriction and recommended continuing physical therapy. (O'Loughlin chart note, October 26, 2020).

8) On December 16, 2020, Employee said physical therapy helped improve his strength but his right shoulder pain continued. Employee was making good progress with physical therapy. PA-C O'Loughlin discussed arthroscopic surgery with possible rotator cuff repair and open biceps tenodesis and restricted Employee from working so he could fully participate in physical therapy and recommended an evaluation in four months. (O'Loughlin chart note, December 16, 2020).

9) On January 27, 2021, Employee reported bilateral shoulder pain at night and with overhead motions. He felt therapy helped to strengthen his shoulders but he was still experiencing limitations. PA-C O'Loughlin said Employee was medically stable as he did not want surgery and "we have pretty much exhausted our conservative management at this time." (O'Loughlin chart note, January 27, 2021). He restricted Employee to modified duty with no lifting greater than 30 pounds and no overhead lifting greater than 15 to 20 pounds. (O'Loughlin Work/School Status Note, January 27, 2021).

10) On February 15, 2021, Sean Taylor, M.D., opined Employee sustained a four percent PPI rating as a result of his work-related bilateral shoulder injury. Employee said he was no longer able to reach for items on a top shelf at home and he has to have his kids get the items due to ongoing shoulder pain. He elected not to pursue surgery. (Taylor chart note, February 15, 2021).

11) On February 5, 2021, Scot Youngblood, M.D., examined Employee for an EME and diagnosed resolved and medically stable work-related bilateral shoulder strains and medically stable preexisting bilateral shoulder superior labral degenerative tears and rotator cuff tendinopathy and low grade partial thickness tears not substantially aggravated by the work injury. Employee reported using a 500 pound machine to remove an asphalt roof and felt pain in his shoulders. He continued to work through the pain but it did not improve. Dr. Youngblood stated:

> The MR arthrograms of the bilateral shoulders performed on July 22, 2020 essentially show age-related degenerative findings. Both shoulders show nondisplaced degenerative superior labral (SLAP) 'tears.' As one ages, the superior labrum of the shoulder degenerates. This degenerative tearing of the superior labrum is essentially normal for age in a 61 year-old.

> The MR arthrograms also show low-grade partial-thickness tears of the supraspinatus rotator cuff tendons. Once again, age-based population studies of asymptomatic shoulders show an increasing prevalence of rotator cuff tearing: it is a normal process of aging. The most common tendon affected is the supraspinatus. The examinee actually received bilateral injections of the subacromial space of both shoulders, and reported no temporary or lasting improvement in his symptoms whatsoever. This strongly argues against these low-grade partial thickness tears being the cause of his symptoms.
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> On a medically more-probable-than-not basis, if the examinee had undergone MR arthrograms of the shoulders prior to June 15, 2020, they would have essentially looked the same as those obtained on July 22, 2020. It should be noted that there is no bone marrow edema or evidence of significant acute injury to the shoulder evidence on these MR arthrograms. This is in keeping with the examinee's own reports that he did not sustain a specific "injury" or traumatic event on June 15, 2020. He simply noted pain at the end of the work day.
>
> Any future treatment for the superior labral degenerative tears or the rotator cuff low-grade partial thickness tears would not be deemed substantially caused by the industrial activity of June 15, 2020. These are pre-existing conditions.

Dr. Youngblood opined employment was not the substantial cause of any current or ongoing disability or need for treatment as the work-related bilateral shoulder strains resolved and were medically stable. He said Employee did not sustain a permanent impairment and is capable of performing heavy work and able to perform his usual and customary employment as a roofer as "[t]here was no internal derangement, fracture, or dislocation that occurred during" the work injury. (Youngblood EME report, February 5, 2021).

12) On February 26, 2021, Employer relied upon Dr. Youngblood's EME report denied all benefits, contending the work-related bilateral shoulder strains resolved with no impairment and no additional medical treatment was needed. It contended the work injury is not the substantial cause of Employee's need for treatment and disability. (Controversion Notice, February 26, 2021).

13) On March 18, 2021, the reemployment benefit administrator designee found Employee eligible for reemployment benefits. (Letter, March 18, 2021).

14) On April 13, 2021, Employee elected to receive a job dislocation benefit and waived his right to receive reemployment training. (Election to Receive Reemployment Benefits or Waive Reemployment Benefits and Receive a Job Dislocation Benefit Instead, April 13, 2021).

15) On May 7, 2021, Employee sought TTD and PPI benefits, medical and transportation costs, penalty for late paid compensation, interest, an unfair or frivolous controversion finding, reemployment benefits and attorney fees and costs. (Claim for Workers' Compensation Benefits, May 7, 2021). Employee also requested a second independent medical evaluation (SIME). (Petition, May 6, 2021).

16) On May 12, 2021, Employee requested cross-examination of PA-C O'Loughlin based upon the January 27, 2021 chart note. (Request for Cross-Examination, May 12, 2021).

17) On June 1, 2021, Employer denied all benefits based upon Dr. Youngblood's EME report. (Controversion Notice, June 1, 2021).

18) On June 2, 2021, the board designee identified "TTD, PPI, Attorney's Fees, Transportation Cost, Medical Cost, Interest, Other" as benefits sought on the May 7, 2021 claim. The parties agreed to an SIME. The parties were also advised:

> If the above summary does not conform to your understanding of the issues raised, or discussions, statements made, agreements or orders entered at the prehearing conference, you have three choices all of which must be exercised **within 10 days after service of this prehearing summary**:
>
> (1) You may ask **the designee** in writing that **the designee modify or amend** the summary to correct a misstatement of fact or to change a prehearing determination, under 8 AAC 45.065(d). If the designee does not modify the prehearing conference summary and you want additional issues to be heard at hearing, you must request another prehearing conference. Otherwise, the hearing will be limited to the issues stated on this summary, under 8 AAC 45.065(c). . . . (Prehearing Conference Summary, June 2, 2021).

19) On June 3, 2021, the division served the parties with the June 2, 2021 prehearing conference summary. (Prehearing Conference Summary Served, June 3, 2021).

