ALASKA WORKERS' COMPENSATION BOARD

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

RASHAD N. FORBES, Employee, Claimant, v. THE HOME DEPOT USA, INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201805576 AWCB Decision No. 22-0034 Filed with AWCB Anchorage, Alaska on May 20, 2022

Employee Rashad Forbes' November 7, 2018 claim was heard on April 6, 2022, in Anchorage, Alaska, a date selected on September 16, 2021. A September 16, 2021 stipulation gave rise to this hearing. Attorney Ben Frey represented Employee, who testified. Attorney Rebecca Holdiman-Miller represented The Home Depot USA, Inc. and its insurer (Employer). All parties appeared by Zoom. The record remained open until April 20, 2022, so Employer could depose a witness, Rihannon Sheets, and submit additional documentation, and closed on that date.

ISSUES

Employee contends he is entitled to additional temporary total disability (TTD) benefits. He did not specify the periods for which he requested TTD benefits.

Employer contends Employee is not entitled to additional TTD benefits because its physician declared him medically stable, and he may not receive disability benefits after the date of medical stability. It further contends Employee's disability ceased 60 days after his work injury.

1) Is Employee entitled to additional TTD benefits?

Employee contends he is entitled to temporary partial disability (TPD) benefits. He contends he had to work after his benefits were terminated and TPD benefits are appropriately paid during those periods. He did not specify time periods for which he requested TPD benefits.

Employer contends Employee is not entitled to TPD benefits because its physician declared him medically stable, and he may not receive TPD benefits after that date. It further contends his disability ceased 60 days after his work injury.

2) Is Employee entitled to TPD benefits?

Employee contends he is entitled to permanent partial impairment (PPI) benefits.

Employer contends he is not entitled to PPI benefits because its physician gave him a zero percent PPI rating and Employee failed to provide a higher rating.

3) Is Employee entitled to PPI benefits?

Employee contends he is entitled to past and ongoing medical care for his work injury.

Employer contends he is not entitled to additional medical care because its physician stated he suffered a lumbar strain, which resolved 60 days post-injury. It contends additional medical findings and diagnoses are not work-related.

4) Is Employee entitled to medical treatment for his work injury?

Employee contends he is entitled to a finding that Employer made an unfair or frivolous controversion by denying benefits in his case.

Employer contends an unfair or frivolous controversion finding is unwarranted because its controversion is supported by a valid medical opinion.

5) Was Employer's controversion unfair or frivolous?

Employee contends he is entitled to an unspecified penalty.

Employer contends he is not entitled to a penalty because all benefits were paid when due and its physician provided a report upon which Employer based a valid controversion.

6) Is Employee entitled to a penalty?

Employee contends he is entitled to interest on unspecified benefits.

Employer contends he is not because all benefits were timely paid.

7) Is Employee entitled to interest?

Employee contends he is entitled to attorney fees and costs.

Employer contends he is not entitled to additional benefits; therefore, he is not entitled to attorney fees or costs.

8) Is Employee entitled to attorney fees or costs?

FINDINGS OF FACT

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

1) On April 12, 2018, Employee was helping co-workers move a heavy bathtub and felt lower back pain. (First Report of Injury, April 16, 2018).

2) On April 16, 2018, Samuel Schurig, DO, saw Employee for his April 12, 2018 work injury. His right knee jerk was absent. Dr. Schurig reviewed x-rays and prescribed tramadol. Neck pain was not mentioned. X-rays revealed no acute fracture, subluxation or significant degenerative changes and soft tissues were unremarkable. (Schurig report; x-rays, April 16, 2018).

3) On April 16, 2018, Dr. Schurig released Employee to light-duty work effective April 4, 2018. He was not to work more than six hours per day or lift more than 10 pounds and was to avoid stooping and bending if possible. (Schurig report, April 16, 2018).

4) On April 17, 2018, an emergency room physician saw Employee for back pain. There was no change from his exam with Dr. Schurig, and neck pain was not mentioned. (Emergency Room report, April 17, 2018).

5) On May 1, 2018, a lumbar magnetic resonance imaging (MRI) showed disc desiccation at L5-S1, but other lumbar disc spaces were unremarkable. (MRI report, May 1, 2018).

6) On May 3, 2018, Robert McRorie, PA, saw Employee for lower back pain and worsening symptoms. Neck pain was not mentioned. (McRorie report, May 3, 2018).

7) On May 25, 2018, Craig Humphreys, MD, saw Employee for "significant" neck and low back pain with shooting pain in both arms and legs. He diagnosed an acute L5-S1 annular tear, radiculopathy, cervical stenosis and strain and an acute myofascial lumbar strain, and prescribed physical therapy, x-rays and a cervical spine MRI. Dr. Humphreys did not offer a causation opinion. (Humphreys report, May 25, 2018).

8) On June 4, 2018, Employee had cervical x-rays and an MRI. His x-rays were normal; his MRI showed mild upper and lower thoracic scoliosis and a "minimal" disc bulge at C3-4 causing mild right neural foraminal stenosis without impingement, and minimal to moderate issues at C5-6. The remainder of the cervical spine was unremarkable. (X-ray report; MRI report, June 4, 2018).

