

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

LONNIE S. BENNETT,)	
)	
Employee,)	
Claimant,)	
)	
v.)	FINAL DECISION AND ORDER
)	
KETCHIKAN PULP COMPANY,)	AWCB Case No. 199828479
)	
Employer,)	AWCB Decision No. 23-0012
and)	
)	Filed with AWCB Juneau, Alaska
NATIONAL UNION FIRE INS. CO. OF)	on February 14, 2023
PITTSBURGH,)	
)	
Insurer,)	
Defendants.)	
)	

Lonnie S. Bennett's (Employee) February 17, 2022 claim was heard on January 24, 2023, in Juneau, Alaska, a date selected on September 6, 2022. An August 19, 2022 hearing request gave rise to this hearing. Attorney Robert Rehbock appeared and represented Employee, who appeared and testified. Attorney Michelle Meshke appeared and represented Ketchikan Pulp Company and National Union Fire Insurance Company of Pittsburgh (Employer). *Lonnie S. Bennett v. Ketchikan Pulp Company, (Bennett I)* AWCB Dec. No. 21-0043 (May 21, 2021) granted Employee's claim for a mobility scooter and ordered Employer to provide Employee the Afiscooter-S4. Witnesses included Vicki Wallace and Dion Samuels, who testified on behalf of Employee, and Carrie Kay and Lee Wheatley, who testified on behalf of Employer. The record remained open to receive Employer's response to Employee's attorney's fees and costs affidavit as amended at hearing and closed on January 30, 2023.

ISSUES

Employee contends *Bennett I* made a factual mistake. He contends the Afiscooter-S4 is not suitable to meet his needs, as it does not operate adequately in the wet conditions in Ketchikan, Alaska, and for outdoor recreational purposes, like going to the beach or unpaved trails. Employee contends he did not abuse the scooter; he merely utilized it to do what it was represented to be capable of by Wheatley and for recreational purposes. He contends he enjoyed outdoor activities before the work injury, such as hunting, fishing and hiking, and needs an apparatus which would enable him to go to rocky beaches and unpaved trails in Ketchikan. Employee contends the “process of recovery” in AS 23.30.095(a) must be interpreted broadly to provide an apparatus for him to pursue outdoor recreational activities. He requests an order granting his claim for an All-Terrain Hopper.

Employer contends Employee failed to comply with 8 AAC 45.150 because he failed to file a petition identifying which facts were erroneous, presenting evidence to support his allegation of factual error, and explaining how the factual error would have affected the outcome in *Bennett I*. It contends Employee’s claim is a “bare allegation,” which does not support a request for modification. Alternatively, Employer contends Employee used the Afiscooter-S4 for recreational purposes not considered reasonable and necessary by his medical providers. It contends such use is not evidence of a factual mistake in *Bennett I* as it awarded the scooter for community mobility, not for recreational purposes. Employer contends the Afiscooter-S4 meets Employee’s community mobility needs because he has been able to travel at least five miles from home to physical therapy and grocery stores and he was able to use the scooter on an unpaved trail in Ketchikan. It contends *res judicata* bars Employee’s claim for the All-Terrain Hopper. Employer contends Employee failed to provide substantial evidence that the All-Terrain Hopper is reasonable and necessary. It contends the All-Terrain Hopper is an electric wheelchair, which has not been prescribed, and no physician prescribed a vehicle to go off-roading, fishing, hunting or hiking. Employer contends the Alaska Workers’ Compensation Act (Act) is not designed to restore Employee to the activities he lost. It requests an order denying Employee’s claim for the All-Terrain Hopper.

1) Should *Bennett I* be modified?

Employee contends he is entitled to interest on the All-Terrain Hopper.

Employer contends Employee is not entitled to interest because he is not entitled to the All-Terrain Hopper.

2) Is Employee entitled to interest?

Employee contends he is entitled to attorney fees and costs because he is entitled to the All-Terrain Hopper.

Employer contends Employee is not entitled to attorney fees and costs because he is not entitled to the All-Terrain Hopper.

3) Is Employee entitled to attorney's fees and costs?

FINDINGS OF FACT

This decision incorporates all factual findings and conclusions from *Bennett I* by reference. A preponderance of the evidence establishes the following facts and factual conclusions:

1) On June 5, 2019, John Bursell, M.D., stated Employee would benefit from a mobility scooter that can be used at home and in the community because he is unable to participate in the community due to limited mobility as he is unable to ambulate greater than 20 steps and has a history of frequent falls. “The tires must be large and sturdy enough to navigate outdoors in winter (heavy wet snow) and summer” and “must have a long-life battery” for trips into town requiring the ability to travel over two miles. Employee was depressed and felt like he had no activities worth looking forward to. Dr. Bursell opined he would benefit from being out of the home and in the community weekly and from a behavior therapy or support group. (*Bennett I*).

2) On May 29, 2020, Employee filed an estimate for the All-Terrain Hopper totaling \$28,360, along with a written statement that it is the only medical transportation device which meets the extreme environment of Ketchikan, Alaska. It has a waterproof motor and battery box to protect it from rain, monster wheels to provide clearance over rocks, curbs, mud and muskeg, 200AH batteries with 15-amp charger, a manual rotating seat, removable overhead roll bar, and winch to get unstuck in various terrain, like the beach, pavement and hiking trails. (*Id.*).

3) On January 7, 2020, Dr. Bursell responded to questions sent to him by the claims adjuster on November 22, 2019. He said the work injury is a substantial factor in Employee's need for the mobility scooter because his ambulation was limited due to chronic lower back pain from the work injury. Dr. Bursell opined the mobility scooter is necessary to allow community mobility. (*Id.*).