20) On December 7, 2021, SIME physician Frank Uhr, M.D., diagnosed right shoulder strain/rotator cuff impingement with radiographic findings that include "partial-thickness rotator cuff tear, subacromial spur with subacromial bursitis, and labral tear" and "left shoulder strain/rotator cuff impingement with radiographic findings that include partial-thickness rotator cuff tear, os acromiale with subacromial spur, subacromial bursal edema and labral tear." Employee denied an acute injury but stated he felt progressive pain in both shoulders over an approximate three week period leading up to the work injury after daily use of a motorized roof removal equipment weighing over 500 pounds and a hand spade. Employee continued to work

through the pain but it worsened and he reported the injury. Dr. Uhr opined Employee's work injury aggravated, accelerated or combined with his pre-existing conditions to cause disability and the need for treatment and his work-related activities were the substantial cause of his disability and need for medical treatment. Dr. Uhr stated:

> In my opinion, the bony pathology that included the presence of an os acromiale and a moderate subacromial spur, identified on the 7/22/20 MR arthrogram of [Employee's] left shoulder obtained approximately 1 month following the 6/15/20 reported injury, preexisted the onset of reported symptoms. I am not able, however, to a reasonable degree of medical probability to opine if or to what extent the soft tissue changes that included partial-thickness tearing of the rotator cuff, subacromial bursitis, and the labral tear pre-existed the onset of symptoms as reported on 6/15/20.
>
> The presence of mild edema in the subacromial/subdeltoid bursa indicates the presence, to some extent, of ongoing inflammation. It should be noted, however, that partial tearing of the rotator cuff tendons, subacromial bursitis, and labral tears can arise as a result of a degenerative process and can be found as incidental, asymptomatic findings in the general population.
>
> As described for the left shoulder, at the time of my interview with [Employee], he denied a history of injury to the right shoulder, pain in the right shoulder, or treatment for a painful right shoulder condition prior to the onset of bilateral shoulder symptoms as reported on 6/15/20.
>
> In my opinion, the bony change identified on the MR arthrogram of the right shoulder obtained on 7/22/20 of a small subacromial spur, pre-existed the 6/15/20 reported bilateral shoulder condition. I am not able, however, to a reasonable degree of medical probability, to opine as to if, and to what extent the soft tissue changes that included a partial thickness rotator cuff tear, edema in the subacromial/subdeltoid bursa, and the complex tear of the glenoid labrum preexisted the 6/15/20 report of the right shoulder condition.
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> The presence of edema in the subacromial/subdeltoid bursa indicates the presence of ongoing inflammation in [Employee's] right shoulder. It should be noted, as with the left shoulder, that the partial thickness rotator cuff tearing as well as tearing of the glenoid labrum can occur as a result of a degenerative process. As previously stated, these findings occur in the general population as incidental, asymptomatic findings.
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> Based on [Employee's] statement that he had not experienced injuries, pain, or medical treatment for a condition of either shoulders prior to the onset of symptoms in both shoulders as reported on 6/15/20, in my opinion the work-related activities, as previously described, that [Employee] performed while clearing a roof over an

> approximately 3-week period of time combined with the radiographic changes previously described to result in [Employee's] disability and need for medical treatment.

Dr. Uhr opined Employee's work-related disability continued and he was not medically stable because his shoulder has not significantly improved and he wished to pursue further available treatment, including surgery, if recommended. He was unable to predict medical stability due to "the uncertain nature of future medical treatment" but estimated it would be achieved approximately one year after one or both shoulders were surgically repaired. Dr. Uhr recommended Employee follow up with PA-C O'Loughlin or another appropriate orthopedic surgeon. He stated PA-C O'Loughlin's decision to declare non-surgical treatment had been exhausted and that further treatment was limited to surgery six months after beginning treatment was premature. Dr. Uhr recommended diagnostic/therapeutic injections into the glenohumeral joint and repeat bilateral subacromial local anesthetic and steroid injections to provide potential therapeutic treatment and to assist with preoperative planning should surgery be undertaken. He noted medical treatment for shoulder impingement, specifically with subacromial decompression, has not been clinically shown to result in improved benefit over nonsurgical treatment two years after treatment. Dr. Uhr opined, "[I]t has not been determined to what extent [Employee's] bilateral shoulder condition [resulted] from subacromial impingement and rotator cuff pathology, from labral pathology, or from both." The treatment Employee received for his bilateral shoulders was reasonable and necessary for the work injury. Dr. Uhr felt Employee was capable of lifting up to approximately 35 pounds from ground to waist level but was not capable of repetitive overhead use or lifting greater than five to ten pounds overhead. He said Employee's bilateral shoulders would not have required medical treatment for the radiographic changes had he not been experiencing pain and Employee's bilateral shoulder pains and overhead activity limitations are the most significant factors in his need for treatment. In response to Employer's request for a PPI rating, Dr. Uhr provided a seven percent upper extremity impairment for both shoulders. (Uhr SIME report, December 7, 2021).

21) On January 6, 2022, the board designee set the February 17, 2022 oral hearing and identified "TTD, PPI, Medical costs, Transportation costs, Interest, Attorney fee's/costs" as issues. The parties were also advised:

> If the above summary does not conform to your understanding of the issues raised, or discussions, statements made, agreements or orders entered at the prehearing conference, you have three choices all of which must be exercised **within 10 days after service of this prehearing summary**:
>
> (1) You may ask **the designee** in writing that **the designee modify or amend** the summary to correct a misstatement of fact or to change a prehearing determination, under 8 AAC 45.065(d). If the designee does not modify the prehearing conference summary and you want additional issues to be heard at hearing, you must request another prehearing conference. Otherwise, the hearing will be limited to the issues stated on this summary, under 8 AAC 45.065(c). . . . (Prehearing Conference Summary, January 6, 2022).

22) On January 7, 2022, the division served Employer and Employee with the January 6, 2022 prehearing conference summary by first-class mail. (Prehearing Conference Summary Served, January 7, 2022).

