ALASKA WORKERS' COMPENSATION BOARD

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

RENE CASTRO, Employee, Claimant, v. STATE OF ALASKA, Self-Insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 202212775 AWCB Decision No. 25-0035 Filed with AWCB Juneau, Alaska on June 2, 2025

Rene Castro's (Employee) March 29, May 17, and November 9, 2023 claims were heard on April 9, 2025, in Juneau, Alaska, a date selected on January 2, 2025. Employee's November 27, 2025 request gave rise to this hearing. Attorney Patricia Huna appeared and represented Employee, who appeared and testified. Attorney Michelle McComb appeared and represented the State of Alaska (Employer). Memoree Polleys testified on behalf of Employer. The record was kept open to receive Employee's supplemental attorney fees, Employer's response, and Employee's reply and closed on May 6, 2025.

ISSUES

Employee contends he has been disabled since the work injury. He contends both his treating physician, and the second independent medical evaluation (SIME) physician opined he cannot return to work. Employee contends the employer's medical evaluation (EME) report stated he cannot work when he has flareups of pain and he frequently has flareups and Employer did not offer light duty work to accommodate his work restrictions during flareups. He requests an order

awarding temporary total disability (TTD) benefits from Employer's controversion and continuing until he reaches medically stable after surgery.

Employer contends Employee is not disabled based upon the EME report releasing him to work. It contends Employee is not disabled because he voluntarily removed himself from the job market. Employer requests an order denying additional TTD benefits.

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

Employee contends all physicians in the case have recommended surgery. He requests an order directing Employer to pay all medical bills related to his work injury, including preauthorization for the left foot and heel surgery in light of Employer's past delays in authorizations and payment of medical bills. Employee contends Employer failed to pay for the SIME magnetic resonance imaging (MRI) bills. He requests an order directing Employer to pay the SIME MRI bills.

Employer contends there is no authority to support an order for medical benefits because it has not controverted medical benefits and there are no unpaid medical bills. It contends the SIME MRI bill was not set as an issue for hearing. Employer contends the SIME MRI bills are not yet due because the medical providers have failed to provide the bills and W-9s, which are required before payment can be made.

2) **Is Employee entitled to medical benefits?**

Employee contends Employer's controversion of TTD benefits based upon the EME report was made in bad faith because it was not based upon sufficient evidence to support a controversion. He contends Employer did not possess sufficient factual information to reasonably conclude he was not entitled to benefits. Employee contends Employer controverted medical benefits in-fact by failing to promptly furnish medical treatment. It contends Employer's failure to communicate regarding a referral by his treating physician delayed medical treatment for months. Employee contends Employer controverted the SIME MRI bills in-fact as it has not promptly paid for them. He requested an order awarding a penalty for an unfair and frivolous controvert.

Employer contends penalty for an unfair or frivolous controvert cannot be awarded because Employee withdrew his claim for "penalty." It contends its controversion of TTD benefits was based upon the EME's report, which was sufficient evidence in support of the controversion. It contends it is unaware of any medical bills which have not been paid pursuant to the Alaska Workers' Compensation (Act). Employer contends there is no evidence proving it controverted medical benefits in fact. It contends the SIME MRI bills were not set as an issue for hearing. Employer contends the SIME MRI medical providers failed to provide bills and W-9s, which are required before payment can be made. It contends it cannot direct Employee's medical treatment and Employee knew the MRI medical providers did not accept workers' compensation cases and went to them anyway. Employer requests an order finding Employer did not frivolously or unfairly controvert.

3) **Did Employer frivolously or unfairly controvert?**

Employee contends he is entitled to interest on all TTD benefits awarded.

Employer contends Employee is not entitled to interest because he is not entitled to TTD benefits and it paid all benefits due.

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

Employee contends Employer controverted his claims. He requests an order awarding full attorney fees and cost, less per diem charges he withdrew.

Employer contends Employee should not be awarded attorney fees and costs on issues on which he did not prevail. It contends fees should be reduced for time spent on administrative tasks. Employer objected to per diem charged for Huna and Employee, contending there is no provision entitling an attorney to per diem.

5) **Is Employee entitled to attorney fees and costs?**

FINDINGS OF FACT

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

1) On December 15, 2021, Employee reportedly injured the fifth toe on his left foot a week prior when he caught it on something. It started to ache a lot when he has to walk or stand a lot, and it had not improved. Employee left work on the ferry early because of the pain as he worked on his feet for hours per day. Left toe imaging was negative for a fracture but Abbey Cummings, PA-C, still treated it as a fracture because of the amount of bruising, swelling, and pain. She advised Employee to wear hard sole shoes and no long walks, or hours standing for two to four more weeks. PA-C Cummings signed off on Employee to be off work for four weeks as she doubted his foot would heal in a normal amount of time if he was standing and walking for 12-hour shifts for two weeks at a time. (Cummings report, December 15, 2021).

2) On April 7, 2022, Employee reported his left heel was very sore; the pain started when he took his first steps out of bed on March 28. It got better that day but by the next day, he could not walk. Employee also wanted to treat his toenail fungus because he was "moving to a warmer climate when he retire[d] at the end of the year." PA-C Cummings diagnosed left Achilles tendinitis and onychomycosis and prescribed indomethacin and Lamisil. (Cummings report, April 7, 2022).

3) On April 21, 2022, Employee reported his left heel still hurt; he did not take indomethacin or ibuprofen but had been doing stretches every morning, wearing shoes in his house, and he put insoles in his walking shoes. The pain was 50 percent better at least; it was worse in the morning and towards the end of his four-mile daily walks. Employee felt ready to go back to work. (Cummings report, April 21, 2022).

4) On August 18, 2022, Employee's left heel was injured when a door hit him on the heel when he went to take a shower while working for Employer as a steward. (First Report of Injury, August 22, 2022).

5) On September 6, 2022, Employee reported injuring his left foot working on a ferry on August 23, 2022, while trying to take a shower and a heavy door hit his foot. He noticed later that day he had increased pain, but he continued to work and used ice therapy. Left heel pain made it difficult to work. It hurt to walk and when he woke up the first step was the most painful. Employee had similar pain in April 2022. Myanandi Than, MD, diagnosed left leg Achilles tendinitis and plantar fascia syndrome, prescribed naproxen, a heel cup, arch supports,

and therapeutic stretches, and advised Employee to avoid walking barefoot. (Than report, September 6, 2022).

6) On September 12, 2022, Employee said his foot pain came back after several months after hitting his foot while showering. Naproxen, a heel cup, ice water, stretching, and a homemade "Straussburg" sock helped a little. The pain was better when he rested and walking too much made the pain return. Employee did not feel like he could go back to work yet because it required a lot of standing and walking. PA-C Cummings referred Employee to physical therapy and took him off work for one month for Achilles tendinitis. (Cummings report, September 12, 2022).

7) On October 4, 2022, Employee began physical therapy. He reported he did not feel any pain at first after the door hit him on the heel but several hours later, the heel pain was so severe he could not walk. Employee experienced pain as soon as he woke up and put his foot on the floor and increased with activity but decreased with rest. He rated the pain 9/10 at worst and 6/10 at best. (Bridgette Schwimmer, DPT, report, October 4, 2022).

8) On October 10, 2022, PA-C Cummings stated Employee was unfit for duty as of October 10, 2022, with severe Achilles tendonitis; he would be fit for duty on November 4, 2022. (Cummings Alaska Marine Highway System (AMHS) Unfit/Fit for Duty Form, October 10, 2022).

9) On October 11, 2022, Employee attended physical therapy and reported decreased pain since his last physical therapy visit; the highest pain rating was 4/10, and the tape really helped. Employee said he still exercised but reduced walking. (Schwimmer report, October 11, 2022).

10) On October 20, 2022, Employee attended physical therapy and reported his foot pain returned the night before and woke him up at 3:00 a.m. Employee indicated the pain was at the Achilles tendon insertion on the calcaneus and it was a sharp pain. He had untucked his sheets and was not wearing the Strassberg sock but had not done anything differently the days before and felt good after his last appointment. (Schwimmer report, October 20, 2022).

11) On October 24, 2022, Employee stated his left foot pain had been increasing. He attended physical therapy, which he found to be strenuous, and struggled walking after sessions. PA-C Cummings recommended trying Voltaren and filled out a work excuse form. She referred Employee to Charles Hightower, MD, for left leg Achilles tendonitis not responding to physical therapy. Employee was planning to move out of state in May. (Cummings report, October 24,

2022). PA-C Cummings estimated an additional five weeks of treatment and restricted Employee from working for five weeks. (Cummings Physician Report, October 24, 2022).

12) On October 25, 2022, a left ankle x-ray showed no displaced fracture, dislocation or soft tissue abnormality, and a focal zone of Employee's left tibial epiphysis lucency suggested degenerative change. (X-ray report, October 25, 2022).

13) On October 25, 2022, Employee attended physical therapy and reported his pain increased since the last visit, but he was not sure it was related to physical therapy. It took two days to go away, and it was the first time it took that long to go away. Pain onset was so variable, it was hard to say what had caused it. (Schwimmer report, October 25, 2022).

14) On October 26, 2022, Employee saw Charles Hightower, MD, for left foot pain after he injured his foot while working on a ferry when a door slammed on the back of his heel. The pain was so intense it was difficult for him to walk, and it had been intermittent since the injury. Physical therapy seemed to cause more discomfort. On a bad day, Employee rated his pain 10 out of 10 and he walked with a limp; on good days, it is a 0/10. Employee denied having any previous injuries or surgeries to his left ankle and said he did not have any injections. Dr. Hightower reviewed the x-ray which showed no obvious fracture or dislocation with normal alignment and some mild degenerative changes in the anterior aspect of the tibia or tibiotalar joint with some lucency within the anterior rim of the distal tibia. He discussed a differential diagnosis of a nondisplaced impaction fracture of the calcaneus at the Achilles insertion. Dr. Hightower recommended an MRI to evaluate further and to continue physical therapy; he educated Employee on stretches for plantar fascia. (Hightower report, October 26, 2022).

15) On October 28, 2022, Employee attended physical therapy and said when he saw the orthopedist he had no pain that day. He felt good after his last physical therapy session and had no pain at all. (Schwimmer report, October 28, 2022).

16) On November 1, 2022, Employee attended physical therapy and felt discomfort in his heel. He felt good after his last physical therapy session. (Schwimmer report, November 1, 2022).

17) On November 4, 2022, Employee attended physical therapy and reported he was able to walk three miles with his dog with a small break. He did fine before and after the walk; it was the longest he had gone, and he had been pain free in the prior three weeks. (Schwimmer report, November 4, 2022).

18) On November 8, 2022, a left foot MRI showed bone marrow edema in the posterior lateral calcaneus extending to the lateral insertion of the Achilles tendon, a possible bone contusion, and mild subcutaneous edema superficial to the lateral distal Achilles tendon with adjacent abnormal marrow edema. (MRI report, November 8, 2022).

19) On November 11, 2022, Employee attended physical therapy and said everything had been going great until he was cleaning up snow and started to feel the stretching sensation in the back of his heel. He said it was just discomfort, and it went away. Employee consistently reported it felt like a stretching sensation and like there was liquid in the area of the Achilles tendon insertion. (Schwimmer report, November 11, 2022).

