ALASKA WORKERS' COMPENSATION BOARD

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

SABRINA M. MARTINO, Employee, Claimant, v. ALASKA ASPHALT SERVICES, LLC, Employer, and THE OHIO CASUALTY INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 202007450 AWCB Decision No. 23-0044 Filed with AWCB Anchorage, Alaska on August 10, 2023

Sabrina Martino's (Employee) January 25, 2022 claim was heard on June 29, 2023, in Anchorage, Alaska, a date selected on May 16, 2023. A May 16, 2023 hearing request gave rise to this hearing. Attorney Robert Bredesen appeared by Zoom and represented Employee, who appeared by Zoom and testified. Attorney Stacey Stone appeared and represented Alaska Asphalt Services, LLC and its insurer (Employer). Other witnesses included Wilbert Pino, MD, and Gina Withrow, who testified for Employer. To allow for supplemental attorney fee briefing from both sides, to receive the Alaska Workers' Compensation Appeals Commission's (Commission) July 13, 2023 attorney fee order in this case, and to allow Employer to respond to the Commission's order as it might apply here, the record was reopened on July 20, 2023, and closed on July 28, 2023. An oral order at hearing declined to continue the hearing at Employer's request. This decision examines that order and decides Employee's claim on its merits.

ISSUES

Employer contended there is a continuing "gap" in the medical evidence as found in *Martino v. Alaska Asphalt Services, LLC*, AWCB Dec. 22-0029 (April 29, 2022) (*Martino I*), and its April 21, 2023 petition for a functional capacity evaluation (FCE) and a thoracic outlet syndrome (TOS) evaluation should be decided first. It requested a hearing continuance so these evaluations could be done before the merits hearing. Employer conceded the hearing could proceed and this decision could order additional medical evaluations if necessary before rendering a merits decision.

Employee contended hearing continuances are disfavored. She contended there is no gap in the medical evidence because physicians provided disability opinions and diagnosed TOS already. Employee opposed delaying the merits hearing; an oral order denied Employer's request.

1) Was the oral order declining to continue the hearing correct?

Employer asserted an injury notice defense under AS 23.30.100. It did not brief or argue this defense at hearing.

Employee contends she gave timely injury notice within 30 days of her injury date.

2) Is Employee's claim barred for failure to give timely notice?

Employee contends medical evidence raises the statutory presumption that her left shoulder, left cervical spine, and left TOS injuries are compensable and need treatment, and Employer has not rebutted the presumption with substantial contrary evidence. She seeks an order finding her injuries compensable, and she claims related past and ongoing medical benefits for each.

Employer contends there are no causation opinions supporting Employee's claim that her work injury caused anything other than a left shoulder strain. It opposes the claimed benefits.

3) Are Employee's left shoulder, left cervical spine, and left TOS compensable injuries?

Employee contends she has been disabled since soon after her work injury with Employer. She claims temporary partial and total disability (TPD and TTD) benefits retroactively beginning September 14, 2021, and continuing until she is medically stable or is no longer disabled.

Employer contends *Martino v. Alaska Asphalt Services, LLC*, AWCB Dec. 22-0046 (June 29, 2022) (*Martino II*) already found Employee medically stable and awarded her reemployment stipend benefits, which it contends are only awarded after medical stability. It further contends Employee moved from Alaska and voluntarily left the labor market. Employer contends she is entitled to no additional TTD benefits.

4) Is Employee entitled to TPD or TTD benefits?

Employee contends she is entitled to interest and a penalty on any past benefits awarded in this decision because Employer had no legal or factual basis to not pay benefits.

Employer contends its controversions based on its employer's medical evaluation (EME) are sound and the EME's opinions and controversions based on them protect Employer from an additional benefit award, associated interest and a penalty.

5) Is Employee entitled to interest or a penalty?

Employee contends she is entitled to full, reasonable attorney fees if she successfully obtains benefits in this decision. She seeks $450 per hour through December 31, 2022, and $520 per hour beginning January 1, 2023, with the increase based on inflation and on the Commission's order.

Employer contends this decision should award Employee no additional benefits. Therefore, it contends her attorney is entitled to no attorney fees or costs. Nonetheless, in the event this decision awards Employee additional benefits, Employer contends Bredesen failed to provide applicable evidence to support his request for $520 per hour.

6) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On June 12, 2009, Employee told Jeffrey Kim, MD, she had been in a motor vehicle accident five weeks earlier. Her symptoms were all on the right side. Dr. Kim diagnosed right neck and radiating right arm pain from the motor vehicle accident, and recommended physical therapy (PT) for six to eight weeks. There was no mention of left neck or arm symptoms. Cervical spine x-rays showed moderately severe disc space narrowing at C5, mild at C6-C7, all characterized as "degenerative disc disease." (Kim report; Eagle Center PT referral, June 12, 2009).

2) On June 17, 2009, cervical spine magnetic resonance imaging (MRI) showed mild degenerative disc and joint disease, borderline spinal stenosis with moderate neural foraminal impingement "bilaterally" at C6-7, "mild to moderate" neural foraminal impingement at C5-6 on the left, mild on the right. (MRI report, June 17, 2009).

3) On July 6, 2009, Employee told Dr. Kim she had tingling on occasion in her right forearm and parts of her hand. He was concerned "for possible radiculopathy." (Kim report, July 6, 2009).

4) On July 24, 2009, Kim Wright, MD, performed right C6-7 laminotomy, facetectomy, foraminotomy and discectomy surgery on Employee to address a cervical disc herniation with radiculopathy down the right arm. (Operative Report, July 24, 2009).

5) Except for the next finding, there are no relevant medical records for 11 years thereafter until Employee's June 30, 2020 work injury with Employer. (Agency file).

6) On June 24, 2014, Dr. Wright advised Employee's past employer, "I am pleased to inform you that this nice patient Sabrina Martino . . . has done very well following surgery. She was last seen by [a physician assistant] on 11/10/2009." (Wright report, June 24, 2014).

7) On June 30, 2020, Employee was running a compactor for Employer when it fell to a lower elevation, and she pulled up on it and felt "shoulder pain." (First Report of Injury, July 7, 2020).

8) On July 2, 2020, Employee prepared a hand-written statement for Withrow:

South Park Job

> On 6-30-20 I was running the Jumping Jack when it "fell" "slipped" to a lower elevation. I pulled quickly up on it so it didn't fall and felt a tightening in my shoulder. It is gotten worse over the last 2 days. This shoulder was sore previously but the pain/tight feeling had gone away. About 2 months ago I had a

> similar feeling but not as painful when I had grabbed the rail on loader to prevent a fall because my leg went out/buckled. I never had that checked because pain [went] away. (Employee statement, July 2, 2020; Employee; Withrow).

9) On July 2, 2020, Employee reported to a Veterans Administration (VA) emergency room for, "Pain in left shoulder." Her chief complaint was charted as left shoulder pain since April 2020, which was "chronic" since April when she, "Re-injured arm at work [on] Tuesday." The provider suspected a rotator cuff injury and gave Employee a Lidoderm patch for her left shoulder. The provider charted her first injury occurred when she grabbed a "truck to keep from falling," and then hurt her left shoulder again "2 days ago" with a "Jumping Jack, which caused" "new pain" from the June 30, 2020 incident. (VA clinic report, July 2, 2020).

10) Beginning July 3, 2020, Employer began paying Employee TTD benefits. (Insurer's payment itemization, Employee's Hearing Brief, Exhibit E, May 11, 2023).

11) On July 6, 2020, adjuster Courtney Personius spoke with Withrow about Employee's work injury. Employer did not doubt "the accident or disability," and said Employee was, "Full-time." (Personius Journal Entry, July 6, 2020).

12) On July 8, 2020, Urgent Care Medical Clinic (Urgent Care) examined Employee for a work injury "using land compactor." She had left shoulder pain on and off since the injury, and had been unable to use her shoulder in certain motions. Urgent Care assessed a "shoulder strain," treated with ice and Motrin, planned to rule out a rotator cuff or labral tear and suggested magnetic an MRI and an orthopedic consultation. (Urgent Care report, July 8, 2020).

13) On July 8, 2020, Employee and T. L. Crowe, MD, with Urgent Care, completed a Division of Workers' Compensation (Division) physician's report. Asked if the body part had been injured before, Employee stated "maybe" and said, "2 months ago maybe? Felt pull went away." When asked how the then-current injury happened, she said:

> Was running Jumping Jack when it malfunctioned, bucked. Felt like it or me was falling. Pulled up quick and felt pain. Over a few days realized might be serious because it wasn't better.

Dr. Crowe took Employee off work for seven days, and recommended an MRI. (Physician's Report, July 8, 2020).

14) On July 14, 2020, the VA clinic in Anchorage did x-rays and an MRI on Employee's left shoulder for "left shoulder pain after falling." The x-rays showed no acute abnormality. The MRI showed various abnormalities. (VA radiology reports, July 14, 2020).

15) A July 20, 2020 PT record states Employee reported "left shoulder pain since early May grabbing a railing." "This pain resolved and then on 2 July 2020 she injured [sic] at work. Now pops." The method of injury was, "injured on/using piece of eqp [equipment]." Employee said she was not able to reach behind her back. The therapists diagnosed rotator cuff "tendinitis/bursitis with secondary Impingement Syndrome." (PT report, July 20, 2020).

16) On July 27, 2020, Cory T. Beals, MD, at a VA facility examined Employee for "pain in the left shoulder." She stated about a month earlier she had a jerking movement to her left shoulder and had felt pain since. Employee said she had PT and was taking over-the-counter anti-inflammatories. "She describe[d] the pain mostly anterior . . . but some radiation posteriorly down her lateral arm as well." Employee's peripheral pulses were symmetric. Dr. Beals diagnosed rotator cuff tendinitis. He recommended PT for six weeks and for Employee to avoid repetitive motions. She planned on moving to Hawaii soon. (Beals report, July 27, 2020).

17) By August 7, 2020, Employee reported her left shoulder was "sore and achy," but her pain was "1/10" while taking medication. (PT report, August 7, 2020).

18) On August 12, 2020, Employee stated she "fell down the stairs on Friday, and felt a bit of a pop in her low back and actually feels better now." The report does not mention her left shoulder. Employee was not doing home exercise because she was getting her belongings ready to move. (PT report, August 12, 2020).

19) Shortly thereafter, Employee relocated to Hawaii. (VA records; Employee).

20) On October 23, 2020, Employee reported left shoulder pain that started approximately four months earlier. It was "only perceived w/overhead reaching." (VA records, October 23, 2020).

21) On November 3, 2020, Employee went to a VA facility in Hawaii for a consultation. The referral stated, "Sabrina moved to Hilo from Alaska to start a new relationship that is falling apart. She was buying property. (Amanda Matthias, PhD, report, November 3, 2020).

22) On November 19, 2020, a PT provider charted her work injury with Employer and left arm symptoms as follows:

> Pt does also have c/o L shoulder pain. Onset June 2020, initial injury happened when she was climbing a ladder onto heavy machinery when her leg spasmed and

> she slipped catching herself with L arm that caused a strain. This resolved after a few days but shortly after she aggravated it while hanging onto something and pulling shoulder again. Finally, while on an inversion table for back pain treatment she raised arm overhead and felt a pain which has continued until now. She reports tightness and apprehension with combined shoulder flexion + abduction + ER. Occasional numbness/tingling to LUE. Pain is posterior shoulder and can radiate along biceps. . . . (Kelsey Kikugawa, DPT, report, November 19, 2020).

23) On November 25, 2020, Mark Hansen, MD, orthopedic physician, saw Employee for left shoulder rotator cuff tendinitis and impingement. She reportedly noticed her left shoulder pain in June 2020 and had been taking ibuprofen. Employee said her left shoulder pain began with an injury at work in Alaska. "She describes a strain to the left shoulder when she jerked on a heavy piece of equipment." A July 2020 MRI showed no signs of a full thickness rotator cuff tear but evidence of strain and impingement. Employee's neck exam was "normal." Dr. Hansen assessed a left shoulder muscle and tendon strain. He recommended ibuprofen for two weeks, PT and would consider "CSI" [corticosteroid injection] if pain persisted. Dr. Hansen did not view this as a surgical issue. (Hansen report, November 25, 2020).

24) On January 6, 2021, Dr. Hansen found Employee still having problems with overhead activities. "She gets paresthesias and a sense of weakness in the left arm/hand with running or overhead activities." Employee was moving from Hawaii to Florida "very soon." Dr. Hansen found Employee had "a definite loss of radial pulse in the left volar wrist with left shoulder abduction and external rotation." This worsened when she rotated her head to the right. Left shoulder x-rays were "normal." Dr. Hansen gave her a left shoulder CSI and noted, "She has some symptoms of impingement," but he was concerned about TOS. (Hansen report, January 6, 2021).

25) On January 7, 2021, Employee filed a domestic abuse petition against her boyfriend in Hawaii, and obtained a temporary restraining order. Attachment to her petition, Employee provided a hand-written statement detailing her relationship with the respondent. Employee stated the respondent once put his hands around her throat and applied pressure, but did not choke her; there is no allegation the respondent injured Employee's neck or left upper extremity. (Petition for an Order for Protection, January 7, 2021; Temporary Restraining Order, January 8, 2021).

26) Thereafter, Employee relocated to Florida. (VA records).

27) On January 29, 2021, Employer's adjuster Rachel Lien created a journal entry and reviewed a medical record from Hawaii that detailed Employee's loss of radial pulse in her left wrist. The journal entry noted Employee's diagnoses included "left shoulder impingement," and possible TOS. (Lien Journal Entry, January 29, 2021).

28) On February 16, 2021, orthopedic surgeon Trevor Born, MD, saw Employee at a VA facility in Florida for her left shoulder. Dr. Born charted that her leg would "still give out" and she was "currently" having falls and "this has caused her some left shoulder/arm pain." Employee also had sciatica and low back surgery. As for her left shoulder, Employee said she had a CSI, which helped about "30-40%," but she still had "heaviness in the arm as well as a feeling of numbness and tingling into the thumb and ring and little fingers." She denied any "real neck pain" but was told she may have TOS. Dr. Born diagnosed left shoulder impingement and a possible "SLAP" tear; scapular dyskinesis and possible TOS. He recommended PT for Employee's rotator cuff; medication and possible intraarticular injections; a chest computerized tomography (CT) scan; and limited her work in respect to her left shoulder. (Born report, February 16, 2021).

29) On March 2, 2021, Employee emailed the Division's reemployment benefits technician and the adjuster Dr. Born's February 16, 2021 VA note restricting Employee's work with her left upper extremity to five pounds lifting overhead and no repetitive overhead use; and Dr. Born's multi-page March 2, 2021 report outlining his evaluation and "work projection note limiting her with certain activities with regards to left upper shoulder." (Employee email, March 2, 2021).