9) On June 18, 2018, Employee told PA McRorie that physical therapy made his symptoms worse. PA McRorie suggested he follow-up with Dr. Humphreys. (McRorie report, June 18, 2018).

10) On June 27, 2018, Dr. Humphreys saw Employee for continuing low back and neck pain. Employee's straight leg raising was negative and there were no objective neurological findings. Dr. Humphreys reviewed the x-rays and MRI and diagnosed a lumbar strain with annular tear and a cervical strain. He recommended more physical therapy and a caudal injection but did not offer a causation opinion. (Humphreys report, June 27, 2018).

11) On July 3, 2018, Mark Simonson, MD, evaluated Employee and found "slight giveaway weakness" in his legs. Dr. Simonson subsequently provided a caudal epidural injection. (Simonson reports, July 3 and July 17, 2018).

12) On August 29, 2018, Dr. Humphreys recommended a thoracic MRI before work restrictions could be changed and permanent restrictions determined. Employee reported no relief from the

epidural injection. His pain increased in his buttock while sitting for a long time. Employee's neck was somewhat better, but his thoracic pain was getting worse; thoracic pain was now his predominant complaint. (Humphreys reply, August 29, 2018).

13) On September 4, 2018, Employee had a thoracic spine MRI, which showed a small central T6-7 protrusion without significant canal stenosis and a minimal right protrusion at T7-8 that caused no impingement. (MRI report, September 4, 2018).

14) On September 21, 2018, David Bauer, MD, saw Employee, who was still employed by Employer but not currently working, for an employer's medical evaluation (EME). His injury occurred as he was moving a bathtub into a bay and started to experience back pain. Employee told Dr. Bauer he thought it was just a strain but when he was at home and had trouble doing dishes, he sought medical care. Four days later, on April 16, 2018, he saw Dr. Schurig, who gave him medication and sent him back to work with some restrictions; he had no neck complaints. On April 17, 2018, he went to the emergency room but still had no neck complaints. Employee said he saw PA McRorie who referred him to Dr. Humphreys. When he saw Dr. Humphreys on May 25, 2018, this was the first record that mentioned neck pain. Employee could not explain why the prior records did not include neck symptoms because he said his neck started to hurt as soon as he had the injury. Thereafter, Employee had medication, physical therapy and a spinal injection, none of which had much effect. He told Dr. Bauer he also had missing reflexes in his right knee. Employee said his lower back was his most significant pain source. After reviewing records and performing a physical, Dr. Bauer diagnosed an overexertion lumbar strain related to the work injury; migratory symptoms of unknown origin; some symptom exaggeration; and no evidence of any objective change or harm to the body. (Bauer report, September 21, 2018).

15) Dr. Bauer opined Employee's injury began on April 12, 2018, and for 60 days thereafter his work was "the substantial cause" of Employee's disability. Thereafter, his complaints had been "expanding, and are nonphysiologic and non-credible at this time." In Dr. Bauer's opinion, the objective studies demonstrated no objective harm. He opined the work injury did not aggravate any preexisting condition. In Dr. Bauer's view, since Employee had not responded to any medical treatments there was no indication any further treatment would be reasonable and necessary given the lack of objective findings. Dr. Bauer found his neurologic examination was "wholly normal." He opined the degenerative changes at L5-S1 were "minor" and required no intervention. In Dr. Bauer's opinion, Employee became medically stable on August 29, 2018, because by then he had

completed physical therapy and an epidural injection, which did not alleviate his symptoms. Dr. Bauer opined Employee had a "zero impairment" rating pursuant to the appropriate American Medical Association guidelines. Employee had no evidence of any physical condition that would restrict him from returning to his normal job in Dr. Bauer's opinion. He opined Employee remained capable of "heavy physical demand level" work, notwithstanding his subjective complaints. (Bauer report, September 21, 2018).

16) On October 4, 2018, Employer controverted Employee's right to benefits based on EME Dr. Bauer's opinions. (Controversion Notice, October 4, 2018).

17) On October 10, 2018, Dr. Humphreys recommended Employee get a functional capacity exam (FCE) at Advanced Physical Therapy before he could comment on Employee's ability to perform described jobs. (Humphreys letter, October 10, 2018).

18) On November 13, 2018, Employee claimed TTD, TPD and PPI benefits, medical costs, an unfair or frivolous controversion, penalty for late-paid compensation, interest and attorney fees and costs. He contended Employer had controverted his right to benefits and stopped paying him based on a medical stability opinion, with which Employee disagreed. (Claim for Workers' Compensation Benefits, November 7, 2018).

