# ALASKA WORKERS' COMPENSATION BOARD

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

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| JOSE INIGUEZ QUINONEZ,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>TRIDENT SEAFOODS,<br><br>Employer,<br>and<br><br>LIBERTY INSURANCE CORPORATION,<br><br>Insurer,<br>Defendants. | FINAL DECISION AND ORDER<br><br>AWCB Case No. 201614882M;<br>201603968J<br><br>AWCB Decision No. 23-0080<br><br>Filed with AWCB Anchorage, Alaska<br>on December 21, 2023 |

Jose Iniguez Quinones' (Employee) September 21, 2017, October 9, 2017, January 4, 2018, January 29, 2019, April 23, 2019, June 17, 2019 (filed on June 25, 2019), and June 17, 2019 filed (filed on October 2, 2019) claims were heard on November 22, 2023, in Anchorage, Alaska, a date selected on September 14, 2023. An April 25, 2023 hearing request gave rise to this hearing. Employee appeared telephonically, represented himself and testified with interpreters' assistance. Attorney Jeffrey Holloway appeared by Zoom and represented Trident Seafoods and its insurer (Employer). At hearing, Employee withdrew his claim for temporary partial disability (TPD) benefits. The record closed at the hearing's conclusion on November 22, 2023.

## ISSUES

Employee contends he is entitled to additional temporary total disability (TTD) benefits for his right shoulder work injury with Employer.

Employer contends Employee's right shoulder is medically stable, he is no longer disabled by his right shoulder injury and is therefore not entitled to additional TTD benefits.

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

Employee contends Employer has made numerous frivolous or unfair controversions. He seeks an associated finding and order.

Employer denies it has frivolously or unfairly controverted any benefits. It contends its timely controversions were all supported either in fact or by law, or both.

**2) Should Employee's request for a frivolous or unfair controversion finding be granted?**

Employee contends he is entitled to a compensation rate adjustment.

Employer contends it correctly calculated Employee's disability compensation rate, and he is not entitled to an upward adjustment.

**3) Is Employee entitled to a compensation rate adjustment?**

Employee contends he is entitled to the cost of hotel accommodations related to his second independent medical evaluation (SIME) that he attended in Hawaii.

Employer contends it provided him with pre-paid hotel accommodations and owes nothing more.

**4) Is Employee entitled to SIME-related expenses?**

Employee contends he is entitled to an unspecified penalty.

Employer contends Employee is not entitled to any penalty as it timely paid all benefits due.

**5) Is Employee entitled to a penalty?**

Employee contends he is entitled to interest on all benefits awarded in this decision.

Employer contends no benefits are awardable in this decision, and therefore Employee's request for interest should be denied.

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

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions relevant to Employee's right-shoulder claim:

1) On March 9, 2016, John Murphy, PA-C, in Seattle, Washington, recorded that Employee on January 19, 2016, had right-shoulder and left-thumb injuries. (US Healthworks, Medical Decision-Making Treatment Plan Summary, March 9, 2016). On related documents, this provider recorded Employee had right-shoulder pain from repeatedly lifting trays, and left-thumb pain after a trauma related to a cart and tray. Employee said he was "putting fish in freezer" while working for Employer in Akutan, Alaska. (US Healthworks, WC Worksheet, Patient Information, March 9, 2016). Employee stated, "As I was pushing one cart, the cart hit a metal sheet and this [bounced] back and smashed my left thumb. My right shoulder is also injured." PA-C Murphy recommended physical therapy (PT) and said Employee could perform modified duty from March 9, 2016, to March 18, 2016, with limited carrying, pushing and pulling. (Provider's Initial Report, Activity Prescription Form, March 9, 2016). Employee's further explanation for his shoulder injury included, "[Patient] was pushing a cart [with] arms," and he "slipped but was still holding on" to the cart with his right arm." His shoulder injury was consistent with rotator cuff tendinopathy. (Rehabilitation-Eval, March 9, 2016).

2) On May 19, 2016, a right-shoulder magnetic resonance imaging (MRI) disclosed a partial-thickness tear of Employee's infraspinatus tendon and moderate AC joint arthrosis, but no other notable findings. (MRI report, May 19, 2016).

3) On May 26, 2016, a provider with an illegible signature released Employee to modified duty with his right shoulder from May 26, 2016 to June 20, 2016, and estimated his then-current work capacities would last for no more than 20 days. (Activity Prescription Form, May 25, 2016).

4) On June 20, 2016, Patrick Bays, DO, orthopedic surgeon, evaluated Employee for his right-shoulder pain. He was accompanied by an interpreter and a nurse case manager. Employee reported a right-shoulder injury on January 19, 2016, while lifting. After Employee's benign

physical examination, Dr. Bays diagnosed a right-shoulder impingement syndrome causally related to the January 19, 2016 work injury. He opined that Employee did not require surgery, had normal range-of-motion, a negative impingement test and "excellent physical examination findings." However, a local anesthetic and corticosteroid might be beneficial; Employee declined the injection. (Bays report, June 20, 2016).

5) On June 20, 2016, after Dr. Bays examined him, Employee returned to his normal provider who diagnosed right-shoulder tendinitis and also recommended a right-shoulder steroid injection. This provider released Employee to modified duty for his right shoulder from June 20, 2016, to July 20, 2016. (Activity Prescription Form, June 20, 2016).

6) On August 11, 2016, Michael Erickson, MD, orthopedic surgeon, saw Employee for his right shoulder and left thumb. Employee reported "no specific injury but pain increased progressively. No pop or snap." Dr. Erickson in reference to the right shoulder diagnosed an infraspinatus tear. He too recommended an injection, but Employee did not want it. Therefore, Dr. Erickson recommended home exercises. (Erickson report, August 11, 2016).

7) On August 30, 2016, David Belfie, MD, with a Spanish interpreter present, examined Employee's right shoulder. He found no clinical evidence of a possible rotator cuff tear. (Belfie report, August 30, 2016).

8) On September 9, 2016, Dr. Belfie with an interpreter examined Employee again and diagnosed a near full-thickness right rotator cuff tear from a "02/2016" work injury. He recommended right-shoulder arthroscopic rotator cuff repair. (Belfie report, September 9, 2016).

9) On September 15, 2016, Dr. Erickson examined Employee's shoulder, and diagnosed rotator cuff partial-thickness tear of the supraspinatus with impingement. He was to "remain out of work until after surgery." Dr. Erickson said Employee would be at maximum medical improvement after shoulder surgery. (Erickson report, September 15, 2016).

10) On October 31, 2016, Dr. Belfie performed right-shoulder surgery on Employee. He restricted Employee to wearing a sling for six weeks and part-time for another six weeks with no active use of his arm away from his side for 12 weeks. Employee also had 12 weeks of post-surgery PT prescribed, but was generally non-compliant and offered "several different excuses as to why he cannot make appointments." (Virginia Mason Medical Center reports, October 31, 2016; December 28, 2016).

11) On November 3, 2016, Dr. Belfie predicted Employee would be off work for three weeks. (Return to Work Authorization, November 3, 2016).

12) On January 26, 2017, Dr. Erickson examined Employee for among other things, "shoulder pain." Employee said he had undergone right-shoulder surgery in October. "He still has significantly restricted range of motion [and] is continuing to have discomfort." On physical examination, Dr. Erickson described this as "extreme restriction" with "external rotation at zero." Employee said his shoulder pain was "3" out of "10" with movement and it "comes and goes." Dr. Erickson's relevant diagnoses included, "Shoulder pain, unspecified chronicity, unspecified laterality (primary encounter diagnosis)." Employee was to continue PT for his shoulder and was "currently off of work because of shoulder." Dr. Erickson expected Employee would obtain "proximal medical improvement" for his shoulder at his appointment in eight weeks. (Erickson report, January 26, 2017).

13) On March 2, 2017, Dr. Erickson charted Employee with "shoulder pain since on-the-job injury of January 19, 2016," and had a delayed start with shoulder rehabilitation. He was "currently off of work" for his left foot. (Erickson report, March 2, 2017).

14) On March 5, 2017, emergency room staff evaluated Employee for flu-like symptoms and noted there were no barriers to communication and said, "The patient speaks fluent English." (Yakima Regional Medical & Cardiac Center record, March 5, 2017).

