

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MICHAEL DWAIN HUNTER TATE,)	
)	
Employee,)	
Claimant,)	
)	
v.)	FINAL DECISION AND ORDER
)	ON RECONSIDERATION AND
AMERICAN DREAM CONSTRUCTION,)	MODIFICATION
LLC,)	
)	AWCB Case No. 201906254
Employer,)	
and)	AWCB Decision No. 25-0025
)	
AMERICAN INTERSTATE INSURANCE)	Filed with AWCB Anchorage, Alaska
COMPANY,)	on April 9, 2025
)	
Insurer,)	
Defendants.)	
)	

American Dream Construction, LLC's, and American Interstate Insurance Company's (Employer) March 24, 2025, petition for reconsideration and modification was heard on the written record on April 3, 2025, in Anchorage, Alaska, a date selected on April 2, 2025. The March 24, 2025 petition gave rise to this hearing. Attorney Elliot Dennis represented Michael Dwaine Hunter Tate (Employee). Attorney Krista Schwarting represented Employer. The record closed at the hearing's conclusion on April 3, 2025.

ISSUE

Employer contends *Michael Dwaine Hunter Tate v. American Dream Construction, LLC*, AWCB Dec. No. 25-0017 (March 10, 2025) (*Tate I*) should be reconsidered as it made a legal error and modified because it made a factual error.

Employee has not filed a response to Employer's petition.

Should reconsideration and modification of *Tate I* be granted to allow Employee to respond?

FINDINGS OF FACT

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

- 1) On May 8, 2019, Employee was injured while working for Employer when he strained his groin lifting a saw. (First Report of Occupational Injury or Illness, May 14, 2019).
- 2) On October 28, 2020, Employee's attorney entered his appearance on behalf of Employee. (Entry of Appearance, October 28, 2020).
- 3) On November 3, 2020, Employee sought TTD benefits, medical and transportation costs, a penalty for late-paid compensation, interest, reemployment benefits and attorney fees and costs. He described the nature of the injury as, "EE was lifting concrete saw, walking backwards up a step into a [C]onnex container. While stepping he felt a pain jolt through lower body and persisted in his left testicle. He has been under treatment since. He has a core muscle injury. He has been approved for implantation of a [dorsal] root ganglion stimulator but wants a 2nd opinion." (Claim for Workers' Compensation Benefits, November 3, 2020).
- 4) On December 1, 2020, Employee requested a hearing on his November 3, 2020 claim. (Affidavit of Readiness for Hearing (ARH), December 1, 2020).
- 5) On December 11, 2020, Employer opposed Employee's December 1, 2020 ARH, contending the second opinion had not been scheduled, it was entitled to depose Employee, and an employer's medical evaluation (EME) was scheduled for January 2021. (Affidavit of Krista M. Schwarting in Opposition to Affidavit of Readiness for Hearing, December 11, 2020).
- 6) On December 30, 2020, a hearing was scheduled for February 3, 2021, on Employee's November 3, 2020 claim. (Prehearing Conference Summary, December 30, 2020; Hearing Notice Served, December 30, 2020).
- 7) On January 12, 2021, Michael Katz, MD, a physical medicine and rehabilitation specialist, examined Employer for an EME and opined Employee's primary problem is a nerve entrapment, which is a relatively common complication of an inguinal hernia surgery. He also believed Employee may have a non-work-related right hip labral tear. Dr. Katz stated Employee's "pain all over" complaints are likely an extension of pain complaints associated with anxiety. He opined

the complication of the hernia surgery met the substantial cause standard for work-relatedness and the work injury is still the substantial cause of his ongoing groin problems. Dr. Katz did not feel work was “a ‘substantial’ factor in the cause” of Employee’s upper/mid/lower back complaints; he said Employee was highly anxious and “anxiety is a clear risk factor for spinal pain.” He recommended microdissection of the nerves to find the entrapment and referred Employee to Dr. Susan MacKinnon, a plastic surgeon at Barnes Hospital in St. Louis, for the procedure. Dr. Katz stated no further injections and blocks are needed other than for diagnostic purposes and he did not believe the SCS is the next treatment option and “a TENS [transcutaneous electrical nerve stimulation] would not do much” but pain medications may be needed. There was also no indication for chiropractic, massage, acupuncture, or passive therapies and no present need for physical or occupational therapy. Dr. Katz said Employee may require a computed tomography or magnetic resonance imaging (MRI) of the scrotal area and said it is always useful to address psychiatric overlay (i.e. the patient’s anxiety and depressive symptoms) while the organic issue is being treated. Employee’s presentation had objective findings in the groin and in his anxiety. Dr. Katz limited Employee to only sedentary work due to the work injury, said Employee had not reached medical stability, and opined it is unlikely that chlamydia is a contributing condition. (Katz EME report, January 12, 2021).

8) On January 19, 2021, Employer controverted all benefits related to the spine and the following specific medical benefits: chiropractic, massage, acupuncture, passive therapies, physical and occupational therapy, TENS unit, and blocks and injections other than for diagnostic purposes based upon Dr. Katz’s EME report. (Controversion Notice, January 19, 2021).