19) On November 6, 2018, Cathy Robbins with Great Land Vocational and Benefits Counseling completed an eligibility evaluation report. She recounted speaking to Employer's district manager Rhiannon Sheets on September 20, 2018, about alternative employment for Employee. Robbins recorded, "Rhiannon told me that after conferring with the Kenai store, there is nothing they can offer him due to the restrictions placed on him by his physician." However, Sheets said if his physician lifted his restrictions "there could be other work he could do." Robbins stated Employee's attending physician did not respond to her request for information, but EME Dr. Bauer did and predicted Employee would have permanent physical capacities to perform jobs he performed in the 10 years prior to his work injury. Dr. Bauer also said Employee would have no ratable permanent partial impairment from his work injury. Robbins recommended Employee be found not eligible for reemployment benefits. (Eligibility Evaluation Report, November 6, 2018).

20) On December 5, 2018, Employer controverted Employee's claim based on Dr. Bauer's EME report. (Controversion Notice, December 5, 2018).

21) On April 29, 2019, Employer terminated Employee's employment based on his "no call no show" from April 22, 2019 through April 26, 2019. Employee's termination was based on

Employer's investigation and Employee's violation of its attendance and punctuality standards. (Progressive Disciplinary Notice, April 29, 2019).

22) On February 11, 2020, PA McRorie said he had not seen Employee for some time but reviewed his imaging and opined he had a spinal pathology. PA McRorie referred Employee back to the spine specialist for another opinion. (McRorie report, February 11, 2020).

23) On February 24, 2020, Employee went to a walk-in clinic for mid- and low-back pain. The examiner diagnosed thoracic spine pain and back muscle spasms. (Jeoffrey Lanfear, FNP-C report, February 24, 2020).

24) On March 10, 2020, Dr. Humphreys saw Employee for the first time since 2018. His main complaints were neck and thoracic pain, which Employee said was getting worse. Dr. Humphreys assessed neck and low back pain but could find no reason for his weakness. He recommended repeat cervical and thoracic MRIs. If there were compressive lesions, he would treat Employee, but if not, Dr. Humphreys would refer him to "Dr. Rankine." (Humphreys report, March 10, 2020).

25) March 10, 2020 lumbar and cervical x-rays were normal. (X-ray reports, March 10, 2020).

26) On July 17, 2020, PA McRorie noted Employee's continued muscle and back pain issues. He was "unsure whether the two are related or if he is starting to develop some other issue in general." PA McRorie recommended blood work and referral to a neurologist, with possible physical therapy for his back. (McRorie report, July 17, 2020).

27) On September 24, 2020, PA McRorie saw Employee and stated he had a significant injury "on-the-job due to heavy lifting," which resulted in a "lumbar disc problem" with radiculopathy. He opined Employee's low back injury remained "unhealed" and recommended more physical therapy and medication. (McRorie report, September 24, 2020).

28) At deposition on November 23, 2020, Employee claimed injury to his lower and upper back and his neck, which he said also affected his legs and arms. He said he had no disciplinary issues while he worked for Employer. Employee was uncertain why he was let go; he understood he was supposed to go on leave of absence, possibly Family Medical Leave Act, due to his injury but when he applied for it, he was told he did not qualify because he did not work there long enough. He said he had no health insurance while working for Employer, but he had "dental." He testified his doctor never cleared him for anything but light-duty work. The last time Employee earned wages from Employer was in April 2019. Employee said he did not receive unemployment

benefits. He believed that he was never released to return to full duty work. (Videoconference Deposition of Rashad Forbes, November 23, 2020).

29) Employee has had his "flagger's card" since March 25, 2018. The next time Employee worked was October 18, 2020, earning $13 an hour as a gas station attendant, working 30 hours per week. He was a cashier and did light stocking and cleaning. While working at the gas station, Employee said he had "pains and aches" in his back from light lifting for which he took ibuprofen. He will sometimes lose his balance and his legs will hurt. Employee said he had no income between last working for Employer and working at the gas station. He supported himself from money he saved while he worked for Employer, and he sold his music equipment worth thousands; his girlfriend also assisted and for a time his brother shared the rent. (Videoconference Deposition of Rashad Forbes, November 23, 2020).

30) On the injury date, Employee was assisting three co-workers install a 300-pound bathtub in a display bay. They were using a device to lift the tub when it fell, and Employee held it up so it would not land on his feet. He held it for about two minutes until his supervisor helped him lower it. After they got the tub stabilized, Employee said he lifted it again and felt a sharp pain throughout his entire back. He told his supervisor about his symptoms. Employee finished the last three hours work that day on light duty. About a week later, he stopped working altogether. (Videoconference Deposition of Rashad Forbes, November 23, 2020).

31) Employee "kept seeking out different doctors until I got an answer that, you know, I felt was lined up with how I felt, which was when I talked to Dr. McRorie." He said PA McRorie told him he could not do any overhead reaching or heavy lifting. Employee said Sheets told him Employer had no light-duty work for him. He said right after the work injury he could barely walk because he had neck, upper back and low back pain even though he was medicated. Once he started doing physical therapy, Employee said he noticed increased pain. Employee said he sometimes gets numbness and tingling down his upper and lower extremities. PA McRorie eventually recommended an MRI in May 2018. PA McRorie referred Employee to Dr. Humphreys, an orthopedic surgeon. He had one cortisone injection in his back in July 2018, which did not help. (Videoconference Deposition of Rashad Forbes, November 23, 2020).

