ALASKA WORKERS' COMPENSATION BOARD

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

JOLENE MAIYUAQ GEERHART, Employee, Claimant, v. YUKON KUSKOKWIM HEALTH CORPORATION, Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 202204600 AWCB Decision No. 23-0020 Filed with AWCB Anchorage, Alaska on April 4, 2023

Jolene Geerhart's (Employee) claims were heard on February 16, 2023, in Anchorage, Alaska, a date selected on December 8, 2022. An October 11, 2022 hearing request gave rise to this hearing. Attorney Keenan Powell appeared telephonically and represented Employee, who also appeared telephonically and testified. Attorney Jeffrey Holloway appeared and represented Yukon Kuskokwim Health Corporation (YKHC) and its insurer (collectively, Employer). Other witnesses included Mark Craig, Cheaney Weaver, Chris Beltzer and Sharona Hlavinka all of whom testified for Employer. The hearing record remained open for additional filings from both parties and closed on March 3, 2023, after the Workers' Compensation Division (Division) received Employer's response to Employee's supplemental attorney fee affidavit.

ISSUES

Employee, injured in October 2021, contends Employer incorrectly based her compensation rate on wages earned in 2020 while she worked at a lower paying job before becoming a nurse. She contends Employer's calculation did not fairly predict her lost future earnings as a nurse. Employee seeks a higher temporary total disability (TTD) compensation rate.

Employer contends it voluntarily increased Employee's compensation rate to account for her school attendance in 2019 and 2020, because she did not become employed as a nurse until March 2021. It contends Employee's wages earned after her work injury cannot be used to calculate her compensation rate. Employer seeks an order denying an additional compensation rate increase.

1) **Is Employee entitled to a compensation rate increase?**

Employee contends Employer failed to pay her TTD benefits owed for four days between June 2 and June 5, 2022. She seeks an order awarding additional TTD benefits for those four days.

Employer contends it paid Employee TTD benefits for all dates on which she was entitled to them, including these four days, and overpaid her. It contends Employee's TTD benefit claim is "frivolous" and "false" because Employer already paid her for those days. Moreover, Employer contends Employee has no physician authorizing disability for those days. It seeks an order denying her claim for additional TTD benefits.

2) **Is Employee entitled to additional TTD benefits?**

Employee contends Employer never petitioned to recover any alleged benefit overpayments, so this decision may not address that issue.

Employer contends Employee was not entitled to TTD benefits on days post-injury on which she was never scheduled to work. It contends if Employee is entitled to any disability benefits it would be temporary partial disability (TPD) benefits, which she never claimed. It further contends Employee's choice to travel to Anchorage several days before a medical appointment, or to remain there too long, was not the result of "disability," but was her choice. Employer contends it

nevertheless paid Employee full TTD benefits for all these dates, resulting in an overpayment, which it contends it should be able to recoup.

3) Is Employer's overpayment issue ripe for decision?

Employee contends Employer frivolously or unfairly controverted compensation by failing or refusing to pay TTD benefits timely for October 19, 2021 through October 20, 2021, and for May 30, 2022 through June 8, 2022. She contends Employer never formally controverted TTD benefits for October 19, 2021 through October 20, 2021. Employee contends after she was disabled for 28 days, Employer had a statutory duty to pay TTD benefits for October 19, 2021 through October 20, 2021, but failed to pay these benefits timely. She requests a frivolous or unfair controversion or controversion-in-fact finding and a referral to the Workers' Compensation Division director for referral to the Division of Insurance pursuant to AS 23.30.155(o).

Employer contends it did not pay Employee TTD benefits for October 19, 2021 and October 20, 2021 untimely, because it was not aware a physician restricted her work on those dates, until Employee filed a medical summary with a note so stating on September 6, 2022. It further contends Employee was not scheduled to work on October 20, 2021, so it did not have to pay her TTD benefits for a day that would have been her normal day off. As to Employee's claim it failed or refused to pay TTD benefits timely for May 30, 2022 through June 8, 2022, Employer contends it did not have to pay these benefits because Employee's physician released her to restricted work on May 3, 2022, and it accommodated her restrictions. Moreover, it contends Employee chose to travel to appointments in Anchorage early and stay longer than needed in May and June 2022. Thus, it contends those dates were not compensable. Notwithstanding Employer paid Employee benefits for these days, it contends since no TTD benefits were due during that period, Employer could not have frivolously or unfairly controverted those benefits.

4) Did Employer frivolously or unfairly controvert Employee's benefits?

Employee contends Employer failed to pay her TTD benefits timely. She seeks additional compensation commonly referred to as a "penalty" pursuant to AS 23.30.155(e).

Employer contends no penalty is owed for benefits it eventually paid Employee for October 19, 2021 and October 20, 2021, because she failed to produce a work restriction note until September 6, 2022, and it paid benefits for those two days timely on September 26, 2022. Further, it contends it already paid Employee a penalty on TTD benefits for October 19, 2021 and October 20, 2021, for May 30, 2022 through June 1, 2022, and for June 6, 2022. Moreover, Employer contends no penalty is warranted on TTD benefits for June 2, 2022 through June 5, 2022, because it lacks medical disability authorization for those dates, Employee was not scheduled to work those dates and she elected to "vacation" in Anchorage when she could have returned home to Bethel. It contends nonpayment or late payment without a controversion before Employee filed her claim cannot be subject to a "controversion-in-fact" allegation. Alternately, Employer contends if any TTD benefit payments were late, tardiness resulted because Employee failed to produce medical records documenting disability until September 6, 2022, and October 3, 2022, so no TTD benefits were "due." It contends Employee's request for a penalty is "pernicious" and violates Civil Rule 11. Lastly, Employer contends after all "the good" Employer did post-injury, Employee still seeks additional compensation, which it contends is simply to increase her attorney's fees.

5) Is Employee entitled to a penalty?

Employee contends she is entitled to interest on all late- or non-paid TTD benefits and on any compensation rate adjustment.

Employer contends it owes Employee no additional benefits. Therefore, it contends she is entitled to no interest. Notwithstanding, Employer contends it already paid Employee interest.

6) Is Employee entitled to interest?

Employee contends Employer controverted her claim for a compensation rate adjustment and her attorney's efforts resulted in her obtaining significant benefits. She contends her lawyer is entitled to attorney fees.

Employer contends Employee's attorney is entitled to no fees, or at best statutory minimum attorney fees, because litigation has been "entirely unnecessary" and "solely perpetuated" by

Employee. It contends it voluntarily increased Employee's compensation rate rather than requiring a hearing. Employer contends it owes nothing more and Employee's "perpetuating litigation of moot issues" is a "pernicious" violation of Civil Rule 11.

7) Is Employee entitled to attorney fees?

FINDINGS OF FACT

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

1) In 2019 Employee was in nursing school, full-time and did not work; she worked as a flagger in summer 2020, and earned $9,177.13. Between graduating from nursing school on December 11, 2020, and beginning work for Employer, Employee was studying for the test to become a licensed nurse and did not apply for any jobs. (Employee).

2) On March 21, 2021, Employee began working as a nurse for Employer, initially earning $44 per hour. She worked one week on, one week off, 12 hours per day. Employee did not request extra shifts during her off weeks while working for Employer. (Employee).

3) Employee grossed $4,301.34 for pay period October 3, 2021 through October 16, 2021. (Employee; Employer's hearing Ex. 19).

4) On October 17, 2021, Employee was moving a bedridden patient when she injured her right upper extremity. (First Report of Injury, October 18, 2021; Employee).

5) For pay period October 17, 2021 through October 30, 2021, Employee grossed only $4,014.29 because her injury took her off work on October 19 and 20, 2021. On the injury date, Employee's pay included $2.00 per hour shift differential; $22.27 per hour overtime premium; and $2.00 per hour shift and weekend pay. (Employee).

6) On October 18, 2021, Employee's initial treatment for this injury was at YKHC's Emergency Room. (Weaver). Tara Lathrop, MD, at YKHC removed Employee from work from October 18, 2021 through October 20, 2021. (Lathrop note, October 18, 2021). Employee worked on October 18, 2021, and received wages. She returned to light-duty work on October 25, 2021, and continued working for Employer in that status until she required surgery in 2022. (Employee).

7) It is common for Employer's workers who are injured on the job, to treat at Employer's emergency room. Notwithstanding Employee's first post-injury treatment was with YKHC's emergency room, Dr. Lathrop's records would not be shared with the adjuster without a medical

record release and Employee would be treated just like any other patient. Employer's insurer would have no special access to Employee's records because she worked at YKHC. Employee's YKHC records are not automatically available to the risk manager. If the adjuster wanted to obtain Employee's medical records from YKHC, they would need a signed medical record release from her and submit a request. (Beltzer).

8) In the days immediately following Employee's injury, Weaver who first adjusted the case had no medical documentation removing her from work. Weaver's October 20, 2021 notation stating Employee "was given 2 days off for rest" simply repeated what Employee told her; it was not based on medical evidence. (Weaver).

9) On October 19, 2021, Weaver asked YKHC's billing department for Employee's medical records and bills. While she was handling the claim until June 2, 2022, the only medical information Weaver had for this case was a magnetic resonance imaging (MRI) notice. (Weaver).

10) On December 16, 2021, Scot Hines, MD, recommended Employee have an orthopedic evaluation. (Hines report, December 16, 2021).

11) While working for Employer in 2021, Employee grossed $101,635.14. (Employee). This included an irregular one-time $10,000 hiring bonus. Beltzer also identified an irregular Covid "Hero's Bonus" for employees who worked during the pandemic. He testified $3,168 Employee received in 2022 was this Covid bonus. Employee's 2021 pay stubs show a $3,203.20 "Bonus," but Beltzer did not state that too was an irregular Covid bonus. (Beltzer).

12) Absent the irregular $10,000 hiring bonus, Employee earned $91,635.14 in 2021. (Brief of Yukon Kuskokwim Health Corp., February 8, 2023; Employer's hearing Ex. 19).

13) On April 7, 2022, Employer's Human Resources Department sent Employee a letter stating:

> Your position has undergone a compensation review, and based upon this review YKHC has determined an adjustment of your pay is appropriate.
>
> Effective March 20, 2022, your new pay rate will be $60.23. This new rate will apply to work performed on and after March 20th. No retroactive adjustments to pay will be made.
>
> Nothing in this letter changes your status as an at-will employee, which means that either you or YKHC may terminate the employment relationship and YKHC may alter your compensation and other terms and conditions of employment at any time, subject to any applicable agreement between you and YKHC. Please contact your manager or the HR Department with any questions or concerns.

> Thank you for your service to YKHC. We appreciate having you as a member of our team.
>
> Sincerely,
>
> Human Resources Department (Letter, April 7, 2022).

14) Employee's March 20, 2022 pay increase went into effect before she traveled to Anchorage in May 2022 for surgical evaluation and became disabled. (Employee).

15) On March 21, 2022, Weaver again asked YKHC's billing department for medical records and billing. (Weaver).

16) On April 12, 2022, Employee called Weaver and said she had a medical appointment at Alaska Native Medical Center (ANMC) in Anchorage for May 3, 2022; Employee said, "she will make travel arrangements." Weaver has never refused to make medical travel arrangements for an injured worker since she has been an adjuster; her notes document no such conversation with Employee. If an injured worker told Weaver she needed to travel to obtain medical care, she would explain medical travel was a "reimbursement program" and any travel, lodging, cabs or meals would be reimbursed after the worker's return. However, if there was a financial hardship, Weaver would offer to make travel arrangements unless she received notice from the injured worker too late to accommodate direct billing. If an injured worker did not have adequate funds to get to their treatment, Weaver would accommodate their situation. Employee never asked Weaver if she could take her husband with her to Anchorage; there is also no such file notation. There is no notation Employee asked for a first-class flight because her shoulder hurt; medical documentation is required for such a request. (Weaver).

17) On May 3, 2022, orthopedic surgeon Marc Kornmesser, MD, at ANMC evaluated Employee and recommended further diagnostic studies. (Kornmesser report, May 3, 2022).

18) On May 3, 2022, Dr. Kornmesser continued Employee's accommodated work restrictions until she completed an x-ray and an MRI. (Kornmesser report, May 3, 2022).

19) On May 3, 2022, Employee had the x-ray. (X-ray report, May 3, 2022).

20) On May 4, 2022, Craig received an email from Employee stating she had an MRI scheduled for May 31, 2022; he offered to give her May 30, 2022 off as well and she accepted that offer. Had she not taken May 30, 2022 off, she could have worked that day and left for Anchorage on May 30, 2022, for her May 31, 2022 MRI. (Craig).