30) On March 4, 2021, EME orthopedic surgeon Dr. Pino evaluated Employee. He charted the following history:

> Ms. Martino is a 43-year-old female who indicates sustaining a work-related injury to her right shoulder while working in Anchorage, Alaska on June 30, 2020.
>
> Ms. Martino indicates that she was running a jumping jack device that was malfunctioning, jamming her back, injuring her left shoulder and requiring emergency room management. Ms. Martino indicates that she was seen in the emergency room at the Air Force Base in Anchorage where she was discharged with no specific diagnosis. Ms. Martino indicates that she was eventually evaluated by another provider who ordered an MRI and initiated physical therapy.
> . . .

> Ms. Martino also indicates that she has been evaluated by a primary care provider both in Hawaii and Florida for her persistent symptoms.
>
> Currently, Ms. Martino indicates that she is being followed by the VA Medical Center in St. Petersburg, Florida where she continues to perform physical therapy. Ms. Martino indicates that she has received injections to her shoulder with no relief of symptoms.

Dr. Pino reviewed 44 pages of medical records including many relating to a February 24, 2020 lumbar microdisectomy, an MRI and x-ray reports. Included was a July 6, 2020 record from East Hawaii Health Orthopedic Clinic noting Employee's left shoulder impingement syndrome and CSI done that date. Dr. Pino's summary of this record does not include its additional diagnosis for possible TOS. Employee reportedly told Dr. Pino:

> Ms. Martino reports persistent pain and pulling sensation of the left shoulder along the anterior aspect of the left arm and radiating into her hand with pain that is present at night and pain that restricts movement. Ms. Martino indicates difficulty with range of motion particularly with overhead activities, occasional cramping that radiates into her right hand and difficulty with activities of daily living.

Employee reported "pain in her left upper extremity around her left shoulder." Dr. Pino examined her cervical spine and found "full range of motion in all planes with no radiating pain into the left upper extremity and no limitation of motion." The explanatory introduction to Employer's questions to Dr. Pino stated Employer has responsibility for benefits under the Alaska Workers' Compensation Act (Act) "only if the relevant injury is 'a substantial cause' of the employee's disability (*i.e.*, inability to work) and/or need for medical treatment." The introduction said this standard required (1) identification of different causes for Employee's "condition"; (2) a comparison of the relative contributions made by the different causes for Employee's disability or need for medical treatment; and (3) a determination as to whether the work injury was "the substantial cause" in relation to other causes. Dr. Pino responded:

> After having an opportunity to perform an independent medical examination on Ms. Martino and reviewing the available medical records, it is my determination that Ms. Martino has sustained a musculoskeletal sprain/strain of the left upper extremity with normal diagnostic studies and normal clinical findings at the time of this independent medical evaluation.

> As a result of the work-related injury of June 30, 2020, Ms. Martino sustained a musculoskeletal sprain/strain of left upper extremity, which is directly related to the work-related injury reported.
>
> Based on the review of the available medical records, this work-related injury is the causative factor and the substantial cause for the employee's reported disability and/or need for medical treatment at the time of injury.

He further explained:

> Based on the available medical records submitted for review as well as review of the clinical findings at the time of this independent medical examination, it is my determination that the work injury was the substantial cause of a new injury to the left upper extremity and not a temporary nor a permanent aggravation of a pre-existing condition.

Dr. Pino suggested Employee do independent exercise, but she needed no further PT or other intervention. He further opined Employee became medically stable on January 6, 2021, the same date an attending physician diagnosed possible TOS and injected her shoulder joint. Dr. Pino stated Employee was able to return to work as a heavy equipment operator consistent with her job at the time of her injury. He released her to "heavy work." (Pino report, March 4, 2021).

31) On March 15, 2021, the reemployment benefits technician received a March 12, 2021 verification form signed by Jacqueline Schulze stating Employee had been off work since July 6, 2020, because of her work injury. (Workers' Compensation Reemployment Verification for 90 Consecutive Days of Time Loss, March 12, 2021).

32) On March 15, 2021, Employee filed a claim for TTD benefits stating she hurt her left shoulder operating a malfunctioning Jumping Jack. Employer said she could not work "per insurance companies rules" until Employee obtained a "full release from primary care," which she had not obtained. (Claim for Workers' Compensation Benefits, March 3, 2021).

33) On March 25, 2021, Employer denied TTD benefits not supported by medical evidence, not related to the work injury and after medical stability on January 26, 2021 [sic]; and a penalty. It based its denials on Dr. Pino's March 4, 2021 opinions. (Controversion Notice, March 25, 2021).

34) Employer paid Employee TTD benefits through March 27, 2021. (Insurer's payment itemization, Employee's Hearing Brief, Exhibit E, May 11, 2023).

35) On March 30, 2021, Employee provided information on a VA claim form. She said about her service-connected lumbar spine injury "after years of pressure on my nerves it has caused

permanent damage that causes my leg to lock up, causes muscle spasms in leg . . . causes me to fall and causes me to limp at times." She mentioned a "shoulder strain" and explained how this may relate to her service-connected lumbar injury:

> My leg occasionally gives out or locks up and I have had several falls due to this. I had a few last summer. I tried to catch a fall and hurt my shoulder. I felt like I might lose balance while using equipment on a job. I pulled back quickly and now have an issue with my l [the report ends with the letter "l"]. (Notice of Intent to Rely and Notice of Supplemental Hearing Evidence, HRG EV 001326).

36) On April 7, 2021, having returned to Hawaii, Employee filed another domestic abuse petition against her boyfriend. In another hand-written attachment, Employee detailed her issues with the respondent but again did not mention any physical injury to her neck or left upper extremity. (Petition for an Order for Protection, April 8, 2021).

37) On April 10, 2021, Employee completed a VA form and on a list of "Current Disabilities or Symptoms That You Claim Are Related to Your Military Service and/or Service-Connected Disability," she included 2020 "shoulder pain." In the "Exposure Type" column, Employee stated "trying to prevent fall." In the same column, she stated her related service-connected disability was a "back injury." Under "How the Disability Relates to the Service Event/Exposure/Injury," Employee wrote "nerve issues caused by back cause me to fall." (Application for Disability Compensation and Related Compensation Benefits, April 10, 2021).

38) On April 12, 2021, Employee reported left shoulder pain at "5/10." She reported having an injury "several months ago at work," and since then "her left arm [has felt] numb and tingling." (VA report, April 12, 2021).

39) On April 13, 2021, Employee described her work injury as follows:

> [L]eft shoulder pain x 8-9 mos [months]
> [T]ried to catch her fall so thinks she pulled her shoulder
> [W]as climbing a ladder and caught herself on a ladder thought it was a muscle sprain
> 1-2 mos later, she had a compacter [sic] and she was not on even ground so she pulled on the compactor to stop the sensation of falling and then she hurt her shoulder
> [F]or days after, she could not turn the steering wheel
> [S]till has problem putting on seatbelt, and can't close car door with left arm
> [S]he has numbness and pulling in her muscles going down her arm
> [S]he feels pressure in her arm

> [I]f she touches her shoulder in certain spots, she can feel the sensation down her arm
> [S]he had xr [x-ray] and mri [MRI] in [A]laska through the VA
> [D]id PT which did not seem to help for several weeks
> [W]ith time she has felt less pain but she has felt a more cold/pressure/numbness feeling
> [H]as symptoms every day, a lot of thing[s] she can't do "pretty much gimp"
> [S]he feels sensation from her elbow to her pinky right now holding the phone
> [D]ifficult for her to raise her arm
> [D]oes not have pain at rest
> [D]riving is very uncomfortable, she has constant pain, she feels like there is a weight pulling down her arm
> [S]he had an injection which helped with pain so she was able to gain some mobility but had more pressure right now. [I]jection done in January
> [S]he was in FL [Florida] and went to VA there, wanted to start PT and then was told it would take months out, saw orthopedist
> [S]he will be staying in Hawaii for prolonged period
> [C]an also feel numbness in thumb more frequently than pinky
> [S]ome question whether she had thoracic outlet syndrome -- done through the VA

The examiner reviewed Employee's January 25, 2021 left shoulder x-rays and found no abnormalities. (VA report, April 13, 2021).

40) On April 13, 2021, Employee's VA disability rating report included "pain in left shoulder" as a "Provisional Diagnosis." This was apparently related to her "falls," which had "caused her some left shoulder/arm pain." Employee's reported falls resulted from a low back injury she sustained while on active duty in the Air Force. "Apparently there is still Worker's Compensation involved with the original injury." The VA subsequently decided the left shoulder was not service connected. (VA reports, April 13, 2021; May 7, 2021).

41) On April 13, 2021, Leung Tcheung, MD, restricted Employee's activities involving her left shoulder for four weeks. (Tcheung letter, April 13, 2021).

42) On April 26, 2021, the reemployment section sent the parties a letter stating, "compensability of [her] claim does not appear to be in dispute." (Technician letter, April 26, 2021).

43) On April 26, 2021, Employer denied TTD benefits not supported by medical evidence, not related to the work injury and any after medical stability; reemployment benefits; and a penalty. Employer based its denials on Dr. Pino's March 4, 2021 report. (Amended Controversion Notice, April 26, 2021).

44) On April 27, 2021, Dr. Born saw Employee for her left shoulder, on referral from Dr. Tcheung. He charted:

> Apparently, she had some type [of] injury which resulted in sciatica and undergoing back surgery. Her leg will still give out on her and she currently will have falls and this has caused her some left shoulder/arm pain. . . . Had a subacromial injection which she states helped about 30-40% she still gets heaviness in the arm as well as a feeling of numbness and tingling into the thumb and ring and little fingers. . . . Was told she may have thoracic outlet syndrome.

Dr. Born diagnosed left shoulder pain, impingement and possible SLAP tear; scapular dyskinesis; and possible TOS. (Born report, April 27, 2021).

45) On April 27, 2021, Employee reported Employer's "physicians" were "clearing her for return to work, however she does not feel safe with returning due to work involving manual labor and operating heavy machinery on construction sites." DPT Kikugawa found signs and symptoms consistent with left TOS and adhesive capsulitis. He opined because of Employee's "deficits and symptoms, including LUE [left upper extremity] and LLE [left lower extremity] numbness and weakness that can affect control of limb," Employee was "not appropriate for return to work operating heavy machinery around others and/or repeated lifting/carrying materials." (Kikugawa report, April 27, 2021).

46) On May 8, 2021, reemployment specialist Lanelle Yamane faxed a questionnaire to Withrow seeking information about Employee's work at the time of her injury. She also asked if Employer could offer Employee alternative employment. (Yamane letter, May 8, 2021).

47) On May 11, 2021, Employee's relevant diagnoses included left TOS and adhesive capsulitis. (Kikugawa report, May 11, 2021).

48) On May 13, 2021, Yamane summarized a conversation with Withrow regarding alternative employment. She gave Withrow a Division form to complete to ensure any proffered work was a legally valid employment offer. (Yamane email, May 13, 2021).

49) On May 18, 2021, Withrow completed a questionnaire at Yamane's request. She checked a "yes" box stating, "alternative employment" could be offered. Yamane's questionnaire said, "Please note, this must be a direct offer of permanent employment to the employee. An open position the employee would compete for or a temporary light duty position work during recovery do not qualify." (Yamane questionnaire, May 8, 2021).

50) On May 18, 2021, Withrow also completed a form purportedly offering alternative employment to Employee as "Prep & Paving Crew Member." The job was to begin on May 12, 2021, and pay $24 per hour in Anchorage, Alaska. The form did not include all required information or Yamane's acceptance. (Offer of Alternative Employment, May 18, 2021).

51) The above-referenced job offer had reported physical requirements including:

> **Asphalt Prep and Paving Crew Members**
> Primary duties: Labor and assist on ground, load and unload equipment (not to exceed 15 lbs), able to use small hand tools and operate some equipment, if qualified and/or needed. If a CDL holder, driver is dispatched daily to various projects. (Alaska Asphalt Services, LLC; Job Specific for Sabrina Martino effective May 12, 2021).

52) On May 25, 2021, Employee reported posterior shoulder pain that lasted from May 18-20, 2021. She had to take muscle relaxers and "was not able to do anything, just stayed in bed." Employee was not sure what aggravated it, but she felt a pull while doing stretches on a doorway, and had been spending time sitting on a bed while doing her taxes. DPT Kikugawa assessed:

> Pt with minimal progress regarding L shoulder and neurogenic pain thus far. This may be due to double crush with cervicogenic impingement at nerve roots in addition to thoracic outlet syndrome. . . . (Kikugawa report, May 25, 2021).

53) On May 26, 2021, Employee completed paperwork for VA rehabilitation assistance. She did not include her left shoulder with her list of "service-connected" disabilities. Employee mentioned she was getting left shoulder treatment at a VA facility, and included "shoulder as secondary" in her list of "pending VA claims," which included back pain, sciatica, depression, anxiety and headaches. (Rehabilitation Needs Inventory, May 26, 2021).

54) On June 23, 2021, Liza Maniquis-Smigel, MD, performed electrophysiological studies on Employee's left upper extremity. Nerve construction velocity (NCV) and electromyography (EMG) studies were reportedly normal. Employee's history was charted as:

> Patient is a 43 year old female, construction worker, who has been experiencing gradual onset of left shoulder pain with radiation to arm which has been progressive since June 2020 due to repetitive heavy equipment injury at work. She relates being on a jackhammer jumper, excavating uneven ground. She began to notice left shoulder pain and impaired rom. Pain is severe that she could not turn the steering wheel. She can't rake. Pain is located in the upper trapezius and

> shoulder blades. She has a painful knot with swelling under the left shoulder blade. Pain is . . . described as dull, achy, tingling, sharp, shooting and burning. No significant neck pain. . . . ROM has progressively become restricted. . . . Seen orthopedics here in HI and FL and was diagnosed with thoracic outlet syndrome.

Dr. Maniquis-Smigel diagnosed a left suprascapular/dorsal scapular neuropathy versus a shoulder/scapular muscle strain. She gave nerve block injections and opined if symptoms were not relieved, further testing may be needed. (Maniquis-Smigel report, June 23, 2021).

55) On June 24, 2021, Dr. Hansen examined Employee and found positive Wrights and Adson tests for "loss of radial pulse on left." She still had "vague paresthesias, temperature change, coloration change, etc. in her left upper extremity with certain positions." He removed Employee from work for six weeks. Dr. Hansen reviewed Employee's left-shoulder MRI, which showed tendinosis but no tears. He gave her a left shoulder subacromial CSI and diagnosed left rotator cuff tendinitis and possible TOS. Depending upon the injection results, Dr. Hansen recommended additional neck and upper back PT, stretching and strengthening exercises and a cervical MRI to rule out left-sided nerve impingement. (Hansen reports, June 24, 2021).