32) Dr. Humphreys recommended more physical therapy. In Employee's opinion, the physical therapy only helped him walk a little better. Employee said once he was controverted, he had no medical care because he had no insurance, no job, no money and did not qualify yet for Medicaid.

In early 2020, he qualified for Medicaid and at that point sought additional medical care. Employee returned to PA McRorie and Dr. Humphreys who gave him medication and more physical therapy. He said Dr. Humphreys referred him to a neurologist, which he had yet to see. As of his deposition, he did not believe he could return to work at his regular job with Employer because he had overhead and lifting restrictions. (Videoconference Deposition of Rashad Forbes, November 23, 2020).

33) Employee said he had applied for many jobs post-injury but felt he was turned down because he does not have a good employment history because of his physical limitations. (Videoconference Deposition of Rashad Forbes, November 23, 2020).

34) On August 10, 2021, PA McRorie saw Employee who "says that he was injured while working and he has not been the same since that time." PA McRorie stated Employee has an injury to his low back, which imaging supported. He referred Employee back to "the specialist" and to physical therapy. (McRorie report, August 10, 2021).

35) On September 15, 2021, neurologist David Rankine, MD, saw Employee and reviewed his blood work for "fatigue" and low back pain. Employee recounted his April 2018 work injury with the tub and said following the injury he was "unable to walk" but eventually "was able to resume walking, but never gained his strength back." Employee said he had weakness and numbness throughout his body. Dr. Rankine diagnosed chronic midline low back pain with bilateral sciatica; muscle fatigue; and vitamin deficiencies. He recommended a bilateral upper and lower extremity electromyography (EMG). (Rankine report, September 15, 2021).

36) On October 18, 2021, Dr. Rankine did bilateral lumbar EMG and found evidence of peroneal sensory peripheral neuropathy of bilateral lower extremities. Otherwise, "Patient has normal EMG testing of the bilateral lower extremities and paraspinals." (Rankine report, October 18, 2021).

37) On October 21, 2021, Dr. Rankine did bilateral cervical EMG and concluded Employee had evidence of early, mild, bilateral carpal tunnel syndrome (CTS). He did not offer a causation opinion. (Rankine report, October 21, 2021).

38) On November 22, 2021, Employee had a lumbar MRI, which showed only "minimal disc bulge" at L3-4, mild disc bulge at L4-5, and moderate disc bulge and an annular fissure at L5-S1 with "a degree of compression" on the existing nerve roots, all like findings from prior images with "no significant progression." The radiologist concluded these findings were lumbar degenerative changes, worse at the L5-S1 level. (MRI report, November 22, 2021).

39) On December 16, 2021, Dr. Rankine found Employee in "a lot of pain" and wondering if something in his blood was making his muscles hurt. Employee said his neck issues were "getting worse every day," and Dr. Rankine opined "clinically," he had a cervical radiculopathy. He recommended a cervical x-ray and MRI. (Rankine report, December 16, 2021).

40) On January 27, 2022, Employee reported to a clinic for COVID symptoms. He was walking normally, and his motor strength and tone were normal. (Kelly Hall, NP, report, January 27, 2022).

41) On February 3, 2022, cervical x-rays, compared with June 2018 cervical MRI and x-rays, showed no significant soft tissue abnormality and "minimal to mild" focal C5-6 degenerative changes. (X-ray report, February 3, 2022).

42) On March 7, 2022, Employee filed a medical summary that included witness affidavits from Julian Cumin [or Arum] and Andrea Frisel. (Medical Summary, March 4, 2022).

43) On March 9, 2022, Employer requested the right to cross-examine Andrea Grisel and Julian Cumin [or Arum] as well as November 4, 2020 to December 1, 2020 physical therapy reports, and Dr. Rankine's records from September 16, October 21, November 22 and December 16, 2021. (Request for Cross-Examination, March 9, 2022).

44) On March 20, 2022, Dr. Bauer reviewed Employee's medical records from April 16, 2018 through January 27, 2022. He concluded the intervening medical records did not change his September 21, 2018 opinions. Dr. Bauer suggested Employee's symptoms might be somatic, or in other words "entirely psychological." He opined an annular fissure or "tear," is degenerative and not created by a lifting injury; in his view, it is the most common and earliest manifestation of degenerative disc disease. He cited numerous studies reporting his opinions. Dr. Bauer stated Employee's prolonged back symptoms are unrelated to the work injury and the lumbar disc degeneration did not arise from the injury. He concluded there was no objective or physiologic explanation for Employee's ongoing subjective pain complaints. In his opinion, psychological factors, "unrelated to this incident" are the most likely drivers for his prolonged complaints. Dr. Bauer opined there was no objective or physiologic condition requiring any ongoing treatment or evaluation. (Bauer report, March 20, 2022).

