ALASKA WORKERS' COMPENSATION BOARD

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

CASEY KOBERG, Employee, Claimant, v. EVERTS AIR FUEL, INC., Employer, and NATIONAL UNION FIRE INS. CO. OF PITTSBURG, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 202101408 AWCB Decision No. 25-0046 Filed with AWCB Fairbanks, Alaska n July 23, 2025

Casey Koberg's May 2, 2023 claim was heard in Fairbanks, Alaska on December 19, 2024, a date selected on November 6, 2024. A June 25, 2024 hearing request gave rise to this hearing. Attorney Patricia Huna appeared and represented Casey Koberg (Employee). Attorney Krista Schwarting appeared and represented Everts Air Fuel, Inc. and its insurer (Employer). Witnesses included Employee and Employee's wife, Deanna Koberg, who testified on Employee's behalf. The hearing was continued until April 15, 2025 to receive the testimony of Employee's rehabilitation specialist, Daniel LaBrosse, who testified on Employer's behalf. The record closed at the hearing's conclusion on April 15, 2025, was reopened to receive the parties' post-hearing pleadings concerning attorney fees and closed again on May 6, 2025.

ISSUES

Employee contends he is entitled to continuing medical benefits and related transportation costs.

Employer contends that any continuing medical benefits should be limited to the treatment recommendations of the second independent medical evaluator (SIME) physician.

1) **Is Employee entitled to continuing medical benefits and related transportation costs?**

Employee contends some of his past medical treatment was provided by the Veterans Health Administration (VA) and he seeks an order for Employer to reimburse the VA for that medical treatment.

Employer generally contends that it relied on its medical evaluators but makes no specific contentions regarding Employee's entitlement to past medical benefits.

2) **Is Employee entitled to past medical benefits and related transportation costs?**

Employee contends he is entitled to additional temporary total disability (TTD) and unspecified temporary partial disability (TPD) benefits until the date of medical stability, which he contends is May 20, 2024.

Employer contends additional disability benefits should be denied because Employee voluntarily left his job following the work injury. It also contends that Employee continued to work for other employers after the work injury so Employee would need to provide documentation of his subsequent employment and work hours to be entitled to additional TTD or TPD benefits. Employer further contends Employee is not entitled to disability benefits following the date of medical stability, which it contends is May 20, 2023.

3) **Is Employee entitled to additional TTD or TPD benefits?**

Employee contends he is entitled to reemployment stipend benefits from the date of medical stability.

Employer makes different contentions with respect to Employee's entitlement to reemployment stipend. In its hearing brief, it contends Employee is currently in the reemployment process and

reemployment benefits are "not presently at issue." In its closing arguments at hearing, Employer also contended that Employee's claim for reemployment stipend benefits should be denied since he has not cooperated in the reemployment process.

4) **Is Employee entitled to reemployment stipend benefits?**

Employee contends he is entitled to an additional permanent partial impairment (PPI) benefit based on the SIME physician's opinion. He also seeks an order for the SIME physician to perform a PPI rating for his spinal injury.

Employer contends it has already paid a three percent PPI benefit so Employee would be entitled to a one percent PPI benefit "at most" based on the SIME physician's opinion. It also contends the SIME physician requires additional information about Employee's service-related disability to determine whether apportionment of PPI is appropriate.

5) **Is Employee entitled to additional PPI benefits?**

Employee seeks interest on all benefits not timely paid.

Employer acknowledges interest would be due on benefits awarded.

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

Employee contends he was aided by the services of his attorney, and he seeks attorney fees and costs.

Employer contends that attorney fees should be based on benefits awarded.

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

FINDINGS OF FACT

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

1) Employee worked for Employer as a Mechanic Helper. (LaBrosse report, September 25, 2021).

2) On February 2, 2021, Employee was standing on the forks of a forklift about 10 feet in the air when he fell and landed on his head. He was knocked unconscious but regained consciousness while emergency medical services were enroute. (Prehospital Care Report, February 2, 2021). Employee was transported to Fairbanks Memorial Hospital where a cervical spine computed tomography (CT) study showed no cervical spine or skull base fractures. (*Id*.; Cervical Spine CT report, February 2, 2021). A brain CT was interpreted as normal with no acute intercranial abnormality. (Emergency Department Report, February 2, 2021). Employee was diagnosed with concussion, fall, whiplash neck injury and scalp laceration, which was repaired with staples. He was released for outpatient care, instructed to be off work for one week and to limit activities to what he could tolerate. (*Id*.).

3) On February 5, 2021, Employee treated with Todd Capistrant, DO, complaining of head and back pain. Dr. Capistrant diagnosed brain injury with loss of consciousness of 30 minutes or less and acute bilateral thoracic back pain. He referred Employee to Joshua Costello, DC, for evaluation and treatment. (Capistrant chart notes, February 5, 2021).

4) Prior to the February 2, 2021 work-injury, Dr. Capistrant had treated Employee on at least three occasions for acute left-sided low back pain without sciatica, and segmental and somatic dysfunction of the thoracic region, lumbar region and pelvic region. (Capistrant chart notes, June 29, 2020; July 7, 2020; August 7, 2020).

5) On February 9, 2021, Employee began post-injury chiropractic care with Dr. Costello, who noted Employee was complaining of "extremely terrible" constant migraines with extreme sensitivity to light and sound. He assessed Employee as having sustained a traumatic brain injury (TBI)/concussion, whiplash, neck pain, mid back pain, lower back pain, and chest pain. (Costello chart notes, February 9, 2021).

6) Prior to the February 2, 2021 work-injury, Employee had received chiropractic care with Dr. Costello on at least six occasions for neck pain, mid back pain, low back pain, and ongoing migraine headaches. The onset of Employee's migraine headaches occurred when he was hit on the top of his head about two years prior. Since then, Employee would get a migraine every two weeks that was worse with exertion. Dr. Costello's assessments prior to the February 2, 2021 work injury included post concussive syndrome. (Costello chart notes, January 29, 2020;

February 3, 2020; February 10, 2020; June 26, 2020; August 7, 2020; January 21, 2021). Chart notes from January 21, 2021, less than two weeks prior to Employee's February 2, 2021 work-injury, state Employee described he had been dealing with migraines for the last few weeks and "yesterday [his] back hurt a lot more compared to normal back pain." Employee also stated his migraine "has been moving around but has been worse on the R side and worse on R side with driving." (Costello chart notes, January 21, 2021).