21) At hearing, Employee initially testified she left Bethel on May 29, 2022, for her May 31, 2022 MRI appointment in Anchorage. She thought there were only two flights per day from Bethel to Anchorage, so she booked the May 29 flight not knowing Alaska Airlines added an additional flight on May 30, 2022. Employee later corrected her testimony and agreed she and her husband flew May 30, 2022 to Anchorage for her May 31, 2022 MRI. She had to check in with her provider at 6:45 AM on May 31, 2022, to be on time for her MRI. Employee booked first-class tickets for her and her husband because if she had to pay her own way, she was going to be "comfortable"; her shoulder hurt, and she did not want someone sitting next to her to bump it. The adjuster never said she could not fly first-class. Her husband stayed with her until a June 3, 2022 MRI because she is afraid of needles and had a contrast injection with the MRI. (Employee).

22) In Hlavinka's opinion, and based on Employee's husband's ticket, Employee could have flown out after work on the evening of May 30, 2022, before her first May 31, 2022 appointment at 6:45 AM, in which case Employer would not have been obligated to pay disability benefits for the day prior to the doctor's appointment. (Hlavinka).

23) On May 31, 2022, Employee had a right elbow MRI and right shoulder x-rays at ANMC. (MRI report; x-ray report, May 31, 2022).

24) On May 31, 2022, Dr. Kornmesser offered Employee right elbow surgery and continued her on accommodated light duty work. (Kornmesser report, May 31, 2022).

25) Employee testified she called Weaver on May 31, 2022, after her doctor had scheduled a second MRI for June 3, 2022. She testified Weaver never offered to pay for medical travel in advance; Employee was told to pay for it herself and then seek reimbursement. It is unclear if Employee was stating she had this reimbursement conversation on May 31, 2022, or at some other time. Employee initially testified she was scheduled to work June 1, 2022, but was expecting to have elbow surgery right after the May 31, 2022 MRI. It turned out she needed another MRI on June 3, 2022. (Employee).

26) Weaver records emails, phone calls and all communications in the adjusting file; she has a "notepad" to record any contact with an injured worker; these are called "log notes." It is important to accurately document everything properly so if another adjuster reviews the file, they can have an accurate case history. Typically, Weaver records her log notes in the file as she makes them; she writes them down and types them into the notepad later. The conversations are not recorded verbatim, but every topic discussed is included in the notation. (Weaver).

27) There is no documentation in the adjuster's file of any communication from Employee on May 31, 2022, after her MRI and subsequent appointment with Dr. Kornmesser. (Weaver).

28) There is nothing in the adjusting file showing Employee called Alaska National Insurance Co. (Alaska National) on May 31 or June 1, 2022, after her appointment with Dr. Kornmesser, to mention the June 3, 2022 MRI. Hlavinka found nothing in Employee's adjusting file showing her intent to remain in Anchorage the entire time until surgery on June 10, 2022; typically, patients return home if there is that much delay between treatments. (Hlavinka).

29) Employee testified she called Weaver on Thursday, June 2, 2022, to say her doctor's office had given her June 3, 2022 MRI appointment to another patient. She testified she told Weaver her MRI appointment was moved to Tuesday, June 7, 2022. At this point in her hearing testimony, Employee offered it was too expensive to return to Bethel in the interim because it would cost $1,500 just for her husband's ticket and she could not afford it. While questioning Employee on direct examination, Powell stated Employee remained in Anchorage from June 2, 2022 through June 6, 2022, and stated Employee had so informed the adjuster; however, on direct examination Employee did not testify she told the adjuster on June 2, 2022 that she was staying in Anchorage from June 2, 2022 through June 6, 2022. (Employee; record).

30) On direct examination, Employee did not testify she asked Weaver if Alaska National would pay to fly her or her husband home to Bethel. On cross-examination, Employee testified that on June 2, 2022, she told Weaver she could not afford to come home. When she spoke to Weaver on June 2, 2022, Weaver did not offer to fly her home to await the June 7, 2022 MRI. Had Weaver flown Employee home to Bethel on June 2, 2022, Employee said she was not scheduled to work that week, contradicting her prior testimony. (Employee).

31) Employee later testified she told "the adjuster" on June 2, 2022 that she was still in Anchorage. She did not ask if she could stay in Anchorage for the week until surgery, because she did not know she had to ask; she queried "why didn't she ask me?" (Employee).

32) On June 2, 2022, Weaver talked to Employee who said she had gotten her May 31, 2022 MRI results; she needed another MRI for her shoulder on June 7, 2022. As of June 2, 2022, Employee had not given Weaver any information about travel arrangements she had made to Anchorage; had she done so it would be documented in the claims file and it is not. Weaver was not aware Employee had a ticket to Anchorage for her MRI with an original return date of June 1, 2022. When Weaver spoke to Employee on June 2, 2022, Employee did not tell her she had

remained in Anchorage the prior two days; they never talked about her physical location and Weaver did not know Employee was in Anchorage when speaking with her. When Weaver entered her June 2, 2022 notation, the only information she had about Employee's MRI and follow-up appointment with Dr. Kornmesser was from the scheduling document. When Weaver spoke to Employee on June 2, 2022, Employer never told her Dr. Kornmesser had scheduled another MRI for June 3, 2022. The only MRI Weaver and Employee spoke about on June 2, 2022, was the one scheduled for June 7, 2022. Had Employee told Weaver she had an MRI scheduled for June 3, 2022, that had been moved to June 7, 2022, Weaver would have recorded it in her file and there is no such notation. When Weaver spoke with Employee on June 2, 2022, Employee did not tell her she had arranged to fly back to Bethel on June 10, 2022, and would remain in Anchorage in the interim. She did not tell Weaver she had already changed her return ticket from June 1, 2022 to June 10, 2022, or that she made these changes on May 31, 2022. Weaver and Employee never discussed Employee wanting to return home to Bethel to await her June 9, 2022 surgery and Employee never asked for financial assistance in returning home. There was no discussion about potential time-loss benefits during the week she spent in Anchorage waiting for her surgery. Weaver agreed this looked like a "don't ask, don't tell" situation. On June 2, 2022, Weaver transferred the case to Hlavinka because it was no longer "medical only." (Weaver).

33) On June 2, 2022, when Employee found out her June 3, 2022 MRI had been rescheduled to June 7, 2022, she made no plans to return home to Bethel and come back for the June 7, 2022 appointment. Employee and her husband decided her husband should go home. She kept her original ticket and planned to stay in Anchorage for the entire week and return on June 10, 2022, after her surgery. Employee testified she "had to" stay in Anchorage because she did not have funds to change her ticket. (Employee).

34) On June 3, 2022, Hlavinka emailed ANMC and stated, "We haven't seen any bills or chart notes to date, so I'm not sure if you have us down for billing." She noted Employee was "apparently scheduled for surgery 06/09," and asked ANMC if it would email or fax bills and notes to her. On this date Hlavinka still had no medical record for the May 31, 2022 MRI or the follow-up appointment with Dr. Kornmesser. (Hlavinka).

35) On June 3, 2022, Hlavinka emailed Employee to introduce herself and asked her to have her provider send medical records directly to Hlavinka promptly. She asked, "do you have flight/hotel arranged already or do you need help with this?" Hlavinka asked if she needed an escort and if

so, "please have the physician write a note about this." She sent Employee this email because she thought Employee was in Bethel; Hlavinka was not aware she had remained in Anchorage. She typically helps claimants who are having surgery schedule travel, so she knows when they are "coming in and when they're coming out." Since Employee had previously stated she made her own travel arrangements, Hlavinka assumed Employee made them and returned to Bethel rather than stay in Anchorage, which is why Hlavinka never offered to fly her back to Bethel. (Hlavinka).

36) On June 6, 2022, Employee emailed Hlavinka, "I paid my way over and my husband is coming in on the evening flight and we are staying at [ANMC] patient housing." She also emailed Hlavinka an airline flight change document for her husband to return from Anchorage to Bethel; she ordered a change to her own ticket to return to Bethel on June 10, 2022. Employee's response said nothing about being in Anchorage for the entire week. Hlavinka did not receive the medical chart notes for the MRI until long after Employee had filed her claim. (Hlavinka).

37) On June 6, 2022, Jeremy Wood, MD, saw Employee in Anchorage for a non-work-related issue while she was waiting for her right shoulder MRI. Employee testified she had "nothing better to do." (Wood report, June 6, 2022; Employee).

38) On June 7, 2022, Employee had a right shoulder MRI at ANMC. (MRI report, June 7, 2022).

39) On June 7, 2022, Employee sent a new plane ticket itinerary for round-trip travel for her husband; Hlavinka reimbursed Employee for these. Not found among the documents Employee emailed Hlavinka were the original travel arrangements for May 30, 2022. (Hlavinka).

40) On June 8, 2022, Employee told Dharti Patel, PA-C, she was scheduled to have surgery for her right forearm pain with Dr. Kornmesser "soon." He reviewed Employee's right shoulder pain and told her Thomas Keller, MD, recommended a corticosteroid injection. Employee declined, citing her needle phobia, but would undergo diagnostic shoulder arthroscopy rather than a steroid injection. She was to schedule shoulder surgery after recovering from her right forearm operation. (Patel report, June 8, 2022).

41) On June 8, 2022, Dr. Kornmesser continued Employee's accommodated work restrictions until July 8, 2022. (Kornmesser report, June 8, 2022).

42) Employee testified she had elbow surgery on June 8, 2022, and was off work recovering from that until August 2, 2022; thereafter she worked one scheduled week and was off one scheduled week; her shoulder surgery was August 22, 2022. (Employee).

43) On June 9, 2022, Dr. Kornmesser operated on Employee's right forearm and stated she was temporarily totally disabled from June 9, 2022 until August 9, 2022. (Operative Report; Kornmesser report, June 9, 2022).

44) On June 13, 2022, Hlavinka asked Employee to send receipts from flights and her tax W-2s and said upon receipt she would reevaluate her rate figures. (Hlavinka).

45) On June 14, 2022, Hlavinka emailed Employee and said, "Please send your W-2s for your other employer for 2021/2020 and if you have easy access to your YKHC one please send that. (I've asked YKHC for it but I haven't rec'd it yet)." (Email, June 14, 2022).

46) On June 14, 2022, Employee sent her airline ticket receipts to Hlavinka on the day she testified Hlavinka asked for them. She did not have a doctor's note stating she needed to fly first-class between Bethel and Anchorage and testified Hlavinka did not reimburse her for the full first-class ticket price. Employee agreed Hlavinka paid for her husband's ticket. (Employee).

47) On June 14, 2022; Hlavinka received Employee's flight information in emails Employee forwarded from Alaska Airlines. She reimbursed Employee in full for her travel, including her first-class tickets; she did not reduce the first-class fare to a lower fare. Ordinarily, Hlavinka would not reimburse for first-class airfare for medical travel without medical documentation stating such travel was medically necessary; she was trying to avoid litigation. (Hlavinka).

48) On June 17, 2022, Hlavinka emailed Employee again and stated she realized her injury date was in 2021, and requested "the W-2s from 2020 and 2019." (Email, June 17, 2022).

49) Prior to June 17, 2022, Hlavinka had no medical documentation setting forth any total disability restrictions. (Hlavinka).

50) On June 17, 2022, there was no medical evidence in the adjuster's file restricting Employee from work from May 30, 2022 through June 7, 2022; Employee has still not provided any medical documentation for total disability for this period. Hlavinka usually does not begin time loss without medical documentation, unless surgery is scheduled, she knows the surgery date and can begin disability benefits from the surgery date. As of June 17, 2022, Hlavinka had evidence in the file showing Employee was working full-time at accommodated light duty. (Hlavinka).

51) On June 17, 2022, Hlavinka made her first disability payment to Employee and paid her TTD benefits from June 7, 2022 through June 20, 2022, initially at $308 per week; this rate continued through August 2022. She began paying time loss on June 7, 2022, because she understood there was an MRI and travel, and documented it in her June 17, 2022 notepad entry.

Hlavinka determined this $308 weekly rate based on Employee's 2020 W-2 earnings, which if divided by 50, would have resulted in a $180 per week rate. Rather than petition to lower the rate, Hlavinka decided to pay the 2021 minimum $308 weekly rate instead. At that time, Hlavinka knew Employee believed this rate was too low and unfair. (Hlavinka).

52) On June 17, 2022, Hlavinka emailed Employee and asked for a medical note stating it was a medical necessity for her husband to accompany her to her MRI. (Hlavinka).

53) In an undated letter, Jane Koo, RN, Case Manager for ANMC, stated:

> Jolene was initially scheduled with Dr. Kornmesser from ANMC Orthopedic to follow-up on her R forearm pain on 05/31/22. Preop office visit with Dr. Kornmesser was scheduled on 06/08/22 and Forearm surgery done on 06/09/22 -- which required escort. Patient was also seen with Dr. Keller from Orthopedic on 06/08/22 for her R shoulder pain -- MRI of the R shoulder with contrast was required prior to this follow-up with Dr. Keller -- escort again was required due to patient being claustrophobic and needing antianxiety medication prior to this imaging on 06/07/22 (this MRI was rescheduled from 06/03/22 due to scheduling error). (Koo letter, undated).