56) By June 24, 2021, Yamane had still not checked off the box on Division form 07-6150 showing Employer had made a valid offer of alternative employment. She again requested additional information from Withrow. (Eligibility Evaluation Checklist, June 24, 2021).

57) On June 30, 2021, Employee filed a third domestic abuse petition against her boyfriend. The attached hand-written detailed statement did not allege the respondent caused any physical injury to her neck or left upper extremity. (Petition For an Order for Protection, June 30, 2021).

58) On July 8, 2021, Dr. Hansen charted Employee had minor pain relief from her injection and had "cramps and numbness in her upper left extremity as well." Employee still had pain "that radiates into left upper extremity with motions of her neck, deep breathing, and random motions of the shoulder." She could not identify "a common denominator" in her symptoms. Dr. Hansen assessed left rotator cuff tendinitis and again suggested a cervical MRI to definitively rule out nerve impingement. (Hansen report, July 8, 2021).

59) On July 14, 2021, Withrow revised her earlier job offer to increase the hourly wage to $28.32. The revised Division form 07-6150 still did not include all required information or Yamane's acceptance signature. (Offer of Alternative Employment, July 14, 2021).

60) On July 20, 2021, a radiologist said Employee's cervical MRI showed "severe left neural foraminal stenosis" at C5-7. (MRI report, July 20, 2021).

61) On July 29, 2021, Employee reported left shoulder pain, numbness and tingling. The pain affected her sleep, and she took medication for it; she denied any "real neck pain." Employee said she was "told she may have thoracic outlet syndrome." Dr. Born again diagnosed left shoulder pain, impingement and a possible SLAP tear; scapular dyskinesis; and possible TOS. He did not list the left shoulder as a service-connected condition. Dr. Born recommended additional PT, topical analgesic, possibly a CSI and a chest CT. He checked her radial pulses at rest and found them "relatively symmetric." (Born, report, July 29, 2021).

62) On July 29, 2021, Dr. Hansen reported Employee still had left-shoulder pain with dysesthesias radiating into her forearm. He diagnosed cervical radiculopathy at C5-6, referral to a neurosurgeon, and said, "No primary shoulder problem." (Hansen report, July 29, 2021).

63) On August 4-6, 2021, Dr. Hansen predicted Employee would have a permanent partial impairment (PPI) rating greater than zero from her work injury and permanent physical capacities to work as an Operating Engineer, Bartender and Informal Waitress, but not as a Construction Worker I or II. (Hansen reports, August 4-6, 2021).

64) On August 4, 2021, Employee claimed TTD, PPI, attorney fees, costs and interest. She described her injury as, "left upper extremity/shoulder." (Claim for Workers' Compensation Benefits, August 4, 2021).

65) On August 21, 2021, Yamane summarized her efforts evaluating Employee for reemployment benefit eligibility and recommended she be found not eligible because Dr. Hansen predicted she would have permanent physical capacities to perform physical demands for her past work as a Bartender and Informal Waitress. By this date, Yamane had still not checked box 14 on Division form 07-6150 showing Employer had made a valid alternative employment offer. While Yamane's report stated Employer "is offering alternative employment," Yamane stated she never received "information needed to determine if the offer of alternative employment" met legal requirements under the Act. Because Employee was found not eligible for reemployment benefits under a different Act section, Yamane stopped following up with Withrow. (Reemployment Benefits Eligibility Evaluation Final Report, August 21, 2021).

66) On August 27, 2021, Employer denied TTD benefits not supported by medical evidence, not related to the work injury, and after medical stability; PPI benefits; interest; penalty; and

attorney fees and costs. Employer based its denials on Dr. Pino's March 4, 2021 report stating Employee could return to her normal work and had a zero percent PPI rating, and on its contention that all benefits were paid timely, and no attorney provided services resulting in Employee receiving a benefit. (Controversion Notice, August 27, 2021).

67) On September 13, 2021, the Reemployment Benefits Administrator's (RBA) designee found Employee "not eligible" for reemployment benefits based on Dr. Hansen's prediction she would have permanent physical capacities to perform prior jobs including Bartender and Informal Waitress. (Helgeson letter, September 13, 2021).

68) Employee did not appeal from the RBA designee's September 13, 2021 decision finding her not eligible for reemployment benefits. (Agency file).

69) On October 4, 2021, Employee said she had difficulty performing exercises because her left shoulder hurt. (VA records, October 4, 2021).

70) On October 29, 2021, William Beringer, DO, examined Employee for neck pain and left arm numbness, tingling, pain and weakness. He found decreased sensation in the C6 dermatome on the left forearm, thumb and index finger and decreased sensation in the C7 dermatome on the left middle finger. Dr. Beringer charted Employee had left-sided neck pain for one and one-half years with left arm pain, tingling and weakness. Her cervical exam was normal, but her motor strength bilaterally was not. Dr. Beringer diagnosed cervical radiculopathy and recommended pain management, an epidural steroid injection and a possible artificial disc replacement. (Beringer report, October 29, 2021).

71) On November 18, 2021, Employee said she was experiencing "significant shoulder pain that [was] unpredictable and negatively impact[ed] her functioning." (VA report, November 18, 2021).

72) On December 2, 2021, Employee reported continued shoulder pain. She was homeless and living in a shed on property she had purchased. Employee needed help coordinating medical appointments for her shoulder pain. (VA medical record, December 2, 2021).

73) On December 8, 2021, Employee requested a second independent medical evaluation (SIME). (Petition, December 8, 2021).

74) On December 16, 2021, Employee reported increased shoulder pain after starting a new job with DoorDash. She wanted her shoulder pain to go away so she could return to work. (VA report, December 16, 2021).

75) On December 17, 2021, Employee said she had been "fighting with workers' compensation for over a year and the VA with assisting in her chronic pain." She mentioned her Alaska work injury and said Employer stopped paying benefits and "therefore she had no choice but to return to work." Employee said the VA had not assisted her in finding work because it said she was "not stable for work" because of her left shoulder pain. She said she was currently an Uber driver but found it "difficult at times due to pain." (VA report, December 17, 2021).

76) On December 23, 2021, Employee reported a "very tight, knot in the left shoulder x 1 week." Her pain was "7-8/10." Employee stated her left shoulder pain had been an "on-going issue for a year and a half." An orthopedic provider had recently told her he thought it might be her neck. However, Employee reported a neurologist told her it was not her neck. "She reported driving for DoorDash this last week and experienced worsening pain but denied any trauma or injury." Employee said she had been using a "shock vest" which usually helped, but did not help on this occasion. (VA report, December 23, 2021).

77) On January 6, 2022, James Van Natta, MD, gave Employee left C5-7 epidural steroid injections. (Van Natta report, January 6, 2022).

78) On January 25, 2022, Employee amended her prior claims and sought TTD; temporary partial disability (TPD); permanent total disability (PTD); medical benefits and related transportation costs; PPI benefits; "other"-- "reemployment"; a penalty; interest; and attorney fees and costs. The reason for this claim was, "Employee was injured by repetitive activities and/or specific incident throughout the duration of her employment with Employer, including an incident on 06/30/20 with [sic] a compactor fell and pulled on her arm. She has various left upper extremity signs and symptoms. The medical investigation in [sic] them so far has included her shoulder and neck." (Claim for Workers' Compensation Benefits, January 25, 2022).

79) On January 31, 2022, Employee reportedly was thinking about having neck surgery. She said she had worked for DoorDash "for about 17 hours but stopped due to pain and scammers breaking into the DoorDash ordering system." (VA report, January 31, 2022).

80) On February 15, 2022, Employer denied TTD benefits not supported by medical evidence, not related to the work injury and after medical stability, which date was corrected from previous notices; TPD, PTD and PPI benefits; unreasonable or unnecessary medical benefits and related transportation expenses through January 5, 2021; all medical benefits and transportation expenses thereafter; reemployment benefits; a penalty; interest; and attorney fees and costs.

Employer added Employee had been found not eligible for reemployment benefits and had not appealed. It relied again on Dr. Pino's March 4, 2021 report. (Controversion Notice, February 15, 2022).

81) On May 17, 2022, Employee testified by deposition and said in December 2021, she worked briefly for DoorDash but has never been paid. (Videoconference Deposition of Sabrina M. Martino, May 17, 2022).

82) On March 24, 2022, Employee still had left shoulder pain. Katherine Yano, PT, stated Employee's signs and symptoms indicated "significant" left shoulder structural pathology. She opined "nerve impingement at the cervical level also seems to be present and contributing to her current complaints." PT Yano referred Employee to orthopedics. (Yano report, March 24, 2022).

83) On April 25, 2022, Employee had another cervical MRI; the radiologist compared this one to her July 20, 2021 MRI. The most significant finding was left C6-7 neural foraminal stenosis, "which [was] similar to prior study." (MRI report, April 25, 2022).

84) On April 29, 2022, *Martino v. Alaska Asphalt Services, LLC*, AWCB Dec. No. 22-0029 (April 29, 2022) (*Martino I*) found a "gap" in the medical evidence "or at best the factfinders [misunderstood]" the evidence, granted Employee's request and ordered an SIME. (*Martino I*).

85) On May 23, 2022, Macario Rivera, MD, at a VA clinic charted Employee had "chronic left shoulder pain sustained while in the service." He assessed left shoulder pain from possible cervical radiculopathy versus tendinosis/bursitis versus subacromial impingement versus vascular lymphedema. He referred Employee to various specialties to rule these conditions out. (Rivera report, May 23, 2022).

86) On June 9, 2022, Employee reported no improvements following her left, scapular nerve blocks from two weeks earlier. The pain was increasing, and her shoulder range of motion was decreasing. (William Knight, DO, report, June 9, 2022).

87) On June 14, 2022, Ming Peng, MD, performed Doppler studies on Employee's left upper extremity. Dr. Peng found complete, transient occlusion of her left subclavian artery with her arm elevated 180° overhead, consistent with TOS. (Peng report, June 14, 2022).

88) On June 20, 2022, David Hock, DO, diagnosed paresthesias; arterial TOS; and cervical radiculopathy. He recommended follow up with a vascular surgeon to consider TOS release. (Hock report, June 20, 2022).

89) On June 29, 2022, *Martino v. Alaska Asphalt Services, LLC*, AWCB Dec. No. 22-0046 (June 29, 2022) (*Martino II*) decided Employee was entitled to "stipend" benefits even though the RBA designee ultimately found her not eligible for other reemployment benefits. *Martino II* found Employer had no legal basis to escape paying stipend because its stated grounds for controverting were not among those that would stop the reemployment process from moving forward. Employee's medical stability date was not an issue in *Martino II*, and *Martino II* did not make an express factual finding or conclusion concerning the date of medical stability. (*Martino II*).

90) On September 24, 2022, Ryan Hagino, MD, vascular surgeon, saw Employee for TOS. After spending "several hours" reviewing outside records and a 45-minute examination, he assessed:

> Chronic left shoulder pain (primary encounter diagnosis).
>
> Plan: Patient presents with a very complex cluster of symptoms combining cervical spine disease, scapular dyskinesis and history of shoulder injury. She has undergone extensive evaluation by multiple providers for her condition. All of these providers have provided different diagnoses for her cluster of symptoms. Arterial duplex scan did demonstrate loss of arterial flow in the left subclavian artery with 180 degrees shoulder abduction. Arterial flow returns at lesser degrees. While this can be seen in normal patients, the patient is experiencing cyanosis and color changes as well as numbness of the hand and [sic] the stress positions. There may be a component of both neurogenic and arterial compression associated with her thoracic outlet. However, there is no evidence of extra ribs. The tenderness overlying her coracoid process may also suggest the presence of pectoralis minor compression as well. She and I had a lengthy discussion regarding her condition. It is my opinion that there is no single answer to explain all of the collection of symptoms associated with her left shoulder and neck. This is likely multifactorial. One surgical procedure will not cure her problems. She and I discussed this and she expressed understanding. . . . I would also like to order a CT angiogram of the left upper extremity to assess for subclavian artery compression, intrinsic stenosis or aneurysm disease. Future recommendations will be based upon additional evaluation. . . . (Hagino report, September 24, 2022).

91) On October 10, 2022, a CT angiogram of Employee's left upper extremity with and without intravenous contrast disclosed no abnormalities. (CT angiogram report, October 10, 2022).

92) On December 13, 2022, Floyd Pohlman, MD, saw Employee for an SIME and initially reviewed 769 pages of medical records. He diagnosed: left TOS; severe, left cervical foraminal stenosis at C5-7; left shoulder impingement syndrome; and possible complex regional pain syndrome (CRPS) type II. Dr. Pohlman produced an initial 45-page December 13, 2022 report. He stated Employee has TOS, "the subject incident represents a permanent aggravation of a preexisting" TOS, and "the substantial cause of her disability and need for medical treatment is the permanent aggravation" of the TOS. Dr. Pohlman further stated impingement syndrome was the "main cause of the shoulder problem." He opined Employee was not medically stable and would not be until her TOS and impingement were treated. She remained disabled by her June 30, 2020 work injury. Dr. Pohlman initially stated Employee's cervical symptoms were not related to the work injury. He served his report on all parties. (Pohlman report, December 13, 2022).

93) On February 6, 2023, after reviewing 78 additional pages of records, Dr. Pohlman wrote a five-page addendum at Bredesen's request. He opined vibrational stress did not contribute to her diagnoses. Dr. Pohlman said, "I think it was the accident that occurred on 6/30/20 that has caused thoracic outlet syndrome to be symptomatic." He reiterated, "I do not think the work injury is the substantial cause for her neck condition." Dr. Pohlman explained Employee had preexisting foraminal stenosis. But he added, "Having said that, the accident itself may have aggravated the preexisting condition, but from an apportionment outlook, the majority would be ascribed to the preexisting condition." As he had done with his first report, Dr. Pohlman served this on all parties. (Pohlman report, February 6, 2023).

94) On February 22, 2023, Dr. Pohlman wrote a seven-page addendum in response to the Division's inquiry. He reiterated Employee had preexisting TOS and the June 30, 2020 injury aggravated this condition and made it symptomatic. Dr. Pohlman agreed a vascular surgeon is best to evaluate TOS. Clarifying his earlier opinion, he opined Employee did not have asymptomatic TOS prior to the work injury but, "She likely had anatomic changes that predisposed her to develop symptoms under the right circumstances/conditions." Dr. Pohlman added on further "reflection of the entire case," the "cervical condition could have been aggravated by the same injury." He was unable to provide "specific restrictions" for Employee's work and recommended an FCE to provide a "more objective basis," and served this on all parties. Dr. Pohlman later clarified his reports at deposition. (Pohlman reports, December 13,

2022, February 6, 2023, February 22, 2023; Videoconference Deposition of Floyd H. Pohlman, MD, March 22, 2023).