7) On February 10, 11 and 12, 2021, numerous imaging studies were performed at Dr. Costello's direction. X-rays of Employee's thoracic spine showed mild anterior wedge compression deformities at T9, T11 and T12. A thoracic spine magnetic resonance imaging (MRI) study showed "Acute marrow edema within numerous thoracic vertebral bodies . . . consistent with acute fractures" and "Mildly exaggerated thoracic kyphosis . . . potentially positional in the setting of muscle spam or due to pain." A cervical spine MRI showed no acute abnormalities and early degenerative changes, most prominent at C5-6. A brain MRI showed no significant intercranial abnormality, no intercranial hemorrhage and an improved posterior scalp hematoma. A chest CT showed numerous subtle thoracic vertebral body fractures and no evidence of underlying chest trauma. (Imaging reports, February 10, 2021; February 11, 2021; February 12, 2021).

8) On February 12, 2021, Employee treated with Dr. Capistrant who assessed him as having sustained a traumatic brain injury with loss of consciousness of 30 minutes or less and acute traumatic compression of levels T9-11. Employee was complaining of pain in his head, back and chest wall and was experiencing headaches. Dr. Capistrant referred Employee to John Lopez, MD, for further evaluation of the compression fractures. (Capistrant chart notes, February 12, 2021).

9) On February 17, 2021, Employee received chiropractic care with Dr. Costello who assessed him as having a concussion, concussion fracture of the thoracic vertebra, pain in the thoracic spine, and other muscle spasms. Dr. Costello's treatment plan anticipated 12 follow-up visits. In total, however, between February 9, 2021 and April 5, 2024 Employee treated at least 32 times with Dr. Costello. (Costello chart notes, February 9, 2021 – April 5, 2024).

10) On February 17, 2021, Employee treated with Dr. Lopez and Alena Anderson, MD. Employee was suffering from daily headaches that were relieved with over-the-counter medications. He stated he had suffered a TBI while in the military two years previous when a

"hatch from a Stryker hit him on the head where he 'saw stars' and was evaluated by EMT at the scene without any further ado." A thoracic lumbar sacral orthosis (TLSO) brace was prescribed, and it was thought Employee would require re-evaluation. (Lopez chart notes, February 17, 2021).

11) On February 18, 2021, Employee treated with Dr. Costello and reported his back and chest were still bothering him. Dr. Costello discussed a home exercise program and future appointments with Employee. (Costello chart notes, February 18, 2021).

12) On February 25, 2021, Employee received chiropractic care from Dr. Costello. His complaints included back, chest and arm pain, "neck jerk," neck tightness, and cluster and migraine headaches. (Costello chart notes, February 25, 2021).

13) On March 1, 2021, Employee treated with Dr. Capistrant, who administered osteopathic manipulative therapy (OMT). Dr. Capistrant's assessments continued to include a TBI with loss of consciousness; acute bilateral thoracic back pain; segmental and somatic dysfunction of the head region, cervical region and thoracic region. (Capistrant chart notes, March 1, 2021).

14) On March 2, 2021, Employee received chiropractic treatment from Dr. Costello. His neck and back were "very painful." Dr. Costello thought Employee was having a combination extreme tension headache related to muscle spasm and migraine related to concussion. Employee still needed a "significant amount of care," according to Dr. Costello. (Costello chart notes, March 2, 2021).

15) On March 4, 2021, Employee received chiropractic treatment from Dr. Costello. That day was the first day Employee had not had a migraine since the work injury; however, he awoke to very bad back pain. (Costello chart notes, March 4, 2021).

16) On March 9, 2021, Employee received chiropractic treatment from Dr. Costello. His complaints included a sore back, migraine and right-sided neck pain. (Costello chart notes, March 9, 2021).

17) On March 11, 2021, Employee received chiropractic treatment from Dr. Costello. His complaints included low back pain, mid back pain, back pain, neck pain and migraine with light and sound sensitivity. (Costello chart notes, March 11, 2025).

18) On March 18, 2021, Employee had thoracic X-rays taken at the direction of Dr. Anderson. The anterior wedge deformities at T9, T11 and T12 were unchanged from the previous study. (X-ray report, March 18, 2021).

19) On March 18, 2021, Employee treated with Dr. Anderson. Based on the prior MRI and recent thoracic x-ray, Dr. Anderson diagnosed multiple compression thoracic fractures and recommended Employee start physical therapy, wear a TLSO for any type of increased pain, and follow-up in a month for repeat imaging. As requested by Employer's adjuster, Dr. Anderson completed a "Return-to-Work Evaluation Form" in which she indicated Employee was "unable to return to work March 18 – April 18, 2021." (Anderson chart notes, March 18, 2021).

20) On April 13, 2021, Employee treated with Dr. Capistrant and reported thoracic pain, neck pain and daily headaches. Dr. Capistrant administered OMT and continued to assess bilateral headaches; cervicalgia; acute bilateral thoracic pain; and segmental and somatic dysfunction of the head, cervical and thoracic regions. (Capistrant chart notes, April 13, 2021).

21) On April 19, 2021, Employee had another thoracic x-ray taken at the direction of Dr. Lopez that showed no significant change in the wedge compression deformities at T9, T10 and T11. (X-ray report, April 19, 2021).

22) On April 20, 2021, Employee had a telephone consultation with Michael Priebe, PA-C. Employee reported being more active and feeling good but had a deep ache in his thoracic back with certain movements, though his pain had significantly decreased since the initial injury. PA Priebe anticipated that Employee would follow up in one month with the likely expectation of being released for work. (Priebe chart notes, April 20, 2021).

23) On April 30, 2021, Employee was expecting to return to work for two hours per day with minimal screen time. (Physical therapy notes, April 30, 2021).