9) On January 29, 2021, the Board approved the parties’ stipulation to vacate the February 3, 2021 hearing and to the following:

- 1) The employer has agreed to preauthorize Vincera Institute to perform a detailed diagnostic evaluation of employee, Michael Tate, related to his pain complaints associated with his May 8, 2019 work injury at Dutch Harbor, Alaska.
- 2) The employer has agreed to make necessary travel arrangements so employee may attend an appointment at Vincera Institute.
- 3) Employee has agreed to withdraw his subpoena compelling adjuster Alicia Thruman to appear and give testimony.
- 4) The parties agree that the issues scheduled for hearing on February 3, 2021 are now moot and though employer has filed its hearing brief and employee is ready to file his hearing brief, it is not necessary for him to do so, and,

5) The employee's counsel reserves the right to seek interim attorney's fees for the cost of preparing for February 3, 2021 hearing, if an agreement between the parties does not resolve that issue. (Stipulation Regarding February 2, 2021 Hearing, January 29, 2021).

10) On February 15, 2021, William Meyers, MD, at Vincera Core Physicians examined Employee. He was "pretty convinced" Employee has a combined issue of hip and core muscle problems:

... the hip is probably the underlying cause considering the location of the inguinal crease as well as the pubic bone left lower abdomen and abductor region. With time and compensation the right side has gotten involved. The mesh is probably not the principal cause of the pain but may be aggravating this to some degree. I want to put him through differential injections of Marcaine which would include both hips, both pubic plates, and both psoas muscle. I suspect the differential injections will help determine the pattern of pain relief and will help provide additional evidence. I would like him to come back and see Dr. Struan Coleman. I do want to get some hip X-rays on him while he is here. I gave most likely an excellent candidate for bilateral hip arthroscopies with bilateral pubic plate repairs, bilateral pelvic floor repairs, with the left side being redo, with mobilization of mesh, possible partial removal, bilateral rectus abdominis and adductor compartment decompressions, and steroid injections. (Meyers chart note, February 15, 2021).

11) On March 25, 2021, the Board approved the parties' stipulation to pay Employee \$15,000 in interim attorney fees. (Stipulation for Approval of Employee's Attorney Fees, March 25, 2021).

12) On April 22, 2021, Employer controverted "treatment recommended by Vincera other than for hernia condition" based upon Dr. Katz's EME report. (Controversion Notice, April 22, 2021).

13) On July 1, 2021, Employee sought TTD and permanent partial impairment (PPI) benefits, medical and transportation costs, a finding of unfair or frivolous controversion, interest, attorney fees and costs, and reemployment benefits. He described the nature of the injury as, "EE was lifting concrete saw, walking backwards up a step into a [C]onnex container. While stepping he felt a pain jolt through lower body. He has been diagnosed with core muscle, hip and lumbar injuries and entrapped nerve(s). He has been unable to obtain treatment he is entitled to under the Act and ER has failed to pre-authorize treatment for the entrapped nerve." (Amended Claim for Workers' Compensation Benefits, July 1, 2021).

14) On July 22, 2021, Employer answered Employee's July 1, 2021 claim, contending TTD benefits were being paid; Employer had not received a PPI rating; it was paying for medical treatment, except treatment specifically controverted; and Employer's two controversions were

based upon evidence in the record. It denied any failure to preauthorize treatment and contended no further attorney fees and costs were due because it previously paid fees pursuant to a stipulation and it was paying time loss and medical benefits. (Answer, July 22, 2021).

15) On August 10, 2021, the Reemployment Benefits Administrator (RBA) designee found Employee ineligible for reemployment benefits based upon Dr. Katz's prediction that he would be able to return to the position of Nurse Assistant with further medical treatment when his attending physician, Jacqueline Austin, FNP, declined to provide predictions. (Letter, August 10, 2021).

16) On August 20, 2021, Employee appealed the RBA designee's decision under AS 23.30.041 contending, "... the RBA found Mr. Tate unqualified for reemployment benefits-based review of the RBA's decision on unreliable or inaccurate information." (Petition, August 20, 2021).

17) On April 6, 2022, Elysia Spencer, MD, performed a microscopic subinguinal left spermatic cord denervation. (Spencer Operative Report, April 6, 2022).

18) On April 15, 2022, Employee reported increasing left testicular pain and swelling. (Mariam Miller, MD, report, April 15, 2022).

19) On May 15, 2022, Employee followed up with Dr. Spencer and reported his suture pain improved since he was last seen, and his testicular and inguinal pain was "the same as preoperatively or somewhat improved." She recommended Employee be evaluated by Alaska Native Medical Center Chronic Pain Physicians as she is not an expert in assessing or treating abdominal wall and pelvic floor musculoskeletal pain and cannot recommend he have treatment at the abdominal wall and pelvic floor musculoskeletal multidisciplinary clinic which previously evaluated him. Dr. Spencer did not think his groin and testicular pain was due to nerve entrapment within the spermatic cord because he did not experience resolution of his pain with the spermatic cord innervation. (Spencer report, May 15, 2022).