54) On June 17, 2022, Employee emailed Hlavinka airline change information showing a change to Employee's husband's ticket made on May 31, 2022. This email stated, and advised Hlavinka for the first time, "I didn't go back to Bethel on June 03." Hlavinka could find no documentation in Employee's log notes that she ever advised anyone at Alaska National of her MRI change before June 17, 2022. (Hlavinka).

55) Employee testified she made two changes to her tickets: the first was so she and her husband could stay in Anchorage, and the second so her husband could return to Bethel alone. She testified appointments at ANMC are often delayed. (Employee).

56) On June 24, 2022, Hlavinka received the undated letter from RN Koo at ANMC. This was the first medical documentation advising Hlavinka that an MRI had been scheduled for June 3, 2022, but had been rescheduled to June 7, 2022, because of a scheduling error. (Hlavinka).

57) On June 24, 2022, Employee requested only a compensation rate adjustment. (Claim for Workers' Compensation Benefits, June 24, 2022). In an attached email Employee stated:

> Hello, this is Jolene Geerhart. I have completed and attached the Claim for Worker's Compensation Benefits form requesting a compensation rate adjustment. I was not employed in 2019 and worked an on-call summer job in 2020. So my pay in 2019 and 2022 do not reflect my pay at the time of my injury. I started

> working as a registered nurse on March 21, 2021 and was injured on October 17, 2021. I have attached my W2's for 2020 and 2021. My 2021 pay reflects more of what I was making at the time of my injury.
>
> Thank you for your time and consideration. (Email, June 24, 2022).

58) On June 28, 2022, the Division served Employee's June 24, 2022 claim with attachments on Alaska National. The attachments were the first documentary proof Alaska National had showing Employee's earnings. (Agency file; Claim Served event, June 28, 2022; Hlavinka).

59) On July 20, 2022, Employer denied "All Benefits" and specifically denied Employee's claim for a compensation rate adjustment:

> The employee wishes her compensation rate to be based on wages from 2021, the year of injury. AS 23.30.220(a)(4) provides that the spendable weekly wage is to be based on wages from the two calendar years before the injury. The employee's attempt to use all of her 2021 wages (based on a W2), is contrary to AS 23.30.220, which specific [sic] allows only wages at the time of injury to be considered; wages earned post-injury are not used under the statute. (Controversion Notice, July 20, 2022).

Employer's July 20, 2022 answer reiterated its controversion language, but also stated it did "not admit" the rate adjustment claim, but also did "not deny" it. (Answer to Workers' Compensation Claim, July 20, 2022).

60) On July 29, 2022, Dr. Kornmesser released Employee to return to regular work on August 3, 2022, without restriction. However, he noted she was scheduled for right shoulder surgery with Dr. Keller on August 22, 2022. Dr. Kornmesser said Dr. Keller would determine further restrictions after Employee's shoulder surgery. (Kornmesser report, July 29, 2022).

61) On August 1, 2022, Powell entered her appearance as Employee's attorney and amended her claim to add attorney fees and costs. (Entry of Appearance; Claim for Workers' Compensation Benefits, August 1, 2022).

62) On August 22, 2022, Dr. Keller operated on Employee's right shoulder, recommended she use a sling for six weeks and suggested she not return to work for three to four months unless it was sedentary. (Operative Report, August 22, 2022).

63) On August 22, 2022, Dr. Keller continued Employee's work restrictions, but released her to work effective November 22, 2022, without restriction. (Keller report, August 22, 2022).

64) On August 23, 2022, Employer denied "All Benefits," Employee's compensation rate adjustment claim and her request for attorney fees and costs, adding a new defense:

> . . . There is no nexus between the work performed by the attorney and any benefits paid to the employee. No attorney's fees or costs are owed.
>
> Employer reserves the right to raise further defenses disclosed during the discovery process. (Controversion Notice, August 23, 2022).

65) On September 6, 2022, Employee amended her claim to include TTD benefits from October 18, 2021 through October 20, 2021, and from May 30, 2022 through June 8, 2022; an unfair or frivolous controversion finding; a penalty for late-paid compensation; interest; attorney fees; and costs. (Claim for Workers' Compensation Benefits, September 6, 2022).

66) On September 6, 2022, Employee filed a medical summary including Koo's undated letter; Dr. Lathrop's October 18, 2021 note stating Employee was off work from October 18, 2021 through October 20, 2021; Kronen's October 25, 2021, APRN Jackson's November 22, 2021, FNP-C Newkirk's December 29, 2021, Dr. Kornmesser's May 3, 2022, June 9, 2022, and July 29, 2022 light duty work releases; and Dr. Keller's August 22, 2022 operative report. (Medical Summary, September 6, 2022).

67) On Employee's September 6, 2022 medical summary, Alaska National first received medical documentation showing Employee's initial disability after her work injury. (Hlavinka).

68) On September 9, 2022, after Hlavinka had reviewed Employee's higher wage documentation, she voluntarily and retroactively adjusted Employee's rate to $1,112.25, on that date paying the difference between $1,112.25 and the previously paid $308 per week for all past TTD periods, including June 1, 2022 through August 2, 2022, inclusively. (Hlavinka).

69) On September 9, 2022, Employee appealed from a designee's discovery order. (Petition, September 9, 2022).

70) On September 21, 2022, unbeknownst at the time to the designated chair, Employee gave notice she had withdrawn her September 9, 2022 appeal of a designee's discovery order. (Employee's Notice of Dismissal of September 9, 2022, Appeal of Designee September 6, 2022, Decision, September 21, 2022).

71) On September 26, 2022, Hlavinka paid Employee disability benefits for her initial disability dates in October 2021, within 20 days of the date Employee provided medical disability documentation attached to her September 6, 2022 medical summary. (Hlavinka).

72) On September 26, 2022, Hlavinka paid Employee TTD benefits for October 19, 2021 and October 20, 2021, and a penalty. The penalty covered benefits paid from October 19 through October 20, 2021, May 30, 2022 through June 1, 2022, inclusively and June 6, 2022, paid at the $1,112.25 per week rate. Alaska National does not have a separate code for "interest"; any payments called "penalty" on Hlavinka's spreadsheet include interest. (Hlavinka).

73) On September 27, 2022, Hlavinka changed the three-day waiting period dates from May 30, 2022 through June 1, 2022, to June 1, 2022 through June 3, 2022. She changed these dates because she assumed when Employee called her on June 2, 2022, she had her MRI that day and flew home. Hlavinka changed the dates when she found out the MRI occurred on May 31, 2022. These were Electronic Data Interchange (EDI) corrections made after Employee, on September 6, 2022, filed her original travel plans from Bethel to Anchorage with the Division, which showed travel on May 30, 2022 and June 1, 2022. Before Employee filed this travel information with the Division on September 6, 2022, Employer and its adjuster had not received this original travel information and were not aware of it. (Hlavinka).

74) On September 28, 2022, Employer again denied "All Benefits" and specifically denied TTD benefits on October 18, 2021, and from June 2, 2022 through June 5, 2022; a compensation rate above $1,112.25; penalty and interest on timely paid TTD benefits; unfair controversion; and attorney fees and costs. It contended:

> The employer has already paid TTD benefits based on the above. The employer denies TTD on 10/18/21 as the employee worked that day; the claim for TTD on 10/18/21 is frivolous and violates Civil Rule 11. The employer further denies TTD from 6/2-6/5/22. The employer lacks a total authorization for disability during this period and, while the employee did have surgery on 6/9/22 in Anchorage, the employee did not need to travel to Anchorage several days in advance; if the employee chose to travel to Anchorage several days prior to surgery that was her decision. The first total disability authorization from the attending physician is 6/9/22. The employer denies penalty and interest on timely paid TTD. The employer had adjusted the employee's compensation rate to $1,112.25 based on 2021 earnings prior to the date of injury, which yield an AWW based on 41 weeks. There is no evidence to support any additional adjustment.

> The employee's assertion that any late payment of compensation is an "unfair controversion" is itself frivolous and violates Civil Rule 11; such an interpretation of AS 23.30.155 would render meaningless the specific and different subsections (d) and (e), which distinguish between compensation specifically denied via a controversion and compensation not timely paid without a controversion. The employer has not controverted any past TTD for which it has received documentation. And the remedy under the Act for late payment of compensation is a penalty, not a referral to the Division of Insurance under AS 23.30.155.
>
> There is no nexus between the work performed by the attorney and any benefits paid to the employee. No attorney's fees or costs are owed, especially when the employee has filed repetitive and duplicate, unnecessary pleadings that could have easily been consolidated into one pleading. (Controversion Notice, September 28, 2022).

75) On September 29, 2022, unaware that Employee had dismissed her September 9, 2022 discovery appeal, the Board heard Employee's appeal from a designee's discovery order. (Written Record Hearing event, September 29, 2022).

76) On September 30, 2022, *Geerhart v. Yukon Kuskokwim Health Corp*., AWCB Dec. No.22-0068 (September 30, 2022) (*Geerhart I*), granted Employee's request for a protective order, in part. It denied Employee's request for an interim attorney fee award. (*Geerhart I*).

77) On October 19, 2022, Employer petitioned for an order reconsidering or vacating *Geerhart I*, on grounds Employee had dismissed her September 9, 2022 appeal in her September 21, 2022 notice. (Petition, October 19, 2022).

78) On October 24, 2022, Hlavinka paid Employee $0.41, $1.33 and $9.14 in interest. A $33 payment was a penalty on time loss from June 2, 2022 through June 5, 2022, inclusively, previously paid at the $308 per week rate. (Hlavinka).

79) By October 30, 2022, the Board had taken no action on Employer's October 19, 2022 petition to reconsider or vacate *Geerhart I.* (Agency file).

80) A December 8, 2022 prehearing conference summary lists the issues set for hearing on February 16, 2023. Employer's subsequent "overpayment" defense was not listed as an issue for hearing. (Prehearing Conference Summary, December 8, 2022).

81) A pay voucher for pay period ending December 24, 2022, shows Employee grossed $80,866.53 year-to-date in 2022, notwithstanding she missed work from June 1, 2022 through August 2, 2022, and from August 22, 2022 through December 1, 2022, recovering from her work-related surgeries. Employee would have earned more money had she not taken time off for

surgery, planned to continue working for Employer, continues to work for it on the same schedule and plans to continue working for Employer permanently. (Employee).

82) On January 23, 2023, Employee filed and served her "12/30/2022" payroll stub from Employer showing her $6,761.39 earnings between December 11, 2022 through December 24, 2022, and her $80,866.53 year-to-date earnings working for Employer. She also filed and served printouts from the Division's online "Benefit Calculator." The first print-out shows Employee's TTD rate at $1,298 based on gross weekly wages totaling $2,219.11 for a married person with five "exemptions," based on her 2021 "weekly wage" through her injury date, October 17, 2021. The second print-out shows Employee's TTD rate also at $1,298 based on gross weekly wages totaling $3,380.70 with the same marital status and exemptions, based on Employee's earnings effective December 30, 2022. (Certificate of Service, January 23, 2023).

83) On February 8, 2023, Employee contended by June 2, 2022, the adjuster knew she remained in Anchorage but did not offer to fly her home. She contended the adjuster's subsequent note stating Employee remained in Anchorage but should have returned home and returned to work, seemed "to be an afterthought." Employee further contended she grossed $80,866.53 in 2022 working for Employer notwithstanding missing work for 23 weeks and six days because of her work injury. She calculated she averaged $3,093.26 per week or $441.89 per day while working, based on a 50-week year. Employee contended using this calculation results in a $1,298 compensation rate based on her 2022 gross income. She contended she averaged $2,552.45 per week in the pay period immediately prior to her work injury. Employee contended whether one uses her pre- or post-injury earnings the result is the same and she is entitled to a $1,298 per week TTD rate. (Employee's Hearing Brief, February 8, 2023).

84) Employee contended Employer failed to pay all TTD benefits due in October 2021 and in May and June 2022. She contended she could not travel to Anchorage any later than May 30, 2022, because she had to be on time for her early morning May 31, 2022 MRI. Employee contended, "The evidence shows that the Insurer was aware that Ms. Geerhart remained in town and did not object at any time, despite communicating with Ms. Geerhart on the telephone and via email between 5/30/22 and 6/30/22 about her remaining in Anchorage." She faulted Employer for not offering to fly her home and not warning her it would not pay TTD benefits while she remained in Anchorage. Employee considered this "patently unfair." She contended medical travel is covered under the Act and nothing occurred while she was in Anchorage in June 2022 to destroy

the work connection. Employee calculated $25,281.43 in TTD benefits paid to date and $31,338.44 owed, leaving $6,057.01 due. (*Id*.).

85) Employee further faulted Employer for not paying her TTD benefits for October 19 and 20, 2021, until September 26, 2022. She cited this "controversion-in-fact" as frivolous under *Harp*, based on her contention that the adjuster "documented multiple times between 10/19/21 and 6/17/22" that she had missed work on October 19 and 20, 2021. Moreover, Employee contended her TTD benefits for May 30 and 31, 2022 remain unpaid. She contended these two factors resulted in a frivolous controversion-in-fact. (*Id*.).