4) On July 24, 2020, Kelly Chick Comstock, a physical therapist, responded to a letter with questions from Employer's attorney and said the Afiscooter-C4 was not a reasonable and necessary option to suit Employee's activities of daily living because it may not be sufficient to handle the steep inclines and uneven terrain in the immediate area around his home but the Afiscooter-S4 mobility scooter was a reasonable and necessary option. Ms. Comstock attached a letter stating:

[Employee] has a 20-year history of chronic, debilitating, and longstanding LBP [lower back pain] complaints ever since a work injury rendered him disabled, and since then he has never been able to recover his pre-morbid active outdoor Alaskan lifestyle of hunting and fishing. His LBP ranges from "10-60 out of 10" in standing, rapidly increased per [Employee] over a period of seconds. He also has chronic shoulder pain. During his skilled PT evaluation, he was able to ambulate only 50' using a cane (he did not bring his walker) and distance was limited by pronounced shortness of breath onset and need for rest. His overall health status has declined because of debility and pain, per his own assessment, rendering him to become admittedly an overweight cigarette smoker. He has been issued durable medical equipment in the past to assist his mobility, beginning with a rolling walker, than [sic] a seated walker, but his tolerance of ambulation has reportedly continued to decline over time to short household distances. He also found that he became unable to successfully pick up the walker high enough to place it into the back of his car. He was finally issued a motorized locomotion device for outdoors, but video shown to PT demonstrated that it was clearly deficient in being able to handle uneven terrain, even in his driveway, and the vehicle was returned. [Employee] reports he was feeling mostly hopeless about his condition and loss of function/mobility after this, until being introduced to potential of an all-terrain 4-wheel power chair.

His preferred and most desirable option is an Extended Train Hopper 4ZS. His insurance carrier has also presented him the options of either an Afiscooter-C4 or an Afiscooter-S4.

He expresses that his dream of return to more normal functions remains, and he would like to engage again "as a productive member of the community." He adds, "I don't want to go out (die) useless in a chair. Instead, he says, "I want to go back to living my life closer to the way I lived it before my accident." This

would require having access to the type of transport/locomotive equipment which would allow him to safely access the outdoors in any kind of inclement weather, and something that could handle inclines, extreme weather, and uneven terrain common to most environments in Alaska.

The two options which appear most likely to meet this motorized mobility needs are either the Extended Train Hopper 4ZS All-terrain option, or the Afiscooter-S4 mobility scooter. The only one which would allow him to transport his seated walker with him (which he uses sparingly) is the Extended Train Hopper 4Zs. The most economical option to meet his motorized mobility needs and provide very reasonable and broad outdoor accessibility is the Afiscooter-S4. (*Id.*).

5) On September 16, 2020, Jared Kirkham, M.D., a physiatrist, thought Employee would benefit from some type of scooter to assist with traveling longer distances due to his poor health, deconditioning and reduced functional capacity. In Dr. Kirkham's opinion, the Afiscooter-C4 would not suit his needs based upon the terrain in Ketchikan, Employee's reduced functional capacity and difficulty with ambulation, and desire to travel longer distances on uneven terrain. The Afiscooter-S4 mobility scooter is reasonable and necessary as it suits Employee's activities of daily living and motorized mobility needs. Dr. Kirkham considered the All-Terrain Hopper a luxury item which could potentially allow Employee access to more varied and interesting terrain. However, in his opinion Employee's need for a power mobility device is not related to work activities; rather his age, genetics, obesity, smoking, general poor health, deconditioning and especially psychosocial factors are substantial factors. (*Id.*).

6) On October 10, 2020, Employer filed an invoice for an Afiscooter-S4 totaling \$4,507. (*Id.*).

7) On April 5, 2021, Ms. Comstock testified at deposition that she is a physical therapist. Employee's main reason for needing an assistive device to help him get around was his back pain and shortness of breath on minimal exertion. Employee showed her videos of a scooter-type device that he was trying to drive around his driveway and she did not think it was a good choice. Employee came in with pictures of the All-Terrain Hopper and said he wanted the tow hitch option, and it was top-of-the-line. He mainly needs to be on something with a stable base that would accommodate some level of shock absorption and be able to handle getting around. Employee lives on a hill with an uneven driveway and needs to be able to get down to the bike path. The All-Terrain Hopper is more suitable for the streets around Ketchikan than the scooter Employee tried out and returned. Ms. Comstock thought the initial scooter was horrible and a "complete mess" for his basic needs. She thought an "in-between model" with a larger wheel-

base and tire and enough impact absorption would be ideal for Employee. It would also be ideal for an attachment so Employee could bring his walker if he needed it. When asked whether the All-Terrain Hopper was more for recreational purposes, Ms. Comstock answered:

For -- yes, because I mean, I think that there is -- if you had -- if you had somebody that was demonstrating the kind of lifestyle that he's described he wants to have and had evidence that he could actually pull that off, it would be an easier recommendation.

Because he has so many health issues, I think it's really a question of -- I think some of it, you know, the psychology is that he's just, you know, reaching for something to try to get his old life back. I think that's the challenge for him because it kind of presents as all or nothing.

And so will he use something that's lesser even if it could give him a start? You know, that's the question in my mind around -- around this. And if he gets this terrain hopper, will he even use it? That's the -- that's the question in my mind as a therapist, you know, in terms of recommending something. . . .

She confirmed the power mobility device would be used outside Employee's home and said:

And the question I have for that is, where is he going to store it, and then how is he going to get it to the recreational site. You know, he would need a truck with a -- and maybe he can afford that, you know, get a truck and get a flatbed and then drive it up and down.