45) On April 4, 2022, Employee contended continued pain from his work injury on April 12, 2018 prevented him from returning to work. He relied primarily on a May 1, 2018 MRI report finding a "paracentral disc protrusion with associated annular fissure." Employee relied on PA McRorie's opinion that the MRI demonstrated "disc injury and stenosis with nerve root

impingement," and Dr. Humphreys' opinion stating Employee suffered from an annular tear at the L5-S1 disc. Employee subsequently reported cervical and thoracic pain as well, which was investigated by his physicians. He contended EME Dr. Bauer recognized the annular tear but concluded Employee only suffered an "overexertion lumbar strain." Employee contended this was in "direct contradiction" Dr. Humphreys' diagnosis. He faulted Dr. Bauer for providing "no explanation" as to why Employee is still experiencing pain consistent with the annular tear. Employee contended Dr. Bauer was simply motivated by money to deprive him of benefits. He contended the gas station job he took out of "financial desperation" two years later caused him "excruciating pain." Employee noted he was recently diagnosed with bilateral CTS. He contended his most recent lumbar MRI again diagnosed degenerative changes and an annular tear at L5-S1. Employee faulted Dr. Bauer for not explaining how Dr. Humphreys "made a mistake in his diagnosis." In summary, he contended he is entitled to his benefits reinstated and back pay for all the time that should have been paid. (Case Brief, April 4, 2022).

46) On April 4, 2022, Employer contended Employee had a lumbar strain from his April 2018 work injury and has subsequently had subjective symptoms, but no doctor has opined the symptoms are related to his work injury. By contrast, it contended Dr. Bauer affirmatively stated Employee no longer has any work-related disability or need for medical care. Employer contended Dr. Bauer acknowledged minor degenerative changes in Employee's lumbar spine but stated they were neither caused nor aggravated by the work incident. Thus, Dr. Bauer concluded Employee's disability lasted 60 days after which his complaints were non-physiologic and non-credible. Dr. Bauer, further found Employee was medically stable, had no evidence of permanent impairment and could return to his normal job at the "heavy" physical demand level with no restrictions. Employer contended even Dr. Humphreys found no causative basis for Employee's weakness. Therefore, it contended Employee is not entitled to additional TTD or TPD benefits after the date he became medically stable, August 29, 2018. Moreover, notwithstanding consistent diagnoses from Employee's various physicians, it contended none have indicated his condition was not medically stable or that his symptoms are work-related. Moreover, Employer contended Employee received unemployment benefits and it should be able to recoup overpaid TTD benefits during periods in which he received unemployment. Further, it contended since Dr. Bauer found Employee became medically stable on August 29, 2018, and it had paid Employee TTD benefits from April 23, 2018 through October 1, 2018, it was entitled to recover an overpayment from any

future indemnity benefits Employee may be awarded. Employer contended the only PPI rating in this case is Dr. Bauer's zero percent rating and Employee had the duty to provide a rating higher than that to obtain a PPI benefit award. It contended Employee is entitled to no penalty or interest because Employer duly controverted based on a valid medical opinion, and no benefits were due but not paid. Employer contended its valid controversion defeats Employee's claim for an unfair or frivolous controversion finding. Lastly, Employer contended since Employee is entitled to no additional benefits through his attorney's efforts, he is not entitled to interest or an attorney fee or cost award. (Employer's Hearing Brief, April 4, 2022).

47) At hearing on April 6, 2022, the parties generally reiterated their hearing brief arguments. Employee testified about his work injury, generally consistent with his deposition testimony. While lifting a 300-pound cast-iron tub at work he first felt pain while lifting the tub to an upright position. Thereafter, the tub fell on him, and he was required to "hold it up" for several minutes while co-workers pulled it off him. He felt "okay" at that point. Soon he was "grabbing his back" and had to sit down in the bay because he was in "a lot of pain." Employee did not come to work until the following week. He said a doctor told him it "could be a sprain or herniated disc." When his pain worsened, Employee sought PA McRorie, who excused him from work beginning April 24, 2018. Employee liked PA McRorie because he listened to him; by contrast Employee did not think Dr. Humphrey listened to him because he wanted him to go back to work. He testified one-month post-injury, he had difficulty turning his head while driving. Employee's medications and physical therapy did not help his symptoms. His physicians ordered various x-rays and MRIs, the latter of which disclosed an annular tear. Employee had an epidural injection, which also did not help his symptoms. His upper back also started to hurt. After some diagnostic testing, Employee said Dr. Humphreys told him there was nothing wrong with him, and PA McRorie said there was nothing wrong with his neck, but it nevertheless still hurt. Employee said after he saw Dr. Bauer, Employer controverted his case, and he could not afford medical care. It took time to get on Medicaid but once he did, Employee resumed care. Employee said he sold his recording equipment to survive. In 2019 he applied for various jobs because he needed money. Employee finally got a job at a gas station in 2020 that was kind of "laid-back." He worked there from around October through November 2020 and left because it caused pain and weakness. Employee subsequently got a job with AT&T, which is his current job in Soldotna, Alaska. He still has "lots of pain" nearly every day in his neck, feet, hands, and back and he has had tingling and weakness

since the injury. On cross-examination, Employee explained his musical endeavor with "beats" since his work injury and testified he made minimal income from it. His current symptoms were pain when he was reaching or picking things up, so he avoids doing that. Employee said his neck hurts every day, and he has muscle weakness in his arms. His legs are better, and he still has weakness and low back pain, but he has been able to do his AT&T job full-time since December 26, 2021. (Employee).