15) On April 12, 2017, Dr. Belfie examined Employee who had not been participating in enough PT that was "manual in nature." He recommended six weeks of PT and, if Employee did not improve, closed right-shoulder manipulation under anesthesia. (Belfie report, April 12, 2017).

16) On April 13, 2017, a physical therapist stated Employee had been extremely verbally abusive with her and other staff and one therapist stated she would no longer work with him. Employee apologized and said he would not be abusive to her again. (PT report, April 13, 2017).

17) On April 13, 2017, Employee was to remain off work until June 13, 2017. (Activity Prescription Form, April 13, 2013).

18) While at PT for his right shoulder on April 26, 2017, Employee was warned not to use racial slurs while in the clinic. When he was heard later making "inappropriate racial comments," he was told his treatment would be concluded at this clinic. (PT report, April 26, 2017).

19) On May 12, 2017, Dr. Belfie predicted Employee would have a permanent partial impairment (PPI) rating greater than zero as a result of his work injury. However, Dr. Belfie could

not comment on relevant job descriptions provided to him until Employee had a formal, physical capacities evaluation (PCE). (Belfie report, May 12, 2017).

20) On May 24, 2017, Dr. Belfie said Employee was not released to any work until July 15, 2017. (Activity Prescription Form, May 24, 2017).

21) By May 25, 2017, Employee's shoulder was improved. (Erickson report, May 26, 2017).

22) On June 2, 2017, Dr. Belfie predicted Employee would not have the permanent physical capacities to perform the physical demands of the following positions: Fish Cleaner; Christmas Tree Farm Worker; Welder Helper; Harvest Worker, Fruit; Construction Worker II; Hide Trimmer; Fence Erector; Farmworker, Vegetable II; or Freezing Room Worker. (Job Description questionnaires, June 2, 2017).

23) On June 14, 2017, Employee completed a PT form on which he stated he was "presently working." He claimed he could not use his right arm "very well." (PT report, June 14, 2017).

24) On June 22, 2017, Employee told PT he had shoulder pain but felt relief in shoulder muscles; he rated his pain at "5/10." He scored "63%" on the Quick DASH for perceived disability. Employee had previously been diagnosed with adhesive capsulitis. (PT report, June 22, 2017).

25) On September 7, 2017, a right-shoulder MRI showed subtle issues in Employee's right supraspinatus tendon, with no other notable abnormalities. (MRI report, September 7, 2017).

26) On September 21, 2017, Employee requested TTD and medical benefits, and a frivolous or unfair controversion finding, for his February 14, 2016 left foot injury in case 201614882. (Claim for Workers' Compensation Benefits, September 21, 2017).

27) On October 9, 2017, Employee requested a compensation rate adjustment for his February 10, 2016 shoulder injury. He explained his injury was, "Pushing a rack outside to the freezer, my foot slipped on ice, and I caught myself with all my weight on my shoulder." Employee was not sure if he had been paid the correct amount of compensation. (Claim for Workers' Compensation Benefits, October 9, 2017).

28) On October 16, 2017, Dr. Belfie performed right-shoulder manipulation under anesthesia on Employee. (Operative Report, October 16, 2017).

29) On October 27, 2017, Employer controverted Employee's request for a compensation rate adjustment in his right-shoulder case. It based this on information from Employee's 2014 W-2 tax form, and the lack of any contrary evidence. (Controversion Notice, October 27, 2017).

30) On November 15, 2017, Dr. Belfie charted that Employee was improving after his right-shoulder manipulation under anesthesia. He restricted Employee from work for the next six weeks, and he was to continue with PT. (Belfie report, November 15, 2017).

31) On December 6, 2017, Employer controverted all benefits in Employee's right-shoulder case on grounds Employee failed to appear for a properly noticed employer's medical evaluation (EME). It based this on Employee's tardy arrival at the examination, which prevented it from occurring. (Controversion Notice, December 6, 2017; agency file).

32) On January 4, 2018, Employee requested TTD benefits and an unfair or frivolous controversion finding in a claim lacking a case number, but referencing the February 10, 2016 shoulder injury. However, the claim also mentioned his left foot and thumb. (Claim for Workers' Compensation Benefits, January 4, 2018).

33) On January 18, 2018, Employee told Dr. Erickson he did not think his right shoulder had been completely rehabilitated following surgery and he continued with decreased motion, and pain. (Erickson report, January 18, 2018).

34) On January 24, 2018, Employer controverted all benefits from December 4, 2017, and continuing in Employee's right shoulder case, on grounds he failed to attend an EME. It contended its controversions were all based on fact or law and Employee was not entitled to a finding of an unfair or frivolous controversion. (Controversion Notice, January 24, 2018).

35) On January 26, 2018, Mark Fleming, DO, orthopedic surgeon, evaluated Employee for his right-shoulder injury, which he stated occurred when he was pushing a cart with fish fillets. Employee reported his right-shoulder pain was "10" on a "1 to 10" scale. After performing a physical examination, Dr. Fleming diagnosed a right-shoulder strain and post-right-shoulder arthroscopy and right-shoulder adhesive capsulitis both as a result of the work injury. He noted right-shoulder acromiolclavicular joint arthrosis preexisted the work injury. Employee was medically stable effective January 26, 2018. He needed no further medical care for his right shoulder. Dr. Fleming opined Employee had physical capacities to perform full-time work from "sedentary" through "very heavy" exertional categories. Pursuant to the AMA *Guides*, Sixth Edition, Dr. Fleming provided a six percent whole-person PPI rating attributable to the right-shoulder work injury with Employer. Effective February 19, 2018, Dr. Fleming also opined Employee would retain his physical capacities to perform his at-injury job as well as all jobs he held within 10 years prior to his work injury. These included: Freezer Room Worker; Construction

Worker II; Welder Helper; Harvest Worker, Fruit; Christmas Tree Farm Worker; Fish Cleaner; Hide Trimmer; Hide Trimmer; and Farmworker, Vegetable II. (Fleming reports, January 26, 2018; February 19, 2018).

36) On February 7, 2018, Employer controverted all benefits in Employee's right-shoulder case from December 4, 2017, through January 25, 2018, temporary disability benefits from January 26, 2018, and continuing, medical and transportation benefits from January 26, 2018, and continuing, and reemployment benefits except an eligibility evaluation. It based this denial on Employee's failure to attend an EME on December 4, 2017, and on EME Dr. Fleming's January 26, 2018 examination where he opined Employee's work injury had reached medical stability and he needed no further treatment for it, had no work restrictions, and was released to his regular job and all jobs he held in the 10 years prior to his work injury. (Controversion Notice, February 7, 2018).

37) On March 23, 2018, the Rehabilitation Benefits Administrator's (RBA) designee (RBA-designee) notified the parties that she found Employee not eligible for reemployment benefits based on a reemployment specialist's report. The specialist and the RBA-designee both relied on Dr. Fleming's EME report regarding Employee's right shoulder. They discounted Dr. Belfie's contrary opinion finding his opinions that Employee would not have permanent physical capacities to perform physical requirements of relevant jobs was based on his prediction about Employee's "current ability to perform these jobs," and not his "future (predicted) ability." Thus, the RBA-designee relied on Dr. Fleming's report that concluded Employee would have permanent physical capacities to perform physical demands of his at-injury job as well as all jobs he performed in the 10-year period prior to his injury. The letter advised Employee he had 10 days to appeal the RBA-designee's decision. (RBA-designee letter, March 23, 2018).

38) On April 25, 2018, Employee filed an untimely petition seeking review of the RBA-designee's eligibility determination. He stated he did not receive the RBA-designee's letter "on my new address until 4/19/18." (Petition, April 25, 2018).

39) On January 24, 2019, orthopedic surgeon Peter Diamond, MD, saw Employee for an SIME. Employee agreed he was "well attended" at Dr. Diamond's appointment. (Satisfaction Survey, January 24, 2019).