23) On January 10, 2022, Employee filed and served Employer by email with 2020 and 2021 travel logs documenting 127.8 miles to obtain medical treatment. (Email and Certificate of Service, January 10, 2022).

24) On January 18, 2022, Employer withdrew its February 26, 2021 and June 1, 2021 controversion notices and stated:

> The employer has elected to withdraw its controversions and cease litigation in this case in light of the SIME report. The withdrawal shall not be construed as an admission that the controversions, at the time of issuance, were not legally support. Past benefits under the Act, with interest, will be paid in accordance with the Act, including past time loss, medical, and related transportation benefits. (Notice of Withdrawal of Controversions, January 18, 2022).

25) On January 18, 2022, Employee requested an unfair or frivolous controversion finding be added as an issue for hearing in the January 6, 2022 prehearing conference summary. (Employee email, January 18, 2022). Employer opposed adding any issue for hearing. It contended the unfair or frivolous controvert issue was dropped at the June 2, 2021 prehearing conference. (Employer email, January 18, 2022).

26) The board designee did not modify the January 6, 2022 prehearing conference summary. (Agency file).

27) On January 19, 2022, Employee's attorney emailed Employer's attorney:

> I'm in receipt of your notice of withdrawal of controversion. We could avoid the necessity of a hearing if you are willing to stipulate in writing for Board approval:
>
> 1. The substantial cause of the current need for treatment and disability is the work-injury,
> 2. Back TTD will be paid from the date that it ceased,
> 3. Penalties and interest will be paid on back TTD,
> 4. Ongoing TTD will be paid until Mr. Torres is released to work by his physicians,
> 5. PPI will be paid in accordance with the SIME report,
> 6. Past and future transportation benefits will be paid,
> 7. Past and future medical benefits will be paid,
> 8. Full fees and costs on past benefits,
> 9. Statutory fees on future benefits.
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> As of this writing, my costs are $68.35 and my fees are $8,943.35.
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> Please advise. (Employee email, January 19, 2022).

Employer responded:

> [W]e do not agree to this proposed stipulation, and nothing requires us to stipulate to anything. The controversions have been withdrawn and past TTD, medicals/transportation and interest are being paid this week, along with a 4% PPI. There is no longer a justiciable dispute. The employer will not stipulate to any penalties, and that is an outrageous request. The controversions were based on valid medical opinions – including Mr. Torres's own physician stating his condition was medically stable. We will contest any penalties but would hope, since the employer elected to attempt to cease litigation, that you, as well, would drop litigation over this issue. We will not stipulate that TTD is due in the future "is released to work by his physicians" as his condition could be declared medically stable by his doctor before that time, and the employer has to right to discontinue TTD upon a new medical stability opinion. (Employer email, January 19, 2022).

Employee's attorney responded:

> My client is entitled to a board order that his injury is compensable and that he is entitled to back and future benefits. We are confident that we will receive on following a hearing.
>
> Given your concern regarding the unfair/frivolous claim which would result not only in penalties but also a possible referral, I made this suggestion in the hopes that your client would like to avoid a decision regarding unfair/frivolous and additional fees. Your suggestion that unfair/frivolous was withdrawn because the designee did not include it in a June prehearing conference summary is erroneous. It was simply an oversight. Regardless, your controversion was made in February

> of 2021 and we have plenty of time to file a new claim on unfair/frivolous and go to hearing on the new claim as there will be no res judicata on that issue if the Board refuses to hear it in the February 2022 hearing.
>
> I would be happy to consider any language you propose regarding medical stability; however, I need a board order either as the result of a stipulation or hearing. (Employee email, January 19, 2022).

28) On January 21, 2022, Employer paid Employee $43,620.23 for TTD benefits from February 25, 2021 to January 13, 2022. (Creative Risk Solutions Check and Envelope, January 21, 2022).

29) Employer paid Employee $7,080.00 for PPI benefits, $5,000 for job dislocation benefits and $973.96 in interest. (Creative Risk Solutions Check 88152, undated).

30) On January 24, 2022, Acting Chief of Adjudications emailed Employer's and Employee's attorneys and asked whether there was a possibility it would settle. (Email, January 24, 2022).

31) On January 25, 2022, Employee's attorney responded to Acting Chief of Adjudications email stating, "Nope." (Employee email, January 25, 2022).

32) On February 3, 2022, Employer filed the following statement:

> 1. The employer admits the employee incurred a bilateral shoulder injury while working in the course and scope of employment for the employer on or about June 15, 2020. The employer never disputed that the employee incurred an injury in the course and scope of employment.
> 2. The employer withdrew its controversion notices following receipt of the report of SIME physician Dr. Frank Uhr on January 18, 2022.
> 3. The employer has paid all medical or related transportation benefits for which documentation has been received. These had all been paid in accordance with the Act.
> 4. The employer reinstated TTD benefits from February 25, 2021, through January 13, 2022, and this was paid to the employee, in lump sum, on January 21, 2022. Interest was paid on past TTD benefits. TTD benefits from January 14, 2022, continuing are being paid to the employee in accord with Dr. Uhr's opinions.
> 5. The employer paid to the employee PPI benefits based upon a 4% rating, in lump sum and with interest, on January 19, 2022.
> 6. The employer paid to the employee a job dislocation benefit of $5,000.00 on January 18, 2022, with interest.
> 7. The employer accepts the current opinions of SIME physician Dr. Frank Uhr, with respect to recommendation for medical treatment for the shoulders, current physical capacities and work restrictions, and current medical instability. The employer accepts that the work injury of June 15, 2020, is the substantial cause of the treatment recommendations of Dr. Uhr, along with current work restrictions resulting in disability. (Statement of Employer, February 3, 2022).

33) On February 7, 2022, Employer's attorney emailed Employee's attorney a drafted stipulation and asked her to provide an attorney fees affidavit. (Employer email, February 7, 2022).

34) On February 8, 2022, Employee renewed his request for cross-examination of PA-C O'Loughlin. (Renewed Request for Cross-Examination, February 8, 2022).