20) On November 16, 2022, Dr. Hightower reviewed the November 8, 2022 MRI. Employee reported his left heel pain had been doing well for several days, and it returned that morning. He described the pain as sharp and in the direct posterior aspect of the Achilles and calcaneal insertion and rated it as 7/10. He said the pain diminished to 0/10 on a good day. Dr. Hightower recommended a wide heel cup to reduce direct pressure over the site, and weaning back to regular shoes slowly over two months if it significantly reduced his pain. If Employee's pain persisted, he recommended he follow up in four weeks to evaluate his discomfort and discuss other treatment options. Dr. Hightower briefly discussed surgical intervention, including an Achilles debridement and bony debridement of his Haglund's deformity fixation. He wrote it is "a significant surgery with significant risk for wound healing and persistent calcaneal pain" and "would not be our first choice going forward." (Hightower report, November 16, 2022).

21) On December 9, 2022, Employee attended physical therapy after a planned one-month absence to determine if it was able to improve left heel pain with footwear modification recommended by the physical therapist and orthopedic surgeon. He reported no change in left heel pain with continued fluctuating presentation that was unpredictable and debilitating when it occurred. Six weeks of additional physical therapy, one or two times per week, was recommended to improve mobility deficits. (Schwimmer report, December 9, 2022).

22) On December 15, 2022, Employee attended physical therapy and reported three days after his last visit, his heel was very painful without any provoking factors. The shoe recommended to him was helpful. (Schwimmer report, December 15, 2022).

23) On December 15, 2022, Employee saw Dr. Hightower and reported some improvement in his left heel pain with modified shoes. Employee continued to experience sharp pains intermittently,

three or four times per day, and rated it 8/10 in severity which required him to sit down. He was concerned about his ability to work on a boat throughout long shifts. Employee was "hesitant to get involved in any surgery with such high risks" and wanted to "put a hold on" on surgery which Dr. Hightower said, "is reasonable." He noted the risks for infection, ongoing pain, and a prolonged recovery and anesthesia risks and that Employee may explore surgery in the future. Employee noted he was "unable to perform his work shift secondary to his longstanding hours." Dr. Hightower recommended a work hardening assessment evaluation Employee to see if he could return to his duties. He recommended continuing work restrictions for sedentary work, including no lifting, carrying, pushing, pulling, or prolonged standing and walking, and for Employee to continue using modified shoe wear. (Hightower report, December 15, 2022).

24) On December 28, 2022, Employee attended physical therapy and reported the past two weeks were really bad as his heel had been sore for five days with 5/10 pain the entire week. He felt like manual lymphatic taping applied on his heel helped. (Schwimmer report, December 28, 2022).

25) On December 29, 2022, Employee said his left foot would not hurt for days but then at times he awoke with pain and was not able to walk for days. When his foot felt okay, he walked two to three miles without issue. Employee had never done the equivalent of a 12-hour shift on his feet at home and did not think that he would be able to tolerate a 12-hour shift daily which required him to cook, clean, and serve food. Dr. Hightower said the next step was surgery, but it would be risky, and infection would be particularly bad in that area; he recommended work hardening. Employee was nervous about surgery. PA-C Cummings recommended Employee see a foot and ankle specialist who had seen many patients with a similar problem rather than a general orthopedist. Employee did not think his job would allow for shorter hours or less time walking with a gradual increase and also thought it was just a matter of time before he had another flareup which required him to be off work for one to four weeks, depending on the severity. (Cummings report, December 29, 2022).

26) On May 18, 2023, Huna entered her appearance on behalf of Employee. (Entry of Appearance, May 18, 2023).

27) On January 31, 2023, PA-C Cummings referred Employee to Virginia Mason Medical Center for "Chronic, Recurrent L Achilles Tendonitis." (Inbound Referral Team – Referral Handoff, January 31, 2023).

28) On January 26, 2023, Gustavo Garcia, MD, orthopedic surgeon, examined Employee for an EME and diagnosed posterior left heel trauma causing bony reaction and pain at insertion of the Achilles tendon. He opined the work injury is the substantial cause of Employee's need for medical treatment. Dr. Garcia stated Employee had not exhausted all treatment options; however, no physical therapy was recommended as he already failed physical therapy. Employee also failed topical analgesics and was not interested in taking oral medication, and an Achilles tendon insertion steroid injection was not recommended. Possible surgical intervention would consist of debridement and partial re-sectioning of the posterior aspect of the calcaneus with insertional Achilles tendon repair. Employee reported he may wish to consider surgery in the future if he continues to have substantial pain. Dr. Garcia opined Employee had not reached maximum stability because he had not exhausted all treatment options and if Employee proceeded with the surgery, he would reach maximum medical stability approximately six months after surgery. A permanent partial impairment (PPI) rating was not yet required since Employee had not reached medical stability. Employer asked:

> Utilizing the US Department of Labor's classifications of work demands, what types of employment are within the employee's physical capacities? Can the employee engage in Sedentary, Light, Medium and/or Heavy level work, as defined below? If the employee has any physical capacity limitations, is the work the substantial cause of those limitations? If the work injury is not the substantial cause, what is?
>
> Sedentary: Able to lift and carry no more than 10 lbs. occasionally throughout a work-day;
>
> Light: Able to lift and carry more than 10 lbs. but no more than 20 lbs. occasionally, and 10 lbs. frequently through the work-day;
>
> Medium: Able to lift and carry no more than 50 lbs. occasionally, and 10-25 lbs. frequently throughout the work-day;
>
> Heavy: Able to lift and carry no more than 100 lbs[.] occasionally, and up to 50 lbs[.] frequently throughout the work-day.

Dr. Garcia responded:

> Patient reports that he is currently retired. Based on the patient's current examination, he has the physical ability to return to work in the job held at the time of injury. The patient currently is rating his pain as 2 out of 10. However, if

> the patient has a flareup of pain symptoms, it may affect his ability to do his job. The patient reports that at times his pain can be as severe as 10 out of 10. With 10 out of 10 pain, he will not be able to perform his job.

Dr. Garcia stated Employee is able to perform all levels of work with pain as 2 out of 10, up to heavy work, but if he had a flareup of pain, "he may be limited to sedentary work during those flareups." (Garcia EME report, January 26, 2023).

29) On February 2, 2023, Employee spoke with Brittney Townsend, MA, at Virginia Mason Medical Center:

> Spoke with patient and he states that he is working for the State of Alaska and that this is a on the job injury. He's glad we got the referral from his doctor but he's waiting to hear back from his case manager to see if they want him to see someone in Alaska first or if it's okay to come to Seattle. He stated he would reach back out to us once he hears more. (Townsend note, February 2, 2023).

30) On February 23, 2024, the reemployment benefit administrator (RBA) designee suspended the eligibility determination due to lack of insufficient information. (Letter, February 23, 2024).

31) On March 3, 2023, Employer denied TTD and temporary partial disability (TPD) benefits after January 26, 2023, based upon Dr. Garcia's EME report. (Controversion Notice, March 3, 2023). It reported it paid weekly TTD benefits totaling $759.68 from September 6, 2022 through February 11, 2023. (Subsequent Report of Injury, March 3, 2023).

32) On April 19, 2023, Employee reported his left Achilles tendonitis was worsening. He experienced daily pain for the past two months and it worsened with walking. Employee retired and "thought it would get better without working." He tried physical therapy, which did not help, and a steroid shot, which made it worse. While Dr. Garcia thought surgery was a risk and it may not resolve the problem and he said Employee could do regular work, PA-C Cummings thought Employee needed to see another foot and ankle surgeon who has more experience with Achilles tendonitis treatment. (PA-C Cummings report, April 19, 2023).

33) On May 1, 2023, PA-C Cummings wrote a letter addressed "To Whom it May Concern:"

> My patient, Mr. Rene Castro, injured his left Achilles tendon on 8/18/2022. He has tried physical therapy and topical anti-inflammatory medication. While it is true that sometimes he has minimal pain and can perform regular activities of daily living and can take walks, the pain flares very regularly and during these times the pain is intense and he needs to stay inactive for a time. His pain is impacting his daily life the majority of the time. He was hoping retirement would

> be helpful, but it hasn't been. He would like to be able to exercise regularly for his general health, but cannot tolerate exercise most days. He is concerned about his future health if he's unable to stay active and concerned about being able to live on his own and being able to take care of his house for years to come. He has seen both orthopedic surgeons in Juneau. Both said surgery is the next option, but said the outcome of surgery is variable. I feel that this patient needs to see a foot and ankle specialist, out of town, who has more experience with this specific injury and can more precisely give information about a possible surgery, recovery, outcomes, etc. I do not feel like the workers' compensation case can be closed yet as patient is still having debilitating pain on a majority of days and daily life is affected and he still has medical options to pursue, but they cannot be pursued in Juneau with our limited orthopedic staff. . . . (Cummings letter, May 1, 2023).

34) On March 29, 2023, Employee sought an unfair or frivolous controvert finding, a penalty for late paid compensation, and attorney fees and costs; under the reason for filing the claim, he wrote, "Controversion Denial." (Claim for Workers' Compensation Benefits, March 29, 2023).

35) On April 19, 2023, Employer answered Employee's March 29, 2023 claim contending all benefits under the Act were paid timely and its controversion was based upon its good faith reliance on Dr. Garcia's medical opinion. (Employer's Answer, April 19, 2023).

36) On May 17, 2023, the parties attended a prehearing conference:

> Employee has retained Ms. Huna as an attorney; she stated she filed an entry of appearance this morning. Employee also filed a new WCC today for TTD, TPD, interest, unfair or frivolous controvert, and attorney's fees and costs. Employee stated all other benefits not claimed in the new WCC are withdrawn.

The only benefit claimed in the March 29, 2023 claim that was not claimed in the May 17, 2023 claim was "penalty for late paid compensation." Employee withdrew the claim for "penalty for late paid compensation." (Prehearing Conference Summary, May 17, 2023; Observation).

37) On May 17, 2023, Employee sought TTD and TPD benefits, an unfair or frivolous controvert finding, interest, and attorney fees and costs. Under reason he wrote, "case was controverted, reemployment benefits." (Claim for Workers' Compensation Benefits, May 17, 2023).

38) On June 7, 2023, Employer answered Employee's May 17, 2023 claim and denied his entitlement to TTD or TPD benefits after January 26, 2023, and contended Employee is not entitled to interest because it timely paid or controverted all benefits. (Employer's Answer, June 7, 2023).

39) On June 12, 2023, Employee requested an SIME due to a medical dispute between PA-C Cummings and Dr. Garcia regarding Employee's functional capacity, causation, treatment, medical stability, and PPI. (Petition and SIME form, June 12, 2023).

40) On July 3, 2024, Employer contended there was no medical dispute between PA-C Cummings and Dr. Garcia on causation, treatment, and medical stability sufficient to justify and SIME. It also contended an SIME was premature because Employee was referred to a specialist and the referral had not been completed. (Answer to Employee's Petition for an SIME, July 3, 2024).