20) On June 22, 2022, Karl Tieva, MD, answered questions from Employee's attorney and opined the work injury is the substantial cause of Employee's spinal pain due to compensation for the left groin pain arising from the work injury. He said continued physical therapy and rehabilitation, evaluation and management by specialists, and additional interventional procedures, potentially surgery, are medical treatments which may be reasonable and necessary for treatment of the work injury and spinal pain. Dr. Tieva believed Employee needed additional medical treatment for his work injury and that it would be reasonable and appropriate for him to return to the Vincera Institute for additional evaluation and treatment. He said additional evaluation and management

at a pain clinic and by specialists in Alaska should be considered before sending Employee out-of-state to Vincera Institute. Dr. Tieva opined Employee had not reached medical stability. (Tieva responses, June 22, 2022).

21) On July 19, 2022, Dr. Tieva referred Employee to Vincera Institute for further evaluation and management of left lower quadrant, left groin, and left testicular pain and said he may benefit from treatment with a core specialist. (Tieva letter, July 19, 2022).

22) On September 9, 2022, Employer answered Employee's August 20, 2021 petition, contending the RBA's decision was based on substantial evidence and did not constitute an abuse of discretion. (Answer, September 9, 2021).

23) On September 2, 2022, Loretta Lee, MD, an internal medicine specialist, examined Employee for an EME and diagnosed (1) left inguinal hernia repair with chronic groin pain, (2) left gluteus minimus muscle strain, (3) lumbar degenerative disc disease and facet arthropathy at L5-S1, (4) thoracic disc protrusion at T7-8 with upper back and shoulder pains, (5) congenital nonunion anomaly at vertebral body T2, (6) SLAP tear in right shoulder, (7) depression and anxiety, (8) resolved chlamydia infection, and (9) dilated right heart chambers and IVC. She opined the work injury was the substantial cause of the left inguinal hernia and chronic groin pain, but the work injury was not the substantial cause of any of the other conditions. The September 17, 2021, pelvis MRI showed only a left gluteus minimus muscle strain, no pelvic muscle injury, and the SLAP tear was preexisting. Dr. Lee stated Employee already had surgery to remove the entrapped nerve recommended by Dr. Katz on April 6, 2022, and the pain did not improve; the physician that performed the surgery recommended against any further surgical procedures. Dr. Lee did not believe further urologic surgeries would help his pain. She opined a TENS unit or other muscle stimulator device, further physical therapy, chiropractic care, massage or acupuncture are not medically reasonable and necessary but fall within the realm of medically accepted treatment plans for the work-related condition. Dr. Lee said Employee had not reached medical stability as his pain doctor recommended an electromyography and nerve conduction study to look for neurogenic claudication versus thoracic outlet syndrome, but it would not be related to the work injury. She did not recommend further injections or blocks because he has had multiple injections and nerve blocks, and nothing helped but stated they would be within the realm of medically accepted treatment options. Dr. Lee stated Employee will likely need to be on some pain medications chronically and treatment by a pain management specialist would be useful to better control his

left lower abdominal and groin pain. If nothing else was suggested by the pain doctor that Employee has not already exhausted or that he is “agreeable to entertaining,” he should be considered medically stable. (Lee EME report, September 2, 2022).

24) On September 12, 2022, Employee requested a hearing on his November 3, 2020 claim. (ARH, September 12, 2022).

25) On September 21, 2022, Employer opposed Employee’s September 12, 2022 ARH contending clarification on the issues to be set for hearing was needed and because it intended to depose one or both EME physician prior to hearing. (Affidavit of Krista M. Schwarting in Opposition to Affidavit of Readiness for Hearing, September 21, 2022).

26) On September 22, 2022, Employer controverted all benefits for conditions other than the inguinal hernia, treatment for femoral acetabular impingement, injections and blocks, passive treatment including chiropractic treatment and massage therapy, and further urologic surgery based upon Dr. Lee’s EME report. (Controversion Notice, September 22, 2022).

27) On October 12, 2022, a hearing was scheduled for December 14, 2022, on Employee’s November 3, 2020 claim. (Prehearing Conference Summary, October 12, 2022; Hearing Notice Served, October 13, 2022).

28) On January 9, 2023, Luke Liu, MD, examined Employee and recommended a left ilioinguinal and iliohypogastric nerve block for diagnostic and therapeutic purposes for left testicle pain. If Employee did not respond to this nerve block, Dr. Liu recommended a pudendal nerve block. (Liu report, January 9, 2023).

29) On January 17, 2023, Dr. Liu performed a left ilioinguinal and iliohypogastric nerve block. (Liu report, January 17, 2023).

30) On February 14, 2023, Employee reported 15 to 20 percent symptom relief after the left ilioinguinal and iliohypogastric nerve block, and a decrease in left testicular swelling. (Liu report, February 14, 2023).

31) On February 27, 2023, Dr. Liu performed a left pudendal nerve block. (Liu report, February 27, 2023).

32) On March 15, 2023, Employee reported 70 percent relief of left-sided groin and testicular pain for about a week after the left pudendal nerve block and the pain gradually returned to baseline. It helped 100 percent with incontinence. Hailey Lankford, PA-C, recommended repeating the left pudendal nerve block for potential extended therapeutic effect and said Employee could also

consider a superior hypogastric nerve block and a rectus abdominus sheath nerve block. (Lankford report, March 15, 2023).