40) Dr. Diamond reviewed approximately 1,000 pages of Employee's medical and other records. He summarized those he deemed most relevant, and interviewed Employee with a "professional translator" present. Relevant to the instant hearing, Employee stated that on or around February

14, 2016, while working for Employer as a helper, he was pushing a large stack of trays, "when he slipped and fell." As he fell, Employee said he held onto the stack with his right arm, forcibly abducting the right shoulder. He claimed immediate onset of right-shoulder pain. Employee said his right shoulder pain persisted and he continued to work at light-duty. Upon returning to Seattle, Washington, Employee said he went to PT for his shoulder for approximately two months with no significant improvement. Dr. Belfie did an MRI on his right shoulder and Employee had out-patient right-shoulder surgery on October 31, 2016. Employee reported more PT but no shoulder improvement. He developed a" frozen shoulder" and had manipulation under anesthesia to address it. Following PT for an additional four to six weeks, Employee said the insurer terminated his treatment. His relevant chief complaint at this SIME was persistent right-shoulder pain. Employee stated his right-shoulder pain was "constant," intermittently worse and specifically worse with any sudden shoulder movement. He believed his right shoulder was still "stiff and weak." Employee told Dr. Diamond he was getting worse. (Diamond SIME report, February 1, 2019).

41) Dr. Diamond said, "I would estimate that the shoulder and foot conditions contributed approximately equally to the need for treatment and the disability for the first year. . . ." He further stated: "The substantial cause of the disability and need for medical treatment is therefore the subject injury and the right shoulder rotator cuff dysfunction." He added, "to a reasonable degree of medical probability, the substantial cause of the continuing disability is the dysfunction in the right shoulder. This is secondary, by history, to the subject injury of 2/14/16." Dr. Diamond opined, "The work-related disability continues. He has continuing pain, stiffness, and weakness of the right shoulder." In his opinion, Employee was not medically stable for his right-shoulder injury and suggested an MR arthrography to assess the shoulder repair. If "the repair appears patent," Dr. Diamond would opine Employee would reach medical stability following a corticosteroid injection and four to six weeks of PT to improve motion. He attributed five percent PPI to the shoulder injury. As of this SIME date, Employee was not able to work without any limitations or restrictions; the only restriction would be "sedentary work" for which Dr. Diamond felt Employee was capable. (Diamond report, February 1, 2019).

42) In response to Employer's questions, Dr. Diamond opined the reported February 14, 2016 work injury was the most significant factor in Employee's need for right-shoulder care. He disagreed Employee's need for medical treatment ended by August 19, 2017, because he still had adhesive capsulitis and right-shoulder dysfunction. Dr. Diamond expected right-shoulder motion

improvement following an injection and PT, but if he were to perform a PPI rating on that date Employee would have a five percent whole person rating according to the AMA *Guides*, Sixth Edition. In Dr. Diamond's opinion, although a formal FCE would be informative, on that date Employee would have been capable of sedentary work three months following the October 31, 2016 right-shoulder surgery, or by January 31, 2017. (Diamond report, February 1, 2019).

43) On January 29, 2019, Employee requested "other" relief in a claim with no case number but referencing his February 14, 2016 left-foot injury as follows:

> I had an evaluation at Hawaii, and I got send [sic] some information about my trip; plane, hotel and transportation, according to them everything was paid and ready to go, but I didn't have the taxi to and from the airport, I didn't have transportation to the hotel when I arrived and also the hotel was only reserved but it wasn't paid. I would like to know what happened because I had to sleep at a park near the clinic where I had evaluation for my case; and only got $120 form [sic] Liberty Mutual and we spoke with Jeffrey D. Holloway assistant and informed her I didn't have money for none of this and give us a call back and until now we haven't heard from them. I would like an explanation about this. ASAP, contact me at the number on top (text continue from bottom paragraph). (Claim for Workers' Compensation Benefits, January 29, 2019).

Attached to Employee's claim was a January 17, 2019 letter from Holloway to Employee stating:

> As you may know, this firm represents the employer. . . . Enclosed please find revised travel arrangements made on your behalf to attend the [SIME] scheduled for January 24, 2019. If you have any questions about this letter or the enclosure, please feel free to contact our office at any time.

Also attached was an email stating:

> José,
>
> Here's everything you need, remember to take the airline confirmation with you to the airport along with your ID; you will need these to board the plane. If there is anything else I can do let me know, I am in the office Monday-Friday, 7:00 am to 3:30 pm, central time. You can call me direct at 319-***-**** [number redacted for privacy] or if you need anything on the weekend or after 7:00 pm, central time, you can call 866-***-**** and page the on-call transportation person (24/7 service) for assistance.

Also included were Alaska Airlines confirmation numbers and flight information for Employee's flight to and from Hawaii for his SIME; Yellow Cab Northwest ground transportation

arrangements in Seattle, Washington; Signature Cab Holdings ground transportation arrangements for Honolulu, Hawaii; Best Western Hotel information with confirmation number for Honolulu; and instructions to use the hotel van for transportation to and from the airport. Also attached was a January 23, 2019 letter on Best Western letterhead from Dujon Curtis, Front Office Manager for Best Western Hotel; it stated:

> My name is Dujon Curtis, and I am the Front Office Manager at the Best Western Plaza Hotel. . .. On January 23, 2019 [Employee] had a reservation to check into our hotel for 1 night, however his reservation was not pre-paid but only reserved. [Employee] stated that Liberty Mutual Insurance was supposed to be covering the payment of his room, but no payment had been received. [Employee] and I attempted to call Liberty Mutual, but their offices had already closed for the day. [Employee] does not have any funds to cover the cost of the room, thus we are unable to check him into this reservation without payment. If you have any further questions or concerns, I can be reached at 808-***-****.

Curtis signed the letter. (Claim for Workers' Compensation Benefits, January 29, 2019).

44) On January 30, 2019, the Workers' Compensation Division (Division) served Employee's January 29, 2019 claim on Holloway and the insurer by certified mail. (Agency file: Judicial, WC Actions, Claim Served tabs, January 30, 2019).

45) Employee's agency files contain no controversion from Employer referencing the January 29, 2019 claim filed within 21 days of the date the Division served the claim on Employer's representatives. (Agency file: Judicial, Party Actions, Controversion, tabs).

46) On February 19, 2019, Employer denied the January 29, 2019 claim. (Answer to Employee's Workers' Compensation Claim, February 19, 2019).

47) Given Employer's timely controversions, it is probable Employer filed a controversion on the January 29, 2019 claim and the Division mis-filed it. (Inferences drawn from the above).

48) On April 23, 2019, Employee, then represented by an attorney, amended his prior claims, added his right shoulder, and requested in both his left foot and right shoulder cases TTD and PPI benefits, medical and related transportation, interest, and attorney fees and costs. (Claim for Workers' Compensation Benefits, April 23, 2019).

49) On May 13, 2019, Employer controverted TTD benefits for Employee's right shoulder from January 26, 2018, and continuing; PPI benefits above six percent; unreasonable and unnecessary medical care and related transportation and all medical care and related transportation after January 26, 2018; attorney fees and costs; interest; and reemployment benefits. Employer based these

denials on Dr. Fleming's January 26, 2018 right-shoulder examination. Dr. Fleming stated Employee was medically stable, needed no further treatment, gave him a PPI rating and released him to his job at the time of injury. (Controversion Notice, May 13, 2019).

50) On May 24, 2019, Holloway emailed Employee a letter with 321 documents attached responding to his April 23, 2019 informal discovery request. Included were pay stubs and "Pay Detail Reports" showing Employee's earnings working for Employer; general employment-related documents showing Employee worked for Employer as an "hourly" worker; 2015 W-2 forms showing Employee earned $3,557.54 working for Employer, and $3,060 working for Eagle Pipeline Construction, Inc.; a work history showing Employee worked for Eagle Pipeline for approximately one month in December 2014 and January 2015 at $18 per hour, M.E. Read Construction, for approximately one month in September 2014 to October 2014 at $15 per hour, Darnell Construction, for approximately one month in June and July 2014 at $12 per hour, Artex Electric Company, from December 2007 until February 2009 at $12 per hour and Lubbock Temp Agency for October 2007 through December 2007 at $10 per hour (there was a gap in employment between February 2009 and June 2014); a 2015 W-4 form showing Employee was single with one dependent, himself; billing statements from various medical providers; emails between a nurse case manager and the adjuster; vocational reemployment documents; Social Security Administration documents showing Employee earned $2,890 in 2014 and $3,060 in 2015 working for Eagle Pipeline Construction, Inc, $420.50 in 2014 working for Labor Ready Central, Inc., $6,048.75 in 2014 working for M.E. Read Construction, Inc., $3,792.98 in 2014 working for Darnell Construction, LLC, $3,557.54 in 2015 and $5,861.30 in 2016 working for Employer; and checks, charts and print-outs showing payments Employer made to Employee or on his behalf from the injury date until May 24, 2019. (Letter, May 24, 2019).