86) Employee also claimed a penalty for late-paid or unpaid TTD benefits for: October 19 and 20, 2021; May 30 and 31, 2022; June 1 and 3, 2022; and June 4 and 6, 2022. (*Id*.).

87) Employee contended she is entitled to full fees and statutory fees and relies on the applicable statutes and *Childs*. She contended Employer only increased her TTD rate, though not enough, after she filed a claim, which Employer controverted, and her attorney became involved. Employee contended she succeeded on her compensation rate adjustment claim, unpaid TTD periods, penalty and interest. She also contended she succeeded in obtaining a protective order in *Geerhart I*, and is entitled to attorney fees for that as well. (*Id*.).

88) On February 8, 2023, Powell filed an affidavit setting forth her efforts in representing Employee; this involved reviewing documents, preparing for and attending prehearing conferences and hearings and preparing pleadings. She bills at $425 per hour and has been awarded this amount in numerous cases; she had no costs. Powell included an itemized statement showing her services rendered in detail through February 8, 2023. (Affidavit of Counsel Regarding Fees and Costs, February 8, 2023).

89) On February 8, 2023, Employer contended it was unaware Employee's physician restricted her from all work on October 19 and 20, 2021, until she provided a medical note to this effect on September 6, 2022. Thereafter, Employer contended it paid Employee's TTD benefits timely under the Act. Employer contended once Employee's physician placed light-duty restrictions on May 3, 2022, it accommodated her limitations and Employee continued to work full-time through May 29, 2022. (Brief of Yukon Kuskokwim Health Corp., February 8, 2023).

90) Employer further contended when Employee traveled to Anchorage for medical treatment on May 30, 2022, she could have left later in the evening for the 55-minute flight and still made her early morning appointment on May 31, 2022. Thereafter, Employer contended unbeknownst

to it at the time, Employee remained in Anchorage even though she had no work-related medical appointment until June 6, 2022. (*Id*.).

91) Employer contended once Employee's physician gave her an off-work note for surgery, it timely began paying TTD benefits at $308 per week based on her 2020 earnings pursuant to the Act. It contended Employee filed her compensation rate adjustment claim just before it paid the first check. Employer controverted because Employee's request for a rate adjustment was "contrary to AS 23.30.220," so it was justified in paying the minimum rate. It contended Employee worked continually on restricted duty and it paid her TTD benefits when her physicians advised she was totally disabled. Employer contended on September 9, 2022, it voluntarily adjusted her TTD rate based on her earnings from January 1, 2021, through the day prior to her injury, October 16, 2021, less a $10,000 signing bonus, which was "an irregular bonus," which totaled $66,573.48 and divided that sum by 41, which yielded a gross weekly wage of $1,623.74. It contended it used the Division's rate calculator for a married person with five dependents and obtained the $1,112.25 percent TTD rate, which it ultimately retroactively paid for all disability periods including June 4 and 6, 2022. Employer also contended it paid interest and penalty once it received the October 19 and 20, 2021 work restriction note on September 6, 2022. It contended it paid Employee TTD benefits for October 19 and 20, 2021, May 30, 2022 through August 2, 2022, and from August 22, 2022 through November 21, 2022, totaling 159 days at the $1,112.25 rate (or $150.89 per day) for a total of $25,263.51, resulting in an overpayment of $17.67. (*Id*.).

92) Employer contended it paid Employee benefits for every day she claims she was not paid, including some dates it contended disability benefits were not even owed, as on days she was not scheduled to work. Alternately, it contended at most Employee could claim entitlement to TPD benefits, which she has not done. Employer contended Employee's continued insistence on claiming benefits it proved it had already paid her was "frivolous." (*Id*.).

93) Employer also contended it had no medical documentation authorizing her absence from work until October 3, 2022, when Employee produced a medical summary. Moreover, it contended Employee would not have been entitled to TTD benefits on June 6, 2022, because it was her normal day off and an injured worker who visits a doctor on her normal day off would not be entitled to TTD benefits. Nonetheless, Employer contended while not admitting liability, it paid Employee TTD benefits for June 1 through 6, 2022. It further contended Employee had no

off-work medical slip for the first week of June 2022. Employer contended the Board should rule these days an overpayment so it can recoup these from future benefits. (*Id*.).

94) Employer contended it "agreed to voluntarily increased the employee's rate in line with *Straight*. . . ." Employer considered the fact Employee was in school during 2019 and 2020 and did not become employed as a nurse until March 2021. It faults Employee for seeking the maximum $1,298 rate because she either wants her entire 2021 wages considered, including those earned post-injury, or she wants to reduce the "divisible number of weeks" to achieve her desired result. Employer contended wages earned after an injury cannot be used to calculate a spendable weekly wage under §220. It relied on *Roberts*, a US Supreme Court case as support. Employer contended §220(a)(4) earnings should be divided by 50 weeks; however, in fairness, it contended it used 41 weeks, which resulted in a higher weekly rate. It contended Employee seeks "special treatment," and wants to "cherry pick" periods for which her earnings should be calculated. Employer contended this method violates the *Gilmore* mandate. It calculated Employee's gross 2021 earnings, less the signing bonus, at $91,635.14, and contended a $1,298 compensation rate would result in Employee receiving 74 percent of her gross earnings, rather than 80 percent of her spendable weekly wage as required by AS 23.30.185. (*Id*.).

95) Employer contended even if the Board awards a higher TTD compensation rate, no additional interest on the increased amount would be due because interest is not "due" until the Board issues a decision and order. (*Id*.).

96) Employer contended Employee violated Civil Rule 11 by making frivolous claims against it. It contended Employee's request for a referral to the Division of Insurance lacks merit because there is no such thing as a frivolous "controversion-in-fact" under §155(o). Employer contended the Board's and Alaska Supreme Court's controversion-in-fact discussions are "a product of judicial creation and activism." It contended in instances where an employer does not file a Controversion Notice, the Board must look "at the employer's answer to a claim for benefits and its actions after the claim is filed to determine whether the employer has controverted in fact the employee's claim for benefits." Employer contended the only reason Employee seeks this "frivolous" finding is to benefit her attorney. (*Id*.).

97) Employer objected to "any and all fees and costs" and contended the litigation "has been entirely unnecessary and has been solely perpetuated by the employee." It asserted it did not have

to increase Employee's compensation rate. As for *Geerhart I*, Employer contended she withdrew her appeal and should not be awarded fees for that effort. (*Id*.).

98) At hearing on February 16, 2023, Employee testified she files her taxes as married with three dependents. She filed a compensation rate adjustment claim because she did not think Employer fairly compensated her. Employee said the adjuster told her the prior compensation rate was based on her 2020 earnings as a flagger and she advised the adjuster she could not live in Bethel on those benefits. Employee hired an attorney because she is unfamiliar with workers' compensation rules and felt overwhelmed by Employer's discovery requests. She clarified her unpaid TTD claim was limited to June 2, 2022 through June 5, 2022, inclusive. (Employee).

99) Craig is Employer's Inpatient and Operating Room Nurse Manager and supervises Employee. She was not called for extra shifts because "she liked her time off." Employee's schedule was Wednesday to Tuesday. She continued to work restricted duty full-time post-injury; at no time was Employer not able to accommodate her physical limitations, except for those times she was totally disabled. Employee's regularly scheduled week off was June 1, 2022 through June 7, 2022. Employee never mentioned anything to Craig about having June 1, 2022 off. She never contacted Craig requesting extra shifts pre-surgery. Craig was aware Employee had surgery scheduled for June 9, 2022; she was off work for a couple of months post-surgery. Had Employee been scheduled to work from June 1, 2022 through June 7, 2022, Employer would have continued to accommodate her work restrictions and she could have worked full-time that week. (Craig).

100) Beltzer is Employer's Vice President of Legal Affairs and Workforce; he also works with Human Resources. He identified Employer's hearing brief Ex. 19 and 22 as Employee's "pay stubs," identical to those Employer uses for all employees. (Beltzer).

101) Beltzer travels to and from Bethel to Anchorage about 90 times a year. The flight lasts approximately 54 minutes. There are generally seats available; Beltzer is on the airline website frequently and sees what flights are available. He has never not been able to travel. Beltzer thinks Alaska National does a "good job" handling YKHC's workers' compensation claims and treats his employees fairly without frivolity. (Beltzer).

102) Hlavinka as Senior Claims Adjuster for Alaska National handles time-loss claims. She maintains contemporaneous log notes. Hlavinka includes emails in her log notes and tracks all indemnity and other payments made in a case. Documenting all payments in a case is "extremely important" so anyone looking at the file can see the case history. (Hlavinka).

103) Hlavinka testified the appropriate method to calculate an injured worker's time-loss rate, for an hourly-paid worker, is to ask the worker and the employer for the worker's tax W-2s for the two calendar years prior to their injury year. "And then we divide it by 50 and we apply it into the workers' compensation calculator with their dependents if they are married and how many dependents they have." In her opinion, this is the most common way a compensation rate is calculated in Alaska. Hlavinka uses the Division's online benefit calculator. She testified it is a common practice and easier to pay TTD benefits to an injured worker entitled to TPD benefits than to obtain payroll information and pay lower, TPD benefits. (Hlavinka).

104) All checks Hlavinka paid Employee for benefits "cleared the bank" and none are outstanding. Hlavinka confirmed she paid Employee TTD benefits at the $1,112.25 weekly rate for every day for which she paid her benefits. (Hlavinka).

105) In her opinion, Hlavinka adjusted Employee's claim fairly, and voluntarily paid benefits beyond what the law required. She paid Employee time loss benefits as well as interest and penalty for dates she believed were not due, because Hlavinka was trying to avoid litigation. Employee always provided documentation "after-the-fact," and Hlavinka always paid promptly to avoid litigation. She voluntarily adjusted Employee's compensation rate because she "thought it was fair." A few days before Employee filed her claim for a compensation rate adjustment, Hlavinka spoke with her, and Employee mentioned, without providing evidence, that she did not think her compensation rate was fair because she was making more money working for Employer than she did before her injury. Hlavinka told her "give me a minute and I'll look at it." Ultimately, she thought Employee made a "good argument," so Hlavinka increased her weekly rate. (Hlavinka).

106) Hlavinka agreed she adjusted Employee's compensation rate after Powell had filed a claim on Employee's behalf. Dates Hlavinka paid Employee benefits for which she was, in Hlavinka's opinion, not owed include June 2 through June 6, 2022. (Hlavinka).

107) Employer paid full TTD benefits on several days for which in Hlavinka's opinion Employee probably qualified for only TPD benefits. (Hlavinka).

108) The only explanation Hlavinka has for the discrepancy between what she says Alaska National paid Employee, and what Employee says it paid her, is that Employee's TTD calculation is wrong. (Hlavinka).

109) Employee in closing argument contended she is entitled to the maximum $1,298 compensation rate for a 2021 injury based on her higher earnings while working for Employer,

and on the applicable law, including *Straight*. She contended if her 30 weeks of income from her hire date to the day before her injury in 2021 is used, or her 2022 earnings while not working for 26 weeks and one day because of her disability or work injury are used, the result is the same. She objected to the panel considering Employer's "overpayment" argument. (Record).

110) Employer in closing argument contended it did "everything right" voluntarily, including adjusting Employee's compensation rate and paying for first-class air travel, when it did not have to. It contended neither the Board nor the Commission has authority to adjust Employee's compensation rate based on an alleged constitutional violation. Further, in a hypothetical example, Employer contended if a worker is injured in 2010 and has surgery in 2015, the injured worker cannot come forward in 2015 and successfully argue that her disability beginning in 2015 must be paid at a higher rate simply because her earnings have increased five years post-injury. In its view, using 2022 earnings in Employee's case is "nonsense." It offered a teacher or slope worker as another example; it contended neither gets to exclude summer months during which he or she did not work, in the TTD rate calculation. Employer noted a "meteoric rise" in compensation rate adjustment claims since what it called the Commission's "ridiculous" *Straight* decision. Employer focused on "predictability" and contended increasing Employee's rate would result in "chaos." It contended Employee's arguments result in Employee receiving a "windfall." It contended the Board should not allow Employee to "cherry pick" her earnings. Employer further contended even if the Board orders a TTD rate adjustment, it should not award interest because the rate adjustment was not "due," until 14 days after the Board orders it. In summary on the overpayment issue, Employer contended it overpaid Employee benefits it paid on October 19 and 20, 2021, May 30, 2022 and from June 1 through June 7, 2022. It seeks an order denying all claims including attorney fees and costs. (Record).