33) On October 20, 2023, Dr. Lee reexamined Employee for an EME. She diagnosed (1) left inguinal hernia repair with entrapment syndrome, (2) left testicle pain, (3) left hydrocele, (4) left gluteus minimus muscle strain, (5) lumbar degenerative disc disease and facet arthropathy at L5-S1, (6) thoracic disc protrusion at T7-8, (7) labral tear in right shoulder, (8) depression and anxiety, and (9) resolved chlamydia infection. Dr. Lee opined the work injury is the substantial cause of his left groin and testicle pain and left hydrocele. The labral tear, depression and anxiety, and chlamydia infection existed prior to the work injury. She said Employee was medically stable because he had not had any appreciable change in his status in the past 45 days and rated Employee with a two percent PPI. Dr. Lee stated further injections and blocks were not indicated because he already had some and had only a very temporary response to them and she recommended he undergo no further invasive surgical procedures as he had a spinal cord stimulator [SCS] placed, and it did not help. She said pain management treatment was reasonable for him to continue and medications could be prescribed for his work injury, but physical therapy was not reasonably necessary because he did not see any significant improvement in symptoms with past physical therapy. Dr. Lee stated Employee would benefit from vocational rehabilitation as it was unlikely that he will be able to return to his prior employment as a laborer; she recommended he be restricted from lifting more than 20 pounds and from being on his feet for more than a few hours a day and that he would need breaks due to the work injury. She said the restrictions were permanent because he did not obtain significant pain relief after a neurectomy. Dr. Lee opined that the treatment recommended by Vincera Institute was not medically reasonable or necessary because it is considered experimental. (Lee EME report, October 20, 2023).

34) On November 30, 2022, the Board approved the parties' stipulation to continue the December 14, 2022 hearing until additional medical evaluations could be performed based upon Dr. Lee's deposition testimony as the additional medical evaluations would help the parties either resolve their dispute or clarify the issues to be decided by the Board. (Stipulation to Continue Hearing, November 30, 2022).

35) On November 2, 2023, Edward Baumgartner, Jr., MD, recommended Employee try a left pudendal nerve block and consider traditional SCS trial and future ablation. (Baumgartner chart note, November 2, 2023).

36) On November 17, 2023, Dr. Baumgartner performed a left pudendal nerve block. Employee was discharged with full relief of his left-sided pudendal pain. (Baumgartner chart note, November 17, 2023).

37) On November 17, 2023, Employer controverted all TTD benefits after October 20, 2023, PPI benefits beyond two percent, and specific medical treatments, including surgical treatment, further physical therapy, and further diagnostic studies and testing based upon Dr. Lee's October 20, 2023 EME report. (November 17, 2023).

38) On November 21, 2023, Employee requested a hearing on his August 20, 2021 petition. (ARH, November 21, 2023).

39) On November 21, 2023, Employee requested a second independent medical evaluation (SIME). (Petition, November 21, 2023).

40) On December 1, 2023, Employer opposed Employee's November 21, 2023 ARH contending discovery was incomplete because Employee had requested cross-examination of Dr. Lee and an SIME. (Affidavit of Krista M. Schwarting in Opposition to Affidavit of Readiness for Hearing, December 1, 2023).

41) On December 4, 2023, Dr. Lee issued an addendum EME report and opined there was no role for placement of an SCS for his work-related left-sided groin and testicle pain after hernia repair surgery because there is no specific evidence for its use in treating nerve entrapment syndrome after hernia repair; and it was tried and failed. She stated pain medication and anti-inflammatory medications could help control the pain associated with nerve entrapment syndrome after hernia repair surgery and noted those commonly used include tricyclic antidepressants, gabapentinoids, serotonin norepinephrine reuptake inhibitors, tramadol, non-steroidal anti-inflammatory medications, and the cox-2 inhibitor celecoxib. Dr. Lee said there was no evidence to support chiropractic therapy to treat nerve entrapment syndrome after hernia repair, but massage therapy may help temporarily with symptoms by relieving some of the pressure around the pudendal nerve. (Lee addendum EME report, December 4, 2023).

42) On December 8, 2023, Employer controverted placement of an SCS and chiropractic treatment based upon Dr. Lee's December 4, 2023 addendum EME report. (Controversion Notice, December 8, 2023).

43) On December 11, 2023, Employer answered Employee's November 21, 2023 petition for an SIME contending he failed to provide an SIME form and documentation of any medical dispute. (Answer, December 11, 2023).

44) On December 28, 2023, a hearing was scheduled on Employee's November 21, 2023 petition for an SIME and August 20, 2021 petition appealing the RBA designee's decision on January 25, 2024. (Prehearing Conference Summary, December 28, 2023; Hearing Notice Served, December 28, 2023).

45) On January 4, 2024, Employer amended its answer to Employee's SIME November 21, 2023 petition contending he failed to lay out all potential disputes as Employer contended there were disputes regarding Employee's ability to return to work and the need for reemployment benefits. It also contended Employee failed to provide documentation of disputes with the recent EME reports and to provide medical records reflecting a dispute regarding orthopedic conditions. (Amended Answer, January 4, 2024).

46) On January 23, 2024, the Board approved the parties' stipulation to continue the January 25, 2024 hearing on Employee's November 21, 2023 SIME petition and August 20, 2021 petition appealing the RBA's decision. (Stipulation for Continuance of Hearing, January 23, 2024).