You know, that would be ultimately what's required for him to -- to utilize that type of a -- you know, for the terrain vehicle that he's -- and probably if he wants to get out on any road with -- you know, out at some of the -- you know, some of the local roads we have, you know, for him to be able to access those he really needs a flatbed to drive that up onto an then to take it.

Otherwise, you are looking at a scenario where he does come out of his driveway, goes down this very steep hill and goes on a bike path.

So you know, trying to understand, you know, the feasibility for both of those scenarios is really -- is really important. If he's somebody that's actually getting out to, you know a recreational site like Refuge Cove here or Ward Lake, if he's doing that and we can help facilitate that by giving him -- once he's there, giving him things to go and do, I'm, like, all on board for that.

If that's not somebody's current lifestyle, then it is outside the home, like right outside the home like in the driveway. . . .

Ms. Comstock felt the Afiscooter-S4 was a fair in-between for what Employee asked for compared to the Afiscooter-C4. She thought it was “a bit of a reach” for Employee to tow things or to be out in the woods on his own with the All-Terrain Hopper. (*Id.*).

8) On April 20, 2021, Employee testified at hearing he cannot walk more than 20 steps and has frequently fallen in the community. Employer provided an upright walker, but it is not good with rocks and cracks, and it collapses; he does not trust it because it collapsed, and he fell and bruised his head. He wants to have more quality of life by fishing or walking at the beach with his family, shopping, using sidewalks and being out in the community. Employee owns a truck and can drive to the store but not all stores have mobility scooters. He started smoking in 1972; he had a heart attack and has diabetes. Employee believes he needs a scooter with a water-proof motor, all-wheel drive and heavy-duty wheels because of the environment in Ketchikan. He also needs to be able to take his walker. Employee included a tow package on the All-Terrain Hopper to pull a trailer carrying groceries and other purchased items. He researched scooters and found the All-Terrain Hopper. Employee is willing to try a scooter compatible with the environment in Ketchikan. He would store the mobility scooter in his basement. (*Id.*).

9) On April 20, 2021, Ms. Kay testified at hearing she took over Employee’s case in April 2019. She was not aware of the terrain around Employee’s house when the Afiscooter-C4 was provided to Employee. Ms. Kay had to search to find a vendor willing to ship a scooter to Alaska. Employee told her the Afiscooter-C4 was not safe because there were steep hills and uneven terrain around his house. She said it cost more to return the Afiscooter-C4 than to purchase and ship it. In March 2020, Employee provided information on the All-Terrain Hopper. Ms. Kay came up with the Afiscooter-S4 because the specs said it could handle a 20 percent grade and had a sealed motor to address rain concerns. (*Id.*).

10) On April 20, 2021, Mr. Wheatley from Afiscooter testified at hearing the Afiscooter-S4 is made for outdoor use. It has a 1,400-watt motor and its batteries may be upgraded to 100-amp hours, which normally provides 28-38 miles range depending on the terrain and how it is driven. The Afiscooter-S4 performs well in wet environments and can be stored outside under a cover. Mr. Wheatley has personally driven the Afiscooter-S4 on a 21-degree slope and on beaches in Florida. The Afiscooter-S4 has attachments for a cane or walker holder. The All-Terrain Hopper is essentially an ATV, and he does not consider it a medical grade mobility device. (*Id.*).

11) At hearing on April 20, 2021, Employee contended the All-Terrain Hopper was reasonable and necessary based upon his physician's recommendation and the extreme environment conditions in Ketchikan, Alaska. Employer contended the All-Terrain Hopper was not reasonable or necessary because Employee sought it for recreational purposes and a less expensive scooter, the Afiscooter-S4, was available and would meet Employee's needs. (Record).

12) On May 21, 2021, *Bennett I* granted Employee's request for a mobility scooter and found the work injury is a substantial factor in his need for a mobility scooter, and a mobility scooter was necessary. It found the Afiscooter-S4 was reasonable and ordered Employer to provide it because Dr. Kirkham and Ms. Comstock agreed the Afiscooter-S4 would meet Employee's mobility needs, Mr. Wheatley credibly testified the Afiscooter-S4 would be able to handle uneven terrain, steep slopes and inclement weather, and the Afiscooter-S4 is significantly less expensive than the All-Terrain Hopper and was adequate to meet Employee's needs. (*Id.*).

13) On July 8, 2021, Employee rode his chair to physical therapy; it was very bumpy, and he felt extra tired. (Emily Ellerbrock, DPT, daily note, July 8, 2021).

14) On October 11, 2021, Employee filed a notice of intent to rely with seven videos and excerpts from the Afiscooter-S4 User Manual. The User Manual stated,

AFISCOOTER S is an outdoor scooter designed to work in normal environmental conditions from very cold temperatures (-30° C/-22° F) to very hot temperatures (+45° C/+113° F).

AFISCOOTER S will operate in light rain showers, but extended use is not recommended in heavy rain or snow.

AFISCOOTER S is easy to operate. The relatively large wheels allows the user to drive on unpaved roads, over moderately rough terrain and over obstacles as high as 5" (12 cm).

AFISCOOTER S maximum safe slope is 11.3° (20%). Do not attempt to climb/descend slopes that are steeper than the scooter's limitation.

The braking system stops the vehicle smoothly and within a short distance after the throttle control lever is released.

AFISCOOTER S is equipped with both front and rear shock absorbers to give the user a comfortable and smooth drive even when using the vehicle on moderately rough roads. A standard handbrake is also provided for backup.