41) On July 12, 2023, the parties agreed to schedule an oral September 12, 2023 hearing on Employee's June 12, 2023 SIME petition. (Prehearing Conference Summary, July 12, 2023).

42) On July 24, 2023, Employee filed copies of emails:

- On February 26, 2023, Employee emailed "Sam Ward," "Good day Mr Ward, just wondering about a paycheck, i dont receive anything this 2/24/23 can you please call me and let me know what steps need to be taken Thanks." (Email, February 26, 2023).
- On May 15, 2023, Employee emailed, "Sam Ward," "Hi Sam, i was talking to my doctor and i like to see an ankle specialist in Seattle." (Email, May 15, 2023).
- On May 24, 2023, Employee emailed "miramg," "Hi my name is Rene Castro my adjuster was Sam Ward, i just need the approve to visit a Ankle Specialist in Seattle thanks." (Email, May 24, 2023).
- On May 30, 2023, Employee emailed "miriamg," "Hi, I'm reaching out because i wonder if i can go back to PT for my injury on my left achilles, My therapist recommending me to back, will help with my problem. I look forward to hearing from you!" (Email, May 30, 2023).
- On June 13, 2023, Employee emailed "miriamg," "Hi Miram, i just have the appointment with Virgina Mason on the 26 of June just need you approve. let me know what is next thanks." (Email, June 13, 2023). (Employee's Notice of Intent to Rely, July 23, 2023).

43) On August 23, 2023, Employer filed an unsigned affidavit of Memoree Polleys stating:

> 1. I am employed as a Claims Director with Penser, North American, Inc. (Penser). The State of Alaska contracts with Penser to provide adjustment services in workers compensation claims. I have reviewed Penser's files in the above matter.

> 2. Sam Ward was the prior adjuster assigned to the above matter. His last day was April 24, 2023. He email address was deactivated on April 30, 2023.
> 3. Miriam Greene is an adjuster employed by Penser. She was assigned to the above matter on August 3, 2023. On August 3, 2023 she contacted Mr. Rene Castro to inquire about a referral he had received to a foot specialist. Mr. Castro indicated that he did not keep an earlier appointment with the specialist and was in the process of moving out of the state to San Diego. Mr. Castro was unable to provide contact information for his new residence and requested a call back on August 7, 2023. He indicated that in the next week or two he would like to get an appointment rescheduled with Virginia Mason Medical Center in Seattle. Ms. Greene told Mr. Castro to notify her as soon as the appointment was rescheduled and indicated Penser would set up travel, hotel, etc.
> 4. Penser has not yet received information regarding the rescheduled appointment date.
> 5. Mr. Castro's change of address was received on or about August 21, 2023.
> 6. The current adjustor assigned to this case is Stephany Brummer. (Unsigned Affidavit of Memoree Polleys).

44) On August 25, 2023, Employee requested cross-examination of Memoree Polleys, and the reason provided to request cross-examination was, "Hearsay. hearsay within hearsay. contradictory statements. irrelevance." (Request for Cross-Examination, August 25, 2023).

45) At hearing on September 12, 2023, the parties agreed to schedule an SIME with an orthopedic surgeon and Employer agreed to pay Employee $5,046 in attorney fees for obtaining the SIME. (Record).

46) On September 17, 2023, Employee emailed a Penser claims adjuster, "Hi Stefany I need some help to find a doctors referral if you can help me that would be great because I don't have a doctors here in California. Thanks." (Email, September 17, 2023).

47) On October 13, 2023, Huna emailed McComb, "Mr. Castro needs a referral to get further treatment in Seattle. The referral he previously had in May is no longer valid. His Juneau physician will no longer give him one and he cannot obtain a physician in San Diego without getting prior approval. On September 17, 2023, Mr. Castro sent an email to his adjuster to try to get prior approval. The adjuster has not responded." (Email, October 13, 2023).

48) On October 24, 2023, Huna asked McComb to respond. (Email, October 24, 2023).

49) On October 25, 2023, McComb responded to Huna, "Please recall that I have been out of the office. I believe the paperwork on the referral is in the process and the SIME records are going out today. They will need to be updated." (Email, October 25, 2023).

50) On October 31, 2023, Huna emailed McComb, "Could you please provide the paperwork for the referral? How would the State obtain a referral from a treating physician who Mr. Castro has not been to in months. I don't understand what you are referring to. Mr. Castro needs treatment. The State is preventing him from receiving it, and has been for some time." (Email, October 31, 2023).

51) On November 9, 2023, Employee sought medical costs and wrote:

> The employer has controverted medical benefits in fact as the employer is not responding to Mr. Castro on obtaining authorization or a referral. Mr. Castro had a referral from a treating physician in Juneau. [H]owever, the employer delayed assistance for such a long time that the referral is no longer accepted. Mr. Castro has since moved to California and cannot obtain medical treatment without preauthorization, which he cannot obtain.

Employee attached the September 17 and October 13, 24, 25 and 31, 2023 emails to his claim. He did not check the box for "an unfair or frivolous controversion." (Claim for Workers' Compensation Benefits, November 9, 2023).

52) On December 4, 2023, Employer answered Employee's November 9, 2023 claim contending it paid "all benefits due under the Act" and relied upon the August 23, 2023 Notice of Intent to Rely. (Employer's Answer to Workers' Compensation Claim Served November 13, 2023).

53) On December 14, 2023, the parties attended a prehearing conference:

> Employee stated he has not been able to reach the adjuster to obtain preauthorization and travel arrangements for medical care. Employer stated the assigned adjuster is now Kayla Pigg. Employer stated it will contact Ms. Pigg to notify of the issue, and will also email Employee Ms. Pigg's contact information. (Prehearing Conference Summary, December 14, 2023).

54) On January 8, 2024, Paavan Patel, DO, referred Employee to Virginia Mason Medical Center for "Achilles tendonitis." (Inbound Referral Team – Referral Handoff, January 8, 2024).

55) On February 7, 2024, Employee saw Mark Reeves, DPM, at Virginia Mason Medical Center, for an evaluation of his left foot. Dr. Reeves reviewed the MRI and diagnosed Achilles insertional tendinitis with a possible calcific component and probable left ankle retrocalcaneal bursitis. He recommended a diagnostic and therapeutic injection of local and steroid for the retrocalcaneal bursitis, which Employee refused. Dr. Reeves also discussed a primary treatment "being early on a night splint" and utilization of ultrasound, "ASTYM" therapy, or "Graston,"

then progressing to eccentrics. If that failed, then Dr. Reeves would agree with the doctor's finding that an intra-Achilles or insertional injection is not a viable or acceptable medical treatment. If all treatment failed, then Dr. Reeves said surgical intervention could be considered, but surgery required detachment of the Achilles, cleaning up the posterior heel, any spurring, any bursitis issues, and then reattaching the Achilles, which has a very long recovery period "where most people feel like it is a year before they are back at full activities." (Reeves record, February 7, 2024).

56) On April 23, 2024, Carol Frey, MD, examined Employee for an SIME and diagnosed a crush injury to the posterior aspect of his left heel on August 18, 2022, and Achilles tendinosis with striations present on the MRI in November 2022, which also showed:

> . . . a fracture that was nondisplaced from the posterior cortex area and exited more laterally. It does not appear to extend into articular surfaces but does extend to the area of the insertional site of the Achilles tendon. He has associated retrocalcaneal bursitis, edema, and non-displaced fracture impact type to the posterior aspect of the calcaneus and enthesopathy.

She opined the work injury caused the injury to Employee's posterior heel and is the substantial cause of his disability and need for medical treatment. Dr. Frey stated Employee's disability continued and necessitates working in a sedentary position as standing or walking more than two hours at a time will aggravate the injury. She believed Employee could return to work without disability with the proper treatment, including biomechanical orthotic devises with a well cushioned heel and 5/16-inch heel lift to decrease the excursion of the Achilles tendon, possible platelet-rich plasma (PRP) to the Achilles tendon, and debridement of the thickened Achilles tendon and removal of the posterior prominence and irregularity of the posterior aspect of the calcaneus. Dr. Frey stated it generally takes six months to fully recover from the surgery and 24 sessions of physical therapy with eccentric Achilles stretch, modalities, and deep soft tissue work and improvement in balance. Employee was not medically stable, and Dr. Frey predicted he would reach medical stability six months after the surgery. Should Employee not proceed with surgery, he should be treated with biomechanical orthotic devices, a stretching program, and anti-inflammatories, and a PPI rating could be performed. Dr. Frey reviewed Employee's job description for Cashier with the AMHS which required 12 hours per day for one day's work for seven consecutive days; standing, walking and sitting at sea 33 percent of the time each and standing 30 percent, walking 70 percent and sitting zero percent of the time while at the

shipyard; lifting 11-20 pounds one-third of the day, 21-25 pounds one-third of the day and 26-50 pounds one-third of the day at sea and in the shipyard; climbing one-third to two-thirds of the day at sea and at the shipyard; and crouching one-third of the day at sea and at the shipyard. She restricted Employee to no walking or standing for more than four hours during the workday in total, no lifting more than 20 pounds at a time, no squatting, and no climbing more than one hour per day with a wide step and handrail. She recommended a new MRI, as it had been a year and a half since the last MRI, to see how the bone healed and to evaluate the Achilles tendon injury. (Frey SIME report, April 23, 2024).

57) On June 25, 2024, Employee requested a hearing on his March 29, May 27, and November 9, 2023 claims. (Affidavit of Readiness for Hearing, June 25, 2024).

58) On July 16, 2024, the parties attended a prehearing conference:

> This prehearing conference was scheduled because Employee filed an ARH requesting a hearing on three claims. Employee stated he wanted a hearing on at least causation scheduled. Employer contended the SIME was not complete as an MRI recommended by the SIME physician has not been completed and that a hearing should not yet be scheduled. It expected the MRI appointment to be scheduled within the next day or two and the claims adjuster would arrange and pay for travel. (Prehearing Conference Summary, July 16, 2024).

59) On August 15, 2024, the parties attended a prehearing conference:

> This prehearing conference was scheduled to discuss the status of the case and Employee's June 25, 2024 ARH. The SIME physician requested a new MRI; the MRI is scheduled for August 23, 2024. Employer stated it would pay for the MRI when it receives the bill and the medical records. The parties both described difficulty scheduling the MRI as Mr. Castro lives in California and his physician will not accept workers' compensation. Employee is an Alaska Retiree and used his Retiree Aetna plan for scheduling the MRI. Employer requested Employee file the medical records regarding the referral for the MRI and that Employee provide a copy of the MRI disc; Employee agreed to do so. (Prehearing Conference Summary, August 15, 2024).

60) On August 23, 2024, a left ankle MRI showed a soft tissue contusion at the posterior aspect of the ankle, no fracture or Achilles tendon injury, a small longitudinal split tear of the peroneus brevis below the malleolus, and a small ganglion cyst formation associated with the sinus Tarsi. (MRI report, August 23, 2024).

61) On September 19, 2024, the parties attended a prehearing conference:

> This prehearing conference was scheduled to discuss the status of the case and Employee's June 25, 2024 ARH. Mr. Castro underwent the MRI and Ms. Huna received a disc with the MRI yesterday; Mr. Castro was unable to get a report from the medical provider. Ms. Huna will make copies and send them to the Board and Employer. Employer is experiencing problems with the billing for the MRI as the medical provider will not bill/accept workers' compensation; it will request the medical report from the provider. (Prehearing Conference Summary, September 19, 2924).