51) On June 25, 2019, Employee, representing himself again, in his right-shoulder case requested TTD benefits, a penalty for late-paid compensation, and interest. He explained, "Shoulder injury while taking out empty racks from freezer -- I did not fall but pulled right shoulder. Looking to get paid for injuries sustained while working." Employee attached to his claim: A Washington "Activity Prescription Form" for a right "frozen shoulder" signed by a physician whose name is not discernible stating Employee was not released any work from June 18, 2019, to August 18, 2019; Curtis' January 23, 2019 letter; the above-referenced email regarding his Hawaii SIME arrangements, and a facsimile cover sheet from Employee to the

Division mentioning "retroactive pay" for his shoulder injury. (Claim for Workers' Compensation Benefits, June 17, 2019).

52) On July 16, 2019, Employer controverted TTD and PPI benefits; unreasonable and unnecessary medical costs and related transportation and all medical costs and transportation from August 19, 2017, and continuing; a penalty for late-paid compensation; and interest for Employee's left foot case. It also controverted PPI benefits greater than six percent; unreasonable and unnecessary medical costs and related transportation; a penalty for late-paid compensation; and interest for Employee's right shoulder. Employer based these on Dr. Fleming's report, and on timely payments or controversions. (Controversion Notice, July 16, 2019).

53) On September 5, 2019, Dr. Belfie performed another manipulation under anesthesia for Employee's right shoulder. (Operative Report, September 5, 2019).

54) On October 2, 2019, Employee in his right-shoulder case again requested TTD benefits, a penalty for late-paid compensation, and interest. He repeated his explanation for how the injury occurred and his reason for filing the claim set forth in his June 17, 2019 claim filed on June 25, 2019. (Claim for Workers' Compensation Benefits, June 17, 2019).

55) On October 22, 2019, Employer controverted PPI benefits greater than six percent; unreasonable and unnecessary medical costs and related transportation; a penalty for late-paid compensation; and interest for Employee's right shoulder. It based these denials on Dr. Fleming's EME report, and on timely benefit payments or controversions. It also partially withdrew its prior controversions and authorized an MR arthrography based on Dr. Diamond's SIME report, and began paying time-loss benefits beginning June 18, 2019, and continuing based on Dr. Belfies' June 18, 2019 report. (Controversion Notice, October 22, 2019).

56) On February 25, 2020, Dr. Belfie stated Employee was at "maximum medical improvement." (Activity Prescription Form, February 25, 2020).

57) Dr. Belfie stated Employee was ready to have his right shoulder rated for permanent partial impairment. (Belfie report, March 31, 2020).

58) On August 21, 2020, Employer controverted temporary disability benefits from February 25, 2020, and continuing for Employee's right shoulder. It based this on Dr. Belfie's February 25, 2020 report that Employee's right shoulder was at "maximum medical improvement" following his September 2019 manipulation under anesthesia, and his recommendation for no additional treatment. (Controversion Notice, August 21, 2020).

59) On December 21, 2020, a different attorney that previously represented Employee filed a claim in the right-shoulder case for attorney fees and costs. Employee's former attorney said Employee instructed him to withdraw. Attorney John Franich, stated he had provided valuable services to Employee for which he should be compensated in accordance with applicable law. (Claim for Workers' Compensation Benefits, December 21, 2020).

60) On January 13, 2021, Employer controverted attorney fees and costs in Employee's right-shoulder case on grounds there was no nexus between any benefits paid to Employee and work performed by an attorney. (Controversion Notice, January 13, 2021).

61) On June 14, 2021, Employee had an FCE at People's Injury Network Northwest (PINN) for "Freezing-Room Worker." He arrived at the evaluation using a power wheelchair resulting from a "cervical spine injury in September 2020 (unrelated to claim of injury)." He chose not to use the wheelchair during his evaluation. The examiner noted, "Objective Biomechanical Findings are not reliable and consistent as client did self-limit secondary to reported pain. . . ." Employee stated he had cervical surgery in September 2020. The evaluator noted, "There were no biomechanical findings evaluated by the Physical Therapist that would prohibit client from fully participating in this evaluation." The conclusion was, "Test findings for this client are valid for safe Maximum functional abilities/tolerances. Test findings for this client are valid for safely performing the listed physical demands/essential job requirements." However, the report also stated, "no job analyses provided." (PINN report, April 27, 2021).

62) On August 13, 2021, Dr. Diamond reviewed approximately 200 pages of additional medical records, and his original SIME report. He opined Employee's right-shoulder "work-related disability continues at present." However, Dr. Diamond added, "the examinee is medically stable vis-à-vis the right shoulder," effective March 31, 2020. He had no recommendations for further right-shoulder treatment. Dr. Diamond stated Employee's treatment had been reasonable and necessary and was in accordance with his original report. Restrictions secondary to the work-related injury included "no above-shoulder level use of the right upper extremity." He was unable to provide a new PPI rating without another examination. Dr. Diamond was not able to determine Employee's functional level but noted he had a June 14, 2021 FCE stating he was valid for safely performing the listed physical demands of a provided job analysis. However, this report was followed by the statement, "No job analyses provided." Dr. Diamond stated based upon the

"Seafood Processor" job analysis he reviewed when he did his original evaluation, Employee was capable of "sedentary work," since March 31, 2020. (Diamond report, August 13, 2021).

63) On September 21, 2021, the parties attended a prehearing conference at which, at Employee's request, the designee set his claims for hearing on November 9, 2021. Issues to be heard in Employee's numerous claims from both his left-foot and right-shoulder cases included: a compensation rate adjustment; TPD, TTD and PPI benefits; a request for an unfair or frivolous controversion finding; medical benefits and related transportation; a penalty; interest; and attorney fees and costs. Also set for hearing was Employee's petition to review the RBA-designee's March 23, 2018 ineligibility determination. (Prehearing Conference Summary, September 21, 2021).

64) On October 21, 2021, Employer amended its prior controversions and controverted temporary disability benefits from April 1, 2020, and continuing; PPI benefits above six percent; medical and related transportation beginning April 1, 2020, and continuing; a compensation rate adjustment; a penalty; interest; unfair or frivolous controversions; and attorney fees and costs for his right shoulder. It based these on Dr. Diamond's August 13, 2021 report stating Employee's right-shoulder injury became medically stable effective March 31, 2020, and because all time loss from March 9, 2016, through March 31, 2020, had already been paid. Employer had paid Dr. Fleming's six percent PPI rating. Dr. Diamond did not recommend any further right-shoulder treatment after March 31, 2020. Employer based its compensation rate on Employee's 2015 earnings, and he provided no evidence to justify an adjustment. All benefits were timely paid or controverted, and upon accepting Dr. Diamond's opinion, Employer already paid interest on TTD benefits owed from March 24, 2018, through June 11, 2019. Employer contended its controversions were all based on fact or law and there was no nexus between any benefits paid to Employee and any work done by an attorney. (Controversion Notice, October 21, 2021).

65) On November 9, 2021, about 25 minutes prior to the first hearing in this case, Employee called the Division and spoke with Office Assistant Weaver. Employee asked Weaver why no one called him to participate at his hearing. Weaver told Employee he was too early and had overlooked the time-zone difference between Employee's location and the hearing venue. She had reminded him a day prior of the time-zone difference. Employee apologized for his error, laughed, and terminated the call. About 11 minutes later, a woman believed to be Adely Martinez called the Division, spoke with Weaver and stated that Employee had just been "assaulted," was filing a police report, needed medical attention and wanted to continue his hearing. Weaver forwarded the

call to Workers' Compensation Officer Kelley for further instructions and advised the hearing chair about Employee's phone call. (Weaver; record, November 9, 2021 hearing).