111) On February 22, 2023, Powell filed a supplemental affidavit covering legal services rendered from February 9, 2023 through February 21, 2023. Attached to her affidavit was an itemized statement for services rendered from August 1, 2022 through February 21 2023, billed at $425 per hour. Powell itemized 49.3 hours totaling $20,952.50. (Supplemental Affidavit of Counsel regarding Fees and Costs, February 22, 2023).

112) On March 3, 2023, Employer objected to Employee's claim for attorney fees and costs. It contended Employee's claims were all unsupported and should be denied. Employer reiterated its Civil Rule 11 contention. It contended because Employee violated Civil Rule 11, her attorney was

entitled to no attorney fees pursuant to Alaska Rule of Professional Conduct 1.5. Employer contended it asked for Employee's wage information on July 25, 2022, which was three weeks after it received Employee's claim, but she did not produce the documents until September 2 and 6, 2022. Once it received the documents, Employer contended it voluntarily increased her compensation rate. Thus, Employer contended Employee's claim was "entirely unnecessary." It denied Powell's involvement resulted in a rate adjustment. Employer contended had Employee promptly responded to the July 25, 2022 discovery request, "her rate would have been adjusted." Lastly, it contended if the Board awards attorney fees they should be reduced to account for "unnecessary litigation." (Employer's Objection to Attorney Fees and Costs, March 3, 2023).

113) Based on the panel's experience: This was not a particularly difficult matter; Powell is a solo practitioner and accepting one client's case impacts a solo practitioner's ability to take other clients; Powell has been awarded $425 per hour in other cases; if Employee succeeds on her primary claim for a compensation rate adjustment, her TTD rate will have increased substantially from $308 to $1,298 per week; Powell represented Employee for a relatively short time; Powell has significant experience, ability and a good reputation; and with a minimal exception not applicable here, all attorney fees in these cases are contingent. (Experience; judgment).

PRINCIPLES OF LAW

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
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> > (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter; . . .
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> **AS 23.30.008. Powers and duties of the commission**. (a) . . . Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

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). "Neither the Appeals Commission nor the Board has jurisdiction to hear any action outside of a workers' compensation claim." The Board has no

jurisdiction "to decide issues of constitutional law." *Alaska Public Interest Research Group (AKPIRG) v. State*, 1267 P.3d 27, 36-37 (Alaska 2007).

> **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 . . . 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).

> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . . In determining the amount of fees

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

Phillips v. Nabors Alaska Drilling, Inc., 740 P.2d 457, 461 n. 9 (Alaska 1987), a TTD rate adjustment case under the 1985 §220 version, said regarding attorney fees:

> In cases where it is clear that the AWCB will calculate employees' benefits under subsection (a)(2), the employer *should* provide this rate without a hearing. If the employee must proceed to a board hearing to receive the higher benefit, the employer may be liable for the employee's costs and attorney fees. AS 23.30.145 (italics in original).

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers can retain competent counsel. *Cortay v. Silver Bay Logging,* 787 P.2d 103 (Alaska 1990). Fees incurred on lost, minor issues will not be reduced if the employee prevails on primary issues. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Dec. No. 152 (May 11, 2011).

Childs v. Copper Valley Electric Association, 860 P.2d 1184 (Alaska 1993) addressed the situation where an injured worker filed a claim and the employer thereafter "voluntarily" paid benefits:

> Here, CVEA controverted Childs's compensation in November 1988, and Childs had to file a claim to recover these benefits. Subsequently, CVEA voluntarily paid benefits for the period from October 1988 through April 1989. CVEA's payment, though voluntary, is the equivalent of a Board award, because the efforts of Childs's counsel were instrumental to inducing it. *See State, Dep't of Highways v. Brown*, 600 P.2d 9, 12 (Alaska 1979) (holding that where employer apparently thought that resisting the claim any further would lead to a Board decision in the employee's favor, a voluntary payment of benefits constitutes an "award"). Therefore, the Board should have awarded Childs attorney's fees on the amount of the voluntary payment pursuant to AS 23.30.145(a).

Rusch v. Southeast Alaska Regional Health Consortium, 453 P.3d 784 (Alaska 2019), held because attorneys are not required to hire paralegals, it was improper to reduce the hourly rate when paralegal work is done by an attorney. *Rusch* held in determining an attorney fee award, the Board must consider all factors in Alaska Rule of Professional Conduct 1.5(a), including:

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

State of Alaska, Dept. of Corrections v. Wozniak, AWCAC Dec. No 276 (March 26, 2020), held a successful attorney representing an injured worker before the Board may receive actual attorney fees in a lump-sum for work prior to hearing to obtain benefits, and may also receive statutory minimum attorney fees for ongoing benefits the attorney successfully obtained for the worker.

> **AS 23.30.155. Payment of compensation**. . . .
>
> (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.
> . . . .
>
> (j) if an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. . . .
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employee's insurer has frivolously or unfairly controverted

> compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (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. . . .

Phillips, 740 P.2d 457 was a TTD rate adjustment case where an injured worker provided evidence to his employer showing his pre-injury earnings did not reflect his higher earnings when injured. The employer voluntarily calculated the worker's TTD rate based on historical earnings other than those required in the primary, applicable §220 subsection. This resulted in a higher rate, but not as high as the worker wanted based on his actual wages when injured. The worker filed a claim seeking a higher rate, and a penalty under §155(e) based on the employer's failure to increase the rate in accordance with well-known decisional law. The Board agreed, increased the rate, and awarded the requested penalty and attorney fees and costs; the employer appealed.

The superior court reversed only the penalty award, and the worker appealed. He contended the Board's penalty was justified because the employer was fully aware *Johnson* and its progeny required a compensation rate adjustment in obvious instances like his, without forcing him to a Board hearing. The claimant contended the penalty award would motivate employers in future cases to pay higher compensation rates in appropriate instances without Board hearings.

Based on the §220 in effect in January 1985, *Phillips* stated TTD rate adjustments were not "mechanical" because the statute said, "the board determines that the gross weekly earnings at the time of the injury cannot be fairly calculated" under the primary statutory formula. Only the Board can then order an increased rate using an alternate theory. The Board in a rate adjustment claim must consider various factors and find "that the wage would have continued for the duration of a disability." *Phillips* continued, because only the Board could order a rate adjustment, regardless of the employer voluntarily paying a somewhat higher rate, higher TTD benefits were not "due" until the Board ordered them, and no penalty could be assessed. The factual disputes in *Phillips* underscored "the need for an impartial factfinder to make these decisions." Moreover, *Phillips* stated in respect to the claimant's bad faith controversion contention, "the only compensation due on the facts presented to the employer was that calculated in accordance with subsection (a)(1)."

Phillips concluded had the employer not paid the worker at least the TTD rate calculated under the primary statutory formula, the Board could have properly awarded a penalty. *Id*. at 461.

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." *Id*. Evidence the employer possessed "at the time of controversion" is the relevant evidence to review. *Id*. The employer in *Harp* cited as a reason for controverting that the employee failed to prove she continued to be disabled, and her disability was not work-related Addressing this, *Harp* said the employee had no legal duty to prove continuing disability, and the employer failed to send the employee to an EME before controverting and consequently had no evidence stating she was not still disabled. *Id*. *Harp* also said the opposite of "good faith" is "bad faith":

> Because neither reason given for the controversion was supported by sufficient evidence to warrant a Board decision that Harp is not entitled to benefits, the controversion was made in bad faith and was therefore invalid. A penalty is therefore required by former AS 23.30.155(e). (*Id*. at 358-59).

Vue v. Walmart Associates, Inc., 475 P.3d 270, 289-90 (Alaska 2020) held though it is proper for the Board to consider evidence an employer had when it filed a controversion, "an insurer has a continuing obligation to consider new evidence that comes to its attention and to modify or withdraw controversions based on that new evidence or face a possible penalty or referral to the Division of Insurance." *Vue* requires review to see if a denial remains legally appropriate.

Harris v. M-K Rivers, 325 P.3d 510, 517 (Alaska, 2014), said, "*Harp* does not require an inquiry into the motives of the controversion's author. We have never overruled *Harp*. . . ."

> When the Board finds that an employer has unfairly or frivolously controverted 'compensation due,' AS 23.30.155(o) says that the Director of the Division of Workers' Compensation must notify the Division of Insurance. In its regulations, the Board has interpreted 'compensation due' in AS 23.30.155(o) to mean 'the *benefits sought* by the employee . . . *whether paid or unpaid at the time the controversion was filed*.' (Citation omitted; emphasis in original). Although we

> do not decide here whether a controversion that is not made in good faith under *Harp* is always frivolous or unfair under AS 23.30.155(o), both the Board and the Commission linked the penalty provisions of AS 23.30.155(e)-(f) to the unfair or frivolous controversion provision of AS 23.30.155(o).

Irby v. Fairbanks Gold Mine, Inc., 203 P.2d 1138 (Alaska 2009), said the Board's determination in an unfair or frivolous controversion case may be based on fact-based or legal-based findings. Fact-based findings focus on whether the controversion is based on adequate facts to justify it. Legal-based findings focus on whether the employer was legally justified in controverting benefits.

Addressing interest, *Circle De Lumber v. Humphrey*, 130 P.3d 941, 951 (Alaska 2006) said:

> We have recognized that awards of prejudgment interest in workers' compensation cases "are a way to recognize the time value of money, and they give 'a necessary incentive to employers to . . . release money due'" (citation omitted). Accordingly, we have held that a workers' compensation award "shall accrue lawful interest . . . from the date it *should have been paid*"(citation omitted; emphasis in original). . . .
>
> Circle De attempts to distinguish the above line of authority by stressing the fact that the TTD . . . benefits were retroactively increased under the alternative calculation of former AS 23.30.220(a)(2). Because this alternative calculation grants the board discretion in setting the employee's gross weekly earnings, Circle De complains that it was incapable of independently determining the compensation rate at the time of Humphrey's entitlement -- "the adjusted compensation rate could not be determined by the employer, only the Board can calculate compensation under AS 23.30.220(a)(2)." We do not agree that the board's decision to use the alternative calculation -- which is only done upon a showing that the normal calculation fails to accurately predict the employee's losses -- should reduce or divest the employee's right to obtain interest on his late-paid benefits. Although awards of interest are intended to encourage employers to make timely payments of compensation benefits, they are not imposed to punish employers; rather, their primary function is to fairly compensate an injured worker for the time value of money lost over the period of time in which he did not have access to money that was owed to him. Moreover, even Circle De concedes that it remains able to estimate an employee's compensation rate under former AS 23.30.220(a)(2), and to distribute benefits accordingly. The risk of erroneous estimation on the part of the employer does not demand a departure from the ordinary interest rule. . . .
>
> **AS 23.30.175. Rates of compensation.** (a) The weekly rate of compensation for disability . . . may not exceed the maximum compensation rate. . . .
>
> **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.

The compensation rate statute stated in part in 1982:

> **AS 23.30.220. Determination of average weekly wage**. Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation, and is determined as follows;
> . . . .
>
> 2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury;
>
> 3) if the board determines that the wage at the time of the injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship to the employee, the wage for calculating compensation shall be the usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board; . . .

In *Johnson RCA/OMS*, 681 P.2d 905 (Alaska 1984), the Alaska Supreme Court construed the 1982 §220 but did not decide the case on constitutional grounds. In *Johnson*:

> Johnson's salary for the final year of his military service, 1979, was $20,166.12. He asserted that his salary for the approximately 40 weeks that he worked for RCA-OMS was some $42,000.00, most of it earned after his injury. The Board, using subsection (2) of AS 23.30.220, determined Johnson's average weekly wage according to his military rather than civilian salary. So computed, his average weekly wage was $387.81, resulting in benefits of $258.54 per week. By contrast, if subsection (3) had been used, his average weekly wage would apparently have been approximately $1,000.00 with benefits two-thirds of that. (*Id*. at 906).

Johnson simply construed the statute and held the Board was required to use an alternate approach in similar cases. *Johnson* held for the first time:

> The objective of AS 23.30.220 is to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid. Normally the formula in subsection (2) will yield a fair approximation of this figure. However, sometimes it will not, and in those cases subsection (3) of the statute is to be used. (*Id*. at 907).

The Court thereafter often repeated this objective, which it derived from Professor Larson's workers' compensation treatise where he said:

> The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of the impact of probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis. (*Id*. at 907; citing 2 A. Larson, *The Law of Workmen's Compensation* §60.11(d), at 10-564 (1983) (footnote omitted)).

In 1983 the legislature amended AS 23.30.220 (effective 1/1/84) to read in pertinent part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) The gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury.
>
> (2) If the board determines that the gross weekly earnings at the time of the injury cannot be fairly calculated under (1) of this subsection, the board may determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history. . . .

The converse situation from *Johnson* occurred a year later in *State v. Gronroos*, 697 P.2d 1047 (Alaska 1985). The claimant retired earning $42,000 per year. At his new job where injured, he earned only $2,000 per month. The Board ordered the employer to calculate the TTD rate based on the prior two years' earnings, as §220 required. The employer appealed and *Gronroos* construed former §220 and said the express "fairness" requirement built into it applied both ways and required an opposite result from *Johnson* when the facts were opposite.