35) On February 8, 2022, Employee's attorney responded to Employer's attorney, "I have authority from my client to propose the attached changes in a revised stipulation. I am also attaching an as-yet unsigned/unnotarized affidavit of counsel. I haven't gone to get it notarized yet. We'll still have to appear because the stip [sic] was filed so late." (Employee email, February 8, 2022).

36) On February 8, 2022, Employer's attorney emailed Employee's attorney another drafted stipulation, "I have spoken with the adjuster and the changes to the stipulation. We have agreed to some, but have changed the language on others to be legally correct and consistent. I have noted explanations of our language with comments. Please let us know if you concur or if you require additional changes. Thank you." (Employer email, February 8, 2022).

37) On February 10, 2022, Employee's attorney emailed Employer's attorney, "I reviewed your new language with my client and he has authorized me to refuse this counteroffer. I will file my brief and other documents shortly. But you still have until Friday." (Employee email, February 10, 2022).

38) On February 10, 2022, Employee filed a brief containing two small paragraphs on page 13 addressing penalties and a unfair or frivolous controversion finding. (Employee hearing brief, February 10, 2022). He sought $15,897.50 in attorney fees and $68.35 in costs, totaling $15,965.85 for 38.3 hours billed through February 7, 2022. He billed 16.8 hours after January 18, 2022. Employee's attorney billed $400 per hour through August 12, 2021, and $425 per hour after August 12, 2021, and addressed the required factors under Alaska Rule of Professional Conduct 1.1(a). He billed 0.1 hour to prepare the request for cross-examination on May 12, 2021, and 2.8 hours to finalize his hearing brief, exhibit list, witness list, affidavit and certificate of service and to prepare the renewed request for cross-examination on February 7, 2022. (Affidavit of Counsel Regarding Fees and Costs, February 10, 2022).

39) On February 17, 2022, Employee testified he never experienced shoulder pain prior to the work injury. He used equipment weighing over 500 pounds while working for Employer to remove roof shingles and he felt pain and decrease in his ability to lift overhead and heavy objects. Employee's

pain never went away, even after physical therapy and injections. He would like to undergo surgery to fix his shoulders which is scheduled to occur next month. (Employee).

40) On February 17, 2022, Employee orally withdrew his request for cross-examination of PA-C O'Loughlin. (Record).

41) On February 22, 2022, Employee sought an additional $3,230 in attorney fees for 7.6 hours billed from February 8 – 17, 2022 at $425 per hour. He billed 0.1 hour on January 19, 2021 to review the January 6, 2022 prehearing conference summary and requested the board designee add unfair or frivolous controversion as a hearing issue. Employee billed 0.1 hour to review Employer's opposition to his request. (Supplemental Affidavit of Counsel Regarding Fees and Costs, February 22, 2022).

42) On March 3, 2022, Employer objected to an award of attorney fees and costs incurred after January 18, 2022, when Employer withdrew its controversions and paid all benefits owed. It contended more than doubling fees after January 18, 2022, was not reasonable or necessary because Employer accepted and paid for all accrued benefits and is frivolous litigation under Civil Rule 11. Employer contended acceptance and voluntary payment is equivalent of an order under AS 23.30.145. It contended it is not contesting Employee's scheduled surgery. Employer requested awarded fees be reduced by time spent pursuing penalties and an unfair or frivolous controversion finding and the requests for cross-examination that Employee withdrew. (Employer's Objection to Attorney Fees and Costs, March 3, 2022).

PRINCIPLES OF LAW

The board may base its decisions 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 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's

> disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
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> **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 . . . .

Under AS 23.30.120, benefits sought by an injured worker are presumed to be compensable, and the burden of producing substantial evidence to the contrary is placed on the employer. *Miller v. ITT Arctic Services*, 577 P.2d 1044 (Alaska 1978). The presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion Hotel,* 813 P.2d 286, 292 (Alaska 1991).

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce "some minimal" relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Kramer* at 473-74, quoting *Smallwood* at 316. To rebut the presumption, an employer must present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment

or (2) work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). "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, 611-612 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after it is determined the employer has produced substantial evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of her case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381. At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant 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 *Rockney v. Boslough Construction Co*., 115 P.3d 1240, 1243 (Alaska 2005), the Court said the presumption did not apply to a vocational rehabilitation plan, since the parties did not dispute the employee's entitlement to a plan or the employer's liability to pay for it and he was not seeking "coverage" for it. They were only disputing the plan's details under which his benefits would be provided. The Court in *Burke v. Houston NANA, LLC*, 222 P.3d 851, 861 (Alaska 2010), discussed other instances in which the presumption analysis did not apply and said:

> The presumption analysis does not apply to every possible issue in a workers' compensation case. We have previously held the presumption of compensability inapplicable when evaluating a reemployment plan because the parties agreed that the employee's claim was covered by the provisions of the workers' compensation statute and applying the presumption did not "promote the goals of encouraging coverage and prompt benefit payment" (footnote omitted).
>
> Here, the board did not use the presumption analysis in evaluating Burke's chiropractic care claim. The presumption analysis might apply to the question whether *any* chiropractic care was necessary because that would raise the issue whether part of the claim was covered at all. It could also apply if a conforming

> treatment plan had been filed because the regulation related to excess treatment requires a factual determination about the efficacy of the treatment (footnote omitted). But we cannot see how the presumption analysis can be used to defeat the explicit statutory provision about frequency of treatment. . . .
>
> **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). When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision No. 087 (August 25, 2008).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
> . . . .
>
> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services

> performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.
> . . . .

The 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 nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, must be considered 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." *State of Alaska v. Wozniak*, AWCAC Decision No. 276 (March 26, 2020), held a lump sum award of fees incurred to the date of hearing and a separate award of ongoing fees on Employee's ongoing PTD benefits is a "reasonable and compensatory award of fees for the benefit obtained, based on the statutory ten percent of compensation awarded."