66) On November 9, 2021, at 9:00 AM as the hearing began, Kelley sent the chair an email:

> EE's Case Manager (Adallie [sic] Martinez) at SOUND MENTAL HEALTH called (206) 536-XXXX to advise that EE was going to get support for the Hearing today -- and because he walks funny with his legs -- the security guard accused him of being drunk and yanked his shoulders and injured him.
>
> He is filing a Police Report right now. (Kelley email, November 9, 2021; phone number redacted for privacy).

67) At the first hearing in this case on November 9, 2021, the chair called Holloway and Employee and placed them on a conference call. Before he could be sworn as a witness, Employee stated in English that he needed to reschedule the hearing; he also demanded a Spanish language interpreter. The chair put the parties on hold while he obtained a Spanish language interpreter to join the conference call; this took several minutes. When the hearing resumed, Employee was no longer on the conference call; he did not call back during the hearing. (Record).

68) The first hearing addressed Employee's November 9, 2021 continuance request as a preliminary issue. Employer opposed the continuance for several reasons: It doubted Employee's veracity; he had not personally requested a continuance; the person requesting it had not entered an appearance and thus could not speak for him; the request and all related information concerning it were hearsay; and Employee was simply trying to delay the hearing. (Record).

69) Employee's grounds for requesting a hearing continuance were questionable, as he was not present to provide sworn testimony. However, after deliberation, the panel granted Employee's continuance request. (Experience; judgment and inferences from the above; record).

70) After the oral order granted Employee's continuance, Employer asked for an order requiring Employee to participate in mediation, and for an order "freezing" the evidentiary record as it was on November 9, 2021. On the latter point, it contended Employee had not filed a brief, but had an unfair advantage of having received Employer's hearing brief with all attachments and could use those arguments and evidence to unfairly bolster his presentation later. After the panel deliberated, *Quinonez v. Trident Seafoods*, AWCB Dec. 21-0110 (November 23, 2021) (*Quinonez I)* denied Employer's mediation request but granted its request to "freeze" the evidentiary record effective November 9, 2021. (Record; *Quinonez I*).

71) In "freezing" the evidentiary record as it stood on November 9, 2021, *Quinonez I* concluded:

> Though Employee is entitled to a hearing where his evidence and arguments will be heard and fairly considered, his rights are not without limitations under these circumstances. Since Employee terminated his appearance while he was on hold waiting for an interpreter, he was unavailable to be questioned under oath about Martinez's second-hand account of his "assault" and need for emergent care.
>
> Employer set forth its hearing arguments and supporting evidence at length in its brief and attached hundreds of pages of medical documentation. Given the unverified assault and claimed need for medical care, it would be unfair to allow Employee or a representative to go through Employer's brief and exhibits, pick apart its arguments and evidence and attempt to bolster his presentation at a future hearing with new evidence. Just as Employee has a right to be present and heard and for his evidence and arguments to be considered fairly, so does Employer. . . . Though as a party Employee may testify at a future merits hearing, he cannot present additional witnesses or written arguments or evidence not previously filed and served in his case as of November 9, 2021, on the issues set for hearing on that date. AS 23.30.001(2), (4).
> . . . .
>
> Since Employee's continuance was granted over Employer's objection, his March 30, 2020 hearing request filed on March 31, 2020 is rendered "inoperative." AS 23.30.110(h). Once the venue petition is decided on the written record, if he wants to schedule a hearing on his various claims in his two cases, Employee must file a separate hearing request for each case and for each claim. 8 AAC 45.070(b)(1)(C), (D); 8 AAC 074(c)(1), (3). A separate hearing request is not necessary to set his RBA "appeal" on for hearing. 8 AAC 45.070(b)(1)A). The designee will be directed to explain this process to Employee in detail at the next prehearing conference. (*Quinonez I*).

72) On January 25, 2022, *Quinonez v. Trident Seafoods*, AWCB Dec. 22-0006 (January 25, 2022) (*Quinonez II)*, denied Employee's petition for a venue change from Anchorage to Juneau, having found no basis for a change. In his written arguments for that hearing, Employee stated:

> I am writing this statement to speak on my interest in changing the location of my L&I claim from Anchorage, AK to Juneau, AK for the following reasons. Since my time in Hawaii in January 2019[,] I have been asking for back payment of benefits that I have not received due to a doctor stating that I could work. Therefore[,] my payments and physical therapy stopped. While in Hawaii[,] my hotel was not paid for[;] therefore[,] I had to stay in a park with cardboard boxes with no blanket. Therefore[,] I would like to be compensated for that. I have also asked for records to be sent on payments that have been directly sent to me, and I was continuously ignored[;] once they were sent to me it was not what I asked for.

> I have been continuously ignored on behalf of my requests from Jeffrey and Anchorage[;] they are not doing what they should be because they are allowing Jeffrey to do what he wants[,] and they are not holding him accountable for what he should be doing for me. (Letter-brief, December 23, 2021).

73) In respect to Employee's complaints against Anchorage Workers' Compensation Division (Division) staff, *Quinonez II* concluded:

> [1] Employee's statement that Anchorage Division staff ignored his request for "payments" information is not supported by the agency file. It is too vague to assist with determining what information Employee requested and the result of his request. What is clear from the agency file is that the Division responded to each of Employee's 173 contacts, which is an exceptionally high number of contacts compared to the average claimant. If the Division failed to send Employee the information he requested, it was only because staff did not understand what he wanted. At the next prehearing conference, Employee may ask the designee for whatever information he needs from his agency file; he may also obtain a complete copy of his agency file on a CD, which will require him to have access to a computer to review it.
>
> [2] If the Division sent Employee the wrong information, he should follow the steps outlined above in [1] to obtain the correct information.
>
> [3] Employee reiterates his contention that the Anchorage office ignored him, which the agency file shows is not correct, and he contends the Anchorage office is allowing Holloway to do "what he wants" and is not holding him "accountable." This contention is also vague; assuming this refers to Employee's Hawaii trip for his medical examination, or Employer's refusal in general to pay controverted benefits, Employee may raise these issues at his hearing on the merits of his claim and a panel will review the evidence and may award benefits as appropriate under the Act. (*Quinonez II*).

74) On May 2, 2022, Employee filed an April 6, 2022 hearing request without a case number on unspecified claims, but for an injury date listed as February 14, 2016. (Affidavit of Readiness for Hearing, April 6, 2022).

75) On August 30, 2022, the parties attended a hearing limited to Employee's left-foot claim. (Agency file).

76) On September 14, 2022, *Quinonez v. Trident Seafoods*, AWCB Dec. 22-0063 (September 14, 2022) (*Quinonez III)*, found Employee not credible when he said Dr. Toomey refused to provide an interpreter. Giving more weight to two physicians, *Quinonez III* denied Employee's claim for medical benefits for his left foot. (*Quinonez III*).

77) On October 17, 2022, Employee appealed *Quinonez III* to the Alaska Workers' Compensation Appeals Commission (Commission). (Commission Clerk's Docket Notice, October 17, 2022).

78) On November 9, 2022, Employee filed an undated hearing request in his right-shoulder case, for an injury date listed as February 10, 2016, for "all shoulder injury." While each of three identical requests filed that day were notarized, none contained proof of service because they did not have the name of the person serving the affidavit, his or her signature, and the date served. (Affidavits of Readiness for Hearing, undated but filed November 9, 2022).

79) On April 11, 2023, the Commission dismissed Employee's appeal of *Quinonez III* for failure to prosecute. (Order Dismissing Appeal, April 11, 2023).

80) On April 25, 2023, Employee asked the Commission to reconsider his *Quinonez III* appeal. (Order on Motion to Reconsider or Stay Order Dismissing Appeal, May 25, 2023).

81) On April 25, 2023, Employee requested a hearing on "All claims related to Shoulder." He properly served this request on Holloway. (Affidavit of Readiness for Hearing, April 25, 2023).

82) On April 27, 2023, Employer controverted all benefits in Employee's shoulder case from December 7, 2022, and continuing. It based this denial on Employee's failure to provide written releases for medical and rehabilitation information or file a petition for protective order on the releases within 14 days after service. (Controversion Notice, April 27, 2023).