In 1988, the legislature amended AS 23.30.220 again to consider employees "absent from the labor market" prior to their injury:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury;
>
> (2) if the employee was absent from the labor market for 18 months or more of the two calendar years preceding the injury, the board shall determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history, but compensation may not exceed the employee's gross weekly earnings at the time of injury; . . .

The next seminal TTD rate adjustment case was *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). The claimant was injured in 1989. *Gilmore* struck down former §220 for the first time on constitutional, equal protection grounds:

> Gilmore started work . . . and was earning average spendable weekly wages of approximately $850. However, for the calendar years 1987 and 1988 he worked for a total of only thirty-nine weeks. He claims that for twenty-two of the thirty-nine weeks he was in vocational training programs learning to be a motorcycle mechanic. He contends that he should have been considered "absent from the labor market" within the meaning of section .220(a)(2) for these twenty-two weeks. If he is correct, he would be entitled to an alternative wage computation, for he would have been "absent from the labor market" for at least eighteen months during the two years in question. (*Id*. at 924-925).

The Board rejected his claim, and he appealed on statutory construction grounds. The Court asked for briefing on whether §220 in effect when the claimant was injured could pass constitutional muster. Subsequently, *Gilmore* ruled it could not and struck down §220 as applied to the case. *Gilmore* set forth the standard for reviewing the constitutionality of §220:

> As our examples illustrate, the current statutory scheme clearly classifies injured employees based on differences in their prior work history. These classifications will often result in substantially different disability benefits for similarly situated employees. The question therefore is whether this unequal treatment is permissible under the Alaska Constitution. (*Id*. at 926).

Gilmore held the legislature's intent could be gleaned from the session laws which said, "It is the intent of the legislature that AS 23.30 be interpreted so as to ensure the quick, efficient, fair, and

predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of AS 23.30." *Id*. *Gilmore* cited *Johnson*:

> The overall purpose of AS 23.30.220(a) and the other sections of the Act used to calculate an injured worker's indemnity benefits is "to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid" (citations omitted). This "fair approximation" is an essential component of the basic compromise underlying the Workers' Compensation Act -- the worker's sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation. . . . (*Id*.).
> . . . .
>
> The benefit levels among injured workers based on section 220(a) bear no more than a coincidental relationship to the goal of compensating injured workers based on their actual losses. In any of the many situations in which a worker's past wage and time of employment do not accurately reflect the circumstances existing at the time of the injury, the formula will misrepresent the losses (footnote omitted). . . . (*Id*. at 928).

The employer in *Gilmore* argued applying the statute as written would lead to "quick, efficient results," but the Court declared:

> This efficiency is gained, however, at the sacrifice of fairness in result. The purpose of the Act, as expressed by the legislature, is to provide a "quick, efficient, *fair*, and predictable delivery of indemnity and medical benefits." The facts of the present case amply demonstrate the potential unfairness of a rigid application of the mechanical formula (footnote omitted). Under the section 220(a)(1) formula as applied by the Board, Gilmore received only the statutory minimum amount of compensation, despite his earning over seven and one-half times more per week at the time of injury.
>
> Efficiency in this area does not require unfairness. A quick, efficient, and predictable scheme for determining a worker's gross weekly earnings could be formulated without denying workers like Gilmore benefits commensurate with their actual losses (italics in original). (*Id*. at 928).

Gilmore concluded Alaska was the only state that did not provide a viable option to consider such factors as unemployment in the rate calculation scheme. *Id*. Consequently, *Gilmore* held:

> The gross weekly wage determination method of AS 23.30.220(a) creates large differences in compensation between similarly situated injured workers, bears no relationship to the goal of accurately calculating an injured employee's lost wages

> for purposes of determining his or her compensation, is unfair to workers whose past history does not accurately reflect their future earning capacity, and is unnecessary to achieve quickness, efficiency, or predictability. . . . (*Id*. at 929).

Gilmore provided a prior statutory construction case law summary dealing with §220 TTD rate adjustments under pre-*Gilmore* versions of §220, as well as other rate calculation issues: *Deuser v. State*, 697 P.2d 647 (Alaska 1985) (alternative method based on injured worker's wages on projected renewal of six-month contract must be used for purpose of temporary disability payments, where formula method substantially underestimates future income); *Brunke v. Rogers & Babler*, 714 P.2d 795 (Alaska 1986) (worker injured three months after beginning new job at dramatically higher salary entitled to have temporary total disability payments based on alternative method instead of formula); *Peck v. Alaska Aeronautical, Inc.*, 744 P.2d 663 (Alaska 1987) (alternative method must be used when 1964 injury produces permanent total disability in 1982, and injured worker's earning capacity increased from $255 to $1,294 per week in interim); *Wrangell Forest Products. v. Alderson*, 786 P.2d 916 (Alaska 1990) (use of alternative method proper where formula method so substantially underestimates an employee's projected future income to not fairly calculate that amount); *Houston Contracting, Inc. v. Phillips*, 812 P.2d 598 (Alaska 1991) (use of alternative method proper where injured worker's employment history consisted of regular pattern of discontinuous, short-term employment).

Gilmore noted in some cases the statute might work well and "may roughly approximate the employee's lost wages when the employee worked full time during the entire two year period at the same job held at the time of injury" or "when the employee has consistently worked only at seasonal occupations," but it does not "account for any upward or downward change in the employee's earning capacity and punishes workers who have newly committed to full time employment." *Gilmore* further stated the "formula also fails entirely to take account of any change in the employee's earning capacity that occurred during the year of injury." *Gilmore* at 932 n. 6. Notably, *Gilmore* provided a "model statute" that it said would not be struck down as unconstitutional.

Thompson v. United Postal Service, 975 P.2d 684 (Alaska 1999) said "fair" is not the primary goal in statutory construction cases and chastised the Board for not applying the 1988 §220 in effect on

the claimant's 1995 injury date. *Thompson* said the Board erred "when it conducted a generalized fairness inquiry rather than asking whether Thompson's past earnings could accurately be used to determine what she would have earned had she not been injured."

In 1995, Alaska's legislature amended §220 and again in 2000 to incorporate most of the "model statute." The amended statute stated in relevant part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
>
> . . . .
>
> 4) If at the time of injury the
>
> A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing by 13 the employee's earnings, including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;
>
> B) employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding (1)-(3) of this subsection and (A) of the paragraph, the employee's gross weekly earnings are computed by determining the amount that the employee would have earned, including overtime or premium pay, had the employee been employed by the employer for 13 calendar weeks immediately preceding the injury and dividing this sum by 13;
>
> 5) If at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees; . . .

This §220 "model statute" version generated little litigation because it had a viable method to take variations in work histories into account to predict lost earnings and compensate injured workers for their actual losses during disability periods.

Dougan v. Aurora Electric, Inc., 50 P.3d 789 (Alaska 2002) reversed a Board and Superior Court decision that had inappropriately applied *Gilmore* to a case decided under the 1995 §220 version patterned after the "model statute" mentioned in *Gilmore*.

> The board correctly applied the new version of AS 23.30.220(a) when it initially calculated Dougan's compensation rate. The amended statute closely follows the model law cited in *Gilmore* as an example of a statute that would not violate the Equal Protection Clause (footnote omitted). The application of the test outlined by this court to deal with an unfair application of the statute is superfluous due to these amendments. Therefore, we reverse the superior court's remand of the compensation rate adjustment and hold that the *Gilmore* test is no longer necessary when the board's initial determination of compensation is based on the amended version of AS 23.20.220. (*Id*. at 796-797).

Bauder v. Alaska Airlines, 52 P.3d 166 (Alaska 2002) affirmed the Board's denial of a TTD rate adjustment challenge noting "the temporary total disability benefits were an accurate reflection of Mr. Bauder's wage loss." *Id*. at 181. *Williams v. Abood*, 53 P.3d 134 (Alaska 2002) in another rate adjustment case again discussed *Gilmore* and *Thompson* and said:

> We made clear that departure from the statutory formula "must be based on substantial evidence supporting the conclusion that past wage levels will lead to an irrational workers' compensation award" (footnote omitted). Specifically, there must be substantial evidence that past wages are an inaccurate predictor of loss due to injury (footnote omitted). We stated that the inquiry is not to determine whether the statutory application led to a 'fair' result, but whether the formula accurately predicted what the employee would have earned had he or she not been injured. (*Id*. at 142-43).

Abood stated one challenging the statute before the Board has "the burden of proving that the statute was an inaccurate predictor of his future earnings loss due to injury." *Id*.

Justice v. RMH Aero Logging, Inc., 42 P.3d 549 (Alaska 2002) affirmed a TTD rate adjustment:

> Because we conclude that our holding in *Gilmore v. Alaska Workers' Comp. Bd*. (footnote omitted) applies with limited retroactivity to the employee's claim for a compensation rate adjustment, and because substantial evidence supports the finding that the employee's past employment history is not an accurate predictor of his future wage losses resulting from the injury, we affirm the board's decision adjusting the employee's compensation rate. (*Id*. at 551).

Justice further explained *Gilmore* and said:

> Thus, the relevant inquiry under *Gilmore* is whether an injured worker's past employment history is an "accurate predictor" of future wage losses due to the injury (footnote omitted). Where past wage levels are an accurate predictor of losses due to the injury, "the Board must apply the statutory formula. The decision to depart from the statute must be based on substantial evidence supporting the conclusion that past wage levels will lead to an irrational workers' compensation award" (footnote omitted). (*Id*. at 553).

Flowline of Alaska v. Brennan, 129 P.3d 881, 886 (Alaska 2006) reaffirmed *Gilmore* was not only still good law but that its basic premise was sound and said:

> The accurate predictor test turns on whether the worker's wage history was an accurate predictor of losses due to injury. Under *Gilmore*, the Board could not deviate from the statutory scheme unless there was substantial evidence to support the conclusion that past wage levels would lead to an irrational workers' compensation award (footnote omitted).

Brennan also said:

> Finally, Flowline complains about the Board's use of the "fairness" language of *Gilmore* (footnote omitted) in its decision . . . and argues that the Board used an improper test to decide Brennan's case. But it is clear from the Board's decision that it was well aware that the *Gilmore* test and related tests may not be applied to the post-1995 version of the statute after our decision in *Dougan v. Aurora Electric, Inc*. (*Id*. at 882).

Brennan found the Board simply used *Gilmore* as a "shorthand" way of setting forth its understanding of the legislature's "purpose" which was:

> That purpose itself retains the fairness language, as it is the legislature's intent that the statute be used to "fix a fair approximation of an employee's probable future earning capacity during a period of temporary partial or temporary total disability" (footnotes omitted). As we pointed out in *Gilmore*, a fair approximation of a claimant's future earning capacity lost due to the injury is the 'essential component of the basic compromise underlying the Workers' Compensation Act -- the worker's sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation' (footnote omitted). Despite subsequent amendments to the statute aimed at increasing the efficiency and predictability of the compensation process, this compromise, and the fairness requirements it engenders, provide the context for interpreting the Workers' Compensation Act. (*Id*. at 882).

Furthermore, *Brennan* said in respect to *Gilmore*:

> *Gilmore* was explicitly concerned with balancing the purposes of the . . . Act as a whole, purposes which included the "quick, efficient, fair, and predictable" delivery of benefits to injured workers. *Id*. at 927. Fairness was considered an essential component of the application of the statute and could not be sacrificed in the pursuit of the other purposes. *Id*. at 928. (*Id*. at 886, n. 5.)

The "model statute" §220 was amended in 2005 back to essentially what it was when *Gilmore* struck it down. The current 2005 §220 does not contain the same "fairness" options for an hourly worker as some prior versions, and states in part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
>
> . . . .
>
> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;
>
> (5) if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees; . . .

In *Straight v. Johnson Construction & Roofing, LLC*, AWCAC Dec. No 231 (November 22, 2016), the employee had taken time off work in the two years prior to his injury to build his home. After returning to work for the employer in 2015, he was injured while working at an hourly-paid job with Davis-Bacon wages. The wages on the date he was injured far exceeded the modest wages he earned in the pre-injury prior two years when he was working on his home.

The Board applied §220(a)(4) for an hourly worker and divided the claimant's highest earnings from 2014 by 50 weeks. It noted §220 no longer contained a "general fairness" provision as it did when *Gilmore* and other rate adjustment cases were decided. The claimant appealed. Rejecting the Board's view, *Straight* reviewed Supreme Court case law and noted the Court repeatedly "indicated that a fair compensation rate must take into consideration the injured worker's probable

future earnings capacity." *Straight* also stated this doctrine "may be what the legislature intended" when it adopted AS 23.30.220(a)(5), which provides a method to calculate an injured worker's spendable weekly wage if "at the time of injury the employee's earnings have not been fixed or cannot be ascertained." *Straight* reasoned that while the legislature's purpose for adopting §220(a)(5) was not clear, the Act mandates the Board look to future earning capacity and decide if an injured workers' weekly rate has been "fairly determined."