47) On February 20, 2024, the Board approved the parties' stipulation to remand the case to the RBA's office and to assign an Alaskan rehabilitation specialist to Employee's case rather than a Missouri specialist who would be unfamiliar with Alaska law. (Stipulation, February 20, 2024).

48) On April 23, 2024, Paul Kaloostian, MD, a neurosurgeon, examined Employee for an SIME, and diagnosed (1) thoracic and lumbar myofascial strain related to the work injury, and (2) inguinal hernia with associated post-inguinal hernia repair, neuropathy to the groin and left testicle related to the work injury. He opined the work injury is the substantial cause of Employee's need for groin pain medical treatment and disability and there was no need for further treatment for any midback, low back, or neck pain for the work injury as that had healed. Dr. Kaloostian recommended a micro-decompression of nerves involved in the inguinal hernia surgery because there is likely entrapment, which is a common complication. He urged the surgery be performed at a tertiary care facility by a general surgeon or neurological surgeon specializing in entrapped nerves, such as UCLA, UC San Francisco, or John Hopkins. Dr. Kaloostian stated Employee continued to be disabled by groin pain, was not medically stable because more treatment was necessary, and he predicted Employee would reach medical stability three to six months after the micro-

decompression of the left inguinal region. He stated Employee could do sedentary work with no heavy lifting, bending, or twisting. (Kaloostian SIME report, April 23, 2024).

49) On April 17, 2024, Employee requested a hearing on his July 1, 2021 claim. (ARH, April 17, 2024).

50) On May 24, 2024, Employer opposed Employee's April 17, 2024 ARH contending Dr. Kaloostian's deposition needed to be completed. (Affidavit of Krista M. Schwarting in Opposition to Affidavit of Readiness for Hearing, May 24, 2024).

51) On September 3, 2024, a hearing was scheduled for October 23, 2024, on Employee's July 21, 2021 claim on TTD benefits, medical and transportation costs and attorney fees and costs. (Prehearing Conference Summary, September 3, 2024; Hearing Notice Served, September 3, 2024).

52) On October 16, 2024, Employee's attorney filed a fee and costs affidavit totaling \$153,955.96. He sought \$139,546.37 in attorney fees for 300.1 hours at \$465 an hour and \$14,409.50 in costs, including 53.2 hours of paralegal fees at \$200 per hour. He also addressed the *Rusch* factors. (Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees, and Costs, February 16, 2024; Affidavit for Award of Paralegal Fees for Work Performed by Shona J. Embs, October 17, 2024).

53) On October 22, 2024, Employer's attorney emailed Employee's attorney:

I tried to call you a few minutes ago, but your office phone went to voicemail. I have confirmed the following with my client:

1. Benefits post 10/20/23 will be converted to TTD, and the difference between stipend and TTD will be paid. There may be a short period before stipend was initiated, and that will be paid as TTD;
2. The past two checks got off track, but will be entered with a penalty this week;
3. My client will authorize the surgery recommended by Dr. Kaloostian, with the corollary that progress needs to be made on having Mr. Tate seen ASAP--the adjuster will provide the necessary authorization and
4. TTD will be paid going forward, with the hope that Mr. Tate will recover along the timeline discussed by Dr. Kaloostian. We will of course reserve the right to obtain an IME as necessary.

Please instruct your client to make an appointment at a tertiary medical center--if he starts this process immediately, hopefully he can be seen within the next month.

We need to review the attorney fees to ensure that they are related to the issues set for hearing and will discuss that with you accordingly. If there are updated fees, please let us know as soon as possible. (Email, October 22, 2024).

54) On October 23, 2024, Employee's attorney replied to the October 22, 2024 email:

I have not been able to talk with my client, but I have drafted a stipulation which embodies the terms of the offered agreement in your email yesterday. I am agreeable to filing this stipulation with the board. Please review and if acceptable, sign it and return it to me and I will file it with the board. We can appear at 9:00 to advise of the agreement. If this stipulation is not acceptable to you, let me know ASAP, as I am still preparing for the hearing.

The draft stipulation stated:

A hearing is scheduled for October 23, 2024, to address the issues of employee's entitlement to medical treatment including treatment at a tertiary medical center, past and future temporary total disability benefits, interest and attorney fees. To resolve the issues pending before this board the parties stipulate as follows:

1. Employee is not medically stable and has not been medically stable since his initial work injury on May 8, 2019.
2. Employee is entitled further medical treatment consistent with the opinions of Dr. Paul Kaloostian, the SIME physician in this case, including treatment of his groin pain, hydrocele and urinary incontinence issues at an out-of-state tertiary medical Center.
3. Employee will be paid temporary total disability benefits from October 20, 2023, less amounts paid to him as .041 stipend benefits. Employee will be paid temporary total disability benefits going forward until he is medically stable.
4. Interest will be paid on the difference between the amount paid to employee as .041 stipend benefits and past temporary total disability benefits.
5. Employer will provide employee's counsel with written documentation on how it has computed past TTD and interest payments.
6. Employee is entitled to attorney fees pursuant to AS 23.30.145 (a) and (b). The parties agree counsel for employee shall be paid statutory fees under AS 23.30.145 (a) on all benefits paid from October 23, 2024 forward and actual attorney fees from the beginning of this case to October 23, 2024 with credit for \$15,000 paid in fees pursuant to the March 25, 2021 stipulation approved by this board.
7. The parties request the board to temporarily suspend its work on this case, except for approval of this stipulation. Within 10 days of filing this stipulation, the parties will file a stipulation with the board setting forth the agreed to amount of past actual attorney fees owed to employee's counsel from the beginning of this case until October 23, 2024. Or if they cannot reach agreement, they will file a joint notice that they cannot agree on the amount of past legal fees owed and a request that the board decide the issue of past legal fees based on the record.
8. Two past due .041 stipend payments, plus late payment penalties, will be paid to employee on or before October 25, 2024. (Email and Stipulation to Resolve Issues [sic] Scheduled for Hearing, October 23, 2024).