62) On October 3, 2024, Employee filed a compact disc with the imaging from the August 23, 2024 MRI, and an SIME affidavit. (Employee's SIME affidavit, October 3, 2024).

63) On October 29, 2024, Employee filed the August 23, 2024 MRI report. (Medical Summary, October 29, 2024).

64) On October 30, 2024, Employee filed an SIME affidavit with the August 23, 2024 MRI report. (Employee's SIME Affidavit, October 30, 2024).

65) On November 12, 2024, Dr. Frey issued an addendum after reviewing the August 23, 2024 left ankle MRI:

> The patient sustained a posterior blow to the left heel on 8/18/2022. This is a substantial cause of the injury. The patient had an impact injury to the posterior aspect of the left calcaneus, has an enthesopathy, insertional Achilles tendinosis that shows up two years later on an MRI, which means that it is chronic and continuous. It is right at the insertional site of the Achilles tendon. He has enthesopathies in this area and also an associated retrocalcaneal bursitis.
>
> A substantial cause of the patient's current medical condition is the injury of 8/18/2022. (Frey addendum SIME report, November 12, 2024).

66) On January 2, 2025, the parties agreed to schedule a hearing on Employee's claims dated March 29, May 17, and November 9, 2023, and on the issues identified for hearing: "TTD, TPD and PPI benefits, medical and transportation costs, reemployment benefits, unfair or frivolous controversion, interest, and attorney fees and costs." The Board designee directed the parties to file and serve witness lists and hearing briefs by April 1, 2025, and evidence by March 19, 2025. (Prehearing Conference Summary, January 2, 2025).

67) On January 8, 2025, the RBA designee stated the eligibility determination would remain suspended due to the lack of sufficient information to make a decision. (Letter, January 8, 2025).

68) On February 10, 2025, Employer filed medical records from Dr. Hightower. (Medical Summary, February 10, 2025).

69) On March 21, 2025, Employee filed a bill dated September 12, 2024, for the August 23, 2024 MRI at San Diego Imaging Chula Vista for $1,150 in charges and showing Aetna paid $420; there was a remaining balance of $625 for Employee's coinsurance amount, with a balance of $150. He also filed a bill dated September 3, 2025, from Sharp for MRI charges for a Magnetic Resonance Technology (MRT) charge totaling $4,380 and showing Aetna paid $3,728.89 and Employee's responsibility was $651.11. Employee also filled a list of medical travel mileage. (Employee's Documentary Evidence, March 21, 2025).

70) On March 24, 2025, Employee filed his 2024 W-2 which showed his taxable income was $10,037.50. (Employee's Documentary Evidence - Errata, March 24, 2024).

71) On April 1, 2025, Employee withdrew reemployment benefits as an issue as "he is currently going through the process and the employer is not obstructing his efforts." (Employee Notice of Withdrawal of Issue, April 1, 2025).

72) On April 1, 2025, Employee filed a hearing brief seeking TTD benefits from the March 3, 2023 controversion until he reached medical stability after surgery, medical costs, an unfair and frivolous controversion, and attorney fees and costs. He contended he has been disabled since his work injury, relying on Dr. Frey's and PA-C Cummings' opinions stating he cannot work, and Dr. Hightower's work restrictions. Employee contended Dr. Garcia also stated he could not work when he had flare ups and Employer did not offer light-duty work following the restrictions Dr. Garcia provided during the flare ups. He contended a cost-of-living adjustment (COLA) should be applied to any TTD benefits awarded. Employee contended he is entitled to a prospective determination of compensability for the recommended surgery. He contended ongoing problems with adjusters delayed his treatment at Virginia Mason until February 7, 2024. Employee contended Employer failed to pay for the August 2024 MRI, his private insurance paid for the bill, and he was billed for a portion of the cost. He contended Employer's failure to pay for the SIME MRI bills demonstrate a prospective determination is necessary. Employee contended Dr. Garcia's opinion was not sufficient to reasonably counter the factual information presented by Employee, and a penalty is required by AS 23.30.155 because he stated Employee could not work when his pain level was a 10 out of 10. He contended Employer failed to investigate the frequency, duration and intensity of his flare ups and it controverted in bad faith

in the March 3, 2023 controversion. Employee contended he is entitled to interest on any TTD benefits awarded. He contended he is entitled to attorney fees and costs if he is successful at hearing as Employer controverted his claim. Employee's hearing brief used three paragraphs on pages four to five to summarize facts alleging Employer controverted-in-fact medical treatment at Virginia Mason and four lines on page seven to summarize facts alleging Employer's controverted-in-fact the SIME MRI bills. His brief totaled 13 pages and did not include an analysis of whether Employer controverted-in-fact; it included only an analysis of whether Employer filed an unfair or frivolous controversion based on Employer's March 3, 2023 controversion. (Employee's Hearing Brief, April 2, 2025).

73) On April 1, 2025, Employer contended Employee had preexisting left Achilles tendonitis. It contended Employee voluntarily removed himself from the job market and is not entitled to TTD benefits. Employer contended it is not aware of "any unpaid medical expenses submitted under the Act." It contended Employee has not obtained a PPI rating and it rebutted the presumption with Dr. Garcia's and Frey's opinions. (Employer's Hearing Brief and Witness List, April 1, 2025).

74) On April 3, 2025, Huna filed an affidavit of attorney fees costs stating she has been licensed to practice law in Alaska since 1994; she has been representing injured workers before the Board since 2017; she had been a Hearing Officer for approximately four years; she represented the State of Alaska in workers' compensation cases; she practiced in employment, labor, and torts law in Alaska; and was a hearing examiner for the State of Alaska for a number of years. She affied she spent $1,429.75 in costs and billed 39.0 hours total - 4.9 hours were spent from May 3 to May 24, 2023 and were billed at $415 per hour (4.9 x $415 = $2,033.50); 4.4 hours were spent from June 2 to October 31, 2023 and were billed $435 per hour (4.4 x $435 = $1,914); and 30.6 hours were spent from November 1, 2023 to April l3, 2025 and were billed at $450 per hour (30.6 x $450 = $13,770), totaling $17,77.50 in fees ($2,033.50 + $1,914 + $13,770 = $17,717.50). She attached an invoice which included the following entries:

Date	Notes	Quantity	Rate	Total
December 22, 2023	review prehearing summary and reemployment letter	0.2	$450	$90
January 30, 2024	review reemployment docs	0.5	$450	$225
February 26, 2024	review RBA letter	0.1	$450	$45
March 11, 2025	talked to client re: travel, reviewed med	0.5	$450	$225

	sum			
March 19, 2025	talked to client re: evidence, began documentary evidence	0.5	$450	$225

(Employee's Affidavit of Attorney Fees and Litigation Costs, April 3, 2025).

75) On April 7, 2025, Employer filed a supplemental witness list for Memoree Polleys. (Supplemental Witness List, April 7, 2025).

76) The parties agreed to withdraw reemployment, PPI benefits and transportation costs as issues to be decided at hearing. (Record).

77) The parties agreed Polleys may be called as a rebuttal witness. (Record).

78) At hearing, Employee contended he cannot work during flareups. He contended he was unable to earn the wages he earned at the time he was injured due to the work injury. Employee contended his Social Security retirement benefits and State of Alaska retirement benefits are not enough to live on. He contended he intended to retire from the State of Alaska and move to San Diego to live near his family and to work a new job. Employee contended he cannot perform the work duties of his job at the time of injury or any other job he held because he is limited to sedentary work and those jobs require heavier workloads. (Record).

79) At hearing, Employee further contended Employer controverted medical benefits in fact when it failed to respond to his calls and emails for assistance arranging medical treatment at Virginia Mason and it took almost a year to obtain medical treatment at Virgina Mason. He contended failing to pay a medical bill or paying a medical bill late, such as the SIME MRI bills, without a controversion notice, is a controversion-in-fact. (Record).

80) At hearing, Employer contended there is no current work restriction and Dr. Garcia clearly stated Employee can return to work. It contended Employee voluntarily removed himself from the labor market. Employer contended it is entitled to a Social Security offset and an offset for the State of Alaska retirement if Employee is awarded TTD benefits. It contended Employee failed to actively look for work. Employer contended its March 3, 2023 controversion was based upon substantial evidence as it was based upon Dr. Garcia's opinion. It contended there is no authority to support an order for medical benefits when it has not controverted medical benefits and there are no unpaid medical bills. Employer contended that the medical providers for the SIME MRI refused to provide bills and a W-9, and the issue was not properly before the panel as it was not set for issue and some of the bills were only just recently provided. It contended

Employee's attorney fees should be reduced for time spent on reemployment benefits, PPI benefits, and transportation costs as those issues "did not come to fruition." Employer contended it wasted a great deal of resources to address those issues. It contended there is no statutory authority allowing the panel to order an employer to pay medical bills that have not been submitted. Employer contended there is no evidence showing Employee did not get a response to his emails. It contended it cannot direct Employee's medical treatment. (Record).

81) At hearing, Employer contended a controversion-in-fact of the Virginia Mason medical treatment, and the August 2024 MRI bills, were not set as issues for hearing. It contended it was not provided proper notice of the controversion-in-fact issues. (Record).

82) At hearing, Employer contended the SIME MRI bills were not set as a hearing issue. (Record).

83) At hearing, Employee contended the SIME MRI bill were set as an issue for hearing because it is included in "medical costs" set for hearing. (Record).

84) At hearing, Employee contended his November 9, 2023 claim raised an unfair or frivolous controversion-in-fact of medical treatment and Employer was provided notice. (Record).

85) On April 8, 2025, Employee testified he and his almost 65 years old. He graduated from high school in Tijuana, Mexico and went to college for two years in Mexico. Then, Employee worked for his dad in construction. All of the jobs he has held have been physical jobs requiring walking and standing; he has never held an office job. Employee worked for AMHS for 10 years as a steward and before that he worked for the Juneau School District clearing. He also worked as a Alaska Airlines ramp agent unloading planes and at the warehouse and at two restaurants as a waiter before he worked for the school district. When Employee was injured, he was working as a cashier on the Kennicott, restocking and cleaning in the restaurant, serving customers, and cleaning rooms and restocking laundry at ports. He worked from 10 am to 10 pm with a break for lunch when the restaurant closed for one hour. Employee worked for 14 days straight on the ship. There was no flexibility for light duty work. When he was injured, he was asked to stay to finish the 14-day schedule even though employees are supposed to leave the ship at the next port when they are injured. It took six days to return to Juneau. Employee did not think he can work during flareups, because the pain is 10 out of 10 when it flares. The flares occur every two to three weeks, when he wakes up with pain and the pain lasts four to five days. Employee wanted the surgery, but Dr. Hightower said he would not perform the surgery due to the risk of infection.