83) On May 25, 2023, the Commission denied Employee's request for reconsideration of its order dismissing his *Quinonez III* appeal. (Order on Motion to Reconsider or Stay Order Dismissing Appeal, May 25, 2023).

84) On June 1, 2023, the parties attended a prehearing conference before a Board designee. The designee asked Employee several times if he wanted a hearing scheduled on his right-shoulder injury. Employee refused to answer but alleged he never received discovery from Holloway. Holloway said he never received the April 25, 2023 hearing request and had never received Social Security records the designee ordered Employee to produce. Employee wanted to know why he received a check in 2022 from the insurance company. Holloway stated if Employee received a check it would have been for benefits owed him and would have arrived with a written explanation. Employee responded that Holloway and the designee were both "corrupt." Based on Employee's April 25, 2023 hearing request, the designee set a hearing for November 22, 2023, on Employee's right-shoulder claims for TTD, TPD, unfair or frivolous controversions, a compensation rate

adjustment, transportation costs [including compensation for his SIME trip because he allegedly had to sleep in a park], an unspecified penalty, and interest. (Prehearing Conference Summary, September 14, 2023).

85) On September 18, 2023, Employer objected to hotel manager Curtis' written statement and demanded a right to cross-examine him. (Request for Cross-Examination, September 18, 2023).

86) On November 14, 2023, Employer in its hearing brief contended Employee is not entitled to additional TTD or TPD benefits. It contended it paid TTD benefits from March 9, 2016, through March 31, 2020. Additionally, Employer said it actually paid TTD through August 18, 2020, when the parties attempted mediation, but when mediation failed, benefits it had paid from April 1, 2020, through August 18, 2020 on were considered an overpayment. It relied on SIME physician Dr. Diamond who declared Employee medically stable effective March 31, 2020. Since that medical stability opinion raised a counter-presumption, Employee failed to rebut it with substantial evidence to the contrary, and an FCE showed he could work full time, Employer contended Employee is not disabled under the law and is entitled to neither TTD nor TPD benefits after the date of medical stability, and when he was not disabled. (Hearing Brief of Trident Seafoods Corporation, November 14, 2023).

87) Employer contended Employee is not entitled to a compensation rate adjustment because, as an hourly worker, he was entitled to his benefits calculated under AS 23.30.220(a)(4). Using the primary calculation method under this sub-section, Employer contended Employee was entitled to $266 per week. It contended Employee's TTD rate resulted in him earning more money per year since he was disabled, then he earned in either of the two years prior to his work injury. Employer contended he failed to present any evidence supporting a departure from the primary rate calculation method set forth in the Act. Employer further contended Employee's compensation rate adjustment claim was barred under AS 23.30.110(c) because it controverted his original claim for a rate adjustment and he failed to request a hearing on that claim within the requisite two years, even when tolling events and a continued hearing were considered. (Hearing Brief of Trident Seafoods Corporation, November 14, 2023).

88) Employer contended Employee is not entitled to transportation costs for his SIME appointment in Hawaii. It questioned his statement that he had to sleep in a park when he was not able to get into his pre-arranged hotel room. Employer contended the pre-arranged room could not have been reserved, and a confirmation number received, without payment. In contended

Employee is therefore entitled to no additional transportation-related benefits for his SIME appointment. (Hearing Brief of Trident Seafoods Corporation, November 14, 2023).

89) Employer contended Employee is not entitled to an unfair or frivolous controversion finding. It contended all its controversions were based on fact or applicable law at the time they were made and met the applicable "*Harp*" standard. (Hearing Brief of Trident Seafoods Corporation, November 14, 2023).

90) As it contended Employee is entitled to no additional benefits, and all past benefits were paid when due, Employer contended he is likewise not entitled to interest or a penalty. (Hearing Brief of Trident Seafoods Corporation, November 14, 2023).

91) At hearing, Employee withdrew his TPD claim stating he had not worked anywhere for pay since his work injury, making this benefit category inapplicable. As for his TTD claim, Employee adamantly asserted it was not temporary, it was "permanent" and he should be entitled to benefits from August 19, 2020, and continuing forever. (Record).

92) Employee could not state what he believed a proper compensation rate adjustment should be, and after the designated chair explained how compensation rates are generally calculated, Employee contended his rate "should be higher" but he did not know how high. He contended that he planned to extend his contract with Employer and work more hours, but his work injury precluded that from occurring. He said he would have made $20,000 in 2016 had he not been injured. However, he also admitted he had never before made $20,000 a year. He disagreed with the income tax evidence he previously provided and thought he made more money than is stated on those documents. Employee wanted a "reasonable," "humanitarian" compensation rate. The designated chair reviewed his earnings information in the agency file, which showed he made $13,152.23 in 2014; and $5,861.30 in 2016. Employee could not say if these results were "typical," but did not expressly state the records were incorrect. (Record).

93) When asked to address and clarify his request for an unfair or frivolous controversion finding, Employee stated there were "many." Following additional questioning from the designated chair, Employee stated his only objection to the numerous controversions in this case were those attributable to Holloway. He accused Holloway of "corruption" but gave no testimony supporting this allegation. Employee said Holloway's actions "harmed" him, making him wonder why Holloway was so "abusive" and such a "coward." He "just wants justice." (Record).

94) Employee's "transportation" request was limited to hotel expenses associated with his SIME. He testified that when he got to the hotel in Hawaii, the staff would not let him stay there and claimed Employer had failed to pay the bill. As he did not have enough money to pay for the room himself, Employee said he spent the night in a nearby park. When asked what he wanted as a remedy for this issue, Employee said he wanted Holloway to be "more humanitarian." He wanted someone to say, "I'm sorry." When pressed to be more specific on any monetary legal remedy he sought, Employee said he wanted Employer to be "more responsible" and he wanted "compensation" for what they did to him in Hawaii, in a "fair amount." (Record).

95) As for his penalty claim, after the designated chair explained how penalties generally apply, Employee said he wanted a penalty for having to sleep on a bench in a Hawaiian park before his SIME appointment. Employee also contended it was Holloway's fault he was in a wheelchair, and but for Holloway cutting off his benefits, he would not be in a wheelchair. He explained the wheelchair necessity occurred, when at one point while Employee was living in Seattle, Washington, two people assaulted him at a bus stop and stole his wallet. Employee reasoned that this was Holloway's fault because he stopped disability benefit payments and but for this, Employee would have had funds to find a safe place to stay and would not have been assaulted. He seeks a penalty on this assault, and interest on all benefits. (Record).

96) At hearing, Employer noted Employee had a six-month contract and notwithstanding his intent to have extended, the contract was not extended. Therefore, there was no evidence Employee would have worked beyond his original six-month contract but for his work injury. Employer contended that even if additional employment were contemplated, using the Division's TTD rate calculator, Employee's compensation rate would still be only $269.19, just three dollars higher than the minimum rate, which it already paid him for all periods of disability. (Record).

97) Employer paid Employee TTD benefits at a $266 weekly rate from March 9, 2016, through August 18, 2020, totaling $59,563.20. (Agency file: Payments tab).

98) On his injury date, Employee was single with only himself as a dependent. (First Report of Injury, October 7, 2016).

99) If Employee had earned $20,000 in 2016, or in either of the two years prior to his 2016 work injury, his weekly TTD compensation rate would have been $269.19. (Workers' Compensation Division on-Line Benefit Calculator).

100) Employee's agency file contains no evidence that Employer, its adjusters or Holloway intentionally deprived him of a hotel accommodation on the evening before his SIME in Hawaii. The file contains evidence Employer arranged for a hotel room for his stay. (Agency file).
101) Why the Hawaii hotel room was unavailable is not clear. (Agency file).

## PRINCIPLES OF LAW

The Board may base its decision on not only direct testimony, medical findings, and other tangible evidence, but also on the Board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). "Neither the Appeals Commission nor the Board has jurisdiction to hear any action outside of a workers' compensation claim." The Board has no jurisdiction "to decide issues of constitutional law." *Alaska Public Interest Research Group (AKPIRG) v. State*, 1267 P.3d 27, 36-37 (Alaska 2007).

> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
>
> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer . . . submit to an examination by a physician . . . of the employer's choice. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases. . . .
>
> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance**. (a) If an employee objects to a request for written authority . . . the employee must file a petition with the board within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required . . . within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. . . .
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> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter; . . .