95) On March 22, 2023, Dr. Pohlman testified he was an orthopedic surgeon specializing in shoulders for decades; he has not performed surgery in about 10 years. He now performs independent medical evaluations including Division SIMEs. Dr. Pohlman has seen perhaps three TOS patients over his 40 years in practice; he would refer them to a vascular surgeon as he is not a TOS expert. He agreed with Dr. Hagino's neurogenic TOS diagnosis. In Dr. Pohlman's opinion, Employee's June 30, 2020 work injury caused her TOS. He opined Employee probably also had a left-shoulder impingement prior to the work injury, and the injury may have contributed to it, although its substantial cause is "anatomical." As opposed to TOS, which is "rare," many people including Dr. Pohlman develop shoulder impingement. Treatment for impingement includes steroid injections. If impingement were Employee's only problem, she would be back working. But, since two steroid injections did not give her significant relief, impingement is not her "main problem." Employee's injury occurred when she was using a dirt compactor and it slipped out of her hands. After reviewing the whole case, Dr. Pohlman opined the work injury probably aggravated Employee's preexisting cervical foraminal stenosis and caused it to become symptomatic. However, "when it comes down to like apportionment . . . 90 percent preexisting." Dr. Pohlman noted Employee did not have left-sided cervical symptoms prior to the work injury and now has "symptoms of stenosis" that "weren't apparent prior to her injury." Given Employee's symptoms, Dr. Pohlman opined it was appropriate for her to have been off work since the June 30, 2020 injury, and that injury was the substantial cause of her ongoing disability. He also said it was "reasonable" to say the work injury was the substantial cause for Employee's need for further neck treatment. Dr. Pohlman opined since Employee has "overlapping symptoms," her neck should be treated first and see what symptoms resolve. (Videoconference Deposition of Floyd H. Pohlman, MD, March 22, 2023).

96) On cross-examination, Dr. Pohlman said several other physicians also diagnosed TOS in this case. He clarified his prior opinion about "apportionment," and said the cervical spine stenosis was 90/10 or 80/20 percent preexisting versus work-related. Dr. Pohlman recommended Employee be seen by a cervical specialist. He opined if Employee gets her neck and TOS treated and still has symptoms, "that would point to CRPS" as a possible diagnosis. Until Employee gets treatment, physicians do not know what is causing her symptoms. Dr. Pohlman opined

Employee should have an FCE; but if she had one now, she would not be able to work at more than a sedentary position. He clarified, "Unless she gets treated I don't think she'll go back to work, period." Employee's cervical spine and TOS both need treatment. "I mean she can't go back to work in this condition." (Videoconference Deposition of Floyd H. Pohlman, MD, March 22, 2023).

97) On April 21, 2023, Employer petitioned for an order requiring an FCE and a TOS evaluation as part of the SIME process, and petitioned for an order requiring Employee to produce Social Security earnings information. (Petitions, April 21, 2023).

98) On May 3, 2023, Bredesen prepared an affidavit stating he first spoke with Employee on July 15, 2021. Through December 30, 2022, he had incurred $43,515 in attorney fees at $450 per hour and $876.89 in costs representing Employee. From January 4, 2023 through mid-afternoon May 3, 2023, he incurred an additional $20,428 in attorney fees at $520 per hour, and $10,250.67 in costs. Bredesen claimed $75,070.56 in attorney fees and costs through mid-afternoon May 3, 2023 ($44,391.89 + $30,678.67 = $75,070.56). He has practiced law for over 20 years, mostly representing parties in Alaska workers' compensation cases. Bredesen has a solo practice and does not employee a paralegal. He is only able to take a limited number of cases at any time. Cases requiring depositions, settlement negotiations and hearings limit his ability to take new cases. Bredesen's rate has been previously approved at $450 per hour beginning January 1, 2020. Effective January 1, 2023, he increased his hourly rate to $520 per hour based on United States Bureau of Labor Statistics information showing inflation between January 1, 2020 and January 1, 2023. The Consumer Price Index (CPI) Inflation Calculator shows $450 in January 2020, had the same buying power as $521.87 in January 2023. (Affidavit of Counsel, May 3, 2023).

99) On May 16, 2023, the Board designee listed the issues as: Employer's April 21, 2023 petition to compel Social Security earnings information and petition to compel an FCE and TOS evaluation; TTD and TPD benefits; medical costs and related transportation expenses; interest; penalty; and attorney fees and costs. (Prehearing Conference Summary, May 16, 2023).

100) On June 9, 2023, Employee filed and served a medical mileage log from July 2, 2020 through October 10, 2022. The log states the date travel occurred, the address to where she traveled, the round-trip mileage, the applicable mileage rate for each year and the amounts claimed. (Notice of Intent to Rely, June 9, 2023).

101) On June 22, 2023, the Commission affirmed *Mitchell II*. (*Alaska Asphalt Services, LLC v. Martino*, AWCAC Dec. No. 304, June 22, 2023) (*Mitchell III*).

102) On June 26, 2023, Bredesen filed and served another affidavit itemizing his attorney fees and costs from May 3, 2023 through June 23, 2023. Included were $8,840 in attorney fees and $175.60 in costs for a total of $9,015.60 in additional attorney fees and costs. This brought Bredesen's attorney fee and cost total to this date to $84,086.16 ($44,391.89 + $30,678.67 + $9,015.60 = $84,086.16). (Affidavit of Counsel, June 26, 2023).

103) On June 29, 2023, Bredesen filed a third affidavit for his services in this case from June 23, 2023 through June 29, 2023. Included were $8,424 in attorney fees. This brought Bredesen's total requested attorney's fees and costs to date to $92,510.16 ($75,070.56 + $9,015.60 + $8,424 = $92,510.16). (Affidavit of Counsel, June 29, 2023).

104) At hearing on June 29, 2023, the parties did not raise Employer's April 21, 2023 Social Security petition. The panel declined Employer's April 21, 2023 petition to continue the hearing so an FCE and TOS evaluation could occur before the merits hearing. The record remained open initially until June 30, 2023 for Employee's supplemental attorney fee affidavit, until June 7, 2023 for Employer's objections, and until July 10, 2023 for Employee's reply. (Record).

105) At hearing, Employee said after recovery from a 2009 right-sided neck surgery, she had no work restrictions and immediately went to work at a pipe-laying job; she returned to full-duty work. Employee had no left-sided neck, arm or shoulder symptoms prior to working for Employer. She explained her June 30, 2020 work injury in more detail; the choke was broken on the Jumping Jack compactor, and the ground was uneven. These factors may have caused the compactor to go out of control. Two working days later, Employee told Max her supervisor she needed to see someone for her shoulder because it hurt. Max told Employee to fill out an injury report with Withrow, who asked if she had ever injured her left shoulder before. Employee said she answered Withrow consistent with her July 2, 2020 hand-written statement, and clarified that her statement referred to previous left shoulder pain while getting into a loader at work for Employer. Withrow advised Employee she needed a full work release to return to work; Employee did not have one. In September 2020, Employee relocated to Hawaii for financial reasons and a personal relationship. Between June and September, Employee had continued left shoulder symptoms and sought treatment with the VA. She also noticed a "whoosh" sensation in her left arm. Employee had difficulty getting into treatment with the VA but eventually saw a

physician and had PT. When Employee did PT she noticed her arm became numb and changed colors; this continues to the present. She mentioned a "ripping" sensation in her arm with the compactor incident, and post-injury shoulder pain while carrying "fabric" while working for Employer. (Employee).

106) Employee moved to Florida in January 2021. While there, she recalled spending 30-45 minutes meeting with EME Dr. Pino. Employee was "pretty sure" she brought up her hand discoloration signs and other left arm symptoms to him. (Employee).

107) On cross-examination, Employee said she has never been self-employed and received no money from DoorDash. She clarified her medical records regarding her left leg giving out and her falling and said she never actually fell or caught herself with her left arm; her left leg would buckle on occasion. Employee does not think Dr. Born's medical record regarding her leg buckling and her falling and catching herself with her left arm is "entirely accurate." (Employee).

108) At hearing, Dr. Pino testified he had reviewed his own report and two Dr. Pohlman's SIME reports. He explained his January 6, 2021 medical stability opinion was based on his examination, provided medical records, Employee's range of motion, and her normal motor, sensory and reflex exams. Dr. Pino agreed with Dr. Pohlman that Employee's left shoulder issue is "impingement consistent with a strain." He did not expressly agree or disagree with Dr. Pohlman's TOS diagnosis; Dr. Pino said TOS is not typically treated by orthopedics. Like Dr. Pohlman, if Dr. Pino found a patient with TOS, he would refer the patient to a thoracic or vascular surgeon. (Dr. Pino).

109) Dr. Pino understood Dr. Pohlman said the cervical spine "condition" was not work-related. He found nothing in his examination indicating Employee had a cervical "condition" resulting from the work injury. Dr. Pohlman's two reports did not change his opinions. (Pino).

110) On cross-examination, Dr. Pino said the cover letter accompanying the EME request did not mention TOS. The first time he knew TOS was an issue was when he reviewed Dr. Pohlman's records in preparation for hearing. Dr. Pino said the 44 pages he reviewed in March 2021 contained no references to TOS and Employee had no clinical indications suggesting it when he examined her. Although he said he performed a complete physical examination, he did not perform an Adson's test because "there was no indication to do that." (Dr. Pino).

111) Dr. Pino conceded Employee continued to have subjective pain complaints when he examined her and suggested she do home exercises to address them. Nevertheless, he testified her shoulder "condition" had fully resolved but her subjective complaints remained, which he could not support with objective findings. (Dr. Pino).

112) Dr. Pino understood Alaska's "the substantial cause" standard as the "main factor producing symptoms or the main condition causing the clinical presentation at the time of [his] exam." His opinions relied on his expertise and on specific questions asked. Dr. Pino reviewed Dr. Pohlman's original report, which summarized all reports he did not have; he did not review Dr. Pohlman's February 6, 2023 addendum report or his deposition transcript. Dr. Pino did not expressly state he disagreed with Dr. Pohlman's TOS diagnosis, but said Employee did not exhibit TOS symptoms when he examined her in March 2021. He sees TOS "very infrequently" and he is not a TOS expert. A vascular surgeon would give a better TOS opinion. Dr. Pino said TOS is a "controversial" diagnosis because in the past it was over diagnosed, and its etiology was unknown. TOS was beyond his specialty, and he declined to further comment on it. (Dr. Pino).

113) Dr. Pino said there was no literature suggesting work causes cervical stenosis, but he agreed using vibratory equipment can temporarily aggravate cervical stenosis. When asked if he could rule out the June 30, 2020 work injury, or work activities for Employer in general, as contributing factors to Employee's current symptoms, Dr. Pino said he could not comment on her current symptoms; he does not know about her current symptoms. When treating a patient, there are typically numerous causal factors that must be considered. (Pino).

114) At hearing, Withrow said Employee came into her office on July 2, 2020, and mentioned hurting her arm. She told Employee to write a statement, and seek medical care. Employee did not mention a "fabric" incident or a "ripping" bicep to her. Withrow told Employee she needed a full work release so she could go back to work lifting, raking and so forth. Employee did not return to work for Employer after July 2, 2020. Withrow considered Employee's September 14, 2020 text to Max her resignation because in it, she said, "I moved to Hawaii and at this point I have no intent on coming back to Alaska." Employee could not perform her job duties with Employer remotely. Withrow said she did not offer Employee alternative employment in 2020 because she did not have a full work release and because she ultimately left the state. She did not think it was her job to "beat down her door" and offer Employee work. Withrow testified

that once Yamane advised that she could offer Employee modified employment, she did so. (Withrow).

115) Employer's first three Controversion Notices contained a typographical error for Dr. Pino's medical stability date in the "Specific Benefits Controverted" block. They said he opined medical stability occurred on January 26, 2021, whereas elsewhere on the notices his proffered date, January 6, 2021, was accurately stated. (Observations).

116) Employee contends her work injury with Employer permanently aggravated her preexisting left shoulder and left cervical stenosis conditions, and caused left TOS. She seeks an order determining these injuries are compensable under the Act and requests past and ongoing benefits related to them. Employee contends she remains medically unstable and in need of additional treatment. Consequently, Employee contends she is entitled to TTD benefits from March 28, 2021 through September 13, 2021, meaning this decision should award the difference between the "stipend" ordered in *Martino II*, and TTD benefits, plus interest and penalty and ongoing TTD benefits from September 14, 2021, with interest and penalty on all past amounts awarded. She contends Dr. Pohlman's opinions and Dr. Pino's EME report failed to rebut the raised presumption, entitling her to an appropriate penalty. (Employee's Hearing Brief, May 3, 2023; Employee's Supplemental Hearing Brief, June 22, 2023; record).

117) Employee contends Dr. Pino had medical records from other physicians diagnosing TOS, but he either failed to read them or just "missed it." She contends she told Dr. Pino about her TOS symptoms when he examined her, but he did not listen. Employee contends no reasonable person would rely on Dr. Pino's opinions. (Employee's Hearing Brief, May 3, 2023; Employee's Supplemental Hearing Brief, June 22, 2023; record).

118) Employee seeks an order requiring Employer to preauthorize and pay for treatment by a vascular surgeon and neurologist for her TOS, an evaluation and treatment by an orthopedic surgeon for her neck, and an orthopedic surgeon or physiatrist for her left shoulder, all within the realm of necessary and reasonable treatment options pursuant to *Hibdon*. Employee contends she should be allowed to select treating physicians for her neck, shoulder and TOS given the VA has paid for her treatment to date and she has no unpaid medical bills. (Employee's Hearing Brief, May 3, 2023; Employee's Supplemental Hearing Brief, June 22, 2023; record).

119) Employer contends Employee did not give proper notice for her injuries under AS 23.10.100. Moreover, it contends her attorney's comments are not "evidence," and Employee's

undeniable and significant preexisting medical history cannot be ignored. Employer contends no medical record suggests Employee has a "permanent" condition caused by her work injury. (Employer's Hearing Brief, May 3, 2023; Employer's Supplemental Hearing Brief, June 23, 2023; record).

120) Employer contends Dr. Pohlman admitted he is not an expert in TOS or cervical issues and this decision cannot rely in his opinions on those topics. By contrast, Employer contends Dr. Pino saw Employee relatively soon after the work injury, is a specialist in cervical cases and this decision should rely on his opinions. It contends there is medical evidence suggesting Employee's left leg buckled and caused her to fall on her "left arm and neck." Employer contends it would be patently unfair to attribute Employee's left shoulder, left neck and left TOS to it when Employee had only a minor shoulder injury. It contends there remains a "gap" in the medical evidence even though Employer offered to provide a TOS evaluation. (Employer's Hearing Brief, May 3, 2023; Employer's Supplemental Hearing Brief, June 23, 2023; record).