Under normal conditions, AFISCOOTER S can travel approximately 45 km (30 miles) before the batteries require recharging. The distance will be reduced if the scooter is used frequently on slopes, rough ground or to climb kerbs [sic], etc.

AFISCOOTER S is 65 cm (25.5" wide). Take great care not to hit persons or any objects around the vehicle.

Never use AFISCOOTER S on stairs.

Never try to go over an obstacle that is more than the maximum recommended slope angle and obstacle height given in the specification sheet.

Do not use AFISCOOTER S in heavy rain or extreme humidity, or at temperatures below -30°C (-22°F) or above $+45^{\circ}\text{C}$ ($+113^{\circ}\text{F}$).

The AFISCOOTER S is able to go up slopes higher than the recommended safe slope.

INCLINE INFORMATION

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Proceed with extreme caution as you approach the downgrade of a ramp or incline.

Take wide turns with your AFISCOOTER S around any tight corners. If you do that, the scooter's rear wheels will follow a wide arc. Do not cut the corner short, and do not bump into or get hung up on any railing corners.

When driving up an incline, try to keep your AFISCOOTER S moving. If you must stop, start up again slowly, and then accelerate cautiously. When driving down an incline, set the speed switch to MIN and drive forward only. If your AFISCOOTER S starts to move down the incline faster than you want, allow it to come to a complete stop by releasing the throttle control lever, then push the throttle control lever forward slightly to ensure a safely controlled descent.

WARNING! Even though your AFISCOOTER S is capable of climbing slopes greater than those illustrated in Figure A, (Max. 26% (15°)) do not, under any circumstances, exceed the incline guidelines or any other specifications presented in this manual. Doing so could cause your AFISCOOTER S to become unstable.

Your AFISCOOTER S ability to travel up inclines is affected by your weight, scooter speed, your angle of approach to the incline, and your AFISCOOTER S set up.

CORNERING INFORMATION

Excessively high cornering speeds can result in tipping. Factors that affect the possibility of tipping include, but are not limited to, cornering speed, steering angle (how sharply you are turning), uneven road surfaces, inclined road surfaces, riding from an area of low traction to an area of high traction (such as passing from a grassy area to a paved area -- especially at high speed while turning), and abrupt changes of direction. High cornering speeds are not recommended. If you feel that you may tip over in a corner, reduce your speed and steering angle (i.e., lessen the sharpness of the turn) to prevent your AFISCOOTER S from tipping.

WARNING! When cornering sharply, reduce your speed and maintain a stable centre of gravity. When using your AFISCOOTER S at higher speeds, do not corner sharply. This greatly reduces the possibility of a tip or fall. Always exercise your common sense when cornering.

BRAKING INFORMATION

Your AFISCOOTER S is equipped with two powerful braking systems:

Regenerative: uses electricity to rapidly slow the vehicle when the throttle control lever returns to the center/stop position.

Park Break: activates automatically after regenerative braking slows the vehicle to a near stop, or when power is removed from the system for any reason.

OUTDOOR DRIVING SURFACES

Your AFISCOOTER S is designed to provide optimum stability under normal driving conditions, on dry, level surfaces of concrete, tarmac, or asphalt. However, we recognize that there will be times when you will encounter other surfaces. For this reason, your AFISCOOTER S is designed to perform well on packed soil, grass, and gravel. Feel free to use your AFISCOOTER S safely on lawns and in parks.

Reduce your AFISCOOTER S speed when driving on uneven terrain and/or soft surfaces.

Avoid tall grass that can become tangled in the running gear.

Avoid loosely packed gravel and sand.

If you feel unsure about a driving surface avoid it.

STATIONARY OBSTACLES (STEPS, CURBS, ETC.)

WARNING! Do not drive near race surfaces, unprotected ledges, and or drop offs (curbs, porches, stairs, etc.)

WARNING! Do not try to go up or down an obstacle that is too high.

WARNING! Do not try to go backward down any step curb or other obstacle. This may cause the AFISCOOTER S to tip.

WARNING! Be sure your AFISCOOTER S is traveling perpendicular to any curb you may be required to go up or down.

WARNING! Do not attempt to climb a curb that is higher than 12 cm (5”).

PRECAUTIONS DURING INCLEMENT WEATHER

Avoid exposing your AFISCOOTER S to inclement weather.

If you are suddenly caught up in rain, snow, severe cold or heat while operating your AFISCOOTER S, proceed to shelter at the earliest opportunity. Thoroughly dry your AFISCOOTER S before storing, charging, for operating it.

PROHIBITED! Operating in rain, snow, salt, mist spray conditions, and on icy slippery surfaces can have an adverse effect on the electrical system.

WARNING! Prolonged exposure to extreme hot or cold weather may affect the temperature of AFISCOOTER S parts, possibly resulting in skin irritation. Exercise caution when using your AFISCOOTER S in extremely hot or cold conditions or when exposing your AFISCOOTER S to direct sunlight for prolonged periods of time.

Video one showed the Afiscooter-S4 at rest with one front tire on dirt and the other on grass on an incline next to a concrete staircase; the front tire on the dirt is not in contact with the ground and Employee is standing next to the scooter. Video Two showed Employee on the Afiscooter-S4 on grass while the back tires spin and the scooter does not move; it does not show how Employee drove on to the grass and how it was eventually moved from the grass. Video three showed error code four on the Afiscooter-S4 screen and Wallace stating it would not go forward or backwards. Video four showed Employee on the Afiscooter-S4 in grass near a shelter and a wooden picnic table, traversing from the grass to a dirt trail by driving forward, then backing up and then going forward again to make the turn on to the dirt trail. Video five shows the Afiscooter-S4 pressed up against the curbed lip of a trail bridge on Ward Lake trail; the trail is gravel and the scooter was rocking back and forth. Video six shows Employee standing next to the Afiscooter-S4 with its front tires on the Ward Lake trail bridge and the back tires on the gravel trail while Employee manipulates the throttle and direction, resulting in the scooter rocking forward and backward. Video seven showed error code four again. (Notice of Intent to Rely, October 11, 2021).