24) On April 30, 2021, Employee returned to work in a modified duty capacity, working only two hours per day. He tried to perform office and computer work for Employer but could not do this type of work because it gave him migraine headaches. Employee was then restricted from work starting in May and did not return to work until Employer received a work release dated September 24, 2021. At that point, Employer offered Employee an opportunity to return to work in the modified Mechanics Helper position. (*Koberg I*).

25) On May 11, 2021 Employee treated with Dr. Capistrant and reported his "headaches have gotten worse lately." He had been working light-duty, two hours daily, and was getting x-rays on May 17th with Dr. Lopez to see if he could return to full-duty at work. Dr. Capistrant administered OMT, and his assessment of Employee's condition remained consistent with previous visits. (Capistrant chart notes, May 11, 2021).

26) On May 17, 2021, Employee had another telephone consultation with PA Priebe and reported he "feels pretty good," and "feels like he has healed." After reviewing x-rays taken earlier that day, PA Priebe concluded Employee's compression fracture had been stable over the last several months and released Employee from care. (Priebe chart notes, May 17, 2021).

27) On May 19, 2021, Employee treated with Dr. Capistrant who referred him to James Foelsch, MD, for neurological treatment and evaluation. Dr. Capistrant continued to diagnose Employee as suffering from TBI with loss of consciousness, bilateral headaches and cervicalgia. As requested by Employer's adjuster, Dr. Capistrant completed a return-to-work form and indicated Employee was unable to work from May 20, 2021 to June 14, 2021. (Capistrant chart notes, May 19, 2021; Everts Return-to-Work Evaluation form, May 19, 2021).

28) On May 22, 2021, Employee underwent an employer medical evaluation (EME) with orthopedic surgeon Mark Rangitsch, MD. Dr. Rangitsch diagnosed Employee as having suffered a traumatic brain injury and multiple compression fractures of the thoracic spine which were currently improving. He opined, "The substantial and only cause that I can appreciate is due to the work-related injury and the fall." Dr. Rangitsch thought Employee's thoracic fractures had not yet stabilized but were anticipated to be medically stable by July 15, 2021; that the back injury would likely result in a ratable permanent impairment once medically stable; and that although additional physical therapy was recommended, no further osteopathic manipulative therapy or chiropractic treatment was reasonable or necessary. He further thought Employee was physically capable of performing sedentary to light duty work but his TBI imposed limitations should be addressed by a neurologist. (Rangitsch report, May 22, 2021).

29) On May 26, 2021, Employee had been making gradual progress with strength but, at that time, his migraines still limited his ability to focus and look at display screens for prolonged time periods. (Physical therapy notes, May 26, 2021).

30) On June 3, 2021, Employee was complaining that his migraines fluctuate in intensity and stated he was waiting for an evaluation regarding his migraines. The chart notes state, Employee "Continues to have migraines that increase with driving and screen time intermittently; responded well to dry needling and deep cervical flexor strengthening." (Physical therapy notes, June 3, 2021).

31) On June 8, 2021, Employer controverted OMT, chiropractic and message therapy treatments based on Dr. Rangitsch's May 22, 2021 EME report. (Controversion Notice, June 8, 2021).

32) On July 14, 2021, Employee was showing gradual progression in his strength and function but was still presenting with headaches that limited him from doing more strenuous activities. (Physical therapy notes, July 14, 2021).

33) On July 15, 2021, Employee presented to the Anchorage VA Medical Center for his annual wellness examination. He reported a pain level of "5" in his neck and lower back since 2017 and requested chiropractic treatment through the VA, which was ordered. (Swope chart notes, July 15, 2021).

34) On August 8, 2021, Employee presented for a neurologic evaluation and reported continued mid-back pain, a previous injury in 2014 when he was hit with a 100-pound hatch and did not lose consciousness, and detailed headache symptoms since the work injury. Lorn Miller, MD, assessed acute headache due to traumatic head injury and traumatic brain injury with loss of consciousness of 30 minutes or less and prescribed Indocin, Amerge and Topamax. (Miller chart notes, August 8, 2021).

35) On August 23, 2021, Employee reported he had a "rough few weeks with trials of migraine medication." He also reported he was "having worsening vision and hasn't been able to exercise secondary to increased symptoms. Back has actually been doing worse." The assessment was "worsening of symptoms with medication trials – impacted ability to exercise at home which has increased symptoms." (Physical therapy notes, August 23, 2021).

36) On August 25, 2021, Employee was referred to Dan LaBrosse for a reemployment benefits eligibility evaluation. (*Koberg I*).

37) In September 2021, Employee returned to work at the modified Mechanics Helper position. He was restricted to lifting 40 pounds and to standing and sitting for no more than two hours at a time. Employee's work was the same job he was doing at the time of injury but Employer left it up to Employee what duties he would perform without "pushing" himself to injury. (*Koberg I*).

38) On September 2, 2021, Employer controverted continuing physical therapy more than the frequency standards because Employee's physician, Dr. Anderson, had not provided a written treatment plan as required by statute. (Controversion Notice, September 2, 2021).

39) On September 2, 2021, Employee had a neurologic follow-up with Dr. Miller via telephone and reported that Topamax exacerbated his headaches, made his eyes feel hot and caused tingling in his feet. Indocin did not alleviate Employee's head pain and caused nausea and Amerge gave him heartburn, made his eyes hurt and did not decrease head pain. Dr. Miller prescribed Nurtec to prevent chronic migraine, and if Nurtec did not work, he thought Botox would be indicated since it works very well for post traumatic headaches. He opined Employee's back was approaching medical stability but noted Employee's neck pain had been getting progressively worse and thought it might be exacerbating Employee's headaches. Employee and Dr. Miller discussed "impairment verses disability and the long-term consequences of an impairment," and Dr. Miller encouraged Employee to remain diligent in his efforts to recover. (Miller chart notes, September 2, 2021).

40) On September 13, 2021, Kieth Youngblood, PsyD, performed a neuropsychological evaluation on referral from Dr. Capistrant. Employee's chief complaints were impairment of short-term memory, disturbance of affect with irritability, and difficulty with balance and vision. Dr. Youngblood diagnosed mild neurocognitive disorder due to traumatic brain injury, unspecified depressive disorder and unspecified anxiety disorder. He recommended Employee "maintain a professional relationship with his neurologist to address difficulty with vision and hearing, as well as chronic posttraumatic headache." He also recommended Employee "continue with seeing a mental health professional to address an anxiety disorder and . . . consider consulting a psychiatrist for the use of medications." (Youngblood chart notes, September 13, 2021).