121) Employer contends it offered Employee modified work, but she voluntarily removed herself from the labor market and failed to accept the job offer. Thus, it contends she is not entitled to disability benefits. Employer contends Employee's preexisting cervical spine condition is the substantial cause of her need for medical treatment, according to Dr. Pohlman. Moreover, it contends Employee presented no medical evidence showing the cervical spine condition, left shoulder or TOS were substantially caused by her work injury. Employer contends the medical record lacks any causation evidence or off-work notes. It relies on *Martino II* that it contends found Employee was medically stable. Employer contends the work-related left shoulder strain resolved and Employee is entitled to no further benefits or attorney fees and costs. It disputes Bredesen's $520 per hour attorney's fees as "inflated" and he presented no evidence that the "market" has changed since he previously received $450 per hour. (Employer's Hearing Brief, May 3, 2023; Employer's Supplemental Hearing Brief, June 23, 2023; record).

122) On July 13, 2023, the Commission granted Employee's request for appellate attorney fees at $520 per hour and costs, given her success defending against Employer's appeal in *Martino III*. (Order on Appellee's Motion for Attorney Fees and Costs, July 13, 2023).

123) On July 14, 2023, Employee filed *Martino III* as "Supplemental Authority" for the instant decision. (Bredesen email, July 14, 2023).

124) On July 20, 2023, the panel on its own motion reopened the hearing record and notified the parties it would receive the Commission's July 13, 2023 order as supplemental authority. The panel also gave Employer an opportunity at its option to file a five-page response to the order by no later than 5:00 PM on July 28, 2023. (Designated Chair email, July 20, 2023).

125) On July 28, 2023, Employer timely responded to the Commission's July 13, 2023 order awarding Employee attorney fees and costs on appeal. It contends the matter for the Commission is "distinguishable from any work before the Board," and is not authority in the instant matter to award attorney fees for work done at the Board level. Employer contends it would be "clear error" for the Board to adopt a rate increase, because Employee failed to meet her burden to demonstrate $520 per hour "was in line with the market in Alaska," and could not do so. Relying on the Commission's statement that it would have been "more comfortable" with awarding $500 per hour, Employer contended $500 per hour is "the more reasonable rate," because appellate work is "more legally complex" than work before the Board. (Response Distinguishing Why Appeals Commission Decision Re Fees Does Not Apply to Any Matter before the Board, July 28, 2023).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .

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

> **AS 23.30.008. Powers and duties of the commission**. (a) The commission shall be the exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter in those matters that have been appealed to the commission, except for an appeal to the Alaska Supreme Court. . . . Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

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

Construing AS 23.30.010(a), *Morrison v. Alaska Interstate Construction, Inc*., 440 P.3d 224, 237 (Alaska 2019), said the Board must consider different causes of the "benefits sought" and the extent to which each cause contributed to the need for the specific benefit at issue. The Board must then identify one cause as "the substantial cause." *Morrison* held the statute does not require the substantial cause to be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." The Board need only find which of all causes, "in its judgment is the most important or material cause related to that benefit." (*Id*.). *Morrison* further held preexisting conditions, which a work injury aggravates, accelerates or combines with to cause disability or the need for medical treatment, can still constitute a compensable injury. (*Id*. at 234, 238-39).

Summers v. Korobkin Construction, 814 P.2d 1369 (Alaska 1991) stated injured workers have the right "to a prospective determination of compensability." It further stated:

> [I]njured workers must weigh many variables before deciding whether to pursue a certain course of medical treatment or related procedures. The salient factor in many cases will be whether the indicated treatment is compensable under [the Act].

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires. . . .

> **AS 23.30.100. Notice of injury or death.** (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the employer. . . .
>
> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter; . . .

Benefits sought by an injured worker are presumed compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application is a three-step analysis. To attach the presumption, 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, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). The fact-finders do not weigh credibility at these first two stages. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

If the employer's evidence rebuts the presumption, it drops out and the employee must prove his claim by a preponderance of the evidence. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011) (reversed on other grounds, *Huit*, 372 P.3d at 919). 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 this third step, evidence is weighed, inferences are drawn, and credibility is considered. *Wolfer*. An injured worker is entitled to a presumption of continued work-related disability. *Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145 (Alaska 1989). The presumption analysis does not apply if there are no factual disputes, or if the parties do not dispute coverage. In such cases, applying the presumption would not promote "the goals of encouraging coverage and prompt benefit payments." *Rockney v. Boslough Construction Co.*, 115 P.3d 1240, 1243 (Alaska 2005).

Huit addressed the presumption analysis under AS 23.30.120 as it applies following 2005 legislative changes to the Act. The claimant in *Huit* contended a scratch at work caused an

infection leading to disability and need for treatment. In noting there was no other cause identified as contributing to the infection, *Huit* said the Board did not need to evaluate the relative contribution of different causes. However, in the presumption analysis' second stage, the employer had to produce substantial evidence showing the disability or need for medical treatment did not arise out of and in the course of employment. *Huit.*

Finding the statute ambiguous, *Huit* reviewed the legislative history associated with the 2005 changes. It found legislative history suggested the presumption analysis remained intact and there was no indication the legislature intended to change the way an employer rebutted the presumption. *Huit* further noted rebutting the presumption required the employer to show the infection did not arise out of the claimant's employment. The employer had to show the work-related scratch could not have caused the infection (the negative-evidence test) or another bacteria source caused it (the affirmative-evidence test). Simply stating the "magic words," *i.e.*, "work was not the substantial cause," was not enough to rebut the presumption because the employer must provide "substantial evidence" stating the disability was not work-related. *Huit*.

Huit concluded no doctors' opinions met the negative-evidence test because none said the work-related scratch could not have been the entry point for infection-causing bacteria. To the contrary, the medical experts agreed bacteria could enter the bloodstream through minor scratches. *Huit* further noted that for doctors' opinions to meet the affirmative-evidence standard they needed to provide substantial evidence ruling out the work-related scratch by identifying another explanation for the bacteria's presence in the claimant's bloodstream. No doctor provided substantial evidence of another cause. Consequently, *Huit* found the employer had not rebutted the presumption and the claimant was entitled to benefits.

Vue v. Walmart Associates, Inc., 475 P.3d 270 (Alaska 2020) held employers have a continuing duty to modify or withdraw a controversion when they receive evidence undermining a prior controversion notice.

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and

> reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered. . . .

Cortay v. Silver Bay Logging, 787 P.2d 103, 109 (Alaska 1990) stated attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 975 (Alaska 1986) reiterated, "As we have noted, the objective of awarding attorney's fees in compensation cases is to ensure that competent counsel are available to represent injured workers." It added:

> If an attorney who represents claimants makes nothing on his unsuccessful cases and no more than a normal hourly fee in his successful cases, he is in a poor business. He would be better off moving to the defense side of the compensation hearing room where attorneys receive an hourly fee, win or lose. . . .

Rusch v. Southeast Alaska Regional Health Consortium, 453 P.3d 784, 798-99, 803 (Alaska 2019), clarified the Court's directives on awarding attorney fees to successful claimant lawyers:

> To clarify our holding in *Bignell*, we hold that the Board must consider all of the factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney's fee. . . . On remand, the Board must consider each factor and either make findings related to that factor or explain why that factor is not relevant.

Uresco Construction Materials, Inc. v. Porteleki, AWCAC Dec. No. 152 (May 11, 2011) affirmed a case where the Board awarded attorney's fees under both §§145(a) and (b).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
> . . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury. . . . On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days. . . .
> . . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the time period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate . . . in effect on the date the compensation is due. . . .

Bauder v. Alaska Airlines, Inc., 52 P.3d 166, 176 (Alaska 2002) stated, "When an employer

neither timely pays nor controverts a claim for compensation, AS 23.30.155(e) imposes a 25% penalty," but only if "if the employer is ultimately found liable for the disputed compensation."

"The Alaska Workers' Compensation Act sets up a system in which payments are made without need of Board intervention unless a dispute arises." *Harris v. M-K Rivers*, 325 P.3d 510, 518 (Alaska 2014). A controversion notice must be filed "in good faith" to protect an employer from a penalty. "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." Only evidence the employer possessed "at the time of controversion" is relevant. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992).

> **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.

Lowe's v. Anderson, AWCAC Dec. No. 130 at 13-14 (March 17, 2010) said to obtain TTD benefits, assuming no presumptions applied, an injured worker must establish: (1) she is disabled as defined by the Act; (2) her disability is total; (3) her disability is temporary; and (4) she has not reached the date of medical stability as defined in the Act. *Bailey v. Litwin Corp*. 713 P.2d 249, 254 (Alaska 1986) recognized that once an injured worker raises the presumption of temporary total disability, she is entitled to a "presumption of continuing compensability" for TTD benefits. An employer may rebut the continuing presumption of compensability and gain a "counter-presumption," by producing substantial evidence that the date of medical stability has been reached. *Lowe's*. Once an employer produces substantial evidence to overcome the presumption in favor of TTD benefits, the employee must prove all elements of her claim by a preponderance of the evidence. However, if the employer raised the medical stability counter-presumption, "the claimant must first produce clear and convincing evidence" that she has not reached medical stability. One way an employee rebuts the counter-presumption with clear and convincing evidence is by presenting a medical opinion showing "further objectively measurable improvement is expected" from additional medical care. The 45-day provision merely signals

"when that proof is necessary." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1246 (Alaska 1992).

The Board in *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266-67 (Alaska 1974) (*Vetter I*) had denied the claimant's disability claim, finding:

> The Board believes that applicant does not want to work and that her husband, who did not want her to work before the injury, probably keeps her from working now.

The claimant appealed and *Vetter I* concluded, as a general proposition:

> If a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability.

Vetter I found no substantial evidence to support the Board finding the claimant "was unwilling to work" and remanded the case; on remand the result was the same. In a second appeal, *Vetter v. Wagner*, 576 P.2d 979 (Alaska 1978) (*Vetter II*) reversed and remanded with more forceful instructions that the claimant was entitled to benefits. *Cortay,* 787 P.2d 103 at 107 reviewed a TTD decision and was urged to apply *Vetter I*. *Cortay* concluded "*Vetter* does not control this case"; "There is no evidence that Cortay intended to remove himself from the labor market."

> **AS 23.30.200. Temporary partial disability**. (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability. . . .
>
> **AS 23.30.395. Definitions**. In this chapter,
> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .

> (24) "injury" means accidental injury . . . arising out of and in the course of employment. . . .
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonable expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting form the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period for 45 days; this presumption may be rebutted by clear and convincing evidence;

Kessick v. Alyeska Pipeline Service Co., 617 P.2d 755, 758 (Alaska 1980) stated, "Nor does the lack of objective signs of an injury in and of itself preclude the existence of such an injury. . . . There are many types of injuries which are not readily disclosed by objective tests."

> **8 AAC 45.060. Service. . . .**
>
> (b) . . . If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.
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> **8 AAC 45.063. Computation of time**. (a) In computing any time period prescribed by the act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.
>
> **8 AAC 45.074. Continuances and cancellations**. . . .
>
> (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or canceled only for good cause and in accordance with this section. For purposes of this section,
>
> (1) good cause exists only when
>
> (A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;
> (B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;
> (C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;
(E) the hearing was set under 8 AAC 45.160(d);
(F) a second independent medical evaluation is required under AS 23.30.095(k);
(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;
(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;
(I) the parties have agreed to and scheduled mediation;
(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);
(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or
(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

8 AAC 45.180. Costs and attorney's fees. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. . . .

Rules of Prof. Conduct, Rule 1.5, referenced in *Rusch*, 453 P.3d 784, 798-99 states:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

ANALYSIS

Among issues set for this hearing in the May 16, 2023 prehearing conference summary was Employer's April 21, 2023 petition to compel Social Security earnings information from Employee. The agency file does not immediately reflect what happened to that petition, and neither party argued it at hearing. Therefore, this decision will not address the discovery petition.

1) Was the oral order declining to continue the hearing correct?

Employee objected to Employer's April 21, 2023 petition for an order requiring her to undergo an FCE and a TOS evaluation before her claims could be heard on their merits, because granting it would require a hearing continuance. She contended there was a full, ripe medical record and she was not in a financial position to suffer additional delays. Employer contended this decision could not render a merits decision because a "gap" remains in the medical evidence as found in *Martino I*, because Employee needs an FCE and a TOS evaluation. Alternately, Employer conceded the hearing could proceed, and after the panel reviewed the record it could order additional medical examinations if necessary.

Continuances are not favored and not routinely granted. 8 AAC 45.074(b). Other than wanting to expand the SIME, Employer did not show "good cause" for a continuance under 8 AAC 45.074(b)(1)(A-N). But the SIME already occurred; the file contains medical evidence upon which to render a decision. As Employee correctly noted, Dr. Pohlman said it would be helpful to have an FCE to determine Employee's specific physical limitations, but if she were to have one prior to necessary treatment, it would be not useful because she needed treatment first. Moreover, many medical providers have already addressed TOS, including vascular surgeon Dr. Hagino who examined her and diagnosed TOS on September 24, 2022. This decision credits Dr. Pohlman's clarified FCE opinion. AS 23.30.122; *Smith*. A vascular surgeon already diagnosed TOS so there is no "gap" in the medical evidence. The oral order ensured a quick and efficient hearing, and the oral order declining to continue the hearing was correct. AS 23.30.001(1);

2) Is Employee's claim barred for failure to give timely notice?

According to Employee and the agency file, her injury occurred on June 30, 2020. On July 2, 2020, she reported her injury to Withrow and provided a hand-written statement. She told Withrow she hurt her shoulder. Employee did not need to self-diagnose possible resultant or aggravated medical conditions including impingement, cervical issues or TOS in her notice. Employer cited no legal authority requiring her to make more than one injury report upon learning other body parts may have been affected by the same injury. Employee told Winslow what she knew about her shoulder -- that it hurt. The law gave Employee 30 days to provide Employer with notice of her injury. AS 23.30.100(a). Employee's injury report to Withrow was timely and her claim will not be barred for failure to give timely notice.

3) Are Employee's left shoulder, left cervical spine, and left TOS compensable injuries?