None of the specialists told him not to work but they all told him the same work restrictions. Employee did not look for work because his foot is a problem, no one would hire him for work he has done in the past with his flareups. He never got a response from the claim adjusters after he emailed them and called them and left messages to set up the referral appointment at Virginia Mason. Employee received a call from an adjuster when he was moving to San Diego in August 2023; he asked her to call back five days later when he arrived in San Diego, but he never got a return call. No adjuster ever asked about his flareups frequency, duration, or debilitation. Employee wants the surgery recommended by Drs. Reeves and Frey; he wants to fix his ankle and foot and to get back to work. Aetna paid for the August 2024 MRI costs; the medical office hold him it did not take workers' compensation cases but would take his private insurance, who could bill workers' compensation. Employee gave the medical office the Aetna information because there was no other choice. He did not look for any other medical provider for the MRI; he needed a referral for the MRI and Dr. Frey would not provide it. Employee went to his regular physician, Dr. Patel, to obtain a referral for the Virigina Mason medical treatment. He did not want to take oral medication because he saw his friends deal with addiction issues. Employee did not want the injection recommended by Dr. Reeves because Drs. Hightower and Garcia said it would make his heel worse. Dr. Reeves became upset by his refusal of the injection and threw the syringe he prepared during his appointment and walked out of the exam room. Employee received around $400 per month from Social Security beginning in 2024; Medicare benefits began this month. He bought his house in Juneau in 2008 and sold it in 2023, and he uses the money to live. Employee retired from the State of Alaska in January 2023 and received his first check in April 2023; he made about $10,000 in income in 2024 from his retirement. He intended to work after he retired from the State of Alaska, but he is not working due to his work injury. Employee's dream was to move to San Diego, where his three sisters, brother, and nieces and nephews live, find another job, and be home every night. He moved in with one of his sisters in San Diego, but she got sick and moved into a medical facility. Employee moved to Tijuana in January 2024 because it is cheaper to live there and his retirement benefits are not enough to allow him to afford to live in San Diego. He did not receive a letter from Penser informing him his adjuster changed; he found out after the fact. (Employee).

86) At hearing, Employee objected to Polleys referring to the claims adjuster file to refresh her memory while testifying. He objected to Polleys testifying about information in the claims

adjuster file which she has no personal knowledge of. Employee objected to the testimony Polleys provided regarding communications with medical providers by Penser claims adjusters and administrators as hearsay as she did not communicate with the providers herself but reviewed the claims adjuster file that contained notes from other claims adjuster about any communications, which was not provided to Employee. (Employee).

87) At hearing, Employer contended it was entitled to raise its statutory defenses to the August 2024 MRI bill because Employee contended the bills were not paid and are a part of his claim for medical costs and the basis for a controversion-in-fact in his hearing brief. (Employer).

88) A copy of the claims adjusters' file was not filed. (Agency file).

89) On April 8, 2025, Polleys testified she is the claims director and point of contact for State of Alaska and Penser. Employee's compensation rate was $759.68 per week and Employer last paid TTD benefits through February 1, 2023. She listened to Employee testify and took notes. If Employee retired in December 2022, then he would have been overpaid TTD benefits as Penser was unaware he retired. Generally, medical benefits are paid after receiving the Health Care Financing Administration (HCFA), a form that all providers know how to use for billing, and chart notes correlating to the billing. The HCFA has the date of service, the physician, the address of where to send payments and the diagnostic codes and units. The W-9 is a form which provides the medical providers taxpayer ID code, which is required to "get the payee into the state system." Penser has not controverted medical treatment; claims adjuster tells medical providers they cannot pay until they comply with the Internal Revenue Service requirements and supply the W-9 form. Penser has two letters to request the billing information from a medical provider including an open and billable letter, as it provides the statutory 180-day language to submit billing. When Employee was injured, the policy did not include sending the open and billable letter. The second letter was the W-9 letter, which was sent to providers in California to Gateway Imaging, and to date Penser has not received any records, W-9, or bills from the medical providers. Polleys was aware Viginia Mason, Gateway Imaging, and San Diego Imaging were medical providers in this case. There have been five claim adjusters assigned to Employee's claim. Sam Ward was an adjuster, but he is no longer working at Penser; he stopped working there in April 2023. Polleys does not have access to adjuster emails after they leave employment with Penser. Adjusters are not allowed to preauthorize or pre-deny medical treatment, they are allowed to say whether medical treatment is open and billable and to inform

of an upcoming EME and to explain the 30-day rule to pay or deny medical costs once the records and bills are received. Phone calls were made to the medical providers in this case and messages were left and contact was made with a person at Gateway Imaging by phone. Polleys overheard telephone calls, conducted trainings about how staff are supposed to answer things, performed audits, and briefly reviewed the claims adjuster file. She sees the claim adjuster notes about what the adjusters "have said." Polleys had conversations with the adjusters and the administrative assistants about this case. Per the contract with the State of Alaska, Penser has four days to get claims reassigned. Once the claims are reassigned after an adjuster is let go or quits, the new adjuster is supposed to make a phone call to give the new information. The administrative assistants are also supposed to send out claim reassignment letters after a new adjuster is assigned. (Polleys).

90) On April 11, 2025, Huna supplemented her fee and costs affidavit, stating she spent an additional $255 in costs, including $60 per diem for Employee, $60 per diem for herself, and 21 hours from April 6 to April 8, 2025, and billed at $450 per hour, totaling an additional $9,450 in fees. The total fees Huna sought are $27,167.50 and costs are $1,684.75. (Employee's Affidavit of Attorney Fees and Litigation Costs Addendum for Hearing Fees and Costs, April 11, 2025).

91) The first document Employee filed raising the August 2024 MRI costs as an issue for hearing and the first document he filed alleging Employer unfairly or frivolously controverted in fact the August 2024 MRI costs was Employee's hearing brief. (Agency file).

92) The first document Employee filed alleging Employer unfairly or frivolously controverted in fact the Virigina Mason medical treatment was Employee's hearing brief. (Agency file).

93) None of the prehearing conference summaries listed an unfair or frivolous controversion-in-fact finding as something requested in Employee's November 9, 2023 claim; they only listed "medical costs." (Prehearing Conference Summaries, December 14, 2023, July 16, August 15, September 19, October 22 and October 31, 2024, and January 2, 2025).

94) On April 25, 2025, Employer objected to any submitted attorney fees and costs on issues on which Employee does not prevail, citing *Childs*. It objected to any and all charges "administrative in nature"; specifically it objected to 0.5 hour billed to book airline travel, contending coverage for the task is inherent in the attorney's hourly rate charges. Employer objected to per diem charged for Huna and Employee, contending there is no provision entitling

an attorney to per diem. (Employer's Partial Objection to Employee's Attorney Fees, April 25, 2025).

95) On May 6, 2025, Employee contended there is no legal precedent distinguishing an attorney's time as being an "administrative" task and not billable. He cited *Rusch* to contend that the value of an attorney's time is clear when *Rusch* reversed the reduction in time to a paralegal rate for work done by an attorney. Employee contended a licensed attorney doing specific work for a case, such as arranging travel to attend a hearing in person, should be able to bill for the time expended doing that work. He withdrew per diem expenses at this time, stating the time needed for legal research and to write the arguments to dispute Employer's contention is not worth the expense. (Employee's Response to Employer's Attorney Fees Objections, May 6, 2025).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . employers. . . .
> . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The Board may base its decision not only on direct testimony 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 23.30.010. Coverage**. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment . . . if the disability . . . or . . . need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or . . . need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need

> for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .
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> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
> . . . .
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. . . .
> . . . .
>
> **AS 23.30.110. Procedure on claims.** (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability . . . and the board may hear and determine all questions in respect to the claim.

The language "all questions" in AS 23.30.110(a) is limited to questions raised by the parties or by the agency upon notice duly given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981).

> **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;

Under AS 23.30.120(a), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286 (Alaska 1991). The Alaska Supreme Court (Court) held the presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce "some" "minimal" relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991). To rebut the presumption, an employer must present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment or (2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of

credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051 (Alaska 1994).

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379 (Alaska 1991). At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The Board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). If the Board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, it may rely on one opinion and not the other. *DeRosario v. Chenega Lodging*, 297 P.3d 139, 147 (Alaska 2013). The Board alone is charged with determining the weight it will give to medical reports. *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. 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. . . .

Summers v. Korobkin Construction, 814 P.2d 1369, 1372 (Alaska 1991) stated, "Moreover, we believe that an injured worker who has been receiving medical treatment should have the right to a prospective determination of compensability." A Board order determining compensability will help an injured worker decide whether to pursue medical treatment or procedures.

> **AS 23.30.155. Payment of compensation.** . . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division, in a format prescribed by the director, a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it 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 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 employer'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 specified in AS 09.30.070(a) that is in effect on the date the compensation is due.

Employers must either pay or controvert benefits without an award but may controvert any time after payments are made. AS 23.30.155(a). A controversion notice must, however, be filed and it must be filed in good faith to protect an employer from a penalty for nonpayment of benefits. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *Id*. at 358. The

employer must possess sufficient evidence in support of the controversion that, if the employee does not introduce evidence in opposition to the controversion, the Board would find the employee not entitled to benefits. *Id*. The controversion and the evidence on which it is based must be examined in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion. *State of Alaska v. Ford*, AWCAC Dec. No. 133 at 21 (April 9, 2010). When an employer has insufficient evidence that an employee's disability is not work-related, the controversion was in bad faith, invalid and a penalty is imposed. *Harp* at 359.

An employer's duty to pay or controvert medical benefits does not arise only when Employee incurs actual medical bills, because an employee may not be able to afford the prescribed treatment on his own. *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014). The Court has taken a broad reading of the term "controverted," and has held a "controversion in fact" can occur when an employer did not file a formal controversion. *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978). A controversion-in-fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation, *Underwater Construction Inc., v. Shirley*, 884 P.2d 156, 159 (Alaska 1994), or when an employer consistently denies and litigates its obligation to pay an increase in benefits. *Wien Air Alaska v. Arant*, 592 P.2d 352 (Alaska 1979). A controversion-in-fact also occurs when an employer does not file a controversion notice but denies liability for benefits in its answer to a claim. *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007). To determine whether there has been a controversion-in-fact, an employer's answer to a claim for benefits and its actions after the claim is filed must be examined. *Id*. at 152. Resistance before the filing of a claim cannot serve as a basis for a controversion-in-fact. *Id*. For there to be a controversion-in-fact, an employer must take some action in opposition to a claim after it is filed.

A workers' compensation award accrues legal interest from the date it should have been paid. *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984).

> **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 (March 17, 2010), explained to obtain TTD benefits, assuming the presumption has been rebutted, an injured worker must establish: (1) she is disabled as defined by the Act; (2) her disability is total; (3) her disability is temporary; and (4) she has not reached the date of medical stability as defined in the Act. *Id*. at 13-14.

"The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment." *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974). An award of compensation must be supported by a finding the claimant suffered a decrease in earning capacity due to a work-connected injury or illness. *Id*. *Vetter* further held where a claimant, through voluntary conduct unconnected with his or her injury, leaves the labor market, there is no compensable disability. Expanding on its ruling in *Vetter*, however, the Court, in *Cortay v. Silver Bay Logging*, 787 P.2d 103, 106 (Alaska 1990) noted the definition of "disability" in AS 23.30.395 says nothing about an employee's reasons for leaving work. The issue is whether the claimant is able to work despite his injury, not why he is no longer working.