Nonetheless, when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed. *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." It held the Board must consider all of the following

eight non-exclusive factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a fee's reasonableness:

> (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.

In *Cavitt v. D&D Services,* AWCAC Decision No. 248 (May 4, 2018), the Commission applied *Shirley* and held, in awarding attorney's fees, the Board undervalued its order "confirming [the employee's] entitlement to TTD" because the employer would have to seek modification of that order before it terminated benefits.

> **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. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . . .
>
> (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. This additional amount shall be paid at the same time as, and in addition to, the

> installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .

Land and Marine Rental Co. v. Rawls, 686 P.2d 1187 (Alaska 1984), held a workers' compensation award, or any part thereof, shall accrue lawful interest from the date it should have been paid. Interest and penalty are mandatory.

> **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.

> **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. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.
> . . . .

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 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).

> **8 AAC 45.050. Pleadings.**
> . . . .
>
> (f) Stipulations.
> . . . .

> (3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.
>
> (4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.

When parties enter into a stipulation regarding compensability of an employee's diabetes, and file the stipulation with the Board, the stipulation has the effect of a board order such that the employer is required to petition the Board for a modification of the order if it wishes to contest the condition's continuing compensability. *Harris v. M-K Rivers*, 325 P.3d 510, 522 (Alaska 2014).

In *Shirley*, the employer paid TTD benefits and employee sought PTD benefits. The employer did not file a formal controversion notice but disputed PTD in its answer when it stated, "Carrier is awaiting clarification from record review to determine P & T status. Until such time TTD is on-going" and it "reserve[d] the right to raise further defenses after discovery." The Court observed:

> Alaska Statutes . . . outline the manner by which compensation payments are to be made. Compensation is "payable without an award, except where liability to pay compensation is controverted by the employer." AS 23.30.155(a). If payment of compensation is controverted, the employee is entitled to a hearing and a compensation order "rejecting the claim or making the award." AS 23.30.110(e). If an award is made, then compensation is "payable under the terms of an award." AS 23.30.155(f). . . . . [A]n employer seeking to modify or terminate payments made under a Board order must first seek the approval of the Board. AS 23.30.130(a).

Thus, when an employee sought, and was entitled to, an express award of permanent and total disability benefits, it was an error to not make the award because such an award would require the employer to first seek modification and obtain board approval before terminating benefits. *Id*. at 161.

In *Summers v. Korobkin Construction*, 814 P.2d 1369 (Alaska 1991), an injured worker filed a claim seeking a decision from the Board on whether his work injury was "compensable" because the employer refused to acknowledge the employee had a compensable claim while still paying for the employee's medical bills. His doctor said he might need neck surgery and a major factor in the injured worker's decision whether to pursue surgery was whether the employer would pay for it. The Board declined to hear the case noting there was no actual "controversy," since the injured worker had not received any medical care for over a year, and there were no unpaid work-related medical bills or other claims. The superior court agreed. Reversing, the Court stated:

> Here, Korobkin disputed many aspects of Summers' application for adjustment of claim. Korobkin's answer advanced numerous defenses to Summer's claim, including that Summers' injury was not work-related . . . Summers is entitled to a hearing on Korobkin's defenses. If Summers prevails, Korobkin will still be able to controvert Summers' claim at a future hearing, if the grounds for controversion arise after the initial hearing. AS 23.30.130. However, a worker in Summers' position, who has been receiving treatment for an injury which he or she claims occurred in the course of employment, is entitled to a hearing and prospective determination on whether his or her injury is compensable.

> **8 AAC 45.065. Prehearings**. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on
>
> (1) identifying and simplifying the issues;
>
> (2) amending the papers filed or the filing of additional papers; . . . .
> . . . .
>
> (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.
>
> (d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's

request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.
. . . .

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.

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

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

8 AAC 45.120. Evidence. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. . . . The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. . . .

Alaska Rule of Evidence 408. Compromise and Offers to Compromise. Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to

> compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.

In *Lopez v. Administrator, Public Employees' Retirement System*, 20 P.3d 568 (Alaska 2001), the Alaska Public Employees' Retirement Board (PERS board) refused to admit into evidence a compromise and release agreement from the injured worker's workers' compensation case. In the agreement, the employer, against whom Lopez had also filed an occupational disability claim, admitted her injury was work-related. Lopez sought to admit this evidence as an admission by a party opponent against its interest. The Court in affirming the board's decision referenced Evidence Rule 408, which bars admission of compromises between parties. The Court further noted compromised settlements are ordinarily of little probative value as they reflect the litigants' "desire for peace rather than any concession of a weak position." *Id*. at 575. The PERS board had a regulation, 2 AAC 35.160(c), similar to 8 AAC 45.120(e), which stated:

> The hearing will not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence, including hearsay evidence, will be admitted if it is evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Irrelevant and unduly repetitious evidence will be excluded or curtailed.

Lopez held the PERS board did not abuse its discretion by excluding the compromise release agreement from evidence. *Id*. at 575-76.

An attorney fee case, *Hobart v. Silver Bay Logging*, AWCB Decision No. 98-0072 (March 25, 1998) rejected the employee's reliance on Evidence Rule 408 to keep out certain evidence discussing settlement. *Hobart* noted evidence in workers' compensation cases is not governed by the Alaska Rules of Evidence. It further noted the board panel hearing a claim is "not a lay jury" from which certain evidence needs to be withheld to avoid error because the experienced panel, unlike a lay jury, can "disregard irrelevant evidence." *Id*. at 4.

In *Alaska Statebank v. Kirschbaum*, 662 P.2d 939 (Alaska 1983), the creditor bank sought a deficiency judgment against a debtor in the event the proceeds of a judicial foreclosure sale of the encumbered property were insufficient to cover the balance due on a construction loan. The Court held discussions and statements were admissible that were made at the time the creditor bank and the debtor agreed on the validity and claim amount but were negotiating remedies.

A claim becomes moot when "it is no longer a present, live controversy." *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167 (Alaska 2002).

ANALYSIS

1) Was the oral order denying Employee's request to add penalties and an unfair and frivolous controvert finding as hearing issues correct?