Employee seeks an order finding her left shoulder, left cervical spine and left TOS injuries "compensable" under the Act, pursuant to *Summers*. She contends her June 30, 2020 work injury aggravated her preexisting left shoulder condition and cervical stenosis and caused her left TOS. Employee relies on Dr. Pohlman's SIME opinions, in conjunction with the overall medical record. She seeks ongoing medical care including past medical transportation expenses, past TPD and past and future TTD benefits related to these three injuries. Employer contends

Employee reported only a left shoulder injury, which Dr. Pino said was a strain, and was fully resolved by the time he saw her in March 2021. It contends this decision should give greater weight to Dr. Pino's opinion and lesser weight to Dr. Pohlman's, with exception of his "apportionment" opinion.

(A) The left shoulder

(i) The initial benefits

Employee seeks an order finding her three claimed injuries arose out of and in the course of her employment with Employer, commonly referred to as "causation," and she equates that to "compensable" injuries. AS 23.30.010(a); AS 23.30.395(24). Initial causation of the need to treat, and related disability, for Employee's left shoulder injury was never in dispute. Compensation and benefits were payable and paid under the Act for Employee's disability and need for medical treatment because those needs arose out of and in the course of her employment with Employer. AS 23.30.010(a). On March 12, 2021, adjuster Schulze agreed Employee had been off work since July 6, 2020, because of her work injury. Employer initially paid Employee TTD benefits from July 3, 2020 through March 27, 2021.

On November 25, 2020, Dr. Hansen said Employee's July 2020 left shoulder MRI showed objective evidence of strain and impingement. He assessed a left shoulder muscle and tendon strain. On January 6, 2021, Dr. Hansen noted, "She has some symptoms of impingement." Moreover, EME Dr. Pino stated, "As a result of the work-related injury of June 30, 2020," Employee "sustained a musculoskeletal sprain/strain of left upper extremity, which is directly related to the work-related injury reported." He further opined "this work-related injury is the causative factor and the substantial cause for the employee's reported disability and/or need for medical treatment at the time of injury." Dr. Pino expressly stated it was his "determination that the work injury was the substantial cause of a new injury to the left upper extremity and not a temporary nor a permanent aggravation of a preexisting condition." AS 23.30.010(a).

SIME Dr. Pohlman said Employee's work-related impingement syndrome was the "main cause of the shoulder problem." Therefore, all physicians who offered an opinion agreed Employee

has left shoulder impingement and her disability and need to treat her left shoulder symptoms is compensable and she had a work-related left shoulder "injury." AS 23.30.395(24); *Summers*.

Although for reasons unclear from the record, the VA rather than Employer's insurer paid Employee's left shoulder medical bills, Employer never denied any specific medical care as unreasonable or unnecessary until March 21, 2012, when it relied on Dr. Pino's opinion. Therefore, "causation" and "compensability" of the left shoulder injury prior to March 25, 2021 have never been disputed and the statutory presumption analysis need not be applied to these past TTD and medical benefits. AS 23.30.120(a)(1); *Rockney*. Employee's request for an order finding she suffered a work-related left shoulder injury with Employer will be granted. *Summers*.

(ii) Ongoing benefits

However, Employee also seeks ongoing benefits post-controversion. Like Employee, the Court in *Summers* also used "causation" and "compensability" interchangeably. *Summers* held an injured worker who has been receiving medical treatment has the right to a prospective "determination of compensability." This helps an injured worker decide what treatment to obtain based on whether "his or her injury is compensable."

Employee's VA records, while containing useful information, are confusing, repetitive and offer no express causation opinions; but they repeatedly reference her work injury historically and document her continuing left shoulder symptoms and diagnoses. Drs. Pino and Pohlman agree Employee's left shoulder strain and impingement do not currently disable her. Dr. Pino opined the strain is resolved and is not disabling; Dr. Pohlman said if impingement was her only problem "she would be back working." Without disputed facts on this issue, the statutory presumption analysis need not be applied here either. *Rockney*. Since there is no medical evidence suggesting Employee cannot work because of her left shoulder injury, and those physicians who have opined on the issue agree it is not disabling her, Employee is not entitled to TTD benefits for her left shoulder symptoms at this time because the left shoulder does not disable her. AS 23.30.395(16). She retains her right to seek TTD benefits in the future should her left shoulder become disabling, and Employer retains its defenses.

However, there are differing medical opinions about the need for continuing medical treatment for Employee's left shoulder. Dr. Pino said she needs no further left shoulder treatment; Dr. Pohlman said the treatment for left shoulder impingement "includes steroid injections." This factual dispute invokes the presumption analysis. AS 23.30.120(a)(1); *Meek*.

Without regard to credibility, Employee raises the statutory presumption for continuing treatment for her left shoulder with her testimony and with Dr. Pohlman's opinion. *Wolfer*; *Tolbert*. She said her left shoulder continues to be painful, as charted in VA records. SIME Dr. Pohlman agrees Employee still has left shoulder impingement and said one way to treat it is with steroid injections. Without regard to credibility, Employer rebuts the presumption with EME Dr. Pino's opinion. He said Employee's left shoulder injury was fully resolved and needs no further formal treatment. *Wolfer*; *Huit*. The burden shifts back to Employee, who must prove her claim for continuing medical care for her left shoulder with substantial evidence. *Runstrom*; *Saxton*.

Employee must show the June 30, 2020 work injury is still the substantial cause of her need for ongoing left shoulder medical care. This decision must evaluate the relative contribution of different causes of Employee's need for left shoulder medical treatment. AS 23.30.010(a); *Morrison*. Medical benefits under the Act are payable if, in relation to other causes, the work injury remains the substantial cause of the need for that treatment. AS 23.30.010(a). In this task, this decision is aided by medical opinions, but the factfinders rather than medical providers, decide the ultimate legal question.

There are many possible causes for Employee's ongoing need for left shoulder medical care: (1) sequela from her 2009 car accident; (2) natural degeneration; (3) her June 30, 2020 work injury with Employer; (4) recorded falls on stairs or other occasions when her non-work-related lumbar issues caused her left leg to buckle; (5) her various moves from state to state, which records say aggravated her symptoms; (6) an inversion table treatment, which a record states caused left arm symptoms; (7) work-related incidents with Employer before June 30, 2020, such as grabbing a truck, ladder, railing, a rack, or a ladder on a truck or loader, as variously described in her medical records, in early 2020; (8) her work with DoorDash or Uber; (9) stress related to a bad

relationship with her boyfriend; (10) an Air Force injury, as stated in one medical record, (11) a "pull" while doing stretches on a doorway, and sitting on a bed while doing her taxes, as stated in a report, and (12) an incident with her boyfriend causing Employee to file for a protective order.

While the above possible causes are all recorded in Employee's extensive medical records, there is no medical opinion expressly stating or implying that any of these other than the June 30, 2020 work injury with Employer is the substantial cause of her continuing left shoulder symptoms and need to treat them. In its closing argument, Employer implied Employee's left-leg buckling, and resultant falls, may have injured her left shoulder. Employee did not fully explain her statement that Dr. Born's medical record about her falling and having left arm is not "completely accurate." That history is repeated in Employee's VA medical records, which are duplicative and difficult to follow. *Rogers & Babler*.

Employee at hearing testified her left leg does go out but she has not actually "fallen." However, one post-injury medical record reports Employee was "currently" having buckling-fall incidents; another said she fell on steps, but that incident Employee made her back feel better and there is no mention of left arm symptoms. A buckling-falling history is also repeated in non-medical VA records with information gleaned from Employee. The inconsistency between Employee's VA medical and non-medical records and her hearing testimony initially raises a question about her credibility. AS 23.30.122; *Smith*. But her VA records must be read in context.

Upon further inspection the VA non-medical records read in context show Employee was, with one exception, referring to pre-injury buckling-falling incidents. In VA disability paperwork where Employee was relating her left shoulder issues to her service-connected lumbar spine injury, she stated in March 2021, "My leg occasionally gives out or locks up and I have had several falls due to this. I had a few last summer. I tried to catch a fall and hurt my shoulder. I felt like I might lose balance while using equipment on a job. I pulled back quickly and now have an issue with my l. . . ." In context, this comment, while partly written in the present tense, refers to the June 30, 2020 work injury and explains why Dr. Born's report is not "completely accurate." This could also explain why one medical report post-injury said Employee was "currently" having buckling-falls. Given this ambiguity, overall, Employee's testimony was credible. AS 23.30.122; *Smith*.

Nevertheless, even if Employee had fallen and caught herself with her left arm post-injury, there is no medical opinion stating the non-work-related lumbar spine issue causing buckling-falls is the substantial cause of her continuing left shoulder symptoms and need to treat them.

Without lay or medical opinion connecting 11 out of 12 possible causes for Employee's continuing left shoulder pain, those possible causes are ruled out as causes that must be considered. That leaves the June 30, 2020 work injury with Employer as the substantial cause of the need for any ongoing left shoulder medical care. It is the substantial cause of Employee's need for any continuing left shoulder treatment. Accordingly, Employee's request for an order finding her continuing left shoulder pain "compensable" will be granted. AS 23.30.010(a); *Summers*.

As for left shoulder treatment, Dr. Pohlman opined steroid injections are one way to treat left shoulder impingement. However, he stated Employee's other issues need to be addressed first. Dr. Hansen stated Employee had "no primary shoulder issue," which comports with Dr. Pohlman's view that since prior steroid injections did not significantly improve her left shoulder symptoms, Employee's left shoulder is probably not her main problem. Dr. Pohlman's opinions are given greater weight because he is an impartial SIME physician, reviewed all the medical records, comports with Employee's other medical records and was comfortable changing his initial opinions upon further considering the case. AS 23.30.122; *Smith*. Dr. Pino's hearing testimony is given lesser weight because he had not examined Employee since March 4, 2021, and said her left shoulder injury had resolved fully, while at the same time noting she had continuing symptoms. His take on Alaska's "the substantial cause" law was not entirely correct, as he conflated the "condition" with the need to treat symptoms, contrary to *Morrison*. AS 23.30.122; *Smith*.

Therefore, although Employee's left shoulder remains a compensable injury, there is no currently recommended left shoulder treatment prior to her other issues being addressed first. With due respect to the VA medical system, and to move her treatment forward more quickly, Employee retains her right to select a physician outside the VA to evaluate and treat her left shoulder at

Employer's expense, and Employer retains its right to object to any recommended left shoulder diagnostics or treatment based only on reasonableness and necessity grounds. AS 23.30.095(a).

(B) The cervical spine

Employee seeks an order finding her June 30, 2020 work injury aggravated or accelerated her preexisting cervical condition or combined with it to cause disability and the need to treat her neck. *Summers*. Employer contends there is no medical evidence supporting Employee's position.

Without regard to credibility, Employee raised the statutory presumption of compensability for her neck with Dr. Pohlman's third report and his testimony. AS 23.30.120(a)(1); *Meek*. After reviewing additional medical records and considering the entire case, he opined the work injury probably aggravated Employee's preexisting cervical foraminal stenosis and caused it to become symptomatic. This raised the presumption and caused it to attach, shifting the burden to produce substantial, contrary evidence to Employer. *Tolbert*. Employer relies exclusively on Dr. Pino whose March 4, 2021 report reflected a cervical examination but no related diagnosis. In other words, without regard to credibility, his report did not say if Employee's work injury caused or did not cause any cervical spine-related diagnoses or symptoms. It is understood Dr. Pino found no evidence during his examination of any cervical related symptoms, which would explain the lack of a cervical discussion in his report. But even after Dr. Pohlman's third report and deposition where he changed his opinion and stated the work injury probably aggravated Employee's preexisting cervical stenosis to cause symptoms and need to treat them, Employer presented no evidence from Dr. Pino or from any other source disagreeing with that assessment. *Huit*.

At hearing, again without regard to credibility, Dr. Pino said he found nothing in his examination indicating Employee had a cervical "condition" resulting from the work injury. He said there was no literature suggesting work "causes" cervical stenosis, but Dr. Pino agreed using vibratory equipment can temporarily aggravate cervical stenosis. When asked if he could rule out the June 30, 2020 work injury, or work activities for Employer in general, as contributing factors to Employee's current symptoms, Dr. Pino said he could not comment on her current symptoms; he did not know about her current symptoms.

To rebut the raised presumption, Employer had to show the June 30, 2020 work injury could not have caused Employee's preexisting cervical spine stenosis to become symptomatic (the negative-evidence test), or show another source caused her symptoms (the affirmative-evidence test). *Huit*. Simply stating the "magic words" is not enough to rebut the presumption because Employer must provide "substantial evidence" stating the disability was not work-related. *Huit*. Dr. Pino did not even say the "magic words," and conceded he could not comment on her symptoms after his March 4, 2021 examination. In fact, Dr. Pino conceded vibratory equipment can temporarily aggravate cervical stenosis. *Huit*. Dr. Pino did not provide substantial evidence of another cause for her symptoms. While Employer relies on his statement that the cervical "condition" is apportioned as 80 to 90 percent preexisting, Employee correctly noted that Alaska has not adopted that apportionment system. *Morrison*. Dr. Pino's opinions did not meet the negative-evidence or affirmative-evidence standards. He did not dispute Employee's subjective symptoms from whatever ailed her and for which he stated she needed a self-directed exercise program. *Huit*. Consequently, Employer did not rebut the presumption and Employee is entitled to benefits to treat her cervical spine as a matter of law. *Huit*.

Alternately, even if Drs. Pino's opinions or Pohlman's apportionment opinion somehow rebutted the raised presumption, Employee would still prevail on her cervical aggravation claim in the third step of the analysis. *Saxton*. Medical records show continuing symptoms down her left arm consistent with cervical involvement. Employee told DPT Kikugawa she had radiation down her lateral arm and biceps. Dr. Hansen found, "She gets paresthesias and a sense of weakness in the left arm/hand with running or overhead activities." Dr. Pino found Employee had persistent pain and a pulling sensation in her left shoulder radiating into her hand. On April 12, 2021, Employee reported having an injury "several months ago at work," and since then "her left arm [has felt] numb and tingling." DPT Kikugawa opined, "This may be due to double crush with cervicogenic impingement at nerve roots. . . ." Dr. Hansen reported Employee still had left-shoulder pain with dysesthesias radiating into her forearm. He diagnosed cervical radiculopathy at C5-6, and referred her to a neurosurgeon. Dr. Beringer diagnosed cervical radiculopathy and recommended pain management, an epidural steroid injection and a possible artificial disc replacement. PT Yano opined "nerve impingement at the cervical level also seems to be present

and contributing to her current complaints." Dr. Hagino said Employee's situation is "likely multifactorial."

While these providers did not expressly address causation, Dr. Pohlman did. He said Employee's injury occurred when using the Jumping Jack dirt compactor. After reviewing the entire medical record, Dr. Pohlman ultimately opined the work injury probably aggravated Employee's preexisting cervical foraminal stenosis and caused it to become symptomatic. He found Employee did not have left-sided cervical symptoms prior to the work injury and now has "symptoms of stenosis" that "weren't apparent prior to her injury." Dr. Pohlman opined it was "reasonable" to say the work injury was the substantial cause for Employee's need for further neck treatment, and recommended cervical spine evaluation and treatment with an orthopedic surgeon. *Saxton*. His opinions would be given greatest weight for reasons previously stated. AS 23.30.122: *Smith*.