Interpreting both *Vetter* and *Cortay*, the Alaska Workers' Compensation Appeals Commission, in *Strong v. Chugach Electric Assoc. Inc.*, AWCAC Dec. No. 128 (February 12, 2010), held where an employee's unemployment is because of his work injury, and his earning capacity is impaired, he is entitled to compensation. *Strong* set the legal standard as "unemployed but willing to work and making reasonable efforts to return to work" when deciding if an unemployed injured worker's loss of earnings is due to a compensable disability or an otherwise non-compensable voluntary withdrawal from the work force. *Id*. at 20.

The Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012) said, "'Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary.' We therefore examine whether the employer rebutted the presumption." *Id*. at 573.

An employer may rebut the continuing presumption of compensability and disability, and gain a "counter-presumption," by producing substantial evidence that the date of medical stability has been reached. *Lowe's* at 8. Once an employer produces substantial evidence to overcome the presumption in favor of TTD, the employee must prove all elements of the TTD 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 he has not reached medical stability. *Id*. at 9. One way an Employee rebuts the counter-presumption with clear and convincing evidence is by asking his treating physician to offer an opinion on "whether or not further objectively measurable improvement is expected." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1246 (Alaska 1992). The 45-day provision in AS 23.30.395(28) merely signals "when that proof is necessary." *Id*.

When an employee's medical providers release him to light-duty work, and his employer provides it, the employee is not totally disabled. *Humphries v. Lowe's HIW, Inc.*, AWCAC Dec. No. 179 (March 28, 2013), *aff'd* 337 P.3d 1174 (Alaska 2014).

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

In *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), the Court held "attorney's fees in workers' compensation cases should be fully compensatory and reasonable," so injured workers have "competent counsel available to them." But when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed.

URESCO Construction Materials, Inc. v. Porteleki, AWCAC Decision No. 152 (May 11, 2011) stated in respect to an attorney fee award at the board level:

> We review the board's decision to not deduct for the time spent on the unsuccessful unfair or frivolous controversion claim for an abuse of discretion. "The board is in a far better position than the commission to evaluate . . . whether a party successfully prosecuted a claim, and any other consideration bearing on the attorney fee issue" (footnote omitted). Here, the board acted within its discretion in evaluating the fee award and adequately explained its reasoning for deciding the time spent on the unsuccessful controversion claim was *de minimis*, and substantial evidence supports the *de minimis* finding. Thus, on remand, if the board decides in favor of Porteleki on the medical benefits claim, the board need not reduce the fee award for the time spent litigating the unsuccessful unfair controversion claim. *Id*. at 8.

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

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

> **AS 23.30.395. Definitions.** In this chapter,
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
>
> **8 AAC 45.065. Prehearings.** (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on
>
> (1) identifying and simplifying the issues;
> . . . .
> (11) the closing date for discovery;
> . . . .
>
> (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.
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> **8 AAC 45.070. Hearings.** . . . .
>
> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

Unless modified, or the case of unusual and extending circumstances, the prehearing conference summary governs the issues and the course of the hearing. The Board's authority to hear and determine questions in respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties." *Simon* at 256.

> **8 AAC 45.090. Additional examination.** . . . .
>
> (b) Except as provided in (g) of this section, regardless of the date of an employee's injury, the board will require the employer to pay for the cost of an examination under AS 23.30.095(k), AS 23.30.110(g), or this section.

Roberge v. ASRC Construction Holding Company, AWCAC Dec. No. 269 (September 24, 2019) held a neurological SIME had not been completed and a final report had not been provided by

the SIME physician when the SIME physician included numerous references to the need for an electromyography and a nerve conduction study in his report to clarify the employee's diagnosis as his opinions were based upon an "incomplete data base."

> **8 AAC 45.120. Evidence.** . . . .
>
> (f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. . . .
> . . . .
>
> (i) If a hearing is scheduled on less than 20 days' notice or if a document is received by the board less than 20 days before hearing, the board will rely upon that document only if the parties expressly waive the right to cross-examination or if the board determines the document is admissible under a hearsay exception of the Alaska Rules of Evidence.
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> **Evidence Rule 801. Definitions**. The following definitions apply under this article:
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> (a) **Statement.** A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> (b) **Declarant.** A declarant is a person who makes a statement.
>
> (c) **Hearsay.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> **Evidence Rule 803. Hearsay Exceptions -- Availability of Declarant Immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
> . . . .

> (5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
>
> (6) **Business Records.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

ANALYSIS

1) Is Employee entitled to additional TTD benefits?

Employer controverted TTD benefits on March 3, 2023, based on Dr. Garcia's EME report; the subsequent report of injury stated Employer paid TTD benefits from September 6, 2022 through February 11, 2023, and Polleys testified Employer last paid TTD benefits through February 1, 2023. Employee claims TTD benefits from the date Employer controverted and stopped paying benefits and continuing until he reaches medical stability after surgery. Employer also contended Employee voluntarily removed himself from the labor market. The presumption of compensability applies to Employee's claim for TTD benefits. AS 23.30.120(a); *Meek*.

Employee must establish a preliminary link between his temporary and total disability and his employment. *McGahuey*. "Disability" is defined as the incapacity to earn the wages which the employee was receiving at the time of injury in the same or other employment because of the work injury. AS 23.30.395(16). The primary consideration of disability is loss of earning capacity related to the work-related disability and the issue is whether the employee is able to work despite his injury. *Vetter*; *Cortay*.

Without weighing credibility, Employee raised the presumption that he is temporarily and totaled disabled with Dr. Hightower's December 15, 2022 work restriction to sedentary work, including no lifting, carrying, pushing, pulling, or prolonged standing and walking, and Dr. Frey's April 23, 2024 SIME report which opined the work injury is the substantial cause of Employee's disability and restricted Employee from walking or standing for more than four hours during the workday in total, lifting more than 20 pounds, squatting, and climbing more than one hour per day with a wide step and handrail due. *Burgess*; *Veco*; *Resler*. He also raised the presumption he is temporarily and totally disabled with his testimony that he cannot work during flareups, which occur every two to three weeks, no one would hire him due to his work injury flareups for work he has performed in the past, and he intended to retire from the State of Alaska and continue working for another employer in San Diego. *Id*.

Once an employee establishes he is disabled, the law presumes his disability continues until Employer produces substantial evidence to the contrary. *Runstrom*. Employer must rebut the presumption by producing substantial evidence that the employee reached medical stability, that something other than work was the substantial cause of the disability, that work could not have caused the disability, or that Employee was capable of earning the wages which he was receiving at the time of injury in the same or any other employment. AS 23.30.010(a); AS 23.30.395(16); *Lowe's*; *Huit*. Dr. Garcia's January 26, 2023 EME report opined Employee had not reached medical stability. Employer did not raise the counter-presumption of medical stability. *Lowe's*.

Dr. Garcia did not state that something other than work was the substantial cause of Employee's disability or that work could not have caused his disability. AS 23.30.010(a); *Huit*. Dr. Garcia opined Employee had the physical ability to return to work in the job held at the time of injury with his current pain rating of two out of 10 pain, but not when his pain flares with 10 out of 10 pain and limited Employee to sedentary work during the flareups. Dr. Garcia clearly stated Employee had a disability because he said Employee's cannot perform his job's full duties during flareups caused by the work injury. It is undisputed that Employer did not offer a lighter duty job to accommodate restrictions for flareups. Therefore, Employer failed to rebut the presumption because it failed to provide substantial evidence that Employee was capable of

earning the wages which he was receiving at the time of injury in the same or any other employment. *Williams*.

Furthermore, had Employer rebutted the presumption with Dr. Garcia's opinion, Employee has proven he is not capable of earning the wages he was receiving at the time of injury in the same or any other employment with his testimony and Dr. Frey's opinion. *Saxton*; *Koons*. Dr. Frey limited Employee to sedentary work and restricted him to no walking or standing for more than four hours during the workday in total, no lifting more than 20 pounds, no squatting, and no climbing more than one hour per day with a wide step and handrail. Employee credibly testified about his work history and all jobs he held are physical jobs that required walking and standing. AS 23.30.122; *CSK Auto*. Dr. Frey reviewed Employee's job description which provided the required percentage of the workday his position at the time of injury required him to walk, stand, crouch, and lift and she considered whether Employee would be capable of performing the required activities.

Employee's testimony is consistent with the position description provided to Dr. Frey. *Id*. There is no evidence Dr. Garcia reviewed the job description for the job Employee held at the time of injury. Dr. Garcia limited Employee to sedentary work in response to Employer's question which defined sedentary work as, "Able to lift and carry no more than 10 lbs. occasionally throughout a work-day" and he did not address Employee's ability to walk, stand, or crouch as his job at the time of injury required. Dr. Garcia's lifting limitation of 10 pounds was even stricter than Dr. Frey's 20-pound restriction. Due to Dr. Garcia's failure to consider Employee's ability to walk, stand or crouch as his job at the time of injury required, and his even stricter lifting restriction, his opinion on Employee's ability to work is job at the time of injury is given less weight than Dr. Frey's opinion. *DeRosario*; *Smith*. Employee has proven with substantial evidence that he is not capable of earning the wages which he was receiving at the time of injury in the same or any other employment.

Employer also failed to provide substantial evidence showing Employee voluntarily removed himself from the labor market when he retired and began receiving retirement benefits from the State of Alaska and Social Security. *Vetter*; *Saxton*; *Koons*. It relied upon medical records from

PA-C Cummings stating Employee intended to retire at the end of 2022, or in May 2023, to prove Employee intended to leave the labor market. The issue is whether Employee is able to work despite his injury, not why he is no longer working. *Cortay*.

When an employee is unemployed because of a work injury, is willing to work, is making reasonable efforts to return to work, and his earning capacity is impaired, he is entitled to compensation. *Strong*. Based upon Drs. Hightower's, Garcia's, and Frey's opinions, Employee is not able to perform his job duties at the time of injury due to the work injury or any other job he has held. Employee credibility testified he intended to retire from the State of Alaska at some point and move to be closer to family in San Diego, where the cost of living is higher, and to continue to work to support himself so he can afford to live there. AS 23.30.122; *CSK Auto*. He moved to Tijuana, Mexico, which has a lower cost of living, to be able to afford to live after the sister he was living with in San Diego moved into a medical facility. *Id*. Employer did not provide Employee with a lighter duty position which would conform to the work restrictions caused by flareups of his work injury. *Humphries*. He is currently not able to work, is unemployed because of the work injury, and is clearly willing to work. *Cortay*; *Strong*; *Rogers & Babler*. Based upon his testimony, Employee's earning capacity has been impaired due to the work injury. Employee is making reasonable efforts to return to work, including pursuing reemployment benefits and the surgery needed to treat his work injury and, hopefully, enable him to perform the job duties for the job he held at the time of injury. *Id*. Employee is entitled to TTD benefits from the date Employer stopped paying benefits due to its controversion and continuing until he reaches medical stability after surgery.

2) Is Employee entitled to medical benefits?