41) On September 24, 2021, Dr. Miller released Employee to modified work with numerous restrictions, including limiting computer screen time to two hours per day. He planned to re-evaluate Employee on November 2, 2021. (Return-to-Work Evaluation, September 24, 2021).

42) On September 29, 2021, Employee saw Dr. Youngblood for a follow-up on his neuropsychological evaluation. Dr. Youngblood's primary diagnosis was neurocognitive impairment secondary to TBI, but he also thought other residual aspects related to the work injury, such as irritable mood and difficulties with balance and vision, were also playing a role in slowing Employee's recovery. He opined Employee's injury was "still reasonably fresh," and Employee could "still experience some degree of natural healing," and recommended that

Employee undertake neurocognitive rehabilitation. (Youngblood chart notes, September 29, 2021).

43) On October 1, 2021, in response to inquiries from Employer's adjuster, which mentioned Employee suffering a traumatic brain injury in the military two years prior when a Stryker hatch hit him on the head, Dr. Miller opined the traumatic brain injury resulting from the fall at work was the substantial cause of Employee's disability and his need for ongoing treatment. Employee was not medically stable, according to Dr. Miller, who predicted medical stability might be reached from six months to two years from that date. (Miller responses, October 1, 2021).

44) November 2, 2021, Employee presented for a neurological follow-up with Dr. Miller regarding a posterior head injury and diplopia, where the following was noted:

> [Employee] continues to suffer from post concussive symptoms reporting daily post traumatic migrainous [sic] headaches, neck and back pain. Patient feels pain and tenderness to palpation at the upper cervical cranial junction . . . .
>
> [Employee] admits to suffering from preexisting episodic migraines that responded well to ibuprofen. He reported that his migraines occurred from 1-2 times per month until 2017, when headaches increased to 2-4 per month after a military service connected mild TBI and migraines have become daily since the work related fall and TBI on 2/2/21. The patient does not believe his migraines have reached medical stability and he is pursuing prevention of chronic migraine with Botox treatments, the first of which was provided earlier today. . . .
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> Prior to his 2/2/21 injury, [Employee] received treatment at Alaska Brain and Spine for migraines, neck and back pain. Records reviewed from Alaska Brain and Spine reflect evaluation and treatment by Chiropractor Joshua Costello who provided predominantly eye exercises and spinal manipulations. On note 6/26/2020, Dr. Costello references "migraines nearly every[]day, mostly in the late afternoon/evening and the intensity is extremely decrease[d] since beginning of care/ pt still has a way to go in ou[r] treatment plan and should continue POC to resolve migraine, post concussive syndrome, pelvis, L/S, T/S pain. . . .
>
> Per patient's report, his back and neck pain have reached medical stability. . . .

Diagnosis included intractable chronic post-traumatic headache; injury of head, sequela; back pain, unspecified back location; cervicalgia; chronic migraine without aura; hyperreflexia and diplopia. Dr. Miller planned for Employee to follow-up in three months for Botox treatment. (Miller chart notes, November 2, 2021).

45) On November 7, 2021, Employee reported to Dr. Miller that he thought his back and neck pain had reached "medical stability." Dr. Miller educated Employee on proper stretches to alleviate his neck and back pain. (Miller chart notes, November 7, 2021).

46) On November 30, 2021, at Dr. Miller's direction, Employee underwent a follow-up brain and cervical spine MRIs. The brain MRI indicated "no intracranial disease process; no abnormal intracranial mass or mass effect; no acute or chronic intracranial hemorrhage." The cervical spine MRI indicated "Focal C5-6 degenerative change again seen not significantly changed compared to prior MRI." (MRI reports, November 30, 2021). That same day, Employee returned to Dr. Costello for chiropractic treatment. (Costello chart notes, November 30, 2021).

47) On December 18, 2021, Greg Zoltani, M.D., performed a neurological EME. Employee's complaints included midback discomfort, neck discomfort and headaches and he reported a previous service-related concussion in 2017 when the hatch to a Humvee came down on top of his head. Employee stated he had a 30 percent service-related disability based on that concussion, and ongoing headaches since that concession that he started treating in 2019. Dr. Zoltani diagnosed status post-concussion, historically related to the work injury; temporary aggravation and pre-existing chronic post-traumatic migraine headaches due to a 2017 concussion that was still under treatment; and thoracic compression fractures, healed and historically related to the work injury. He opined the work injury was the substantial case of Employee's need for spinal treatment as well as his concussion and re-aggravation of his post-traumatic migraine headaches. Dr. Zoltani thought Employee's migraine headaches would have been medically stable six to eight weeks after the injury, or by April 2, 2021, and Employee's need for treatment after that was his pre-existing concussion. He did not recommend any further treatment for the work injury and opined ongoing Botox injections were palliative care and not within the realm of medically accepted treatment "under the facts of this case." Dr. Zoltani pointed out that the Botox injections allowed Employee to participate in returning to gainful employment and he did not think Employee had incurred any permanent partial impairment from the work injury. According to him, Employee could return his job as a mechanic helper and perform light, medium and heavy work activities without restrictions. (Zoltani report, December 18, 2021).

48) On January 3, 2022, Natalie Macke, DO, issued a letter addressed "To whom it may concern" stating Employee had treated with the clinic "for multiple visits regarding a spectacle

prescription that has been fluctuating and changing every couple of months." She described Employee as having suffered a TBI which, "depending on location and severity can affect vision by damaging parts of the brain involved in perception and visual processing" and that she and Stanley Fuller, MD, had examined Employee and had been unable to find any ocular pathology that would be responsible for his vision changes. (Macke letter, January 3, 2022).

49) On January 4, 2022, relying on Dr. Zoltani's December 18, 2021 EME, Employer controverted all benefits for Employee's head injury, including TTD, TPD, PPI, medical and travel benefits. The controversion also included ongoing Botox injections because they were palliative and not reasonable or necessary "under the facts of this case." (Controversion Notice, January 4, 2022).