15) On February 17, 2022, Employee filed a claim “seeking modification” of *Bennett I* “[p]ursuant to AS 23.30.130” “due to a mistake in the determination of fact.” He contended the Afidscooter-S4 “fails to conform to the representations made by defense at prior hearing.” Employee checked the boxes for medical benefits, interest and attorney’s fees and costs. (Claim for Workers’ Compensation Benefits, February 17, 2022).

16) On March 10, 2022, Employer denied unreasonable and unnecessary medical benefits, including the All-Terrain Hopper or other vehicles to be used for recreational purposes, interest, attorney’s fees and costs. It contended Employee failed to mitigate his damages by misusing and abusing the Afiscooter-S4 Employer provided, the All-Terrain Hopper is not a medical grade mobility scooter and is primarily used for recreational purposes, his claim should be barred by *res judicata*, and Employee failed to comply with 8 AAC 45.150(d). (Answer to Employee’s Workers’ Compensation Claim, March 10, 2022).

17) On May 13, 2022, Dr. Kirkham performed a telemedicine employer’s medical evaluation. Employee reported he received an Afiscooter-S4, and it is a great scooter if you are in the city but not in Ketchikan, which is rural and “everything is vertical.” He said the scooter does not work in Ketchikan, it has difficulty on soft terrain, gravel and traveling up steep hills and does not allow him to drive on the beach. Employee wants an All-Terrain Hopper he can drive into the back of his truck with four-wheel drive that can drive on sand, snow and wet grass all season. When asked, “Has [Employee] used the heavy-duty mobility scooter in a manner in which, as a physician, you would expect him to use it for medical purposes?” Dr. Kirkham answered,

Based upon the video supplied and review of records, Mr. Bennett is using the mobility scooter for recreational purposes including travelling about his neighborhood and travelling to appointments. It does not appear to be used for medical purposes such as activities of daily living or even instrumental activities of daily living. For example, he reports that he uses the electric scooters at the grocery store for shopping purposes. (Kirkham EME report, May 13, 2022).

18) On June 14, 2022, Employee was discharged from physical therapy with “no formal functional improvements in entire plan of care.” (Comstock daily note, June 14, 2022).

19) On January 4, 2023, Employer filed evidence it intended to rely upon at hearing, including a video reviewing the Afiscooter-S4. The video shows a man driving the scooter over manicured lawns, ground with uneven surfaces, including dirt and grass, and an eight-inch log on a sunny day. (Notice of Intent to Rely, January 4, 2023).

20) On January 4, 2023, PT Comstock testified at deposition she last saw Employee in a professional setting on June 14, 2022. (*Id.* at 5). She did not have any conversations with him about the Afiscooter-S4; another physical therapist at the office saw his scooter. (*Id.* at 13). Comstock has never seen an Afiscooter-S4 in Ketchikan. Occasionally she sees people in power wheelchairs going up and down the main drag, but it scares her because the sidewalks “aren’t great and it’s -- it’s not what we are used to in the Lower 48, you know, in terms of reliability, you know, for handicapped access; not to mention the weather and everything else. So it’s tough for electric vehicles.” (*Id.* at 21-22). Comstock does not know the specifications for the Afiscooter-S4. (*Id.* at 22). She also does not know the recreational activities Employee has done in the last 25 years but understands he wants to get into the back woods in Alaska. (*Id.* at 22-23, 26).

21) On January 6, 2023, Employee testified at deposition he recently moved to a new residence a few weeks ago in Ketchikan (Employee deposition at 5). He stores the Afiscooter-S4 inside and he last used the scooter three months ago to go shopping at Safeway but he cannot take it inside Safeway, so he uses a store scooter or his cane to walk through the store; he always has a cane. (*Id.* at 6, 31). Employee estimated he put five miles on the scooter that day to travel from his previous residence to the store and back. (*Id.* at 7). Employee wants a different scooter “to have some equality. I’d like to be able to go to the beach with my family, go do outdoor activities with them, go hiking -- or while they go hiking, at least be with them and be able to traverse the terrain. I’d like to go back -- I’d like to go fishing again, maybe even hunting. I’d like some equality in my life before my accident.” (*Id.*). He said the Afiscooter-S4 worked well on paved surfaces, sidewalks, city streets, without any rain but it shuts down when it rains, it gets stuck on grass, he ran out of battery, it “turns off in the middle of nothing.” (*Id.* at 8). Employee was not satisfied from the first day he got the Afiscooter-S4 when he “couldn’t turn it.” (*Id.* at 9). He was able to go around Ward Lake on a gravel trail, which is about a mile and video four was taken by Wallace at Ward Lake. (*Id.* at 13-14). Video four shows the scooter did not function in the environment, the front tires would leave marks in the gravel because you “can’t turn it,” the tires freeze up and leave the ground, there was no traction. (*Id.*). Video five was also taken at Ward Lake and shows Employee trying to go over the three-inch lip of the bridge on the trail from a dead stop. (*Id.* at 15). Employee was able to take the Afiscooter-S4 from his previous residence to physical therapy and back. (*Id.* at 18). He wants a scooter to be able to go to the

beach and get close enough to throw out a fishing line, go hiking with his family and go hunting with his friends. (*Id.* at 20). Of all the scooters Employee researched, the All-Terrain Hopper “seems to fit the bill” because it is waterproof, has four-wheel drive and it can be used in all seasons. (*Id.*). It is classified as an electric wheelchair. (*Id.*). The Afiscooter-S4 throws error codes when loading it in the back of his pickup. (*Id.* at 21). The video Employee submitted shows the error code he gets a lot. (*Id.*). Employee said he called a guy in Florida from the company that sold the Afiscooter-S4 to Employer and told him about the problems he was having, and he was told we could have a different tires put on. (*Id.* at 23-24). One video show Employee riding the scooter and getting stuck in grass. (*Id.* at 29).