Employee requested an order directing Employer to pay all medical bills related to his work injury, including preauthorization for left foot and heel surgery recommended by Dr. Frey in light of Employer's past delays in authorizations and payment. On November 9, 2023, Employee claimed medical costs and the reason he provided for filing the claim was, "The employer has controverted medical benefits in fact as the employer is not responding to Mr. Castro on obtaining authorization or a referral. Mr. Castro had a referral from a treating physician in Juneau. [H]owever, the employer delayed assistance for such a long time that the

referral is no longer accepted. Mr. Castro has since moved to California and cannot obtain medical treatment without preauthorization, which he cannot obtain." Employer contended there is no authority to support an order for medical benefits because it has not controverted medical benefits and there are no unpaid medical bills.

An employer must furnish medical treatment for the period for which the nature of the injury or the process of recovery requires. AS 23.30.095(a). An injured worker has the right to a prospective determination of compensability for medical treatment to help the worker decide whether to pursue the medical treatment. AS 23.30.135(a); *Summers.* Employee is concerned about obtaining the surgery due to Employer's "delayed assistance" for his referral to a specialist at Virginia Mason and in obtaining the SIME MRI. He is presumed to be entitled to continuing medical care, and he attached the presumption with Dr. Garcia's recommendation of debridement and partial re-sectioning of the posterior aspect of the calcaneus with insertional Achilles tendon repair and Dr. Frey's recommendation of debridement of the thickened Achilles tendon and removal of the posterior prominence and irregularity of the posterior aspect of the calcaneus. *McGahuey*; *Burgess*; *Wolfer*; *Resler*. Because Employer did not offer substantial evidence to rebut the presumption, the surgery Employee seeks will be awarded. *Williams*. Employer will be directed to pay for the surgery and other reasonable and necessary medical treatment for Employee's work injury, all subject to the Act, administrative regulations, and the Alaska Medical Fee Schedule.

Employee contended Employer failed to pay for the SIME MRI bills and requested an order directing Employer to pay for them. Employer objected, contending the SIME MRI bills were not set as an issue for hearing. Prehearing conferences are held so parties can identify and simplify issues. 8 AAC 45.065(a)(1). Once a prehearing conference is completed, the designee issues a prehearing conference summary. Unless modified, the summary limits the issues for hearing and controls the hearing's course. AS 23.30.110(a); 8 AAC 45.065(c); 8 AAC 45.070(g); *Simon*. This avoids "trial by ambush" and allows parties to properly prepare for hearing.

The issues set for hearing in the January 2, 2025 prehearing conference summary included "TTD, TPD and PPI benefits, medical and transportation costs, reemployment benefits, unfair or frivolous controversion, interest, and attorney fees and costs" sought in Employee's March 29, May 17, and November 9, 2023 claims and the designee directed the parties to file evidence by March 19, 2025. Employee's November 9, 2023 claim sought medical benefits for the medical treatment recommended by Employee's treating physician, who referred Employee to Virginia Mason where Employee saw Dr. Reeve who recommended additional medical treatment. An employee's claim for medical costs for medical treatment are governed under AS 23.30.095(a) and AS 23.30.097.

The August 2024 MRI was part of the SIME as Dr. Frey, the SIME physician, recommended a new MRI to see how the bone healed and to finish evaluating the Achilles tendon; she issued an addendum report after reviewing the August 2024 MRI. *Roberge*. Therefore, the August 2024 MRI costs are not medical treatment but are SIME costs under AS 23.30.095(k) and 8 AAC 45.090(b). Employee did not amend his claims to include SIME costs. The first document Employee filed requesting SIME MRI costs is Employee's hearing brief; he did not file copies of the SIME MRI bills until March 21, 2025, after the evidence hearing deadline. 8 AAC 45.065(a)(11); 8 AAC 45.150(f), (i). Employee failed to properly raise a claim for the SIME MRI costs. AS 23.30.001(4); 8 AAC 45.070(g); *Simon*. The January 2, 2025 prehearing conference summary did not include the SIME MRI bills as an issue for hearing. 8 AAC 45.065(c). Employee has not provided any unusual and extenuating circumstances exist. 8 AAC 45.070(g); *Simon*. The SIME bills will not be addressed at this time. 8 AAC 45.065(c); 8 AAC 070(g); *Simon*.

3) Did Employer frivolously or unfairly controvert?

Employee contended Employer's March 3, 2023 controversion notice unfairly and frivolous controverted TTD benefits based upon Dr. Garcia's EME opinion, and he sought a finding of an unfair or frivolous controversion in his March 29 and May 17, 2023 claims. Employer contended a penalty for an unfair or frivolous controversion was not set as an issue for hearing because Employee withdrew his request for "penalty for late paid compensation" at the May 17, 2023 prehearing conference. An unfair or frivolous controversion finding request may or may

not be coupled with a penalty request. Here, it is not as Employee withdrew his penalty request. Nevertheless, he still requests an unfair or frivolous controversion finding, which if found would result in no direct penalty payment to Employee, it would result in the Division of Workers' Compensation Director referring the matter to the Division of Insurance to investigate if Employer had engaged in an unfair claim settlement practice. AS 23.30.155(o). The January 2, 2025 prehearing conference clearly stated the issues for hearing included a request for a finding of an unfair and frivolous controversion and Employer's March 3, 2023 controversion notice was the reason Employee provided as grounds in his March 29, and May 17, 2023 claims. Employee properly raised a request for a finding of an unfair and frivolous controversion based upon Employer's March 3, 2023 controversion and Employer had notice. 8 AAC 45.070(g); *Simon*. An unfair and frivolous controversion finding will be addressed. 8 AAC 45.065(c).

Employee contended Employer's March 3, 2023 controversion notice was made in bad faith because it lacked sufficient evidence to support a controversion. He contended Dr. Garcia's EME opinion did not include sufficient factual information to reasonably conclude he was not entitled to TTD benefits. Employer contended Dr. Garcia's EME report is sufficient to reasonably conclude Employee was not entitled to TTD benefits. Dr. Garcia opined Employee had the physical ability to return to work in the job held at the time of injury with his current pain rating of two out of 10 pain, but not when his pain flares with 10 out of 10 pain and Employee was limited to sedentary work. Dr. Garcia did not release Employee to full duty work without restrictions; he restricted Employee to sedentary work for flareups caused by the work injury. His report was not adequate to support a controversion because Dr. Garcia clearly stated Employee had a disability because he said Employee's cannot perform his job during flareups caused by the work injury. Employer lacked a sufficient basis to state that Employee's disability was not work-related. *Ford*. The March 3, 2023 controversion notice was unfair and frivolous and this matter will be referred to the Director for further action under AS 23.30.155(o).

Employee contended Employer unfairly or frivolously controverted benefits in fact because its delay in responding to Employee's request for authorization for treatment at Virginia Mason delayed his treatment until February 2024. Employer contended this unfairly or frivolously controversion-in-fact of the Virgina Mason medical treatment was not set as an issue for hearing.

On January 2, 2025, the parties agreed to schedule a hearing on Employee's March 29, May 17 and November 9, 2023 claims and the prehearing conference summary identified the issues for hearing as "TTD, TPD and PPI benefits, medical and transportation costs, reemployment benefits, unfair or frivolous controversion, interest, and attorney fees and costs." 8 AAC 45.065(c). The January 2, 2025 prehearing conference included Employee's November 9, 2023 claim and included medical costs and unfair or frivolous controversion as an issue for hearing. 8 AAC 45.065(c). Employee's November 9, 2023 claim contended Employer controverted the Virigina Mason medical treatment in fact. An unfair or frivolous controvert-in-fact for Employee's Virgina Mason medical treatment was included as an issue for hearing and it will be addressed. 8 AAC 45.065(c); 8 AAC 45.070(g); *Simon*.

Alternatively, Employer contended it paid all medical bills pursuant to the Act and there is no evidence it controverted-in-fact. It also contended Employee failed to prove Employer received the 2023 emails. An employer's duty to pay or controvert medical benefits may arise when the employee seeks medical treatment, not just when he incurs actual medical bills because he may not be able to afford the treatment on his own. *Harris*. Once a physician prescribes medical treatment for an employee, the employer is required to either furnish, authorize, or controvert benefits within the required time. AS 23.30.095(a); *Harris*. If Employer controverted medical benefits, it had to file a controversion notice. AS 23.30.155(d). Employer did not formally controvert medical benefits, and its December 4, 2023 answer to Employee's November 9, 2023 claim for medical benefits contended it paid "all benefits due under the Act" and relied upon the August 23, 2023 Notice of Intent to Rely with Polleys' unsigned affidavit. *Moore*. Employee contended Employer unfairly or frivolously controverted benefits in fact because of its delay in responding to Employee's request for authorization for a referral for treatment at Viriginia Mason delayed his treatment until February 2024.

Employee was first referred to Virigina Mason for medical treatment on January 31, 2023. A February 2, 2023 phone call note by Townsend at Virginia Mason stated Employee was waiting to hear back from his case manager to see if it was okay to go to Seattle for treatment. On July 24, 2023, Employee filed and served copies of emails he testified he sent to claims adjusters on May 15, 24 and June 13, 2023 seeking assistance in scheduling and approving the medical

treatment at Virigina Mason. In response, Employer filed an unsigned affidavit by Polleys stating adjuster Greene contacted Employee in August 2023 and told Employee to notify her as soon as the appointment was rescheduled and that Penser would set up travel and hotel, but that Penser had not received information regarding the appointment and Stephany Brummer was the new adjuster. On September 17, 2023, Employee sought Brummer's assistance with a referral for the Virginia Mason medical treatment by email. Huna and McComb exchanged emails regarding the Virginia Mason medical treatment and the adjuster's failure to respond in October 2023.

Polleys testified regarding Penser's regular business practices of notifying injured workers when the adjusters changed and communications regarding medical treatment and billing with providers by adjusters. Polleys stated adjusters are not allowed to preauthorize or pre-deny medical treatment, they are only allowed to say whether medical treatment is open and billable, to inform of an upcoming EME, and to explain the 30-day rule to pay or deny medical costs once the records and bills are received. However, Polleys did not communicate herself with Employee or the medical providers by phone, email, or letter; she overheard telephone calls, conducted staff trainings, audited the file, had conversations with the adjusters and administrative assistants about the case, and briefly reviewed the claims adjuster file. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient in itself to support a finding of fact unless it is admissible over an objection in civil actions. 8 AAC 45.120(e). Hearsay is a statement, other than one made by the declarant while testifying, offered to prove the truth of the matter asserted. Rule 801(c).

Polleys offered testimony regarding statements made by adjusters to Employee and the medical provider regarding the Viriginia Mason medical treatment to prove the content of the statements, that it properly conveyed the regular business practice information. That is hearsay. Polleys did not participate in the communications that occurred between the adjuster and with Employee or the Virginia Mason medical provider; she read the notes made by adjusters and had conversations with the adjusters and administrative assistants about the case. Therefore, the "prior statement by a witness" exception and the "recorded recollection" to the hearsay rule do not apply. Rule 803(1), (5). The "business records" hearsay exception would have permitted

consideration of the claim adjuster file, which would have contained notes made by the adjusters' regarding the communications with Employee and the medical provider. Rule 803(6). Employer did not file the claim adjuster file. Therefore, the business records hearsay exception does not apply. *Id.* Polleys testimony regarding statements made by adjusters to Employee and the medical provider regarding the Viriginia Mason medical treatment to prove Employer furnished medical treatment is not sufficient to support a finding of fact. 8 AAC 45.120(e). Employer provided no direct evidence of communications between the adjusters and Employee or Virginia Mason.