55) On October 23, 2024, the parties stated terms on the record. Employer agreed to pay Employee TTD benefits after October 20, 2023; the TTD benefits will be offset by paid stipend benefits. If

there was a short gap period prior to “stipend” benefits, Employer agreed to pay TTD benefits for that period. Employer agreed that Employee was not medically stable, and it will authorize the surgery recommended by Dr. Kaloostian. Employer agreed there were two outstanding checks for overdue past stipend benefits that will be entered with penalty that week and should be mailed by Monday October 28, 2024, “but it might even be this week.” The parties had not reached an agreement on attorney fees and costs but agreed that if they were not able to resolve the attorney fees and costs, they would request the Board decide attorney fees and costs. (Record).

56) On October 24, 2024, Employee’s attorney filed a supplemental fee and costs affidavit totaling \$161,541.96, for an additional \$6,696 in fees for 14.4 hours at \$465 per hour and \$800 in costs for paralegal fees for four hours at \$200 per hour. (Supplemental Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees, and Costs, October 24, 2024; Supplemental Affidavit for Award of Paralegal Fees Performed by Shona Embs, October 24, 2024).

57) On November 5, 2024, Employee’s attorney emailed a draft stipulation to Employer’s attorney and said, “Please edit as needed and return.” (Email, November 5, 2024).

58) On November 7, 2024, Employer’s attorney emailed Employer’s attorney:

Here is the status on the checks. I will review the stipulation and hopefully we can finalize everything but the attorney fees tomorrow.

1. Late checks for the period of 09/17/24-10/14/24 (4 weeks). Check issued on 11/05/24 in the amount of \$2469.30.
2. TTD check for the period of 10/15/24-10/28/24 (2 wks) was issued on 11/04/24 in the amount of \$1411.06.
3. TTD check for the period of 10/29/24-11/11/24 will go out on 11/11/24. (Email, November 7, 2024).

59) On November 8, 2024, Employee filed an emergency motion to enforce the October 23, 2024 hearing stipulation. He contended Employer failed to make timely payment of past due benefits, including penalties, failed to meaningfully respond to Employee’s stipulation to document the parties’ agreement, and failed to respond to Employer’s request for attorney fees and costs. Employee requested a hearing be scheduled. (Employee’s Emergency Motion to Enforce Stipulated Agreement and Obtain Ruling on Legal Fees, November 8, 2024).

60) On November 22, 2024, Employer answered Employee’s November 8, 2024 emergency motion. It stated a check was issued on November 5, 2024 in the amount of \$2,469.30 for the period September 17 through October 15, 2024, a check was issued on November 4, 2024 for TTD

benefits from October 15 through October 28, 2024 for \$1,411.06, a check was issued on November 11, 2024 for TTD benefits from October 29 through November 11, 2024, and a penalty check was issued on November 8, 2024. Employer stated it is continuing to review past benefits and convert them to TTD benefits as needed. It contended the parties had not reached an agreement on attorney fees and costs and Employer did not object to a hearing on attorney fees and costs. (Answer, November 22, 2024).

61) On December 11, 2024, the Board designee scheduled a hearing on February 6, 2024, on Employee's "[November 8, 2024] petition to enforce the stipulated agreement and obtaining a ruling on fees" and set the issues as:

- The employer has failed to make timely payment of past due benefits, including penalties as it agreed during the 10/23/24 hearing.
- Employer has failed to meaningfully respond to employee's stipulation to document parties' agreement employer has failed to respond.
- Employee's request for attorney's fees and costs. (Prehearing Conference Summary, December 11, 2024).

62) On January 30, 2025, Employee filed a hearing brief contending the terms from the October 23, 2024 stipulation should be written into a decision and order. He contended Employer failed to pay the past TTD benefits owed from October 20, 2023, offset by the stipend benefits Employer paid. Employee calculated TTD benefits owed as \$12,043.85, with a reduction for the late-paid stipend amount of \$2,469.30 and stipend benefits Employer already paid totaling \$19,754.44 from \$34,267.59 for 48.57 weeks (48 weeks + 4 days) at a weekly TTD benefit rate of \$617.32. He contended Employer owes a penalty and interest on the \$12,043.85. Employee also contended he is entitled to continuing TTD benefits until he is medically stable based upon the parties' stipulation. He requested orders awarding the specific amount he is owed for back TTD benefits and for the overdue TTD benefits, and attorney fees and costs. Employee contended he is entitled to actual attorney fees and costs totaling \$175,681.95, with credit for the \$15,000 Employer paid in the past, and future statutory fees on ongoing benefits. Attached to Employee's hearing brief as an exhibit was a history of payments paid by Employer as of December 29, 2024, provided to Employee by Employer. (Hearing Brief on Employee's Emergency Motion to Enforce Stipulated Agreement and Obtain Ruling on Legal Fees, January 30, 2025; Benefits Payments on Behalf of Michael Dwaine Hunter Tate; December 29, 2024).