22) On January 9, 2023, Dr. Kirkham testified at deposition he reviewed five videos of the Afiscooter-S4. (Kirkham deposition at 9). It is difficult to discern whether Employee is exaggerating deficiencies in the scooter or if it cannot do what he wants it to do. (*Id.* at 10). The purpose of a mobility scoot is to promote engagement in activities of daily living, which would be traveling to and from the store, visiting friends, performing activities around the home and improving the ability to work. (*Id.* at 15). Dr. Kirkham believes the Afiscooter-S4 is reasonable to get around Ketchikan to go to the store or to physical therapy for “community mobility.” (*Id.* at 18-19). But “advanced recreation like off-roading would not be considered medically necessary, although it would be considered fun.” (*Id.* at 19). Dr. Kirkham understood that Employee wants to be able to hunt, fish and go to the beach with his family, which are “more advanced recreational activities” he would encourage Employee to participate in. (*Id.* at 21-22). He considers those to be “luxury recreational activities”; reasonable and necessary mobility devices include a walker, cane, forearm crutches, braces, a wheelchair, and a motorized wheelchair in the worst-case scenario. (*Id.* at 23-25).

23) On January 19, 2023, Employee filed an affidavit of his attorney’s fees and costs. (Affidavit of Fees and Costs, January 19, 2023).

24) On January 24, 2023, Wallace testified she has known Employee for over 30 years and was in a romantic relationship with him. She filmed the videos of Employee using the Afiscooter-S4. Employee could only go around Ward Lake trail clockwise because the trail has two steps, and the scooter can go down but not up the stairs. He recently ended their relationship because of his limited physical capabilities. (Wallace).

25) On January 24, 2023, Samuels testified at hearing that Wallace is his aunt; she and Employee basically raised him. He was there when the videos were filmed at the end of the driveway at Employee's previous residence. Employee was unable to turn the scooter at the end of Employee's old driveway and the brakes "did not work" because the scooter would "slide." He did not go around Ward Lake with Employee. (Samuels).

26) On January 24, 2023, Employee testified at hearing he tried to use the Afiscooter-S4 for all the activities he "desired" to be able to do. The Afiscooter-S4 threw a code when it was wet when he went to town. Its turning radius was too large. The Afiscooter-S4 would get stuck on wet grass, and it did not go over obstacles, such as curbs and the bridge on Ward Lake trail. It threw a code when it was loaded in a vehicle. Employee researched mobility devices extensively when he found the All-Terrain Hopper; he selected that device because it has four-wheel drive and can operate in rain, snow and ice. Before the injury, Employee hiked, fished and biked. He would like equality, which to him means the ability to explore the outdoors, fish, and participate in family activities at the beach. Employee believes the Afiscooter-S4 is not suitable for the environment in Ketchikan. (Employee).

27) On January 24, 2023, Kay testified at hearing she was the adjuster when Employee was provided with the Afiscooter-S4. Employee can contact Mobility Direct for problems with his scooter but to her knowledge, Employee did not report issues with the machine functioning in rain. She heard from Employee that the scooter did not meet his expectations for outdoor activities. (Kay).

28) On January 24, 2023, Wheatley testified at hearing the Afiscooter-S4 has a manufacturing warranty, which could cover electrical issues with rain. He reviewed the videos submitted in October 2021 and the error code four is an error which occurs when the scooter is used "very aggressively" and requires resetting the motor switch. It does not occur when the scooter is exposed to water. He thought Employee could benefit from education on the scooter's capabilities, and larger back tires to resolve getting stuck in wet grass; larger "golf tires" are available for this model. The Afiscooter-S4 can go over short curbs, four to five inches, but going over it at ten miles per hour would be "violent." A ramp would be required for curbs over five inches. The turning radius is larger because the machine is larger. The only way to have a tighter turning radius would be to switch to a three-wheel model, which would have less capabilities than the Afiscooter-S4. The brakes are electromagnetic, which stop motion using

electromagnetic force. The brakes release when the throttle is engaged, and when the throttle is released, the brakes re-engage causing the scooter to stop quickly. For emergency braking, a hand brake is supplied. A technician can be sent to repair brake issues but if the brakes are working properly, the customer must pay for the technician visit. The Afiscooter-S4 can work in everyday rain but not heavy rain and not when submerged in water. Wheatley has provided the Afiscooter-S4 to customers all over the lower 48 states and Alaska. He has driven the Afiscooter-S4 in the rain and into the ocean in Florida and the scooter functioned properly. (Wheatley).

29) At hearing, Employee requested attorney's fees be added for the 1.9 hours his attorney spent while attending the hearing. (Record).

30) On January 30, 2023, Employer opposed Employee's attorney's fee affidavit. (Employer's Opposition to Employee Attorney's Fee Affidavit, January 30, 2023).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

. . . .

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The Board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *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. . . . 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. . . .