48) The Board left the record open for Employer to submit a supervisor's deposition and other Internet documents it had relied on at hearing. The panel did not authorize Employee to file any additional evidence. (Record).

49) On April 19, 2022, Sheets testified she is "district execution manager" for Employer. She is familiar with Employee's injury and knew he finished working the day of but refused to come in the next day. The Kenai store was trying to find light duty he could perform following his injury. On the Monday following Employee's injury, Employer was able to accommodate his need for light duty and had him change price labels on displays. However, around October 2018, the store no longer had light duty available. By April 2019, Employer had received medical information and Employee was back on the schedule but had five consecutive days as a "no call/no show" that resulted in his termination. Employer would have received a return to full duty work release from a doctor for it to put him back on the schedule. Sheets had no further contact with Employee after his termination. She was unaware of Employee's day-to-day medical condition from injury date through his termination in April 2019. Sheets was unaware who made the decision to put Employee back on the schedule and what medical evidence they relied upon to do so and was unaware what documentation was provided to prompt Employee to return from his leave of absence. Employee had previously provided notes from his physician removing him from work and in April 2019, he could have produced a medical note taking him off work. Sheets would have told him that his ability to work was "driven by medical documentation." Rather, Employer heard nothing from Employee in April 2019, and he was a, "No call/no show." However, Employee continued to have health insurance until he was terminated on April 29, 2019. (Telephonic Deposition of Rhiannon Sheets, April 19, 2022).

50) On April 20, 2022, pursuant to the Board leaving the hearing record open, Employer filed additional hearing evidence consisting of online screenshots of Employee's musicmaking efforts under his name "Banks." Some entries suggest Employee was marketing music online that he

created spanning from May 4, 2018 through approximately December 28, 2021. (Facebook screenshots, Hearing Evidence 477 through 511, April 20, 2022).

51) On April 29, 2022, Employee filed an affidavit mostly reiterating his hearing testimony but also responding to Sheets' deposition. (Affidavit, April 26, 2022).

52) On May 2, 2022, Employee objected to Employee's affidavit as unauthorized evidence submitted after the record closed. (Opposition to Employee's Untimely Affidavit, May 2, 2022).

PRINCIPLES OF LAW

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

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
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> **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. . . . 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. . . .

Phillip Weidner & Assocs., Inc. v. Hibdon, 989 P.2d 727, 732 (Alaska 1999), addressed "reasonableness" of medical treatment:

> The question of reasonableness is "a complex fact judgment involving a multitude of variables." However, where the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable (citations omitted).

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

Benefits sought by an injured worker are presumptively compensable and the presumption applies to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, and without regard to credibility, an injured employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, and without regard to credibility, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). If the employer's evidence rebuts the presumption, it drops out and the employee must prove his claim by a preponderance of the evidence. *Id*. This means the employee must "induce a belief" in the fact-finders' minds that 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. *Huit*.

> **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 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 Dec. No. 087 at 11 (August 25, 2008).

> **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. . . .
>
> **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. . . .
> . . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after 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 time period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate . . . in effect on the date the compensation is due. . . .

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992). "For a controversion notice 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." Evidence the employer possessed "at the time of controversion" is the relevant evidence to review. *Id*.

> **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 compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041. . . .

Stonebridge Hospitality Associates, LLC v. Settje, AWCAC Decision No. 153 (June 14, 2011), held when a PPI claim is ripe for adjudication, and not merely hypothetical, the claimant is required to obtain a rating and present it at hearing if she wants a PPI benefits award.

> **AS 23.30.200. Temporary partial disability**. (a) In case of temporary partial disability resulting in decreased 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. . . .
>
> **AS 23.30.395. Definitions**. In this chapter,
> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence. . . .

ANALYSIS

1) Is Employee entitled to additional TTD benefits?

Employee contends he continued to be disabled from his work injury after October 1, 2018, the last date Employer paid him TTD benefits. Employer contends he was medically stable effective August 29, 2018, and his work injury did not disable him after that date, so it does not owe him any additional TTD benefits. This creates a factual dispute to which the presumption of compensability applies. AS 23.30.120; *Meek*. Employee raises the presumption with his testimony stating he was physically unable to work due to pain from his work injury after August 29, 2018, and with his light-duty work restricted releases. *Tolbert*. Employer rebuts the presumption with Dr. Bauer's opinion that Employee became medically stable and able to return to normal work effective August 29, 2018. *Huit*. Thus, the presumption drops out and Employee must prove his TTD benefit claim by a preponderance of the evidence. *Saxton*.