63) On January 30, 2025, Employee's attorney filed a fee affidavit for attorney fees and costs totaling \$175,681.96, including an additional \$13,950 in fees for 300.1 hours at \$465 per hour and \$280 in costs for 1.4 additional paralegal hours at \$200 per hour. (Second Supplemental Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees, and Costs, January 30, 2025; Supplemental Affidavit for Award of Paralegal Fees Performed by Shona Embs, January 30, 2025).

64) On January 30, 2025, Employer filed a hearing brief contending the parties did not agree on the amount of attorney fees at the October 23, 2024 hearing. It contended that it entered payments of TTD benefits beginning in early November 2024 and authorized an appointment with the physician Employee selected, and he attended it. (Employer's Hearing Brief, January 30, 2025).

65) At hearing, Employee testified he has not received all past TTD benefits Employer agreed to pay him at the October 23, 2024 hearing. Employer stopped paying benefits in December 2024. Employee said he would not have been able to navigate the workers' compensation system without his attorney. (Record).

66) Employee contended Employer had not paid all past TTD benefits owed, which should be offset by the stipend benefits already paid, and it stopped paying TTD benefits in December 2024. He had seen the specialist located in Los Angeles for an initial appointment and was waiting to receive the medical records. Employee contended it is important to have the parties' oral agreement in writing, and contended he should be awarded actual, full attorney fees and costs under AS 23.30.145(b), and continuing attorney fees on benefits paid from October 24, 2024, and continuing. (Record).

67) Employer contended it paid benefits retroactive to November 2024. It contended it had informed Employee it was unwilling to agree to the full attorney fees in the attorney fee affidavits but was willing to sign a stipulation without the attorney fees. Employer contended the attorney fees and costs Employee seeks are too high. (Record).

68) On February 6, 2025, Dennis filed a supplemental fee affidavit for paralegal fees for 0.4 hour, at an hourly rate of \$200, totaling \$80. (Third Supplemental Affidavit for Award of Paralegal Fees Performed by Shona Embs, February 6, 2025). He also filed a supplemental fee affidavit for attorney fees for an additional 4.3 hours, at \$465 an hour, totaling \$1,999.50. The new total amount for fees and costs is \$177,761.46, for a total attorney fee of \$162,191.87 for 348.8 hours at \$465 per hour and \$15,569.59 in total costs, including 59 hours of paralegal work at an hourly rate of

\$200, and \$3,769.59 in expenses. (Third Supplemental Affidavit of Counsel for Award of Attorney Fees, Paralegal Fees and Costs, February 6, 2025).

69) Employer has paid Employee \$139,370.47 in TTD benefits, \$22,223.74 in “stipend” benefits, and \$4,425 in PPI benefits as of December 29, 2024, and paid \$9,296.50 for the reemployment evaluation. (Benefits Payments on Behalf of Michael Dwaine Hunter Tate; December 29, 2024).

70) Employer paid TTD benefits through November 30, 2023; the weekly TTD benefit rate is \$705.53. (Benefits Payments on Behalf of Michael Dwaine Hunter Tate; December 29, 2024).

71) Employer paid “stipend” benefits from February 5 through September 16, 2024, totaling \$19,754.44; the biweekly “stipend” benefit rate is \$1,234.65. (Benefits Payments on Behalf of Michael Dwaine Hunter Tate; December 29, 2024)

72) Employer issued a check for the two late “stipend” payments totaling \$2,469.30 on November 5, 2024, for “stipend” benefits from September 17, 2024 through October 14, 2024. (Benefits Payments on Behalf of Michael Dwaine Hunter Tate; December 29, 2024).

73) Employer began paying TTD benefits from October 15, 2024; the first TTD benefit check for this period was issued on November 4, 2024. (Benefits Payments on Behalf of Michael Dwaine Hunter Tate; December 29, 2024).

74) Employer stopped paying TTD benefits on December 23, 2024; the TTD benefit check for the last payment was issued December 23, 2024. (Benefits Payments on Behalf of Michael Dwaine Hunter Tate; December 29, 2024).

75) The next three checks which should have been issued for TTD benefits prior to the February 6, 2024 hearing date should have been issued on January 6, 20, and February 3, 2025. (Experience, judgment, and observation).

76) There are 45 weeks and four days from December 1, 2023 through October 14, 2024. (Observation).

77) There are six weeks and three days from December 24, 2024 through February 6, 2025. (Observation).

78) The parties agreed that penalties and interest on unpaid TTD benefits owed pursuant to the October 23, 2024 stipulation were not included as issues for the February 6, 2025 hearing in the December 11, 2024 prehearing conference summary and cannot be addressed at this hearing. (Record).