50) On January 19, 2022, LaBrosse authored an addendum report, noting he had received a reply from one of Employee's providers who predicted he would not be able to return to his job at the time of injury, "which [Employee] was currently doing under a restricted release capacity." The report also states, Employee reported "resigning from his position as a Mechanic Helper with his employer at the time of injury." (*Koberg I*).

51) On February 18, 2022, Employee underwent a follow-up orthopedic EME with Dr. Rangitch, who opined Employee's thoracic spine work injury had resolved and required no further medical care. He further opined Employee had reached medical stability on January 1, 2022, and had sustained a three percent PPI. (Rangitch report February 18, 2022). Employer paid Dr. Rangitch's three present PPI rating on March 2, 2022. (Secondary Report of Injury, March 8, 2022).

52) On February 21, 2022, Dr. Costello recommended Employee have an additional 12 visits, twice per week as well as massage therapy and acupuncture twice per week and a thorough "eye work up due to [Employee] not having good visual acuity after having multiple prescription changes." (Costello chart notes, February 21, 2022).

53) On April 1, 2022, Sara Geraci, ARNP, administered a Botox injection. (Geraci chart notes, April 1, 2022).

54) On April 8, 2022 and April 22, 2022, Employee underwent acupuncture treatment with Anna Tron. (Tron notes, April 8, 2022; April 22, 2022).

55) On April 25, 2022, Dr. Costello continued to recommend that Employee continue getting massage therapy, acupuncture and physical therapy in conjunction with chiropractic treatment.

He recommended Employee schedule another 16 visits, at least twice per week, "to address the pt severe spinal dysfunction, migraines, and post-concussive symptoms." (Costello chart notes, April 25, 2022).

56) On April 26, 2022 and May 3, 2022, Employee underwent acupuncture treatment with Anna Tron. (Tron notes, April 26, 2022; May 3, 2022).

57) On May 31, 2022, Employee followed up with NP Geraci and reported his last Botox treatment was not as effective as earlier ones. NP Geraci recommended Employee continue with Botox for migraines. (Geraci chart notes, May 31, 2022).

58) On July 5, 2022, NP Geraci administered Botox treatment and advised Employee to return in about three months for his next treatment. (Geraci chart notes, July 5, 2022).

59) On August 16, 2022, the RBA designee determined Employee was eligible for reemployment benefits under statutory criteria, including Employer's inability to offer Employee physically appropriate alternative work. (Helgeson letter, August 16, 2022).

60) On August 25, 2022, Mr. Blauvelt averred that he is Employer's Benefits and Program Manager. He was also the person who spoke with LaBrosse on October 29, 2021, and informed him that Employee was currently employed by Employer in a "*modified duty* job" that met the physical restrictions imposed by Employee's physician. If Employee had chosen to maintain his employment with Employer, his "*modified* position" would have been available for the "foreseeable future." After Employee's injury, Employer employed him in a "*modified duty* capacity" from September 24, 2021 through January 21, 2022, when Employee voluntarily resigned. Employee was working at a "*modified* position" at the time Mr. LaBrosse contacted him to discuss the potential for a "*modified duty* position." (*Koberg I*) (emphasis in original).

61) On September 9, 2022, Employee notified the RBA he was waiving reemployment benefits and had elected to receive job dislocation benefits. However, later that same day, Employee notified the RBA he had changed his mind and wanted to receive reemployment benefits and had selected LaBrosse to assist with developing an acceptable reemployment plan. (Notice of Election, September 9, 2022).

62) On October 4, 2022, Employer deposed Employee, who described being knocked off a K-loader at work, falling ten feet, landing on his head on concrete in an aircraft hangar, losing consciousness, and waking up on the ground in a "big pool of blood." (Employee dep., October 4, 2022 at 21-23). Employee's symptoms from the work injury include thoracic spine limitations

on twisting, lifting and bending, and migraine headaches. (*Id*. at 35, 37-38). He confirmed he was enrolled at the University of Alaska Fairbanks (UAF) in a four-year business degree program through the GI Bill. (*Id*. at 9, 44-45). Employee has lifetime health insurance through the VA and a 60 percent disability rating for his ankle, back and head injuries while in the service. (*Id*. at 18, 43). His GI disability benefits include medical treatment and a monthly payment of around $1,200. (*Id*. at 43). Employee described an injury in the military where a tank hatch hit him on the head while he was not wearing a helmet. (*Id*. at 39). Dr. Costello started treating him for this injury, which involved back pain and migraine, in 2017. (*Id*. at 40-41). Between 2017 and 2019, his back pain and migraine symptoms worsened. (*Id*.). Before the work injury, Employee would get migraines "almost every day, but it wasn't . . . constant." (*Id*. at 42). After the work injury, he now gets migraines every day. (*Id*.). Before the work injury, Employee's migraines were controllable with Excedrin, now they are not. (*Id*.). He worked a part-time job for three months, from May until August 15, 2022, doing grounds maintenance for the fairgrounds. (*Id*. at 51-52). The job ended because Employee went back to school. (*Id*.). His last day of work with Employer was in January 2022. (*Id*. at 14).

63) On October 18, 2022, Employee presented to NP Geraci for his fourth Botox injection and reported no improvement in his migraines with Botox. It was noted that traditional methods of treatment had also been tried and proven unsuccessful. Employee stated that if he doesn't have improvement with Botox, he would like to discontinue Botox after today's treatment. A follow-up visit was scheduled for 3 months. (Geraci chart notes, October 18, 2022).

64) On December 16, 2022 Employer controverted Employee's entitlement to further reemployment stiped payments until the equivalent of $5,310 in previously paid PPI benefits were reimbursed to Employer at Employee's TTD rate – approximately 16 weeks of TTD payments. (Controversion Notice, December 16, 2022).

65) On January 11, 2023, Employee testified, when he returned to work in September 2021, his job description had changed to include more sitting, including doing light maintenance on small engines that had been conveniently placed near him. He was working eight hours per day, five days per week. Employer had modified descriptions of his old job and he felt like he was stuck in place and not really advancing towards a specific new job. (*Koberg I*).