Benefits sought by an injured worker are presumptively compensable and the presumption applies to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996).

The presumption's application involves a three-step analysis. To attach the presumption, and without regard to credibility, an injured employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, and without regard to credibility, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). If the employer's evidence rebuts the presumption, it drops out and the employee must prove his claim by a preponderance of the evidence. *Id*. This means the employee must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn, and credibility is considered. *Huit*.

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony . . . is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

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

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid . . . promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, in a format prescribed by the director, stating
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> (1) that the right of the employee to compensation is controverted;
> . . . .
> (5) the type of compensation and all grounds on which the right to compensation is controverted.
>
> . . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division, in a format prescribed by the director, 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.
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employee's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate . . . in effect on the date the compensation is due. . . .

*Phillips v. Nabors Alaska Drilling, Inc.,* 740 P.2d 457, 461 (Alaska 1987), stated the Board, to justify a rate adjustment claim, must find "that the wage would have continued for the duration of a disability." *Phillips* continued, because only the Board could order a rate adjustment, even if the employer voluntarily paid a somewhat higher rate, higher TTD benefits were not "due" until the Board ordered them, and no penalty could be assessed. Moreover, *Phillips* stated in respect to the claimant's bad-faith controversion contention, "the only compensation due on the facts presented to the employer was that calculated in accordance with subsection (a)(1)." *Phillips* concluded had the employer not paid the worker at least the TTD rate calculated under the primary statutory formula, the Board could have properly awarded a penalty.

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits."

*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."

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

> **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) he is disabled as defined by the Act; (2) his disability is total; (3) his disability is temporary; and (4) he has not reached the date of medical stability as defined in the Act.

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).

> **AS 23.30.220. Determination of spendable weekly wage.** (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
> . . . .
>
> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during

> either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee; . . .

*Williams v. Abood*, 53 P.3d 134 (Alaska 2002), a rate adjustment case, stated one challenging the rate statute before the Board has "the burden of proving that the statute was an inaccurate predictor of his future earnings loss due to injury." *Id*.

In *Straight v. Johnson Construction & Roofing, LLC*, AWCAC Dec. No 231 (November 22, 2016), the employee had taken time off work in the two years prior to his injury to build his home. After returning to work for the employer in 2015, he was injured while working at an hourly-paid job with Davis-Bacon wages. The wages on the date he was injured far exceeded the modest wages he earned in the pre-injury prior two years when he was working on his home. The Board applied §220(a)(4) for an hourly worker and divided the claimant's highest earnings from 2014 by 50 weeks. It noted §220 no longer contained a "general fairness" provision as it did when *Gilmore* and other rate adjustment cases were decided. The claimant appealed. Rejecting the Board's view, *Straight* reviewed Supreme Court case law and noted the Court repeatedly "indicated that a fair compensation rate must take into consideration the injured worker's probable future earnings capacity." *Straight* also stated the Act mandates the Board look to future earning capacity and decide if an injured workers' weekly rate has been "fairly determined."

> **AS 23.30.395. Definitions**. In this chapter,
> . . . .
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> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not 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;
>
> **8 AAC 45.065. Prehearings**. . . .

> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing. . . .
>
> **8 AAC 45.070. Hearings**. . . .
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> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary . . . governs the issues and the course of the hearing. . . .

ANALYSIS

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

Employee initially claimed he was entitled to additional TTD benefits for his work injury with Employer. AS 23.30.185. At hearing, he stated his disability was "permanent" and not temporary. Nevertheless, this decision assumes Employee seeks TTD benefits as stated in his claims and in the controlling September 14, 2023 prehearing conference summary. 8 AAC 45.065(c); 8 AAC 45.070(g). Employer contends it paid Employee TTD benefits through all times he was off work with a doctor's opinion, from March 9, 2016, through March 31, 2020, and paid him TTD benefits through August 18, 2020, while the parties attempted mediation. Therefore, Employer claims a TTD benefit overpayment. To obtain TTD benefits, Employee must be both not medically stable and must be temporarily totally disabled. AS 23.30.185; AS 23.30.395(16), (28); *Lowe's*.

This factual dispute invokes the statutory presumption analysis. AS 23.30.120(a)(1); *Meek*. Employee pointed to no medical opinion stating he was not medically stable for his right shoulder after March 31, 2020. AS 23.30.395(28). However, he testified he was still disabled because of his right-shoulder related symptoms. As shoulder injuries are common and not complex, his testimony raised the statutory presumption and shifted the burden to Employer. *Tolbert*. Employer rebutted the raised presumption with Drs. Belfie's and Diamond's opinions stating Employee was medically stable on September 5, 2019, and on March 31, 2020, respectively, and with a functional capacity evaluation showing he is able to work light-duty, full-time. *Huit*. This shifts the burden back to Employee who must prove his claim for additional TTD benefits by a preponderance of the evidence. *Saxton*.

By statute, Employee is not entitled to additional TTD benefits after the date he became "medically stable." AS 23.30.185; AS 23.30.395(28). The date of "medical stability" is generally, but not always, determined with medical evidence. Here, on February 25, 2020, Dr. Belfie opined Employee's right shoulder reached "maximum medical improvement" after his September 5, 2019 manipulation under anesthesia. SIME physician Dr. Diamond opined Employee's right shoulder became medically stable effective March 31, 2020. The agency file demonstrates that Employer paid Employee TTD benefits from March 9, 2016, through August 18, 2020, resulting in an overpayment because this latter date is beyond the latest date any physician established for the date of medical stability -- March 31, 2020.

Employee did not identify a medical opinion stating he was not medically stable and still disabled on a date subsequent to Dr. Diamond's March 31, 2020 medical stability opinion. Once Employer provided evidence showing Employee was medically stable, it gained a "counter-presumption," which shifted the burden to show he was not medically stable back to Employee to prove by clear and convincing evidence. AS 23.30.395(28). He failed to do so because he presented no medical opinion stating he would have objectively measurable improvement in his right shoulder with additional medical treatment. AS 23.30.395(28); *Leigh*; *Saxton*. In fact, the medical evidence demonstrates his examining physicians said he needs no further right-shoulder medical care.

Employee failed to provide any medical evidence showing a date of medical stability for his right shoulder after March 31, 2020. AS 23.30.395(28). He failed to show he was temporarily totally disabled after that date because of his right shoulder. *Lowe's*. An FCE showed he was not, even though he did not put forth full effort during the test. AS 23.30.395(16). His claim for additional TTD benefits will, therefore, be denied. *Saxton*.

**2)Should Employee's request for a frivolous or unfair controversion finding be granted?**

Employer filed numerous controversions. AS 23.30.155(a), (d). At hearing, when asked to specify which of the many he felt were frivolous or unfair, Employee pointed only to those Holloway issued. He was unable to articulate why he thought any controversion Holloway authored was frivolous or unfair, other than to generally allege that Holloway was "corrupt." If granted, his request for a frivolous or unfair controversion finding would result in the matter being referred to

the Division director for a referral to the Division of Insurance. It would provide no benefit to Employee personally. AS 23.30.155(o).

Related to the right-shoulder injury, Holloway signed controversions dated October 27, 2017 (compensation rate adjustment, on grounds Employee's rate was based on the earnings information he provided); December 6, 2017 (all benefits, based on Employee's failure to attend an EME); January 24, 2018 (all benefits, based on Employee's failure to attend an EME); February 7, 2018 (TTD, medical and related transportation, and reemployment benefits other than an eligibility evaluation, based on Dr. Fleming's EME report); May 13, 2019 (TTD and PPI benefits, medical benefits and related transportation, attorney fees and costs, interest, and reemployment benefits, based on Dr. Fleming's report); July 16, 2019 (PPI benefits, medical costs and related transportation, based on Drs. Fleming's, Belfie's and Diamond's reports); October 22, 2019 (PPI benefits, medical costs, transportation, a penalty and interest, based on Drs. Fleming's, Belfie's and Diamond's reports); August 21, 2020 (TTD benefits, based on Dr. Belfie's report); January 13, 2021 (attorney fees and costs, based on their being no nexus between any benefits paid to Employee and work done by an attorney); October 8, 2021 (TTD and PPI benefits, medical costs and related transportation, a penalty, interest, an unfair or frivolous controversion finding, attorney fees and costs, based on Dr. Diamond's two SIME reports); October 21, 2021 (temporary disability and PPI benefits, medical and related transportation, a compensation rate adjustment, a penalty, interest, an unfair or frivolous controversion finding, attorney fees and costs, based on Drs. Fleming's and Diamond's reports); and April 27, 2023 (all benefits, based on Employee's failure to provide written authority when requested or file a petition for protective order).