79) Employer did not file a response to Employee's supplemental affidavit of attorney fees. (Agency record).

80) On March 10, 2025, *Tate I* granted Employee's motion to enforce an October 23, 2024 hearing stipulation and ordered Employer to pay Employee \$14,463.82 in TTD benefits it owes pursuant to the October 23, 2024 stipulation and to pay Employee's attorney \$147,191.87 in fees and \$15,569.59 in costs. (*Tate I*).

81) On March 24, 2025, Employer requested reconsideration and modification of *Tate I*:

. . . First, the Board found that there were substantial gaps in the payment of benefits to the employee. Attached please find a spreadsheet of all indemnity benefits paid to the employee, including PPI, TTD and .041 (k) stipend. On pages 16-17 of the decision, the Board determined that there were three checks that preceded the hearing that had not been issued, but the spreadsheet demonstrates that they all were. Therefore, that compensation has already been issued and does not require reissuance. This affects the amount of compensation awarded by the Board and requires recalculation. Second, the Board's calculations do not take into account the employee's multiple relocations over the past two years. The employer and insurer remain entitled to take the appropriate cost of living adjustments. To the extent that the employer and insurer are required to pay benefits prior to the Board granting reconsideration, the employer and insurer specifically reserve the right to claim an overpayment of benefits and recoup the overpayment from future benefit installments. Finally, the employer and insurer request modification on the amount of attorney fees awarded to Mr. Dennis. As noted above, they paid more benefits than the Board accounted for in its order. In addition, they began paying TTD benefits and authorized the evaluation with the physician of the employee's choice prior to the Board's order.

Employer attached a payment history as of Thursday, March 13, 2025 to its petition showing it paid TTD benefits on January 6, February 3 and 17, and March 4, 2026, for December 24 through March 3, 2025. (Petition, March 24, 2025).

PRINCIPLES OF LAW

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

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

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

AS 23.30.005. Alaska Workers' Compensation Board. . . . (h) Process and procedure under this chapter shall be as summary and simple as possible. . . .

AS 23.30.130. Modification of awards. (a) Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

. . . .

In the case of a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005).

AS 23.30.135. Procedure before the board. (a) . . . The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

AS 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case. . . . To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. . . .

AS 44.62.540 limits the Board's authority to reconsider and correct alleged legal errors under this section to 30 days. "Reconsideration" requests are used to address alleged legal errors, not factual errors. *Lindekugel*. A petition for reconsideration has a 15-day time limit for the request, and

power to reconsider “expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied.” *Id.* at 743 n. 36.

8 AAC 45.050. Pleadings. . . .

(c) For answers to claims and petitions under this subsection,

. . . .

(2) an answer to a petition must be filed not later than 20 days after the date of service of the petition and served upon all parties;

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 45.120. Evidence. . . .

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

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

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

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

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

(1) the facts upon which the original award was based;

(2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and

(3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

(f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

ANALYSIS

Should reconsideration and modification of *Tate I* be granted to allow Employee to respond?

Employer timely filed a petition seeking reconsideration, contending *Tate I* made legal errors in the amount of attorney fees awarded. AS 44.62.540; *Lindekugel*. It also contended *Tate I* legally erred by failing to apply cost-of-living adjustments to calculate the past owed TTD benefits. *Id.* Employer's petition also raises issues concerning factual findings in *Tate I* for TTD benefits paid after December 23, 2024. It presented post-hearing evidence showing Employer paid TTD benefits from December 23, 2024 through March 3, 2025. AS 23.30.130; 8 AAC 45.150. The panel's timeframe in which to reconsider *Tate I* is relatively short and expires on Wednesday, April 9, 2025 (March 10, 2025 + 30 days = Wednesday, April 9, 2025). 8 AAC 45.063(a); AS 44.62.540; *Rogers & Babler*. Employee's response to Employer's petition is not due until Monday, April 14, 2025 (March 24, 2025 + 20 days = Sunday, April 13, 2025 = Monday, April 14, 2025). 8 AAC 45.050(c)(2); 8 AAC 45.063(a). Consequently, to ensure the quick, efficient, fair, and predictable delivery of benefits to Employee at a reasonable cost to Employer, and to make this process as summary and simple as possible, and to best ascertain the parties' rights, this decision will grant

Employer's petition solely to provide Employee time to respond to Employer's petition and toll the parties' time to seek appellate review. AS 23.30.135(a); 8 AAC 120(m). After the time has expired for Employee to respond, Employer's petition will be decided on its merits.

CONCLUSION OF LAW

Reconsideration and modification will be granted to allow for Employee's response.

ORDER

- 1) Employer's March 24, 2025 petition is granted.
- 2) Employee is directed to file his response to the petition on or before 5:00 p.m. Alaska Time on April 14, 2025, after which time the petition will be decided on its merits.

Dated in Anchorage, Alaska on April 9, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Sara Faulkner, Member

Unavailable for signature
Anthony Ladd, 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 on Reconsideration and Modification in the matter of Michael Dwaine Hunter Tate, employee / claimant v. American Dream Construction, LLC, employer; American Interstate Insurance Company, insurer / defendants; Case No. 201906254; 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 April 9, 2025.

/s/

Rochelle Comer, Workers' Compensation Technician