66) On January 11, 2023, LaBrosse testified he did not complete the steps prescribed by regulation for an offer of alternative employment for the April 30, 2021 modified Mechanic

Helper job because Employee reported he tried to do this job but was not able to do it. Therefore, LaBrosse considered this job a failed work attempt. He did not include this job as part of Employee's work history because it was a limited capacity, temporary position that Employer offered while it was anticipating that Employee would be able to go back to his job at the time of injury. LaBrosse followed up with Employer on December 15, 2021, and Mr. Blauvelt stated if Employee is not released back to work when he is medically stable, it would not be up to him whether Employer would be able to offer alternative employment. LaBrosse has completed labor market surveys and job analysis in other cases but did not do so here because Employee did not have a firm offer of permanent employment. Instead, Employee was working at a modified, temporary position. LaBrosse explained, usually an employer will modify the job at the time of injury to match whatever limitations a claimant has with the hope that the employee will improve and be able to return to the job at the time of injury, which is what Employee's work for Employer appeared to be. Employee had not reached medical stability, and it appeared to LaBrosse that Employer was using Employee's modified duties as a "placeholder" until Employee improved, which is something Mr. LaBrosse sees quite often. (*Koberg I*).

67) On January 24, 2023, Employee returned to NP Geraci and denied any improvement in his daily headaches after a full year of receiving Botox injections and he was interested in alternative treatments. Again, it was noted that traditional treatment methods had been tried and proven unsuccessful, including Nortriptyline, Rizatriptan, Indomethacin, Naratriptan, Topiramate, Ubrelvy, Nurtec and now Botox. NP Geraci prescribed Aimovig and discussed Qulipta and GammaCore with Employee and planned to see him again in three months. (Geraci chart notes, January 24, 2023).

68) On March 10, 2023, *Koberg v. Everts Air Fuel, Inc.*, AWCB Decision No. 23-0017 (March 10, 2023) (*Koberg I*) denied Employer's petition seeking review of the RBA designee's eligibility determination, concluding the RBA designee did not abuse her discretion in finding that Employer had not offered Employee alternate employment. (*Id.*).

69) On March 22, 2023, the VA approved Employee to receive up to 15 chiropractic treatments between June 1, 2023 – September 29, 2023. (Approved Referral for Medical Care, March 22, 2023).

70) On April 11, 2023, Employee again saw NP Geraci and reported his migraines had worsened over the past three months. He described daily, "low level," constant, migraines with the pain levels fluctuating, sometimes as severe as "7/10 usually at least twice per week." Employee reported no improvement with Propranolol and was interested in another treatment. NP Geraci prescribed Qulipta and would consider prescribing Aimovig if Qulipta was not "covered." She planned to see Employee again in three months. (Geraci chart notes, April 11, 2023).

71) On May 2, 2023, Employee claimed TTD, TPD, and PPI benefits, reemployment benefits, medical and transportation costs, interest and attorney fees and costs. (Claim for Workers' Compensation Benefits, May 2, 2023).

72) On May 2, 2023, Employer controverted reemployment stipend benefits "while not in a full-time reemployment plan" on the basis Employee had voluntarily removed himself from the labor market by resigning from his job. (Controversion Notice, May 2, 2023).

73) On May 23, 2023, Employer controverted TTD benefits after September 30, 2021 based on Employee's return to full-time employment with Employer, PPI benefits greater than three percent based on Dr. Rangitsch's spinal PPI rating, all benefits other than Board ordered reemployment benefits after February 18, 2022 based on Drs. Rangitsch's and Zoltani's opinions that Employee's work injury had "resolved" by that date, and reemployment stipend benefits while not in a full-time reemployment plan. (Controversion Notice, May 23, 2023).

74) On June 1, 2023, Employee resumed physical therapy treatments after approximately a "1.5-year hiatus from PT." The chart notes from this twenty-third session state Employee described having "persistent spinal pain from his injury in 2021" and is "continuing chiropractic care appx 1-2 times biweekly at AK Brain and Spine." The diagnosis and treatment plan from this visit indicate Employee "has limitations in spinal ROM, strength and stability resulting in pain and loss of function. . . . He should benefit from PT in order to restore ROM followed by progressive strengthening through his ROM in order to improve function and decrease symptoms." (Daily Note, June 1, 2023).

75) On June 20, 2023, the RBA sent a letter to LaBrosse notifying him Employee had been found eligible for reemployment benefits and had selected him to develop a reemployment benefits plan on his behalf. The plan was to be prepared within 90 days. (RBA letter, June 20, 2023).

76) On July 27, 2023, Employee treated with NP Geraci and reported daily migraines with increased migraine intensity at least twice weekly. He had received Aimovig the day before but had not started taking it. NP encouraged Employee to start the Aimovig that weekend. If Aimovig was not helpful, she would consider prescribing Qulipta. (Geraci chart notes, July 27, 2023).

77) On September 22, 2023, reemployment specialist LaBrosse submitted a vocational rehabilitation plan for the vocational objective of Park Ranger. The plan was not signed by either the Employee or Employer. (LaBrosse Plan, September 22, 2023; observation).

78) On October 12, 2023, the VA referred Employee for 15 chiropractic treatments from October 12, 2023 to February 11, 2024, and Employee resumed chiropractic treatments with Dr. Costello. (Approved Referral for Medical Care, October 12, 2023; Costello chart notes, December 5, 2023). He also resumed physical therapy and started massage therapy. (Daily Note, November 17, 2023; Kendall chart notes, December 5, 2023).

79) On October 17, 2023, the RBA sent LaBrosse a letter questioning the status of the reemployment plan since it had not been approved and signed by Employee and Employer. The letter requested LaBrosse to advise the RBA within 10 days of the parties' decision regarding plan approval. (RBA Letter, October 17, 2023).

80) On November 13, 2023, Employer proposed reemployment plan for Employee to be a Heavy Equipment Operator. (Reemployment Plan, November 13, 2023).