To obtain additional TTD benefits, Employee must show he was both medically unstable and disabled during the period for which by his own testimony he seeks TTD benefits. AS 23.30.185; AS 23.30.395(16), (28). He must demonstrate that his work injury is, in relation to other causes, "the substantial cause" of his claimed disability. AS 23.30.010(a). First, Employee has not experienced objectively measurable improvement from any treatment he received for this injury, including medication, physical therapy and a caudal epidural injection. This implies he was medically stable long ago. AS 23.30.395(28). Second, Employer correctly notes that while numerous physicians and objective imaging show he has an annular tear at his L5-S1 disc, none of his providers have stated the April 12, 2018 work injury is "the substantial cause" of this annular tear or that the work injury or this annular tear are "the substantial cause" of his alleged disability. Employee assumes the work injury caused the annular tear because after the injury he had MRIs that detected it. But expert medical testimony is necessary to determine if the annular tear is causing Employee's symptoms, and if so, did the work injury caused the annular tear. Employee presented no such evidence. While a physician need not say "magic words" to meet the legal causation requirement, a physician must give some opinion suggesting that something that happened to Employee on April 12, 2018 was "the substantial cause" of his alleged disability after August 29, 2018. AS 23.30.010(a).

By contrast, EME Dr. Bauer was clear in his two reports stating the annular tear is a degenerative condition in Employee's case and cited numerous articles supporting his opinion that it is not causing his diverse symptoms. He said Employee's subjective complaints were "non-physiologic and non-credible" and Dr. Bauer offered non-work-related psychological factors as an alternative explanation for his symptoms and any related disability. Dr. Bauer opined Employee was able to perform heavy labor as well as lighter duty positions. Moreover, Employee's objective upper and lower extremity EMGs showed only mild CTS in the upper extremities, which no physician has attributed to the work injury, and normal bilateral lower extremity findings except for "peroneal sensory peripheral neuropathy," which is a complex medical issue requiring medical testimony to help this panel understand any possible connection it could have to Employee's work injury. That evidence is also lacking. No physician has explained how Employee's injury was "the substantial cause" of symptoms arising from his neck and thoracic spine. Dr. Humphreys found no evidence justifying Employee's reported weakness. Further, Dr. Bauer is the only physician specifically addressing "medical stability" in this medical-legal context and he stated Employee was medically stable effective August 29, 2018. To the extent PA McRorie disagrees with Dr. Bauer's opinions, he is not a medical doctor, he is a family provider, and his opinions will be given less weight than Dr. Bauer's opinions as orthopedic surgeon. AS 23.30.122; *Smith*; *Moore*.

Employee failed to meet his burden of proof and Employer's medical evidence is more convincing than his. *Huit*; *Saxton*. Dr. Bauer said Employee became medically stable from his work strain on August 29, 2018. His opinion is given greater weight. AS 23.30.122; *Smith*. That alone defeats his claim for TTD benefits after that date. AS 23.30.185; AS 23.30.395(28). He also opined Employee could return to his regular duties on that date. Therefore, he was not "disabled" from his work injury and not entitled to additional TTD benefits. AS 23.30.395(16). His claim for additional TTD benefits will be denied.

2) Is Employee entitled to TPD benefits?

Employee claims TPD benefits after his work injury when he worked light-duty or part-time with other employers and made less money than he would have otherwise made. Employer disputes that claim. The same analysis from subsection (1), above, including the presumption analysis, applies here and is incorporated herein by reference. TPD benefits may not be paid for any

disability occurring after the date of medical stability. AS 23.30.200. Therefore, Employee's claim for TPD benefits will be denied for the same reasons his TTD benefit claim was denied.

3) Is Employee entitled to PPI benefits?

Employee claims entitlement to PPI benefits but he provided no PPI rating. AS 23.30.190(a). Consequently, he cannot raise the statutory presumption on this claim. Had Employee raised the statutory presumption, Dr. Bauer's zero percent PPI rating opinion would have rebutted it. Employee had the duty to provide a PPI rating greater than zero to support his claim. He failed to provide a PPI rating and his PPI claim will be denied. *Settje*.

4) Is Employee entitled to additional medical treatment for his work injury?

Employee contends he is entitled to past and ongoing medical care for his work injury. Employer contends he had only a lumbar strain, which has resolved. This creates a factual dispute to which the statutory presumption analysis must be applied. *Meek*. Employee raises the presumption with his testimony that he needs additional medical care for his work injury because he continues to suffer from pain and other symptoms and with his providers opinions that he needs continuing medication, physical therapy and possible diagnostic imaging. *Tolbert*. Employer rebuts the presumption with Dr. Bauer's EME reports, in which he states Employee suffered only a strain, which has resolved, and his work is not the substantial cause of the other various conditions and symptoms he is now experiencing. *Huit*. Employee must prove his claim for additional medical care for his work injury by a preponderance of the evidence. *Saxton*.