Each controversion stated which benefits were denied and why. AS 23.30.155(a)(1), (5). Each referenced the supporting medical or other records as they apply to Employee's right-shoulder claims. AS 23.30.155(a)(5). Each EME or SIME report as stated in the "Findings of Fact" section above, support the controversions and are an adequate factual basis for them. Employee appeared late for his first EME with Dr. Fleming, so it did not occur, which justified Employer controverting his benefits until he attended the EME. AS 23.30.095(e). His failure to return discovery releases or petition for a protective order timely was legal justification for a controversions based on that failure. AS 23.30.107(a). As there is no evidence showing that an attorney provided valuable

services to Employee that resulted in him obtaining benefits, because that issue is not before this panel, there is no basis to find controversion of attorney fees and costs were unfair or frivolous. Only one claim had no corresponding controversion in the agency file. But because Employer answered that claim and denied it, it is probable Employer filed one but the Division mis-filed it. *Rogers & Babler*. Consequently, Employee provided no factual or legal basis to result in this decision finding a frivolous or unfair controversion, and his request will be denied.

If Employee wants to pursue his allegation that Employer, its adjusters or Holloway are "corrupt," or on similar grounds, he will have to do that in another forum, as this agency has no jurisdiction over such claims because as presented they do not arise under the Act. *AKPIRG*.

**3) Is Employee entitled to a compensation rate adjustment?**

Employee requests a compensation rate adjustment. AS 23.30.220(a)(4). Although he does not suggest a particular rate, Employee contends his rate should "be higher." He bases this primarily on his contention that he was trying to extend his contract with Employer, and he would have worked longer and made more money but for his work injury. By contrast, Employer contends it paid Employee the minimum rate based on earnings information he provided. Moreover, it contends even were the panel to accept Employee's unsupported testimony about continuing to work for Employer but for his work injury, he would still only be entitled to the minimum weekly rate, which it has already paid.

The statutory presumption of compensability does not apply to this issue, because Employee bears the burden of proving his claim for a compensation rate adjustment. *Abood*. It is undisputed that Employee was an hourly worker at the time of his injury with Employer. Therefore, his rate would be determined under the primary formula set forth in AS 23.30.220(a)(4) for an hourly worker.

Other than his hearing testimony stating he hoped to continue to work for Employer but for his work injury, Employee provided no supporting evidence. Moreover, it is undisputed that although he wanted to extend his contract, the contract was never extended. Furthermore, Employer is correct that even had he extended the contract and had not been injured, and earned $20,000 in 2016, Employee's hypothetical higher earnings in the year of his injury would still result in him

obtaining only three dollars per week ($269.19) above the minimum, $266 per week TTD compensation rate he was paid. Employee testified at hearing that he had never earned $20,000 in any year. He failed to prove that the minimum compensation rate does not reflect his probable future earnings capacity, by a preponderance of the evidence. *Phillips*; *Straight*; *Saxton*. Therefore, his compensation rate adjustment claim will be denied.

**4) Is Employee entitled to SIME-related travel expenses?**

Upon close questioning at hearing, Employee clarified that his "transportation" claim is related to his SIME in Hawaii. When he arrived in Hawaii at the designated hotel, staff would not give him a room because the bill had not been paid and Employee had inadequate funds to pay for it himself. Employee had to sleep on a park bench. His testimony was credible on this point. AS 23.30.122; *Smith*. When pressed further on the relief he wanted, Employee stated, "I want justice." Although Employee submitted a note from the hotel manager supporting his position, Employer objected to the note and demanded its right to cross-examine Curtis on the statements therein. Employee did not present Curtis for cross-examination at hearing. Ordinarily, such documents are not admissible unless the author is presented for examination at hearing or in a deposition.

Even if the note from the hotel manager were considered, there is no monetary remedy available to Employee. That he had to sleep on a park bench the night before his SIME is truly regrettable. For what it is worth, the panel is sorry this happened. However, there is no statutory remedy to fix this. There is no legal basis for this decision to order Employer to pay Employee the fair-market value of a room in which he did not sleep, if that is what he seeks. *AKPIRG*. Employer presented evidence showing it made hotel arrangements for Employee's SIME. It is not clear from the record what happened; it is most likely there was a data error or other miscommunication. There is no evidence that Employer, its adjuster or Holloway intentionally deprived Employee of a place to sleep the night before his SIME. *Rogers & Babler*. This decision has no authority to force an apology, "compassion" or "humanitarianism" from Employer or its agents. All this panel can do is provide monetary benefits if they are statutorily authorized. Without a statutory or regulatory basis to compensate Employee for a room in which he did not stay, his request for unspecified "compensation" for sleeping on a park bench will be denied.

**5) Is Employee entitled to a penalty?**

When asked to clarify his penalty claim, Employee stated he wanted a penalty assessed against Employer because he had to sleep on a park bench in Hawaii prior to his SIME. AS 23.30.155(e). He also wanted a penalty because he had "arm pain," "foot pain" and was in a wheelchair. "Arm pain" is not a legal basis for awarding a penalty. *Quinonez III* denied Employee's foot claim. Employee blamed Holloway personally for his alleged confinement to a wheelchair. He contends his wheelchair use arose from a Seattle mugging, which he attributes to Holloway's controversions that terminated his benefits. But for his terminated benefits, Employee contends he would have had money to obtain a safe place to live and would not have been assaulted. There is no statutory or other legal basis under the Act to award a penalty based on these assertions. *AKPIRG*.

Penalties are normally awarded when an employer fails to pay or controvert claims or benefits timely. AS 23.30.155(e); *Bauder*. Even then, a penalty may be awarded only if the injured worker is awarded benefit; here, Employee is not. *Bauder*. Controversion notices must be filed "in good faith" to protect from a penalty. For a controversion to be in good faith, Employer must possess sufficient evidence in support of the controversion that, if Employee did not introduce evidence in opposition to it, he would not entitled to benefits. Evidence Employer possessed "at the time of controversion" is the relevant evidence to review. *Harp*. As analyzed above, each of the numerous controversions filed in this case were adequately supported in fact or law. *Irby*. Had the controversions and the evidence upon which they relied been the only evidence available for review, Employee would not have been entitled to the denied benefits. *Harp*. Moreover, as this decision awards him no additional benefits, there would be no benefits due but not paid upon which to base a penalty. *Bauder*. Therefore, Employee's vague penalty claims will be denied.

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

Interest may be awarded on benefits due but not timely paid. AS 23.30.155(p). As this decision awards Employee no additional benefits, it follows that none were unpaid when due, and his interest claim will be denied.

## CONCLUSIONS OF LAW

1) Employee is not entitled to additional TTD benefits.
2) Employee's request for a frivolous or unfair controversion finding should not be granted.
3) Employee is not entitled to a compensation rate adjustment.
4) Employee is not entitled to SIME-related travel expenses.
5) Employee is not entitled to a penalty.
6) Employee is not entitled to interest.

## ORDER

1) Employee's claims for additional TTD benefits are denied.
2) Employee's requests for one or more frivolous or unfair controversions findings are denied.
3) Employee's claim for a compensation rate adjustment are denied.
4) Employee's claim for SIME-related housing expenses is denied.
5) Employee's claims for various penalties are denied.
6) Employee's claim for interest is denied.

Dated in Anchorage, Alaska on December 21, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Mark Sayampanathan, Member

/s/
Bronson Frye, Member

## APPEAL PROCEDURES

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

after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

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

## RECONSIDERATION

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

## MODIFICATION

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

## CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Jose Iniguez Quinonez, employee / claimant v. Trident Seafoods, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201614882M and 201603968J; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on December 21, 2023.

/s/
Rachel Story, Law Office Assistant I