Roberts v. Sea-Land Services, Inc., 566 US 93 (2012) addressed a compensation rate adjustment claim arising in 2002 under the federal Longshore & Harbor Worker's Compensation Act (LHWCA). The claimant contested his compensation rate and contended though he was injured in 2002, his benefits should have been calculated at the statutory maximum rate for 2007 because in the latter year he was "newly awarded compensation" following a judge's order. The United States Supreme Court held, "An employee is 'newly awarded compensation' when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf." The claimant had contended that "awarded compensation" means awarded in a formal order. In contrast, the employer contended that phrase means "entitled to compensation" under the LHWCA. The decision turned on what the word "award" meant, and which fiscal year maximum rate must be used in the claimant's situation.

Roberts reasoned, "It is difficult to see how employer or claims examiner can use a national average weekly wage other than the one in effect at the time an employee becomes disabled." The claimant in *Roberts* became immediately disabled in 2002 and did not return to work. His employer voluntarily paid disability benefits until 2005. When benefits were discontinued, the claimant filed a claim which went before a judge who awarded the maximum disability rate for 2002, the year the employee became disabled.

> **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. . . .

> **8 AAC 45.065. Prehearings**. . . .
>
> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing. . . .
>
> **8 AAC 45.070. Hearings**. . . .
>
> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary . . . governs the issues and the course of the hearing. . . .
>
> **Alaska R. Civ. P. 11**. **(a)**. . . .
>
> **(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper -- whether by signing, filing, submitting, or later advocating it -- an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

"Court proceedings are governed by rules that apply to all litigants and give direction to judicial officers." *Pruitt v. State, Office of Lieutenant Governor*, Slip Op. No. 7644 (March 23, 2023).

ANALYSIS

1) Is Employee entitled to a compensation rate increase?

Employee was injured working for Employer in 2021. She contends her 2019 and 2020 earnings do not bear any resemblance to her lost earnings while disabled in 2021 and 2022 because she was enrolled in nurse's training in 2019 and 2020 and only worked briefly as a flagger in 2020. It is

undisputed Employer initially calculated her weekly compensation rate based on her 2020 flagger's income, and paid her $308 per week; Employee concedes Employer later adjusted it to $1,1125.25. But she seeks the maximum $1,298 weekly rate and relies on §220(a)(5) and *Straight*. Employee bears the burden of proof on this issue. *Abood*.

Employer contends it initially and voluntarily paid Employee $308 per week even though it could have sought a lesser amount. It further contends it subsequently and voluntarily raised Employee's rate from $308 to $1,112.25 based on earnings documentation she provided and using Employee's earnings from January 1, 2021 through October 16, 2021, and dividing her gross earnings for that period by 41 weeks. Employer contends neither this panel nor the Commission can deviate from the statutory formula set forth in §220(a)(4) and discounts what it calls the Commission's "ridiculous" *Straight* decision. Employer contends this decision has no authority to rule §220(a)(4) unconstitutional. It contends wages earned after an injury cannot be used to calculate a spendable weekly wage. Moreover, Employer contends using Employee's proposed calculation results in her receiving 74 percent of her gross earnings, rather than 80 percent of her spendable weekly wage as required by AS 23.30.185.

For many years §220's prior iterations contained rate provisions that generated regular litigation and decisions repeatedly rejected by the Alaska Supreme Court -- first by the Court's statutory construction and later, on constitutional grounds. Most of these disputes had been resolved legally by around 1984, and §220 was amended to correct constitutional infirmities. *Thompson*.

In 2005, the legislature amended §220 to a version like the one the Court in *Gilmore* previously deemed unconstitutional as applied; this 2005 version applies in this case. The parties agree Employee is an hourly worker. The current §220(a)(4) applicable to hourly workers states: "Computation of compensation . . . shall be on the basis of an employee's spendable weekly wage at the time of injury." The statute then states the spendable weekly wage "is the employee's gross weekly earnings minus payroll tax deductions." *Id*. While Employer correctly notes this decision has no authority to address constitutional issues with §220, neither may it ignore decades of settled case law interpreting and construing past and current versions of AS 23.30.220, including the Commission's *Straight* precedent. *AKPIRG*; AS 23.30.008(a).

AS 23.30.220's objective "is to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid." *Johnson*. Normally,§220(a)(2) "will yield a fair approximation of this figure." Sometimes, it does not, and a different subsection must be used. *Id*. Professor Larson, upon whom the Alaska Supreme Court routinely relies, aptly noted, "the entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity." Larson recognized that an injured worker's disability "reaches into the future, not the past." *Johnson*; 2 A. Larson, *The Law of Workmen's Compensation* §60.11(d), at 10-564 (1983). Ironically, although §220(a) requires spendable weekly wages "at the time of injury" be used as the basis for calculating a TTD rate, the statute immediately pivots to determining those earnings by referencing the past.

The Alaska Supreme Court has routinely applied Larson's logic to increase TTD benefits in compensation rate adjustment claims. *Johnson*; *Gilmore*; *Deuser*; *Brunke*; *Peck*; *Alderson*; *Houston Contracting, Inc.* The Court has evenhandedly allowed an employer to reduce an injured worker's earnings in the instance where past earnings were much higher than the claimant's future losses due to the injury. *Gronroos*. The §220 version is not at issue here. *Dougan*.

In *Gilmore,* the claimant appealed a decision denying his rate adjustment claim on statutory construction grounds. The Court on its own motion asked for briefing regarding constitutionality questions and struck down §220 as applied, on equal protection grounds. That does not mean *Gilmore* would not have come to the same result construing the statute using the *Johnson* rationale. *Gilmore* quoted from *Johnson* and said §220(a)'s overall purpose is "to formulate a fair approximation of claimant's probable future earning capacity during the period in which compensation benefits are to be paid." *Gilmore* held a "fair approximation" was an "essential component" behind the Act. It further stated there was "no substantial relationship" between calculating a worker's weekly wage by reference to past calendar years when the number reached does not reflect the worker's actual losses, and achieving a "quick, efficient, fair, and predictable delivery of indemnity" benefits. *Gilmore* rejected the employer's contention that the mechanical formula led to "quick, efficient results," and said efficiency cannot be gained "at the sacrifice of fairness in result." Employer makes a similar argument here, and contends Employee's requested calculation will result in unpredictable "chaos." However, as illustrated in its brief, Employer had

no difficulty predicting Employee's lost earnings into the future and voluntarily used her 2021 earnings to increase her compensation rate from $308 per week to $1,125.25 per week. The issue here is, did Employer go far enough in adjusting her TTD rate?

To be clear, "fair" is not the primary goal in statutory construction cases involving TTD rate claims. *Thompson*. The question is whether an injured worker's "past earnings could accurately be used to determine what she would have earned had she not been injured." *Id*. In cases where the standard formula results in "an accurate reflection" of an injured worker's wage loss, the statute must be applied. *Bauder*. Subsequently, the Court said, "departure from the statutory formula" must be based on "substantial evidence supporting the conclusion that past wage levels will lead to an irrational workers' compensation award." In other words, there must be substantial evidence that "past wages are an accurate predictor of loss due to injury." The question here is, will the statutory formula in the instant case "accurately" predict what Employee would have earned had she not been injured. *Abood*; *Justice*. *Brennan* reaffirmed *Gilmore* and said its premise was sound; the fact-finders could not deviate from the statutory scheme unless "there was substantial evidence to support the conclusion that past wage levels will lead to an irrational . . . award."

More recently, the Commission in *Straight* remanded a case for additional evidence and said the fact-finders could rely on AS 23.30.001 and §220(a)(5) "to assist in ascertaining a fair spendable weekly wage." Though Employer contends *Straight* is "ridiculous," it is precedent, and its facts are strikingly like the instant case. AS 23.30.008(a). The claimant in *Straight* had not worked in the two years prior to taking a job that paid Davis-Bacon wages. Employee had attended nursing school in 2019 and 2020, and had worked only as a flagger briefly in 2020 prior to her 2021 injury with Employer. The *Straight* claimant's earnings increased dramatically after he reentered the workforce. Employee's annual earnings went from approximately $9,000 in 2020 to over $91,000 in 2021 even though she did not begin working until late March. Moreover, Employee's primary disability did not occur until May 2022, after her hourly wage had increased from $44 to $60, which also increased her overtime rate. *Johnson*.

Employer contends a person cannot be injured in one year and years later request a higher compensation rate after his or her earnings have increased significantly. However, *Peck* shows

Employer is incorrect, where a pilot injured in 1964 who became disabled in 1982 was entitled to a rate increase from $255 to $1,294 per week. The Court has consistently held, solely on statutory construction grounds, that an alternative method must be used for calculating TTD benefit payments where the formulaic method "substantially underestimates future income." *Deuser*; *Brunke*; *Alderson*; *Houston Contracting, Inc.*; *Bauder*. *Gilmore* said a mechanical formula fails to account for "workers who have newly committed to full time employment." It fails to account for "any change in the employee's earning capacity that occurred during the year of injury."

Employer presented Employee's direct supervisor Craig, and its vice president Beltzer as witnesses at hearing. Neither denigrated Employee's work performance; neither mentioned any disciplinary issues, inappropriate absences or a likelihood that she would not continue her ongoing employment with Employer. Employer and Employee agreed she continued to work for Employer on restricted duty full-time after her work injury until she needed invasive treatment in mid-2022. Both parties agreed she continues to work for Employer as a nurse. *Saxton*; *Abood*.

The undisputed evidence shows Employee had no earnings in 2019 while she was attending school to become a nurse, and only earned around $9,000 in 2020 as a flagger. It is undisputed she grossed $4,301.34 in the pay period ending the day prior to her October 17, 2021 injury, without including any Covid "Hero" or other irregular bonus. Employer's brief stated her 2021 gross earnings totaled $91,635.14. The evidence also shows, with exception of the three-day waiting period post-injury, her main total disability began in May 2022, after Employer had increased her hourly wage from $44 to $60.23 per hour. According to Craig, Employee worked one week on and one week off, typically 12 hours a day. This resulted in considerable overtime; her overtime rate increased with her pay increase. There is no evidence that her hourly wages or working hours decreased post-injury. The only limitation was her restricted duty while she was healing. *Saxton*; *Abood*.

Using Employee's $4,301.34 gross earnings for pay period October 3, 2021 through October 16, 2021, (a 14-day period with one week on, and one week off) as one measure of what Employee would lose when disabled because of her work injury, results in the following: $4,301.34 x 26 pay periods per year = $111,834.84 per year / 52 weeks = $2,150.67 per week gross wages. It is undisputed Employee is married with five dependents. According to the Division's online Benefit

Calculator, this results in a $1,813.70 spendable weekly wage and the maximum $1,298 TTD rate. But for the TTD rate cap, 80 percent of her spendable weekly wage would be $1,450.96. Using this method, Employee would receive only 72 percent of her spendable weekly wage, not 80 percent, even if she received the maximum TTD rate. AS 23.30.175(a).

But Employee lost even more than this when she became disabled in 2022. By then, Employee's earnings were better represented in her May 15, 2022 through May 28, 2022 paystub, reflecting her significantly higher hourly pay raise and her earnings immediately before she went to Anchorage for surgery, which began her main TTD period. For this two-week pay period, with one week on and one week off, Employee grossed $5,372.99. There is no "hero bonus" included in this calculation. Using the same calculation method above results in the following: $5,372.99 x 26 pay periods per year = $139,697.74 per year / 52 weeks = $2,686.50 per week gross wages. Clearly, using the Division's Benefit Calculator this too results Employee receiving the statutory maximum $1,298 TTD rate. Here, Employee realizes only around 48 percent of her spendable weekly wage. It is difficult to see how Employee is being overpaid at the maximum rate. Moreover, addressing Employer's constitutional argument, awarding her the maximum compensation rate given these facts is not treating her any differently than similarly situated nurses working for Employer at the same pay rate and schedule. *Gilmore*.

Again, to be clear, this decision need not, and does not, apply constitutional principles set forth in *Gilmore* to the instant case. *Gilmore* simply sets forth well-settled case law, which for decades has construed §220(a) in all its versions to require the fact-finders to look into the future to determine the appropriate TTD compensation rate where the primary statutory formula looking into the past does not accurately predict Employee's future wage losses resulting from her undisputed work injury with Employer. Looking forward does not violate §220, because future earnings are evidence of what Employee lost when she became disabled from her work injury. There is no better evidence of what Employee lost than the actual wages she was making when she became disabled and continues to make, as she still works for Employer.