There is no contrary medical opinion because Dr. Pino's report and testimony do not overcome the raised presumption because he did not offer a causation opinion on her neck. *Huit*. However, again there are numerous possible causes for any symptoms coming from Employee's neck: (1) her 2009 car accident; (2) natural degeneration; (3) her June 30, 2020 work injury; (4) falls on stairs or other occasions when her left leg buckled; (5) her various moves from state to state, which records say aggravated her symptoms; (6) an inversion table treatment a record states caused left arm symptoms; (7) aforementioned work-related incidents with Employer before June 30, 2020, as variously described in records, in early 2020; (8) her work with DoorDash or Uber; (9) stress from a bad relationship with her boyfriend; (10) a physical event with her boyfriend where he applied pressure to her neck; and (11) a "pull" while doing stretches on a doorway, and sitting on a bed while doing her taxes, as stated in one report. *Morrison*.

Of the above, two require analysis. (1) In its closing argument, Employer suggested the buckling-fall incidents may have affected her neck too. However, unlike medical records stating these events caused pain in Employee's left shoulder, there is no medical record stating these incidences affected her neck or caused symptoms deriving from her neck. (2) On January 7, 2021, Employee filed a domestic abuse petition stating her boyfriend put his hands around her

throat and applied pressure, but did not choke her. Employee did not allege in her petition that the respondent injured her neck. If she was seeking a protective order, and if her boyfriend injured her neck on this occasion, one would think Employee would mention it in her petition; it would have been to her advantage. Therefore, there is no lay or medical evidence suggesting buckling-fall incidents or alleged domestic abuse by Employee's boyfriend affected her cervical stenosis. *Morrison*.

There is no medical opinion expressly stating or implying any of these 10 possible causes other than the June 30, 2020 work injury with Employer is the substantial cause of any past or continuing cervical symptoms and need to treat them. Therefore, they are eliminated as causes and need not be considered under AS 23.30.010(a). Employee would prove by a preponderance of the evidence that the June 30, 2020 work injury aggravated, accelerated or combined with her preexisting cervical stenosis to cause it to become symptomatic and require treatment. *Saxton*.

Regarding cervical diagnosis and treatment, Dr. Hansen recommended referral to a neurosurgeon. Dr. Beringer diagnosed cervical radiculopathy and recommended pain management, an epidural steroid injection and a possible artificial disc replacement. Dr. Pohlman recommended cervical spine evaluation and treatment with an orthopedic surgeon. There is no medical opinion suggesting Employee needs no treatment for her cervical symptoms. *Rockney*. Employee retains her right to select a physician outside the VA to evaluate and treat her cervical spine at Employer's expense, and Employer retains its right to object to any recommended cervical spine diagnostics or treatment based only on reasonableness and necessity grounds. AS 23.30.095(a).

(C) The TOS

Employee seeks an order finding her June 30, 2020 work injury caused left TOS, the need to treat it and resultant disability. Employer contends no medical evidence supports her position.

Without regard to credibility, Employee raised the presumption for TOS with Dr. Pohlman's records and testimony; he opined the work injury caused TOS. AS 23.30.120(a)(1); *Wolfer*; *Meek*. This caused the presumption to attach, and shifted the burden to produce substantial,

contrary evidence to Employer. *Tolbert*. Employer relied on Dr. Pino whose March 4, 2021 report reflected no TOS examination and no related diagnosis. Without regard to credibility, Dr. Pino's report did not say if Employee's work injury caused or did not cause TOS. *Wolfer*. It is understood Dr. Pino found no reason to perform the Adson's test or evaluate for TOS, which explains the lack of a TOS discussion in his report. But at hearing even after having read Dr. Pohlman's initial report diagnosing TOS and attributing it to the work injury, Dr. Pino did not disagree with Dr. Pohlman's opinion. Dr. Pino did not review Dr. Pohlman's deposition where he clarified his TOS opinion. Employer presented no contrary evidence on TOS from Dr. Pino or otherwise. *Huit*. At hearing, again without regard to credibility, Dr. Pino said his assignment letter did not mention TOS and he was unaware it was a consideration until he read Dr. Pohlman's report. *Wolfer*. Yet, other than saying TOS was not really an orthopedic issue, Dr. Pino declined to offer a contrary causation opinion about TOS because it was beyond his specialty.

To rebut the raised presumption for TOS, Employer had to show the June 30, 2020 work injury could not have caused Employee's TOS (the negative-evidence test), or show another source caused it (the affirmative-evidence test). *Huit*. Again, Dr. Pino did not even say the "magic words," and declined to comment on her symptoms after his March 4, 2021 examination. *Huit*. Dr. Pino's opinions failed to meet the negative-evidence and affirmative-evidence tests on the TOS issue. Consequently, Employer did not rebut the presumption and Employee is entitled to benefits to treat her TOS as a matter of law. *Huit*.

Alternately, if Dr. Pino's report or testimony rebutted the raised presumption on TOS, Employee would still prevail in the third step of the analysis. *Saxton*. Dr. Pino's opinions would be given less weight and credibility for the aforementioned reasons and because he reviewed a medical record showing Employee had TOS symptoms, and was diagnosed with it, but he did not mention this in his summary of that record and did not address those symptoms and diagnosis. Moreover, his opinions would be given lesser weight and credibility because it is unlikely Employee failed to disclose her TOS symptoms to Dr. Pino when he examined her. She was "pretty sure" she did, and her testimony on this point was credible. AS 23.30.122; *Smith*.

Employee seeks an order requiring Employer to preauthorize and pay for treatment by a vascular surgeon and neurologist for her TOS. Given the above analysis, her request will be granted. Employee retains her right to select a physician outside the VA to evaluate and treat her TOS at Employer's expense, and Employer retains its right to object to any recommended TOS diagnostics or treatment based only on reasonableness and necessity grounds. AS 23.30.095(a).

Employee also seeks mileage benefits for travel to and from her physicians for injury-related treatment. Employer did not dispute her June 9, 2023 mileage log. Her request for medical-related travel will be granted and Employer will be ordered to pay mileage pursuant to her log.

4) Is Employee entitled to TPD or TTD benefits?

With exception of a 2014 record stating she was "doing very well," Employee's medical records show an 11-year gap from the time she recovered from her 2009 right-sided neck surgery to the work injury. Post-injury, her medical records consistently reflect symptoms from her left shoulder, left cervical spine or left TOS injuries, which this decision has found are all compensable injuries. AS 23.30.395(24). No medical provider suggests Employee is malingering or is not experiencing pain as she reported. Dr. Pino said he could find no objective basis for Employee's continued symptoms at his March 4, 2021 EME, but even he suggested she do an independent exercise program to address her subjective symptoms. But as the Court said in *Kessick*, the lack of objective signs of an injury in and of itself does not "preclude the existence of such an injury," because many injuries "are not readily disclosed by objective tests."

(A) TPD benefits

Employee claimed TPD benefits, and at the May 16, 2023 prehearing conference listed TPD benefits as an issue for hearing. AS 23.30. 200. She provided no evidence or argument addressing TPD probably because she testified she had no income during any post-injury period for which she could seek TPD benefits, to date. Her claim for past TPD benefits will be denied.

(B) TTD benefits

Employee also claims past and ongoing TTD benefits. AS 23.30.185. Acknowledging she received "stipend" benefits from March 27, 2021 through September 13, 2021 under *Martino II*,

she requests an offset against her TTD benefit claim to account for those payments. Employee contends she is entitled TTD benefits from September 14, 2021 and continuing until she becomes medically stable from all injuries or is no longer disabled. Employer contends it offered her a modified job, which she refused by removing herself from the labor market. Moreover, it contends there are no "off-work" slips stating Employee is disabled, Dr. Pino found her medically stable effective January 6, 2021, and she is therefore not entitled to TTD benefits after that date.

Without regard to credibility, Employee raised the statutory presumption of compensability on TTD benefits with respect to her left shoulder, cervical spine and TOS with: Dr. Born's February 16, 2021 and March 2, 2021 reports; Dr. Tcheung's April 13, 2021 report, DPT Kikugawa's April 27, 2021 report; Dr. Hansen's June 24, 2021 and July 29, 2021 reports; Dr. Beringer's October 29, 2021 report; Employee's medical history; and Dr. Pohlman's reports and testimony. After January 6, 2021, the date Dr. Pino stated Employee was medically stable: Dr. Born limited Employee's ability to work and activities using her left upper extremity. Dr. Tcheung restricted activities with her left upper extremity for four weeks. DPT Kikugawa said it was inappropriate for Employee to operate heavy equipment or lift and carry objects with her left arm. Dr. Hansen removed her from work for six weeks and referred her to a neurosurgeon. Dr. Beringer recommended pain management, an epidural steroid injection and possible surgery. Employee's VA records reflect her stated inability to work successfully at DoorDash and Uber given her symptoms. Dr. Pohlman stated, referring to Employee's work injury "unless she gets treated I don't think she'll go back to work." He opined Employee's cervical spine and TOS both need treatment and said, "I mean she can't go back to work in this condition." AS 23.30.120(a)(1); *Wolfer*; *Meek*.

The above evidence showed Employee was disabled by her left shoulder, cervical spine and TOS (AS 23.30.395(16)), was not medically stable (AS 23.30.395(28)), and caused the presumption to attach, shifting the burden to produce substantial, contrary evidence to Employer. *Tolbert*. Having raised the presumption of temporary total disability, Employee is entitled to a "presumption of continuing compensability" for TTD benefits. *Bailey*. The following applies the remaining steps from the TTD benefit presumption analysis under AS 23.30.120(a)(1) to each injury:

(i) The left shoulder

Without regard to credibility, Employer rebutted the raised presumption as to Employee's left shoulder injury with Dr. Pino's March 4, 2021 report. All he diagnosed was a left shoulder "sprain/strain" and opined it had fully resolved. Dr. Pino stated Employee was able to return to work as a heavy equipment operator consistent with her described job at the time of her June 30, 2020 injury. He said she was medically stable effective January 6, 2021, and released her to "heavy work" effective March 4, 2021. *Wolfer*; *Huit*. Dr. Pino's report shifted the burden back to Employee who must prove her claim for TTD benefits related to her left shoulder by a preponderance of the evidence. *Saxton*.

On January 6, 2021, Employee was still having problems with overhead activities. "Left shoulder x-rays were "normal." Dr. Hansen gave her a left shoulder CSI. As Dr. Pohlman stated, steroid injections are one treatment for shoulder impingement and strains. Dr. Hansen's injection on January 6, 2021 was clear and convincing evidence that he expected objectively measurable improvement in the injury from this injection and her left shoulder was not yet medically stable. AS 23.30.395(28); *Leigh*; *Lowe's*. Dr. Hansen still noted "she has some symptoms of impingement." On February 16, 2021, Dr. Born said Employee still had left shoulder and arm pain. Employee said her CSI helped about "30-40%," but she still had "heaviness in the arm as well as a feeling of numbness and tingling into the thumb and ring and little fingers." Dr. Born still diagnosed left shoulder impingement and other diagnoses. He restricted her ability to return to work in respect to her left shoulder and opined Employee still needed left shoulder treatment. *Lowe's*. On April 13, 2021, Dr. Tcheung limited Employee's activities with her left shoulder for four weeks. On April 27, 2021, DPT Kikugawa opined Employee's left upper- and lower-extremity "deficits and symptoms," made her "not appropriate for return to work operating heavy machinery around others and/or repeated lifting/carrying materials."

By June 24, 2021, the diagnostic focus began changing. Dr. Hansen removed Employee from work for six weeks for symptoms providers noted were more consistent with her neck or TOS. He noted she received minimal help from CSIs that should have addressed her symptoms but did

not. *Lowe's*. On July 29, 2021, Dr. Hansen reported Employee still had left shoulder pain with dysesthesias radiating into her forearm. He diagnosed cervical radiculopathy at C5-6, referral to a neurosurgeon, and said, "No primary shoulder problem." By July 29, 2021, the records demonstrate it was unlikely "further objectively measurable improvement" from the effects of Employee's compensable left shoulder injury was reasonably expected to result from additional medical care or treatment. AS 23.30.395(28). These contemporaneous reports from unbiased providers are given significant weight. AS 23.30.122; *Smith*. Thus, on July 29, 2021, Employee became medically stable for her left shoulder injury.

The above show Employee was disabled temporarily by her left shoulder injury and not medically stable prior to and through July 29, 2021. AS 23.30.395(16); AS 23.30.395(28); *Lowe's*; *Saxton*. Her claim for TTD benefits for her left shoulder injury from March 27, 2021 through July 29, 2021 will be granted. AS 23.30.185. Since Employer already paid Employee "stipend" benefits from March 27, 2021 through September 13, 2021, it will be directed to pay the difference between stipend and TTD benefits from March 27, 2021 through July 29, 2021, and TTD benefits without reduction through July 29, 2021, for her left shoulder injury.

(ii) The cervical spine and TOS

To rebut the presumption that Employee is entitled to TTD benefits for her compensable cervical spine and TOS, Employer must show without regard to credibility but with substantial evidence that her cervical stenosis and TOS were medically stable, or neither disabled her on or after March 27, 2021. *Wolfer*; *Huit*. Dr. Pino declined to comment on her symptoms after his March 4, 2021 examination. He did not know what her symptoms were after he saw her, and never said she was physically capable of returning to work after other physicians diagnosed her with aggravated cervical stenosis and TOS and restricted her from work. Dr. Pino did not say the work injury using the vibratory Jumping Jack could not have caused Employee's preexisting cervical stenosis to become symptomatic (the negative-evidence test), and admitted it could, nor did he say it could not cause TOS. He did not opine some other event caused the cervical stenosis aggravation or the TOS (the affirmative-evidence test). *Huit*. Consequently, he did not provide substantial evidence rebutting the raised presumption; all he could comment on was her symptoms and his examination findings on the date he examined her and diagnosed only a left

shoulder injury. Employer provided no other contrary medical evidence, and did not rebut the presumption. *Huit*; *Bailey*.

However, Employer defended TTD benefits on grounds it offered Employee a modified position, but she declined it and thus removed herself from the labor market, which disqualifying her from receiving TTD benefits. *Vetter I*. There are several problems with this defense. First, Employer's job offer remains inchoate because Withrow never provided all information required to prove the offer was valid. Yamane repeatedly asked Withrow for additional information to verify the job offer's legitimacy. She never received "information needed to determine if the offer of alternative employment" met legal requirements under the Act. Yamane stopped asking Withrow for it only because Dr. Hansen in the interim predicted Employee would have permanent physical capacities to return to three jobs she held in the 10 years prior to her work injury.