When the Board reviews a claim for medical treatment made within two years of an undisputed work-related injury, its review is limited to whether the treatment sought is reasonable and necessary. *Philip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727 (Alaska 1999). *Hibdon* addressed reasonable 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). (*Id.* at 732).

When reviewing a claim for continued treatment beyond two years from the date of injury, the Board has discretion to authorize “indicated” medical treatment “as the process of recovery may require.” *Id.* With this discretion, the Board has latitude to choose from reasonable alternatives rather than limited review of the treatment sought. *Id.*

In *Bryce Warnke-Green v. Pro West Contractors, LLC*, AWCAC Decision No. 235 (June 26, 2017), the permanently and totally disabled worker filed a claim seeking a new modified van. The injured worker owned a Chevy Suburban at the time of the injury, which did not run. The Alaska Workers’ Compensation Appeals Commission held any increased cost associated with the purchase of a modifiable motor van and any necessary modifications are encompassed in “apparatus” under AS 23.30.095(a) and are compensable medical benefits:

There is no dispute that if an injured worker requires a wheelchair for mobility the employer must provide it. Just as an injured worker must be provided with a wheelchair for mobility, so does a quadriplegic worker require a modified van to provide mobility for accomplishing the basic activities of daily living. Non-injured workers utilize their earnings towards the purchase of transportation. So too, should the injured worker contribute towards the cost of transportation, but the employer is responsible for the increased costs necessitated by the work injury. (*Id.* at 15).

In *Warnke-Green*, the parties agreed it was reasonable for the injured worker to contribute the value of his vehicle. *Id.* at 16.

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the

weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

AS 23.30.130. Modification of awards. (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year . . . whether or not a compensation order has been issued . . . 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. . . .

For an alleged factual mistake, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. Modification under AS 23.30.130(a) "is not appropriate when a party is seeking to" change the result of a decision "based on an allegation that the board committed a mistake of law." *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743-44 (Alaska 2005).

The substantial evidence standard is applied to requests for modification. *Interior Paint Co. v. Rodgers*, 522 P.2d 164 (Alaska 1974). "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, 611-12 (Alaska 1999).

The Alaska Supreme Court discussed AS 23.30.130(a) in *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158, 162 (Alaska 1996), and said "under this statute, the Board 'is granted broad discretion to modify its prior decisions and findings' and may modify its prior factual findings if it finds they were mistaken" (citations omitted). "The concept of 'mistake' requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a backdoor route to retrying a case because one party thinks he can make a better showing on the second attempt." *Rodgers* at 169 (citing 3 Larson, *The Law of Workmen's Compensation* § 81.52, at 354.8 (1971)).

When a party seeks modification based on a mistake of fact and desires to present new evidence, the key element in the regulation is the requirement the new evidence could not have been discoverable prior to the hearing through due diligence. *Lindhag v. State, Dept. of Natural Resources*, 123 P.3d 948 (Alaska 2005). Due diligence requires the new evidence “could not” have been developed prior to hearing, and it is not an abuse of discretion to reject a petition for modification when the evidence simply “was not” developed. *Id.* at 957. Strict compliance with specific pleading requirements at 8 AAC 45.150(d) may not always be required. *Griffiths v. Andy’s Body & Frame, Inc.*, 165 P.3d 619, 624 (Alaska 2007) (pro se claimant following instructions set forth in a prior decision and order); *Sulkosky* at 164 (petition sufficiently specific to allow the board to identify the facts challenged).

In *Burke v. Raven Electric, Inc.*, 420 P.3d 1196 (2018), the Board dismissed a claim seeking death benefits and damages filed by the mother of a worker killed on the job. The Commission affirmed and ordered the mother to pay the employer’s attorney fees and costs, and the mother appealed. The Court affirmed the dismissal of the claim and held the exclusive remedy of the Act did not violate the mother’s right to due process and equal protection. It noted:

The workers’ compensation system consists of a trade-off, sometimes called the “grand bargain,” in which workers give up their right to sue in tort for damages for a work-related injury or death in exchange for limited but certain benefits, and employers agree to pay the limited benefits regardless of their own fault in causing the injury or death. This system has been in place in the United States for over a century and has withstood constitutional challenge. New York’s workers’ compensation statute was found constitutional under the United States Constitution in 1917. New York’s compensation law became the model for the federal Longshore and Harbor Workers’ Compensation Act, which in turn served as the model for Alaska’s Act.

As *Larson’s Workers’ Compensation Law* observes, workers’ compensation in the United States is similar to “social insurance” because “the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame,” even though the funding mechanism for the system is “unilateral employer liability.” *Larson’s* observes that “[a] compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he or she has lost.” Instead, the goal of workers’ compensation is to “give[] claimant a sum which, added to his or her remaining earning ability, if

any, will presumably enable claimant to exist without being a burden to others.” (Citations omitted). *Id.* at 1202-03.

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. . . .

(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. . . .

AS 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied. . . .

AS 44.62.540 limits authority to reconsider and correct a decision under this section to 30 days. The appropriate recourse “for allegations of legal error” is a direct appeal or petition to the Board for reconsideration of the decision under AS 44.62.540(a). *Lindekugel*, 117 P.3d at 743, n. 36, 744 (Alaska 2005).

8 AAC 45.150. Rehearings and modification of board orders. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.

(b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

- (1) the facts upon which the original award was based;
 - (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
 - (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
- (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.
- (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

ANALYSIS

1) Should *Bennett I* be modified?