Employee's May 7, 2021 claim sought penalties for late paid compensation and an unfair or frivolous controversion finding. The January 6, 2022 prehearing conference summary identified the hearing issues and did not include penalties and unfair or frivolous controversion. 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.

Employee sought to modify the January 6, 2022 prehearing conference summary by requesting an unfair or frivolous controversion finding be added as a hearing issue; but Employee did not request to add penalties as an issue. Employer opposed the request as it contended Employee withdrew the issue from his May 7, 2021 claim at the June 2, 2021 prehearing conference. Employee contends he did not withdraw those issues at the June 2, 2021 prehearing conference.

The June 2, 2021 prehearing conference summary did not identify penalties or unfair or frivolous controversion as issues sought in Employee's May 7, 2021 claim. The board designee may amend pleadings at a prehearing conference. 8 AAC 45.065(a)(1), (2). The June 2, 2021 prehearing conference summary also directed the parties to request it be amended if it did not conform to his understanding of the issues raised, discussion, statements made, agreement or orders entered at the

prehearing conference. Neither Employee nor Employer requested the June 2, 2021 prehearing conference to be modified either to include penalties or unfair or frivolous controversion or to include Employee's withdrawal of those issues. It is unclear why the board designee omitted the issues. Therefore, the June 2, 2021 prehearing conference did not waive Employee's claim of penalties or unfair or frivolous controversion.

Nonetheless, the January 6, 2022 prehearing conference summary's identified hearing issues did not include penalties or a frivolous or unfair controversion finding. Employee timely requested modification; however, the board designee did not modify the prehearing conference summary and Employee's request was denied. 8 AAC 45.065(c), (d). Employee was directed to request another prehearing conference if the designee did not modify the prehearing conference summary. He failed to request another prehearing conference. Therefore, Employee failed to provide unusual and extenuating circumstances to stop the January 6, 2022 prehearing conference summary from governing the issues. This decision cannot address penalties and an unfair or frivolous controvert finding as hearing issues. The oral order denying Employee's request to do so was correct.

2) Should Employee's brief and travel logs be stricken?

Employer contended most of Employee's hearing brief contained his contentions supporting penalties and an unfair and frivolous controvert finding. It requested Employee's entire hearing brief be stricken from the record. Most of his brief is his analysis of the the EME physician's opinion's weight and credibility while analyzing whether the work injury is the substantial cause of Employee's need for bilateral shoulder medical treatment, disability and retraining. Employee's hearing brief has two small paragraphs addressing his request for penalties and an unfair or frivolous controversion finding. Employer's request to strike Employee's entire brief will be denied.

Employer contended Employee filed his travel logs late when he attached them as exhibits to his hearing brief. Employee timely filed and served Employer with the travel logs on January 10, 2022 as it was filed more than 20 days before the hearing (February 17, 2022 – 20 days = January 28, 2022). 8 AAC 45.120(f). Therefore, Employee's travel logs will not be stricken. Employer's request to strike Employee's travel logs will be denied.

3) Should the parties' settlement negotiation communications be considered?

Employee objected to the parties' settlement negotiation communications being considered as hearing evidence. Employer submitted several emails exchanged between the parties regarding proposed stipulation terms after it withdrew its controversion and paid benefits. Technical rules regarding evidence, with few exceptions, do not apply in these cases. 8 AAC 45.120(e). Generally speaking, settlement offers are not admissible as evidence. This rule is intended to protect parties' ability to negotiate in good faith, make settlement offers and resolve cases to reduce litigation. Alaska Rule of Evidence 408. Although evidence rules do not normally apply in workers' compensation cases, the Alaska Supreme Court has held it was not an abuse of discretion by the Public Employees' Retirement Board to disallow reference to a settlement agreement in an administrative claim. *Lopez*. Nonetheless, some administrative decisions have declined to apply Evidence Rule 408, relying on 8 AAC 45.120(e). *Hobart*. Rule 408 does not require settlement communications be excluded unless the validity or the amount of the claim is disputed. *Kirschbaum*. The amount of past TTD, reemployment and medical benefits are not in dispute. The parties' negotiation communications will be considered to demonstrate whether there is a justiciable issue and if the work Employee's attorney performed after it withdrew its controversion and paid benefits was unnecessary and unreasonable.

4) Is Employee entitled to an order finding the work injury is the substantial cause of Employee's need for bilateral shoulder medical treatment and disability?

Employer relied on Dr. Youngblood's EME report in its February 26, 2021 and June 1, 2021 controversion notices and raised the defense that work was not the substantial cause of Employee's need for bilateral shoulder medical treatment and disability. Employee filed a claim contending the work injury is the substantial cause of his need for bilateral shoulder medical treatment and disability. The February 17, 2022 hearing was scheduled on January 6, 2022, to decide Employee's claim. Employer withdrew the controversions on January 18, 2022, and paid past medical benefits and TTD benefits from February 25, 2021 through January 13, 2022. On February 3, 2022, Employer stated, "TTD benefits from January 14, 2022, continuing are being paid to the employee in accord with Dr. Uhr's opinions" and it "accepts the current opinions of

SIME physician Dr. Frank Uhr, with respect to recommendation for medical treatment for the shoulders."

Employer contends the issues sought in Employee's claim became moot when it withdrew its controversion notices, paid past medical, TTD, PPI and reemployment benefits, continues to pay TTD benefits and medical benefits remain open and billable. Employee contends he is entitled to an order finding the work injury is the substantial cause of his need for bilateral shoulder medical treatment and disability and awarding reemployment benefits, and past and continuing TTD and medical benefits. A claim becomes moot when "it is no longer a present, live controversy." *Fairbanks Fire Fighters Ass'n, Local 1324*. Employer paid past medical, reemployment benefits and TTD benefits in full. Therefore, those issues are moot.