Employee satisfied her burden of proof with substantial evidence, including Employer's pay stubs showing her pre- and post-injury earnings and her own testimony, which demonstrates her

intention to continue working coupled with the fact that she still works for Employer. *Saxton*. This evidence is undisputed. *Abood*. She demonstrated her higher earnings would, and did, extend into the period of her disability. *Johnson*. Employer's reliance on *Roberts* is misplaced; that case deals with language not in our Act. If anything, *Roberts* supports Employee's position as it notes benefits must be determined when an injured worker becomes disabled. Employee's request for a TTD compensation rate adjustment will be granted, and Employer will be ordered to pay her the difference between the maximum $1,298 weekly rate and the $1,125.25 rate it previously paid. This comports with the legislature's intent. AS 23.30.001(1).

2) Is Employee entitled to additional TTD benefits?

Employee contends Employer never paid her TTD benefits for June 2, 2022 through June 5, 2022; these four days are the only dates she claims remain unpaid. Employer contends it already paid Employee TTD benefits for these four days. This creates a factual dispute to which the presumption analysis must be applied. AS 23.30.120(a); *Meek*. Employee did not expressly testify Employer failed to pay her TTD benefits for these four days; it was argued in her brief. Without regard to credibility, and assuming her testimony implied as much, she raised the presumption with her implied testimony. *Tolbert*. Without regard to credibility, Employer rebutted the raised presumption with Hlavinka's testimony she paid Employee TTD benefits for those four days. *Huit*. Without the presumption, Employee must prove her entitlement to this four-day TTD benefit period by a preponderance of the evidence. *Saxton*.

The basis for Employee's contention that Employer never paid her TTD benefits for June 2, 2022 through June 5, 2022, is unclear. By contrast, Hlavinka's payment records and her convincing, unequivocal testimony show Employer paid these benefits as indicated in Hlavinka's spreadsheet. As between the two witnesses, Employee's testimony is given less weight and credibility and Hlavinka more, on this issue. AS 23.30.122; *Smith*. Employer already paid Employee TTD benefits for June 2, 2022 through June 5, 2022. *Huit*. Thus, Employer's arguments about whether she was entitled to those TTD benefits are irrelevant here because the benefits were already paid. Employee's claim for TTD benefits from June 2, 2022 through June 5, 2022 will be denied.

3) Is Employer's overpayment issue ripe for decision?

Employer in its hearing brief and at hearing contended it had made a benefit "overpayment." It seeks an order identifying the overpayment and allowing it to recoup this amount from future benefits. The "overpayment" issue was not raised in the control the controlling December 8, 2022 prehearing conference summary as one for hearing. 8 AAC 45.065(c). Therefore, this decision will not address it. 8 AAC 45.070(g). However, Employer correctly noted it needs no permission from this decision to withhold "up to 20 percent out of each unpaid installment" of compensation due, if it "has made . . . overpayments of compensation due." AS 23.30.155(j).

4) Did Employer frivolously or unfairly controvert Employee's benefits?

Employee contends Employer frivolously controverted Employee's benefits. Employer contends it never controverted any benefits until after Employee filed a claim, and then controverted her compensation rate adjustment request relying on §220(a)(4). The law on this issue is clear. If this decision determines Employer's insurer frivolously or unfairly controverted compensation due under the Act, the Division director must so advise the Division of Insurance, which will determine if the insurer committed an unfair claim settlement practice. AS 23.30.155(o); *Harris*.

A Controversion Notice must be filed in "good faith," to protect an employer and its insurer from a penalty. *Harp*. Employer had to possess sufficient evidence to support its controversions that if Employee did not introduce evidence in opposition to it, she would not be entitled to benefits. *Id*. The focus is on the evidence Employer possessed when it controverted Employee's claims. *Vue*. Nevertheless, Employer could rely on fact-based or legal-based findings to support its controversion. *Irby*. *Phillips* is dispositive on this issue; it stated only the fact-finders following a hearing can determine a compensation rate in a disputed case. It stated on facts very much like those in this case, in respect to the worker's bad faith controversion contention, "the only compensation due on the facts presented to the employer was that calculated in accordance with subsection (a)(1)." Employer in its July 20, 2022 and August 23, 2022 Controversion Notices used the same bases for controverting Employee's rate adjustment claim.

In other words, so long as it followed the statutory formula and paid at least the minimum compensation rate based on her prior earnings, Employer could pay Employee TTD benefits at any rate it wanted. In a disputed rate case, like this one, only the fact-finders after a hearing on a rate adjustment claim can award a higher rate. Therefore, pursuant to *Phillips*, Employer had a valid legal basis under §220(a)(4) to deny any rate higher than the one derived from applying the primary statutory formula for an hourly worker. *Irby*.

Employer's September 28, 2022 Controversion Notice was fact-based. It contended based on evidence in its possession on September 28, 2022, it had already paid Employee TTD benefits for the dates for which she sought them in her amended claim. Employer contended it paid TTD benefits timely in accordance with the Act after it received medical evidence authorizing the disability. Had she presented no contrary evidence, Employee would not have been entitled to any benefits. Therefore, the September 28, 2022 controversion met the *Harp* fact-based standard. *Irby*.

Based on the above analysis, Employer's three Controversion Notices were neither frivolous nor unfair. Employee's request for a "frivolous" finding and a referral to the Division of Insurance under AS 23.30.155(o) will be denied.

5) Is Employee entitled to a penalty?

Employee at hearing clarified she was not seeking a penalty on the TTD rate adjustment. Employer's July 20, 2022 Controversion Notice addressed only the compensation rate adjustment; therefore, Employee is not seeking a penalty based on that notice.

That leaves only TTD benefits, penalty, interest, frivolous or unfair controversion, attorney fees and costs as possible targets for Employee's §155(e) penalty claim. Employer's August 23, 2022 Controversion Notice also addressed the rate claim and added a controversion of Employee's request for attorney fees and costs. Its September 28, 2022 Controversion Notice additionally denied penalty, interest, a frivolous or unfair controversion and attorney fees and costs. The analysis from section (3), above, is incorporated here by reference.

Only the fact-finders after a hearing can award additional TTD benefits, penalty, interest, find a frivolous or unfair controversion, and award attorney fees and costs. Employer had fact- and legal-based defenses to these claims stated in its denial, which if Employee presented no evidence to rebut them, she would not have been entitled to additional benefits. *Harp*.

Moreover, Hlavinka's credible testimony demonstrated Employer paid TTD benefits timely in accordance with the Act after Employee belatedly provided medical documentation justifying at least some of the TTD benefits Employer timely paid. AS 23.30.122; *Smith*. Given these facts, Employee is not entitled to a penalty. Therefore, because Employer's three Controversion Notices were neither frivolous nor unfair, and met the *Harp* fact-based standard and the *Phillips* legal-based standard, as applicable, the request for a §155(e) penalty will be denied.

6) Is Employee entitled to interest?

The analysis in respect to interest is different from the "penalty" analysis. Interest compensates Employee for the time-value of benefits owed to her and eventually awarded. Contrary to Employer's contention, even though only the fact-finders after hearing may order a compensation rate adjustment, interest on these benefits are payable back to the date to which she was "originally entitled to these benefits." *Humphrey*. Employee's request for interest on her compensation rate adjustment will be granted. AS 23.30.155(p).

7) Is Employee entitled to attorney fees?

Employee prevailed on her primary claim for a compensation rate adjustment; Employer controverted the rate adjustment claim and resisted paying the maximum rate. It only paid its voluntarily increased rate after Powell filed a claim on employee's behalf. *Childs*. Similarly, Employer voluntarily paid TTD benefits, interest and a penalty after Employee's amended claim. She also prevailed on her claim for interest. Employee failed on her request for a frivolous controversion finding and on her penalty claims. The "frivolous" finding if made would only have resulted in this decision asking the Division director to refer the case to the Division of Insurance; it would not have accorded Employee any direct benefit of pursuant to §155(o). Therefore, losing

this claim was inconsequential to her. Similarly, her penalty claim was minimal. Her attorney fee award will not be reduced because she lost on these two issues. *Porteleki*.

Employee incurred no costs. She contends she is entitled to 49.3 hours at $425 per hour totaling $20,952.50 in attorney fees; she also seeks ongoing fees on the rate adjustment. Included in her itemized statement are attorney fees for obtaining a protective order on discovery in *Geerhart I*. Employer contends she should be awarded no attorney fees. It contends it never resisted the compensation rate adjustment; it just needed evidence through discovery before it could voluntarily adjust it. Employer's contention is not well taken. *Phillips*. Nothing in the Act prohibits an injured worker from filing a claim for a TTD rate adjustment and attaching evidence supporting that issue to the claim. Employer's voluntary TTD rate increase following Employee's claim is akin to an "award." *Childs*. Employer will be ordered to pay attorney fees and costs on the entire compensation rate adjustment. Moreover, in the event employee is entitled to future TTD benefits, they will be paid at a higher rate, and she will be entitled to statutory minimum attorney fees on any future TTD benefit payments. AS 23.30.145(a), (b); *Cortay*; *Wozniak*.

Employer contends this litigation was unnecessary and violated Civil Rule 11. It contends Employee's attorney fees, if any, must be reduced to account for her "frivolous and legally unfounded" claims. Employer offers no legal authority applying Civil Rule 11 to workers' compensation claims. This decision has no jurisdiction over Civil Rule 11 allegations, which apply only to "courts." *AKPIRG*; *Pruitt*.

Employer does not dispute Employee's lawyer's hourly rate but disputes fees attributable to the discovery issue upon which she prevailed in *Geerhart I*, only to withdraw her discovery appeal as the facts changed. It cites no authority to reduce Employee's attorney fees for *Geerhart I*. It was unbeknownst to the designated chair before *Geerhart I* issued that Employee withdrew her discovery appeal pre-decision. But the panel never acted on Employer's October 19, 2022 petition to reconsider or vacate *Geerhart I* before its power to do so expired and Employer's October 19, 2022 petition is considered denied. AS 44.62.540(a). Employee's attorney fees related to *Geerhart I* will not be reduced. *Porteleki*.

Employee in her attorney fee affidavits did not expressly address each *Rusch* factor; similarly, Employer did not address them either in briefing or oral argument. These factors include:

> (1) *the time and labor required, novelty and difficulty of the questions involved and skill requisite to perform the legal services properly*: Based on the panel's experience, this was not a particularly difficult matter. *Rogers & Babler*.
> (2) *the likelihood acceptance of the employment will preclude other employment by the lawyer*: Based on the panel's experience, taking one person's case negatively impacts a solo practitioner's ability to take other employment. *Rogers & Babler*.
> (3) *the fee customarily charged in the locality for similar services*: Powell has been awarded $425 per hour in other cases and Employer has not objected to that rate in this case. *Rogers & Babler*.
> (4) *the amount involved, and results obtained*: The compensation rate adjustment claim involved in this matter was substantial, and increased Employee's TTD rate from $308 dollars to $1,298 per week. *Rogers & Babler*.
> (5) *the time limitations imposed by the client or the circumstances*: Employee presented no evidence on this issue. (Agency file; record).
> (6) *the nature and length of the professional relationship with the client*: Based on the panel's experience, Powell represented Employee for a relatively short time. *Rogers & Babler*.
> (7) *the experience, reputation and ability of the lawyer or lawyers performing the services*: Based on the panel's experience, Powell has significant experience, ability and a good reputation. *Rogers & Babler*.
> And (8) *whether the fee is fixed or contingent*: With a minimal exception not applicable here, all attorney fees in these cases are contingent. *Rogers & Babler.*

Given the above analysis, and based on Powell's attorney fee affidavits, Employee will be awarded $20,952.50 in full, reasonable attorney fees and ongoing attorney fees on any future TTD benefits paid at the newly established rate. *Cortay*; *Wozniak*.

CONCLUSIONS OF LAW

1) Employee is entitled to a compensation rate increase.
2) Employee is not entitled to additional TTD benefits.
3) Employer's overpayment issue is not ripe for decision.
4) Employer did not frivolously or unfairly controvert Employee's benefits.
5) Employee is not entitled to a penalty.
6) Employee is entitled to interest.
7) Employee is entitled to attorney fees.

ORDER

1) Employer is ordered to increase Employee's TTD compensation rate to $1,298 per week and to pay her the difference between this newly established rate and the rate it previously paid her.
2) Employee's request for TTD benefits for June 2, 2022 through June 5, 2022 is denied.
3) Employee's request for a frivolous or unfair controversion finding under §155(o) is denied.
4) Employee's request for a penalty under §155(e) is denied.
5) Employer is ordered to pay Employee interest on the increased TTD compensation rate.
6) Employer is ordered to pay Employee's attorney $20,952.50 in attorney fees, and statutory minimum fees on any future TTD benefits paid at the higher rate.

Dated in Anchorage, Alaska on April 4, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Marc Stemp, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Jolene Maiyuaq Geerhart, employee / claimant v. Yukon Kuskokowim Health Corporation, employer; Alaska National Insurance, insurer / defendants; Case No. 202204600; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on April 4, 2023.

/s/
Rachel Story, Office Assistant