81) On November 21, 2023, Employee treated with NP Geraci and reported no improvement in his migraines with Aimovig. NP Geraci prescribed Qulipta and reviewed job descriptions for Park Ranger and Operating Engineer. (Geraci chart notes, November 21, 2023). She predicted Employee would not have the permanent physical capacities to perform either job. (Geraci responses, November 21, 2023).

82) On November 27, 2023, LaBrosse submitted a progress report to the RBA regarding his proposed vocational objective of Park Ranger and noting that Employee wants "to review it further with his attorney before he signs this plan." LaBrosse also stated that Employer had not yet endorsed the proposed reemployment plan. (Progress Report, November 27, 2023).

83) On December 1, 2023, the RBA denied Employer's proposed reemployment plan, deciding to rely on NP Geraci's predictions regarding Employee's permanent physical capacities instead of Dr. Zoltani's. (RBA Letter, December 1, 2023).

84) On December 5, 2023, Employee treated with Dr. Costello. The chart notes from this session state:

> "tension over entire body has been noticeably less since getting care with Dr. Luper. Doing figure 8's seems to improve neck range of motion but still has neck pain. Midback pain and stiffness. Migraine has been less overall. Has had days where he does not have migraines until afternoon."

(Costello chart notes, December 5, 2023).

85) On January 3, 2024, Employer controverted all benefits based on Employee's failure to sign releases. (Controversion Notice, January 3, 2024).

86) On January 4, 2024, Employee filed a Petition for a second independent medical evaluation (SIME). (Employee Petition, January 4, 2024).

87) On January 29, 2024, Employee treated with Dr. Costello. The chart notes from this session state Employee has been having low back pain since the last visit and:

> "Still has pain with sitting, standing up, walking and laying down. Low back pain is worse on the left side and he has increased tension headaches associated with his low back pain. This morning the migraine is worse and back is very tight. He is still getting wrapped around pain in his low back and on left side of his left hip.

(Costello chart notes, January 29, 2024).

88) At a February 16, 2024 prehearing conference, the parties agreed to an SIME. They planned to file a signed SIME form and designate the medical specialty when the SIME binders were filed on March 18, 2024. (Prehearing Conference Summary, February 16, 2024).

89) On February 21, 2024, Employee treated via telemedicine with NP Geraci for ongoing migraine issues. The chart notes state:

> [Employee] "Reports he is unsure if the Qulipta was helpful for his migraines but only had two months of taking and then did not receive another shipment. I asked him to continue with Qulipta for the next 6 weeks then I will see him back to review. If not improving, may try Vyepti."

(Geraci chart notes, February 21, 2024).

90) On March 11, 2024, the VA approved Employee to receive up to 15 physical therapy visits from March 14, 2024 to July 13, 2024. (Approved Referral for Medical Care, March 11, 2024).

91) On March 21, 2024, Employee participated in a telemedicine appointment with NP Geraci. He reported "he has continued with Aimovig and does not find any improvement in migraines. He states he also has been evaluated by another provider and his liver enzymes are elevated." NP Geraci scheduled Employee for a follow-up appointment in three months – June 21.,2024. (Geraci chart notes, March 21, 2024).

92) On March 27, 2024, the parties submitted a jointly signed SIME form, agreeing that a medical disputes existed on issues of causation, compensability, treatment, functional capacity, PPI and medical stability. They also sought the SIME physician's opinion on PPI and medical stability and agreed to "neurology" as the medial specialty required for the evaluation. (SIME form, March 24, 2024).

93) On April 5, 2024, Employee treated with Dr. Costello. This is the last treatment session reflected in the agency file. The chart notes from this session state Employee reported:

> back tight still but less after last visit. Right ankle pain on the inside and pain when he walks. Worse in the morning. Digestion has been overall the same since last visit. Driving has been less aggravating with his migraines. Low back and mid back pain less but still feels stiff, esp. in the morning.

(Costello chart notes, April 5, 2024; observation).

94) On May 20, 2024, LaBrosse sent a "Vocational Rehabilitation Plan – Progress Report" to the RBA proposing, "Director, Recreation Center" as Employee's new vocational objective. LaBrosse stated the plan had not yet been signed off by Employee or Employer/adjuster. (Progress Report, May 20, 2024).

95) On June 2, 2024, Dr. Kaveeshvar completed an SIME report based on a May 20, 2024, neurological exam of Employee and a medical records review. He found the causes of Employee's disability and need for medical treatment included the work injury, which resulted in multiple thoracic spine fractures, concussion, and scalp laceration; chronic migraine, which was a pre-existing condition aggravated by the work injury; chronic back pain, which was aggravated by the thoracic spine fractures from the work injury; post-concussive syndrome with symptoms including persistent headaches, cognitive difficulties, and sensitivity to light and sound; and depression, possibly secondary to chronic pain and disability. Dr. Kaveeshvar opined that the work injury aggravated Employee's pre-existing chronic migraines, which resulted in increased severity and frequency of the headaches and significantly impacted Employee's daily activities

and quality of life. The increased severity and frequency of the headaches due to the work injury was the substantial cause of Employee's disability and need for medical treatment, in his opinion. According to Dr. Kaveeshvar, Employee's work-related disability was continuing since he still experiences daily headaches, chronic back pain, and cognitive difficulties that impact his ability to perform daily activities and work. He opined, "Medical stability was reached on May 20, 2024," since no further improvement was expected from additional medical care. Dr. Kaveeshvar thought Employee required continuing treatment, including Ajovy for migraine management, ongoing physical therapy and chiropractic care to manage back pain, regular neurological follow-ups for headache management, acupuncture and massage therapy as adjunct treatments, and psychological counselling to address depression and coping strategies for chronic pain. He thought that these treatments will help manage symptoms and improve functionality, provide temporary relief from chronic pain, aid in the recovery of individual pain episodes, limit the progression of symptoms, support a "potential" return to work, and enable continued participation in educational activities, future work and reemployment efforts. Dr. Kaveeshvar did not think Employee could work as a Park Ranger without any limitations or restrictions, and work restrictions included avoiding prolonged standing, heavy lifting, and activities that exacerbated headaches and back pain. He rated Employee as having incurred a four percent whole person impairment for headaches. (Kaveeshvar report, June 2, 2024).