On November 9, 2023, Employee claimed medical costs for the Virigina Mason medical treatment. On December 14, 2023, Employee stated he was unable to reach the adjuster to obtain preauthorization and travel arrangements for the Virigina Mason medical treatment and Employer informed Employee another adjuster had been assigned. Employee saw a provider at Virginia Mason on February 7, 2024, after he obtained a referral from Dr. Patel. An employee is entitled to a prospective determination of compensability for medical treatment and Employer was required to either furnish, authorize, or controvert benefits once Employee's physician recommended it. AS 23.30.095(a); *Summers*; *Harris*. PA-C Cummings recommended treatment with a specialist in December 2022 and referred Employee to Virgina Mason in January 2023. Employee credibly testified he was unable to reach his claim adjusters by email or telephone to obtain preauthorization and for travel arrangements for the Virigina Mason medical treatment. AS 23.30.122; *Smith*. His testimony was corroborated by emails he testified he sent to the adjusters. There is no evidence in the file that Employer responded to Employee's emails. While Employer did not expressly deny the Virigina Mason medical treatment, Employer did not "unqualified accept" the medical treatment Employee sought at Virigina Mason because it did not authorize the treatment, delaying the treatment for over a year with no legal basis. *Summers*; *Harris*; *Harp*. Employer unfairly or frivolously controverted the Virginia Mason medical treatment in fact. *Harp*. The unfair or frivolous controversion in fact of the Virginia Mason medical treatment will be referred to the Director for further action under AS 23.30.155(o).

Employee contended Employer controverted benefits in fact when it failed to timely pay for the SIME MRI bills. None of Employee's claims sought SIME costs for the SIME MRI and none of

his claims alleged Employer unfairly or frivolously controverted the SIME MRI costs. The first document Employee filed contending Employer unfairly or frivolously controverted the SIME MRI costs is Employee's hearing brief, which summaries facts alleging the controversion-in-fact occurred but failed to analyze whether Employer controverted-in-fact. Employee failed to properly raise, and Employer was not given notice of his claim, that it controverted the SIME costs in fact. AS 23.30.001(4); 8 AAC 45.070(g); *Simon*. Employee has not provided any unusual and extenuating circumstances exist. *Id*. The controversion in fact of the SIME bills will not be addressed at this time. 8 AAC 45.065(c).

4) Is Employee entitled to interest?

Because Employee prevailed on his claim for TTD benefits, he is entitled to mandatory interest. AS 23.30.155(p); *Rawls*.

5) Is Employee entitled to attorney fees and costs?

Attorney fees may be awarded under AS 23.30.145(a) on the amount of compensation controverted and awarded. Employer controverted TTD benefits and this decision awards Employee TTD benefits. Rule 1.5(a)(4). Attorney fees can be awarded under AS 23.30.145(a).

Attorney fees may also be awarded under AS 23.30.145(b) when an employer resists payment of compensation, and an attorney is successful in prosecuting the employee's claim. Employee prevailed on all the benefits sought in his March 29, May 17, and November 9, 2023 claims. Employee's attorney successfully prosecuted his claims for TTD benefits, medical benefits, a finding of unfair or frivolous controvert, and interest. Rule 1.5(a)(4). Employer resisted paying additional TTD benefits when it controverted them, it resisted an order for medical benefits when it contended there was no authority to support an order for medical benefits, and it resisted an order finding it unfairly and frivolously controverted benefits when it relied upon Dr. Garcia's medical opinion in good faith and unfairly and frivolously controverted the Virginia Mason medical treatment in fact. Employee also prevailed on his June 12, 2023 petition for an SIME, which Employer also resisted. *Id*. Employee's claim for attorney fees and costs will be granted under AS 23.30.145(b) as well.

Employer contended Employee's attorney fees award should be reduced for time spent on issues on which he did not prevail. The issues Employee did not prevail upon were issues he failed to properly raise in his claims, the SIME MRI costs and controversion-in-fact of the SIME MRI costs, and issues the parties agreed to withdraw as issues, reemployment, PPI benefits and transportation costs.

While Employer already paid Employee $5,046 in attorney fees for pursuing the SIME according to the September 12, 2023 agreement, Huna incurred additional time pursuing the SIME when she attended prehearing conferences, talked to Employer and her client regarding the SIME MRI, and provided SIME affidavits and medical records to the Board and Employer to complete the SIME with Dr. Frey. *Roberge*. Employee should be paid attorney fees and costs for pursuing the SIME after the parties agreed to it, including time spent obtaining the SIME MRI and providing the SIME affidavits and medical records.

As Employee did not prevail on reemployment benefits because the issue was withdrawn, attorney fees for time spent on reemployment benefits will be deducted. Huna spent 0.1, 0.5, and 0.1 of an hour on December 22, 2023, January 30, 2024, and February 26, 2024 on reemployment benefits, totaling $540 ($45 + $450 + $45 = $540). Thus, $540 will be deducted from Employee's attorney award.

Employer did not identify time Huna spent on controversion-in-fact of the SIME MRI costs in the fee affidavits. The first document Employee filed raising the SIME MRI costs as an issue for hearing is Employee's hearing brief. The first document Employee filed alleging Employer unfairly or frivolously controverted the SIME MRI costs in fact is Employee's hearing brief. Employee summarized *de minimus* facts alleging the controversion-in-fact in a few paragraphs in his hearing brief and contended it supported his contention a prospective determination was for the left foot and heal surgery was necessary. *Porteleki*. This decision will order Employer to pay for the left foot and ankle surgery as analyzed above. Employer's objection to time spent on controversion in fact the Virigina Mason medical treatment and the SIME MRI costs is considered and denied.

Employer did not identify time Huna spent on PPI benefits in the fee affidavit; and the panel could not discern any time spent by Huna on PPI benefits. Employee's attorney fee affidavit will not be reduced for time spent on PPI benefits.

As Employee did not prevail on transportation costs as that issue was withdrawn, attorney fees for time spent on transportation costs will be deducted. Because the SIME MRI costs were not included as an issue for hearing, time spent filing the SIME MRI bills will be deducted as well. Huna spent 0.5 hour on March 11, 2025 talking to Employee regarding travel and reviewing a medical summary; Employer had filed a medical summary on February 10, 2025. It unknown how much time Huna spent talking to Employee regarding travel and how much was spent reviewing the February 10, 2025 medical summary. Hunt spent 0.5 hour on March 19, 2025 talking to Employee regarding evidence and beginning documentary evidence. On March 21, 2025, Employee filed a list of medical travel mileage and SIME MRI bills. Based upon invoice entries, Employee's attorney fee affidavit will be reduced 0.75 hour, or $337.50 for time spent on transportation costs and the SIME MRI bills (0.75 x $450 = 337.50).

Employer contended Employee's attorney fees should be reduced for time spent by Huna arranging travel to attend the hearing in person because it is an "administrative" task. Employee contended there is no legal precedent distinguishing an attorney's time as being an "administrative" task and not billable. He also contended *Rusch* supports an argument that fees for time spent on administrative tasks should not be reduced as *Rusch* rejected the reduction of fees for paralegal work performed by an attorney to ensure injured workers have competent counsel available to them. There is no statute, regulation, or case law prohibiting an attorney from billing for time spent arranging travel to attend a hearing in person. However, time billed cannot be unreasonable. Rule 1.5. It is not unreasonable to charge the actual time spent on arranging travel to attend a hearing in person. Furthermore, attorney fees should be fully compensatory and reasonable, so injured workers have competent counsel available to them. *Childs*. Huna billed 0.5 hour to arrange travel; there is no evidence the time billed was unreasonable. *Rogers & Babler*. Employer's objection to time incurred to arrange travel is considered and denied.

Employer objected to the per diem costs in Employee's attorney fee and costs affidavit. Employee withdrew his request for per diem expenses totaling $120. Therefore, Employee's attorney costs will be reduced by $120. Employer will be ordered to pay Employee $1,564.75 in attorney costs ($1,684.75 - $120 = $1,564.75).

Huna entered her appearance on May 18, 2023. Rule 1.5(a)(6). Huna billed hourly attorney time at $415, $435, and $450; Employer did not object to those hourly rates. Rule 1.5(a)(1). Employee prevailed on TTD benefits and a prospective determination on surgery, both of which are of significant benefit to Employee, and the TTD benefits involved a dispute regarding compensability, a fairly complex legal issue. *Id*. Huna is well known among both the workers' compensation bar and workers' compensation hearing officers. Rule 1.5(a)(7). She is an experienced attorney who has successfully represented injured workers for many years. *Id*. Huna's hourly billing rate is within the range of billing rates customarily awarded to experienced attorneys in workers' compensation cases. Rule 1.5(a)(3). Virtually all fees in workers' compensation cases are contingent. Employee's hourly billing rates are appropriate given the contingent nature of representation. Rule 1.5(a)(8). None of the fee affidavits submitted addressed the likelihood that acceptance of this case would preclude other employment by Huna or that there were any time limitations imposed by the client or the circumstances; Employer did not address these factors either. Rule 1.5(a)(2), (5). Based upon the above analysis of factors set forth under Rule 1.5(a) and considering the policy of ensuring that competent attorneys are available to represent injured workers, Employee is entitled to reasonable attorney fees and costs, less the deductions analyzed above, totaling $26,290 ($27,167.50 - $540 - $337.50 = $26,290). *Childs*; *Rusch*.

CONCLUSIONS OF LAW

1) Employee is entitled to additional TTD benefits.
2) Employee is entitled to medical benefits.
3) Employer frivolously and unfairly controverted.
4) Employee is entitled to interest.
5) Employee is entitled to attorney fees and costs.

ORDER

1) Employee's March 29, May 17, and November 9, 2023 claims are granted.
2) Employer is ordered to pay Employee TTD benefits from the date Employer stopped paying due to its controversion and continuing, until he reaches medical stability.
3) Employer is ordered to pay for the left foot and heel surgery and other reasonable and necessary medical treatment for Employee's work injury, all subject to the Act, administrative regulations, and the Alaska Medical Fee Schedule.
4) Employee's request for a finding of unfair or frivolous controvert is granted. Staff will provide a copy of this decision to the Director for him to forward to the Division of Insurance for investigation.
5) Employer is ordered to pay interest on the TTD benefits awarded.
6) Employer is ordered to pay Employee $26,290 for attorney's fees and $1,564.75 in costs.

Dated in Juneau, Alaska on June 2, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Brad Austin, Member

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

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

APPEAL PROCEDURES

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

decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true, and correct copy of the Final Decision and Order in the matter of Rene Castro, employee / claimant v. State of Alaska, self-insured employer / defendants; Case No. 202212775; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified US Mail on June 2, 2025.

/s/
Lorvin Uddipa, Workers' Compensation Technician