Employer's February 3, 2022 statement said it "accept[ed] that the work injury of June 15, 2020, is the substantial cause of the treatment recommendations of Dr. Uhr, along with current work restrictions resulting in disability." However, it did not address whether it would be required to seek a board order before discontinuing benefits. An order awarding continuing TTD benefits would require Employer to seek modification under AS 23.30.130 before discontinuing benefits, which is what Employee's claim seeks. *Harris*; *Shirley*. Employer's "acceptance" does not have the same effect as an order. Injured workers are entitled to a hearing and prospective determination on whether his or her injury is compensable. *Summers*. The parties were unable to reach an agreement regarding continuing TTD and medical benefits and did not enter into a stipulation, which would have had the effect of an order. *Harris*. Therefore, continuing TTD benefits and prospective medical benefits are in controversy and are not moot. *Fairbanks Fire Fighters Ass'n, Local 1324*. Employee is entitled an order addressing whether the work injury is the substantial cause of his need for bilateral shoulder medical treatment and disability.

Employee applied the presumption of compensability to the issue of whether the work injury is the substantial cause of his need for bilateral shoulder medical treatment and disability and relied upon Dr. Uhr's and PA-C O'Loughlin's opinions. He contended Dr. Youngblood's opinion failed to rebut the presumption because his disability and need for treatment is due to the bilateral shoulder pain and Dr. Youngblood failed to rule out the work injury because he conceded

Employee's pain began on the date of injury and has not resolved. Employer "admitted" Employee was injured in the course and scope of employment and "accepted" Dr. Uhr's opinions regarding treatment recommendations and "current work restrictions resulting in disability." However, "accepting" physician opinions and paying benefits is not an agreement Employee has proven by a preponderance of the evidence the substantial cause of the Employee's need for medical treatment and disability is the work injury. Therefore, the presumption of compensability applies to this issue. AS 23.30.120(a)(1); *Miller*; *Meek*; *Sokolowski*.

Without assessing credibility, Employee raises the presumption of compensability with Dr. Uhr's opinion his work injury aggravated, accelerated or combined with his pre-existing conditions to cause disability and the need for treatment and his work-related activities were the substantial cause of his disability and need for medical treatment and PA-C O'Loughlin's December 16, 2020 and January 27, 2021 chart notes recommending shoulder surgery. *McGahuey*; *Smith*; *Cheeks*; *Smallwood*; *Resler*.

Without assessing credibility or weight, Employer rebuts the presumption with Dr. Youngblood's opinion Employee's work-related shoulder strains resolved and his pre-existing age-related degenerative bilateral SLAP tears are the substantial cause of his need for bilateral shoulder medical treatment and disability. *Huit*; *Kramer*; *Tolbert*.

Employee must prove work is the substantial cause of his need for bilateral shoulder medical treatment and disability. *Saxton*. Employee credibly testified he first felt shoulder pain and symptoms after the work injury which is consistent with all medical records in the file. AS 23.30.122; *Smith*. Dr. Youngblood acknowledged Employee first reported pain after the end of the work day and opined work caused bilateral strains which resolved and reached medical stability and no additional medical treatment was needed. Dr. Uhr also noted Employee first reported bilateral should pain and symptoms after the work injury, there was no evidence of medical treatment or symptoms prior to the work injury, and it was not possible to determine whether the soft tissue changes in his shoulders preexisted the work injury. He opined Employee was not medically stable because his shoulder had not significantly improved and wished to pursue further available treatment, including the surgery he was reluctant to undergo in the past. Both physicians

noted the degenerative radiographic findings are consistent with age-related incidental, asymptomatic findings. However, Dr. Youngblood's opinion Employee's bilateral shoulder strains resolved contradicts his own observation and Employee's credible testimony his pain and symptoms continue, which lessens his opinion's weight. AS 23.30.122; *Smith*; *Moore*. Dr. Uhr stated Employee's bilateral shoulders would not have required medical treatment based on the radiographic changes had he not been experiencing pain and Employee's bilateral shoulder pains and overhead activity limitations, from his work activities, are the most significant factors in his need for treatment. Dr. Uhr's opinion is given the most weight because he considered Employee's lack of preexisting bilateral shoulder symptoms, which never returned to pre-injury level and because his opinion is consistent with his conclusion Employee would not require medical treatment without significant pain symptomology. *Id*. Employee has proven by a preponderance of the evidence the substantial cause of his need for bilateral shoulder medical treatment and disability is the work injury. *Koons*; *Saxton*; *Wolfer*.

Employer contended an order awarding surgery would be speculative and not based on substantial evidence when it has not been determined what the pathology is or what kind of surgery would be warranted. However, the shoulder surgery is not speculative. On December 16, 2020, PA-C O'Loughlin recommended a shoulder arthroscopy with rotator cuff repairs and open biceps tendodesis, and he continued to recommend it on January 27, 2021. While Dr. Uhr did not specify the shoulder surgery by name, the only recommended surgery in the record is the arthroscopy with rotator cuff repairs and open biceps tendodesis recommended by PA-C O'Loughlin and Dr. Uhr recommended Employee follow up with PA-C O'Loughlin for additional treatment, including injections and surgery. Employee is entitled to an order finding the work injury is the substantial cause of Employee's need for bilateral shoulder medical treatment, including shoulder surgery if recommended by PA-C O'Loughlin, and disability. Employer will be ordered to continue to pay ongoing medical and disability benefits in accordance with the Act.

5) Is Employee entitled to transportation costs?

Employee seeks transportation costs related to his medical treatment. As Employer only contended Employee failed to timely file and serve the travel logs, the presumption of compensability does not apply. *Abood*; *Rockney*; *Burke*. As determined above, Employee timely

served and filed the travel logs on January 10, 2021, more than 20 days before the hearing. 8 AAC 45.120(f). Employee is entitled to transportation costs. 8 AAC 45.084(a), (b)(1).

6) Is Employee entitled to PPI benefits?

Dr. Uhr opined Employee is not medically stable as additional treatment was recommended, including injections and surgery, and provided a seven percent PPI rating. Therefore, Employee's PPI benefits claim is not ripe because he did not reach medical stability. *Egemo*. However, once he is medically stable, he is entitled to PPI benefits if he receives a rating greater than zero. Employee may revisit this issue in the future if a PPI rating dispute arises.