Employee's main contention is that the work injury caused the annular tear at L5-S1. No physician in this case has stated the work injury was "the substantial cause" of the annular tear or that the annular tear is the substantial cause of Employee's ongoing symptoms. AS 23.30.010(a). There is no evidence suggesting the annular tear at L5-S1 is causing Employee's cervical, thoracic or CTS symptoms. Employee faults Dr. Bauer for not explaining how "Dr. Humphreys was wrong" about his annular tear diagnosis. But Dr. Bauer did not dispute that Employee has an annular tear at L5-S1; he simply opined the work injury was not "the substantial cause" of it and the annular tear is not the substantial cause of Employee's ongoing symptoms. Similarly, Dr. Humphreys

never stated the work injury was "the substantial cause" of the annular tear or that the annular tear was the substantial cause of Employee's ongoing symptoms. Thus, there is no dispute between these two physicians on this issue.

To the extent PA McRorie's records state or imply the work injury caused Employee's neck, thoracic, lumbar, CTS symptoms or his annular tear at L5-S1 are work-related, his opinions are given less weight. AS 23.30.122; *Smith*. He is not a medical doctor, is a family practitioner, and is not an orthopedic expert. Further, unlike Dr. Bauer, PA McRorie never addressed the specific medical-legal causation requirements for Employee's injury. He never opined work was "the substantial cause" of Employee's need for medical treatment for any of his medical conditions or symptoms. AS 23.30.010(a). The most convincing medical opinion is Dr. Bauer's, who opined Employee suffered a strain that resolved within 60 days. He stated the annular tear is not "work-related" and consequently any additional diagnostic testing for treatment addressing that condition is not reasonable or necessary and not Employer's responsibility. AS 23.30.095; *Hibdon*. Therefore, substantial evidence supports Employer's position on this issue as well and Employee's claim for past and ongoing medical treatment for his work injury will be denied. *Saxton*.

5) Was Employer's controversion unfair or frivolous?

The evidence Employer relied on to controvert Employee's claim at the time the controversion was made is the relevant evidence to examine to see if Employer's controversion was unfair or frivolous. AS 23.30.155(a), (d); *Harp*. Employer relied on Dr. Bauer's report to controvert. If Dr. Bauer's report was the only evidence available for review, and if benefits would be denied based upon his report if Employee did not introduce contrary evidence, the controversion based on Dr. Bauer's report was in good faith. Viewing Dr. Bauer's EME report in isolation, it is enough to support the controversion because it affirmatively stated Employee was medically stable, no longer disabled, work was not the substantial cause of any continuing disability, impairment or need for treatment thereafter. This is all it was required to do. Employee failed to meet his burden to prove Employer's controversion was in bad faith, unfair or frivolous and his request for an associated finding will be denied. *Harp*.

6) Is Employee entitled to a penalty?

Employee requests an unspecified penalty. The most likely basis for his penalty claim is a contention based on the unfair or frivolous controversion allegation that Employer failed to pay benefits timely when due. AS 23.30.155(e). The above analyses demonstrate Employee is not entitled to any additional TTD benefits and is not entitled to any TPD, PPI or medical benefits associated with his work injury. Employer paid Employee TTD benefits past the date of medical stability. Employee failed to demonstrate Employer failed to pay timely any benefits due. His claim for an unspecified penalty will be denied.

7) Is Employee entitled to interest?

This decision will award Employee no additional benefits. Therefore, he is not entitled to any interest and his interest claim will be denied. AS 23.30.155(p).

8) Is Employee entitled to attorney fees or costs?

Because this decision will award employee no additional benefits, he is not entitled to an attorney fee or cost award. His claim for attorney fees and costs will be denied. AS 23.30.145(a).

CONCLUSIONS OF LAW

1) Employee is not entitled to additional TTD benefits.
2) Employee is not entitled to TPD benefits.
3) Employee is not entitled to PPI benefits.
4) Employee is not entitled to additional medical treatment for his work injury.
5) Employer's controversion was not unfair or frivolous.
6) Employee is not entitled to a penalty.
7) Employee is not entitled to interest.
8) Employee is not entitled to attorney fees or costs.

ORDER

1) Employee's November 7, 2018 claim is denied.

2) Employee's TTD benefit claim is denied.

3) Employee's TPD claim is denied.

4) Employee's PPI claim is denied.

5) Employee's claim for medical treatment claim is denied.

6) Employee's request for an unfair or frivolous controversion finding is denied.

7) Employee's penalty claim is denied.

8) Employee's interest claim is denied.

9) Employee's attorney fee and cost claims are denied.

Dated in Anchorage, Alaska on May 20, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert C. Weel, Member

/s/
Pam Cline, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Rashad N. Forbes, employee / claimant v. The Home Depot Usa, Inc., employer; New Hampshire Insurance Company, insurer / defendants; Case No. 201805576; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on May 20, 2022.

/s/
Kimberly Weaver, Office Assistant