Second, Withrow's putative May 18, 2021 "Asphalt Prep and Paving Crew Member" offer was bookended by DPT Kikugawa's April 27, 2021 statement that Employee was "not appropriate for return to work operating heavy machinery around others and/or repeated lifting/carrying materials," and Dr. Hansen's June 24, 2021 note removing Employee from work for six weeks. The purported modified job offer was not physically compatible with Employee's work restrictions at the time it was made. She was disabled from performing this job. AS 23.30.395(16).

Third, as Employee correctly noted at hearing, there is no evidence she removed herself from the labor market when she went to Hawaii. Hawaii has a labor market too. *Rogers & Babler*. To the contrary, her medical records show she wanted to get well so she could return to work. She tried to work and was physically unable. There is no evidence in the record suggesting Employee "was unwilling to work." *Vetter I* and *II*. Therefore, *Vetter I* is inapplicable to this case. *Cortay*.

Employer presented no evidence to rebut the presumption for continuing TTD benefits for Employee's left cervical stenosis and TOS. *Bailey*. Employee's left shoulder became medically

stable on July 29, 2021, but the unrebutted evidence shows her left cervical stenosis and TOS were not medically stable on that date, and disabled her. Employee's claim for TTD benefits will be granted and she will be entitled to TTD benefits for her left neck and TOS beginning July 30, 2021, and continuing until both become medically stable or she is no longer disabled from either injury. AS 23.30.120(a)(1); AS 23.30.185; *Huit*.

Alternatively, were this decision to find Employer rebutted the raised presumption, Employee would still prevail based on the same above-referenced medical evidence that raised the presumption in the first instance. AS 23.30.120(a)(1); *Saxton*. Were the third step applied, this decision would give greater weight to Dr. Pohlman's report and testimony as he had most recently evaluated Employee, and reviewed more records than did Dr. Pino. AS 23.30.122; *Smith*.

5) Is Employee entitled to interest or a penalty?

Employee contends she is entitled to a penalty and interest. AS 23.30.155(e); AS 23.30.155(p). Employer contends no benefits are due, so no interest is owed, and its valid, good faith controversions protect it from a penalty. *Harp*.

This decision awarded Employee TTD benefits retroactively and prospectively and past medical-related mileage. She will be awarded interest on all past TTD benefits, excepting amounts previously paid as "stipend" benefits under *Martino II* on which Employer has already paid interest, and on her documented medical mileage, as a matter of law. AS 23.30.155(p).

Employee seeks an "additional amount" in compensation commonly referred to as a "penalty," under AS 23.30.155(e). Benefits under the Act "shall be paid periodically, promptly, and directly" to the injured worker except where liability is controverted. AS 23.30.155(a). The Act "sets up a system in which payments are made without need" of a hearing unless a dispute arises. *Harris*. Employer needed a good faith factual or legal basis to deny Employee's right to benefits, and her claims, for her left shoulder, left cervical stenosis and left TOS injuries to avoid a penalty on any awarded benefits. AS 23.30.155(b), (d); *Harp*.

(A) The left shoulder

If the only evidence considered was Dr. Pino's March 4, 2021 report upon which Employer relied, Employee would not be entitled to TTD benefits for her left shoulder because he opined her left shoulder injury was fully resolved and medically stable effective January 6, 2021. A reasonable person could rely upon that opinion in isolation as substantial evidence to deny TTD benefits for her left shoulder injury. Therefore, this decision will deny Employee's claim for a penalty under AS 23.30.155(e) on TTD benefits awarded through July 29, 2021. *Harp*.

(B) The cervical spine and TOS

The penalty analysis for the left cervical spine stenosis and TOS is similar, but the facts are different. Employee's VA medical records contain no causation opinions regarding her cervical spine stenosis and TOS symptoms. Therefore, at least initially there was no medical evidence linking Employee's aggravated cervical spine stenosis and her TOS to her work injury. Nothing triggered Employer's duty to pay TTD benefits or symptoms related to Employee's TOS until December 13, 2022, when Dr. Pohlman issued his first report and raised the presumption as to TOS. By February 22, 2023, Dr. Pohlman had changed his initial opinion and stated the work injury aggravated Employee's preexisting left cervical stenosis and caused it to become symptomatic and to need treatment. In other words, until Dr. Pohlman raised the statutory presumption on these two issues, compensation was not "due." AS 23.30.155(b).

However, Dr. Pohlman served his SIME reports on all parties, presumably by mail. Adding three days to December 13, 2022 for service of the first report, Employer had notice of his left TOS opinion by December 16, 2022 (December 13, 2022 + 3 days = December 16, 2022). 8 AAC 45.060(b). It had notice of Dr. Pohlman's February 22, 2023 revised left cervical stenosis report by February 27, 2023 (February 23, 2023 + 3 days = Sunday, February 26, 2023 + 1 day = February 27, 2023). 8 AAC 45.060(b); 8 AAC 45.063(a). If Employer had any doubts about Dr. Pohlman's opinions, it could have and should have obtained a contrary opinion and controverted benefits based thereon. AS 23.30.155(a), (d). Any doubts about Dr. Pohlman's opinions were resolved at his March 22, 2023 deposition. His December 13, 2022 and February 22, 2023 reports and his March 22, 2023 deposition put Employer on notice that there was medical

evidence connecting Employee's June 30, 2020 work injury to her left cervical stenosis and left TOS symptoms. In other words, they raised statutory presumption. AS 23.30.120(a)(1).

By no later than March 22, 2023, Employer had knowledge of Employee's left cervical stenosis and left TOS injuries and her related disability. AS 23.30.155(b). Therefore, all past TTD benefits became "due" at the latest 14 days after March 22, 2023, or by April 5, 2023. But Employer did not commence paying TTD benefits after March 27, 2021, did not commence benefits by July 30, 2021 when medical records show Employee's left cervical stenosis and TOS were not medically stable and remained disabling, and never filed a controversion notice after February 15, 2022. Employer had a legal duty to review its past controversions and either withdraw or modify them or produce evidence supporting a new one. *Vue*. It did neither. By failing to either pay or controvert, Employer controverted-in-fact any benefits to which Employee could have been entitled given Dr. Pohlman's neck and TOS opinions. To date, Employer has simply produced no contrary evidence. Given this analysis, Employee's claim for a penalty under AS 23.30.155(e) on TTD benefits owed beginning July 30, 2021, and continuing through the date Employer pays past benefits awarded in this decision, will be granted. *Bauder*; *Harp*. The same analyses, above, apply to her past medical milage request, dependent upon the date she incurred the travel expenses.

6) Is Employee entitled to attorney fees and costs?

Employee seeks full, reasonable actual attorney fees, ongoing statutory minimum fees, and costs. AS 23.30.145(a), (b); 8 AAC 45.180(f). Employer objects to the $520 hourly rate. It also objected to this decision considering the Commission's July 13, 2023 "Order on Appellee's Motion for Attorney Fees and Costs," which awarded Bredesen $520 per hour on appeal. Employer contended appellate work is distinguishable from work done at the hearing level. It contends the Commission's order is inapplicable here.

Employer provided no legal precedent distinguishing between an hourly rate for the successful claimant at a workers' compensation hearing, and that same successful claimant on appeal to the Commission or the Court. The panel disagrees with Employer's contention that work before the Commission is "more legally complex appellate work" when compared to work done for a

hearing. Appellate work, especially for the appellee, though different is no harder than work done for hearing because all discovery and evidence presentation, which is often difficult, has already been completed. On appeal, the appellee must merely show the decision below was supported by substantial evidence, and that no legal error was made. *Rogers & Babler*. Therefore, this decision will consider the Commission's July 13, 2023 order in determining Bredesen's hourly rate here.

This decision will also apply the required analysis under Professional Rule 1.5(a) because Employer contends Employee's requested attorney fee rate is unreasonable. *Rusch*.

> *(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.*

Bredesen began representing Employee on July 15, 2021, and continues to represent her for a period now exceeding two years. Employee prevailed in *Martino I* and obtained her requested SIME. She also prevailed in *Martino II*, and obtained stipend benefits while she was in the reemployment process, even though she was ultimately found not eligible. *Martino I* was a routine SIME hearing; *Martino II* required considerable time and labor. The instant hearing is more complicated because it involves three injuries and related benefits, with an unusual overlapping interplay among the three. *Martino II* and the instant matter are more novel and difficult. Considerable legal skill was required for *Martino II* and this hearing.

> *(2) the likelihood, that the acceptance of the employment will preclude other employment by the lawyer.*

Bredesen has a solo practice and does not employee a paralegal. He is only able to accept a limited number of cases at any given time and cases involving depositions and hearings limit his ability to accept additional employment. There were at least two depositions and several hearings in this case. This case probably precluded Bredesen from accepting other employment.

> *(3) the fee customarily charged in the locality for similar legal services.*

The only evidence adduced on this issue is from Bredesen, who was routinely awarded $450 per hour beginning January 1, 2020, and increased his rate to $520 per hour beginning January 1, 2023, based on United States Bureau of Labor Statistics CPI inflation information. Employer

contends Employee failed to prove her attorney's $520 an hour fee is consistent with fees customarily charged for similar legal services. Employer is correct, but this is only one factor to consider.

(4) the amount involved, and the results obtained.

Employee's attorney obtained excellent results. He prevailed in *Martino I* and *II* and in this case. *Martino I* resulted in Employee obtaining an SIME, upon which this decision relies to support its findings and legal conclusions. *Martino II* awarded Employee significant "stipend" benefits, interest and a penalty. The instant decision will award her considerable TTD benefits, medical mileage, interest and a penalty.

(5) the time limitations imposed by the client or by the circumstances.

Employee is living in a self-described "shed" on land she owns in Hawaii. She has no public electricity, water or sewer. Therefore, time was of the essence in resolving this matter so, in the event she prevailed, Employee could obtain benefits and medical treatment with a goal toward improving her living circumstances and returning her to work.

(6) the nature and length of the professional relationship with the client;

Bredesen has an on-going professional relationship with Employee and has represented her for over two years, which is relatively lengthy representation.

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

Bredesen has over 20 years' experience as a lawyer, with most of that involving workers' compensation cases in Alaska. He has also worked on Longshore and personal injury matters incident to workplace injuries. Bredesen has done an excellent job representing his client in this case and in other cases in which he has appeared before this panel.

(8) whether the fee is fixed or contingent.

Attorney fees in disputed workers' compensation cases are generally contingent. AS 23.30.145.

Lastly, the Commission's July 13, 2023 order awarding Bredesen $520 per hour for appellate work in this case cannot be ignored. Employer has given no reason to believe the Commission would rule differently on Bredesen's entitlement to $520 per hour in attorney fees when the fees were incurred at the trial level rather than on appeal. *Bignell*. Moreover, while the applicable statute is ambiguous, and it is an open question, *Martino III* was a final decision and the Commission's July 13, 2023 "Order" could be considered a Commission "decision," which has "the force of legal precedent" unless overruled by the Alaska Supreme Court. AS 23.30.008(a).

Given the above analysis, seven of the eight *Rusch* factors from Professional Rule 1.5(a) cut in Employee's favor. The Commission approved Bredesen's fees at $520 per hour. Employer has not otherwise objected to his attorney fees or costs. It is desirable to have competent claimant counsel available at all levels. *Bignell*. Employee's request for attorney fees and costs will be granted. Employer will be ordered to pay $92,510.16 in actual attorney fees and costs in accordance with Bredesen's three attorney fee affidavits and itemizations, plus statutory minimum fees on all future benefits. *Cortay*; *Rusch*; *Porteleki*; 8 AAC 45.180.

CONCLUSIONS OF LAW

1) The oral order declining to continue the hearing was correct.
2) Employee's claim is not barred for failure to give timely notice.
3) Employee's left shoulder, left cervical spine and left TOS are compensable injuries.
4) Employee is not entitled to TPD benefits but is entitled to TTD benefits.
5) Employee is entitled to interest and a penalty.
6) Employee is entitled to attorney fees and costs.

ORDER

1) Employee's left shoulder, left cervical spine and left TOS are compensable injuries and Employer is ordered to pay all benefits in accordance with the Act, applicable regulations and decisional law.
2) Employee retains her right to select a physician outside the VA clinics to evaluate and treat her left shoulder at Employer's expense, and Employer retains its right to object to any

recommended left shoulder diagnostics or treatment based only on reasonableness and necessity grounds.

3) Employee retains her right to select a physician outside the VA clinics to evaluate and treat her cervical spine at Employer's expense, and Employer retains its right to object to any recommended cervical spine diagnostics or treatment based only on reasonableness and necessity grounds.

4) Employee retains her right to select a physician outside the VA clinics to evaluate and treat her TOS at Employer's expense, and Employer retains its right to object to any recommended TOS diagnostics or treatment based only on reasonableness and necessity grounds.

5) Employee's request for medical-related travel is granted and Employer is directed to pay her mileage pursuant to her June 9, 2023 mileage log.

6) Employee's claim for past TPD benefits is denied.

7) Employee's claim for past and ongoing TTD benefits is granted. Employer is directed to pay Employee TTD benefits beginning March 28, 2021, and continuing until Employee reaches medical stability for her left cervical stenosis and left TOS, or is otherwise no longer disabled pursuant to the Act, applicable regulations and decisional law. Employer is entitled to an offset from TTD benefits ordered in this paragraph for stipend benefits already paid from March 28, 2021 through September 13, 2021.

8) Employee's claim for interest is granted. Employer is directed to pay interest on all past TTD benefits, excepting amounts previously paid as stipend benefits under *Martino II* on which Employer has already paid interest, and on her documented medical mileage.

9) Employee's request for a penalty is denied in part and granted in part. Her claim for a penalty on TTD benefits and mileage awarded through July 29, 2021 for the left shoulder is denied. Her claim for a penalty on TTD benefits and mileage awarded beginning July 30, 2021, and continuing through the date Employer pays past benefits awarded in this decision, is granted.

10) Employee's claim for attorney fees and costs is granted. Employer is directed to pay $92,510.16 in actual attorney fees and costs, plus ongoing statutory fees on all future benefits.

Dated in Anchorage, Alaska on August 10, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/

William Soule, Designated Chair

/s/

Robert C. Weel, 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 accordance 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 accordance 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 Sabrina M. Martino, employee / claimant v. Alaska Asphalt Services, LLC, employer; The Ohio Casualty Insurance Company, insurer / defendants; Case No. 202007450; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on August 10, 2023.

/s/
Rachel Story, Office Assistant