7) Is Employee entitled to interest?

Employer paid interest on past benefits, including TTD and reemployment benefits. Therefore, interest on past benefits is moot. *Fairbanks Fire Fighters Ass'n, Local 1324*.

Interest is mandatory. AS 23.30.155(p). Employee is entitled to accrued interest on unpaid benefits. AS 23.30.155(p); *Rawls*. Employer is directed to calculate interest in accordance with the Act on the transportation costs awarded in this decision.

8) Is Employee entitled to attorney fees and costs?

Employee requests costs and actual fees and costs and a separate award of ongoing fees on his ongoing TTD benefits. AS 23.30.145. Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(a); *Childs*. An award in excess of the statutory minimum fee requires consideration of the nature, length and complexity of the services performed, transportation charges and benefits resulting from the services to the compensation beneficiaries. AS 23.30.145(a). The presumption of compensability does not apply to reasonableness of attorney's fees; Employee bears the burden of producing evidence to support the claim. *Rusch*.

Employer denied all benefits in its February 26, 2021 and June 1, 2021 controversion notices. Employee pursued his May 7, 2021 claim and Employer withdrew its controversions on January

18, 2022, and paid past medical and TTD benefits, interest, and job dislocation benefits, and is ordered to pay continuing TTD and medical benefits based upon the SIME physician's opinion. Employee was successful obtaining his most significant and costly benefits, past and ongoing medical and TTD benefits, and his attorney's efforts were instrumental in inducing these benefits payments. *Childs*; *Cavitt*. The only issues not addressed in this decision and to which Employer objects to paying fees and costs are PPI benefits, penalties and an unfair or frivolous controversion finding. Employer objects to time billed for emails Employee sent during the unsuccessful stipulation negotiation and most of Employee's brief. Employee spent 0.1 hour to email the designee to add unfair or frivolous controvert as a hearing issue and 0.1 hour to review Employer's opposition to his request. The time spent to send the emails requesting unfair or frivolous controversioin be added as a hearing issue and to review Employer's opposition should not be not awarded as Employee was not successful in adding this issue. Time spent on the emails Employee sent to Employer and reviewed from Employer during the unsuccessful stipulation negotiation should be awarded because the parties also discussed the continuing TTD and medical benefits awarded in this decision, not just penalties and unfair or frivolous controversion. Only two small paragraphs in Employee's brief addressed penalties and unfair or frivolous controversion; it is reasonable to allocate 0.1 hours for time spent on those small paragraphs and reduce the fee award.

Employee's attorney addressed the required factors supporting his request for reasonable fees from Alaska Rule of Professional Conduct 1.1(a). *Rusch.* Employer objected to Employee's hourly rate. Employee's attorney received the rates in prior decisions. *Id*. They are reasonable given her experience and rates charged by comparable attorneys practicing in this area. *Id*.

Employer objected to time billed for pursuing cross-examination of PA-C O'Loughlin. Employee billed 0.1 hours on May 12, 2021 to prepare the request for cross-examination. On February 7, 2022, Employee's attorney billed 2.8 hours to finalize his hearing brief, exhibit list, witness list, affidavit and certificate of service and to prepare the renewed request for cross-examination on February 7, 2022. A tenth of an hour is reasonable time to prepare the renewed request for cross-examination on February 7, 2022. *Rogers & Babler*. Employee withdrew his requests for cross-examination of PA-C O'Loughlin at hearing. Therefore, time spent on those requests, a total of 0.2 hours, should not be awarded.

After taking into account the nature, length, complexity of the services performed and benefits received, Employee's actual attorney fees and costs will be awarded less $210. The amounts being deducted include 0.3 hours for time spent pursuing penalties and a unfair or frivolous controversion finding ($425 x 0.3 = $127.50) and 0.2 hours for time spent on the requests for cross examination ($400 x 0.1 = $40; $425 x 0.1 = $42.50) ($127.50 + $40.00 + $42.50 = $210). *Childs*. Employee will be awarded $18,917.50 in attorney fees and ($15,897.50 + $3,230 = $19,127.50; $19,127.50 - $210 = $18,917.50) and $68.35 in costs.

Further, since TTD benefits continue during the continuance of Employee's disability, his attorney is also entitled to a statutory minimum attorney fee on ongoing TTD benefits because Employer controverted paying TTD compensation and Employee prevailed on his claim. AS 23.30.145(a); *Wozniak*.

CONCLUSIONS OF LAW

1) The oral order denying Employee's request to add penalties and an unfair or frivolous controversion finding, as hearing issues was correct.
2) Employee's brief and travel logs should not be stricken.
3) The parties' settlement negotiation communications should be considered.
4) Employee is entitled to an order finding work is the substantial cause of his need for bilateral shoulder medical treatment and disability.
5) Employee is entitled to transportation costs.
6) Employee is not entitled to PPI benefits.
7) Employee is entitled to interest.
8) Employee is entitled to attorney fees and costs.

ORDER

1) Employee's May 7, 2021 claim is granted in part.
2) Employer's February 11, 2022 petition to strike is denied.
3) Employer shall continue to pay TTD benefits in accordance with the Act.

4) Employer shall continue to pay ongoing medical benefits in accordance with the Act.

5) Employer shall pay Employee transportation costs.

6) Employee's PPI benefits claim is not ripe.

7) Employer shall pay interest on the transportation costs awarded in this decision.

8) Employer shall pay Employee's attorney $18,917.50 in fees and $68.35 in costs, totaling $18,985.85.

9) Employer shall pay Employee's attorney statutory minimum fees on ongoing TTD benefits, pursuant to the Act.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Robert Weel, Member

/s/
Nancy Shaw, 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 Miguel C. Torres, employee / claimant v. Consolidated Enterpriises, employer; Zurich American Insurance Company, insurer / defendants; Case No. 202007818; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on March 24, 2022.

/s/
Kimberly Weaver, Office Assistant II