Parties have up to one year following a decision to request modification based on a factual error. AS 23.30.130; *Lindekugel*. *Bennett I* issued on May 21, 2021. On February 17, 2022, Employee filed a claim requesting modification of a determination of fact and contended the Afiscooter-S4 “fails to conform to the representations made by defense at prior hearing.” While 8 AAC 45.150(b) requires a party to file a petition requesting modification of an order, Employee’s claim requesting modification was timely filed. AS 23.30.130(a). However, Employee’s claim failed to set out specifically and in detail the facts upon which the original award was based, the facts alleged to be erroneous and the effect that a finding of the alleged mistake would have upon the existing order, and he did not provide an affidavit stating the reason why the newly discovered evidence could not have been discovered and produced for *Bennett I*. 8 AAC 45.150(d). Employee’s claim is a bare allegation and it failed to provide details sufficient to permit the identification of the challenged facts in *Bennett I* to permit review. 8 AAC 45.150(e); *Rogers & Babler*. Employee’s claim for modification will be denied.

Alternatively, had Employee provided more than a bare allegation and details sufficient to permit the identification of the challenged facts in *Bennett I* to permit review, he failed to provide substantial evidence of a factual mistake. AS 23.30.130(a); *Rodgers; Tolbert*. *Bennett I* found the Afiscooter-S4 a reasonable mobility device under AS 23.30.095(a) and ordered Employer to provide it, and not the All-Terrain Hopper, because Dr. Kirkham and Ms. Comstock agreed the Afiscooter-S4 would meet Employee's mobility needs, Mr. Wheatley credibly testified the Afiscooter-S4 would be able to handle uneven terrain, steep slopes and inclement weather, the Afiscooter-S4 is significantly less expensive than the All-Terrain Hopper and it was adequate to meet Employee's needs. Employee continues to request an order awarding the All-Terrain Hopper because he wants to use it to go hunting, fishing and hiking as he did prior to the work injury. He contends the Afiscooter-S4 is unable to operate in Ketchikan and perform those activities because it is limited in its ability to turn, to operate in heavy rain and snow, and to navigate uneven terrain. Employee submitted videos he contended depict the Afiscooter-S4's inability to perform in Ketchikan.

Employee contended the Afidscooter-S-4 throws a code and is not operable when he has ridden it to town and on Ward Trail. The only error code Employee provided was error code four. Neither video Employee submitted depicting error code four shows what occurred prior to the code. Wheatley credibly testified error code four is given when the scooter is driven "very aggressively" and does not occur from the scooter being exposed to too much water. AS 23.30.122; *Smith*. The manual states the Afiscooter-S4 should not operate for extended time in heavy rain and Wheatley credibly testified it can operate in rain but not when submerged in water. *Id.* The manual also recommends wide turns and reducing speeds when cornering sharply to prevent tipping. Employee testified he used the Afiscooter-S4 to travel from his home to physical therapy and to the grocery store and back, requiring him to navigate slopes and to turn. He and Wallace testified he was also able to complete Ward Lake trail clockwise, including traversing down two steps. The video submitted by Employer on January 4, 2023 demonstrates an Afiscooter-S4 can be driven over an eight-inch log. Video four demonstrated Employee was able to maneuver a turn and navigate from grass to a dirt trail on Ward Lake at a shelter. Thus, Employee has used the Afiscooter-S4 to navigate uneven terrain and turn. The manual states the Afiscooter-S4 can go over obstacles as high as five inches and slopes up to

11.3 degrees or 20 percent grade but the ability to traverse inclines and obstacles depends on the speed of travel and the angle of approach. Videos one and two submitted by Employee do not show his speed and angle of approach in his attempt to operate over uneven terrain and grass. Videos five and six submitted by Employee show he tried to overcome a three-inch obstacle, the bridge on Ward Lake trail, from a standstill. Employee and Wallace testified he was able to complete the Ward Lake trail, so he successfully navigated over the obstacle depicted in the video. Videos one, two, five do not demonstrate the Afiscooter-S4 could not operate over uneven terrain and over obstacles. Therefore, the videos Employee submitted are not substantial evidence the Afiscooter-S4 is unable to operate in Ketchikan. There is substantial evidence the Afiscooter-S4 is operable in an inclement environment, including rain, and in moderately uneven terrain, including slopes and obstacles. *Rogers & Babler*.

Employee contended the Afiscooter-S4 is not capable of performing in all environmental conditions experienced in Ketchikan, such as heavy rain and large obstacles, and he cannot explore areas he used to before to the work injury, such as beaches and areas available for hunting, hiking and fishing. Employee's contention *Bennett I* erred because the Act requires an employer to provide a mobility apparatus to enable an injured worker to complete the same recreational activities he did before the work injury is a contention of a legal error. A legal error falls under a request for reconsideration and cannot be considered because Employee did not timely request reconsideration. AS 44.62.540(a); *Lindekugel*. An employee is entitled to a mobility apparatus to accomplish the basic activities of daily living which is reasonable and necessary. AS 23.30.095(a); *Hibdon; Warnke-Green; Burke*. Employee's desire to hunt, fish and hike as he did before the work injury does not prove the Afiscooter-S4, which cannot perform as Employee desires, is inadequate to meet his need for a device to accomplish "community mobility" as prescribed by his physician. *Bennett I* found Employee was entitled to a reasonable mobility device and found the Afiscooter-S4 was reasonable, not the All-Terrain Hopper, after considering Employee's physical capabilities, his physician's recommendation, the capabilities of the Afiscooter-S4 and the cost of both. Based upon the above analysis, Employee has not provided substantial evidence *Bennett I* made a factual mistake. *Rodgers; Tolbert*. Therefore, *Bennett I* will not be modified. Employee is not entitled to an All-Terrain Hopper; his claim for medical benefits will be denied.