96) Dr. Kaveeshvar's report includes two dates for medical stability: May 20, 2023 at page 84, and May 20, 2024 at page 86. Because Dr. Kaveeshvar examined Employee on May 20, 2024, his May 20, 2023 date was a typographical error, and his intended date of medical stability is the date of his evaluation. (*Id*.; observations; inferences drawn therefrom).

97) On June 25, 2024, Employee filed an affidavit of readiness for hearing (ARH) requesting an oral hearing on his May 2, 2023 compensation claim. Employer opposed the ARH on July 3, 2024 asserting that discovery had not yet closed, and that Employer intended to take the deposition of various medical witnesses, including Dr. Kaveeshvar. (ARH, June 25, 2024; Opposition, July 3, 2024).

98) On September 5, 2024, Employer emailed the RBA inquiring on the status of LaBrosse's reemployment plan and whether it had been approved. The RBA responded by email on Sept. 6, 2024 informing the parties LaBrosse had submitted a revised plan on May 20, 2024 proposing a new goal of Director-Recreation Center, based on the fact Employee's attending physician had

not approved the previous employment goal of Park Ranger. The RBA stated it had not yet received a signed approval from any of the parties. (Employer email, September 5, 2024; RBA email, September 6, 2025).

99) On October 9, 2024, Employer deposed Dr. Kaveeshvar, who testified he is "double-boarded" in pain management and neurology by the American Board of Medical Specialties. (Kaveeshvar dep., October 9, 2024 at 5). His evaluation concentrated on Employee's migraine condition and not his back injury because he understood the evaluation to be a neurological evaluation. (*Id*. at 12-13). Dr. Kaveeshvar acknowledged that Employee had a preexisting migraine condition, but it was "not as bad," because he did not need medications before the work injury. (*Id*. at 7, 12). According to Dr. Zoltani's EME report, Employee has a 30 percent service-related disability, but he does not know what that means. (*Id*. at 8). The conditions for which Employee received that rating would be relevant to his evaluation and could potentially impact Dr. Kaveeshvar's findings. (*Id*. at 8-9). His treatment recommendations for Employee include continued medication management, regular neurological follow-ups, "some" acupuncture, massage therapy as adjunctive treatment, and psychological counseling to address any kind of depression or coping strategies for chronic pain. (*Id*. at 14). Dr. Kaveeshvar would leave the frequency of acupuncture and massage therapy treatments to the discretion of the acupuncturist and the message therapist. (*Id*. at 14-15). His work restrictions for Employee include avoiding prolonged standing, lifting and activities exacerbating headaches and back pain. (*Id*. at 15). Dr. Kaveeshvar's PPI rating for Employee's migraine condition was four percent and he did not assess any PPI rating for Employee's back condition. (*Id*. at 16). He opined the work injury "significantly aggravated" Employee's preexisting migraine condition, which led to the need for medications. (*Id*. at 17). The aggravation was permanent, according to Dr. Kaveeshvar. (*Id*. at 18). He explained, if a person has a previous concussion, it puts that person at a higher risk for having more prominent and prolonged symptoms in subsequent concussions. (*Id*. at 18). People with migraine disorders, even "pretty bad ones," still lead productive lives and work full-time, so Dr. Kaveeshvar does not think just having a migraine disorder precludes someone from working. (*Id*. at 24). From his clinical experience, it is uncommon for someone to be permanently and totally disabled from a migraine disorder. (*Id*. at 30).

100) On November 5, 2024, Employee filed an affidavit of attorney fees, requesting $19,103 in fees and $265.32 in costs for a total of $19,368.32 in fees and costs. These fees and costs were

set forth on "Invoice #66." Employee's attorney averred she had been licensed to practice law in Alaska since 1994; had been representing injured workers before the Alaska Workers' Compensation Board since 2017; had been an Alaska Workers' Compensation Board Hearing Officer for approximately four years; and had also represented the State of Alaska in workers' compensation cases for four years. She had also practiced employment law, labor law and tort law in the State of Alaska, and for "a number of years," was a hearing examiner for the State of Alska. Her time was billed at rates of $415, $435 and $450 per hour. (Affidavit of Attorney Fees, November 5, 2024).

101) On December 19, 2024, a hearing on Employee's workers' compensation claim was held. During the hearing, Employer requested to present rebuttal testimony from Employee's reemployment specialist, LaBrosse. However, because LaBrosse was not immediately available to testify, the hearing chair elected to conclude the hearing instead of continuing it until later in the day when LaBrosse would be available to testify. (Record).

102) On December 19, 2024, Employee testified he has a disability rating from his military service for low back, ankle right knee and head injuries. He really liked his job at the time of injury and it was very disheartening not being able to do it after the injury. Employee described Employer's modified job duties after his injury as a "made-up job" that involved entering data for five-year-old work orders. He was told the modified duties were a retraining program and it did not seem like a "real job." Employee resigned from his position with Employer in January 2022. He had VA benefits to "fall back on," and he started taking online and in-person courses for a Business Management degree in Recreation. The online courses allowed him to take breaks for his migraines. Employee could not take all his courses in person because of problems with prolonged sitting, bright classroom lights and the noise of people talking. He completed an associate's degree over the summer, and he has now completed three-quarters of a bachelor's degree. Employee would like to complete his bachelor's degree if he had the funds to do so. LaBrosse has prepared two reemployment plans for him: Park Ranger and Recreation Center Management. He did not produce college transcripts for LaBrosse because LaBrosse never asked for them and he did not participate in reemployment activities on a full-time basis. The VA pays Employee a $1,900 monthly housing stipend while he is taking classes. His monthly VA disability benefit is $1,300. He undertook part-time seasonal work after the work injury that

involved light duty cleaning, landscaping and lawn mowing with hearing protection. This employment was a temporary job to make ends meet. (Casey Koberg).

103) On December 19, 2024, Employee's wife, Deanna Koberg, testified about how the work injury affected him. Employee no longer goes kayaking like he did before the injury and family events are "taxing" for Employee because of noise. (Deanna Koberg).

104) In its closing arguments at hearing, Employer cited *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264 (Alaska 1974), to support its contention that Employee was not entitled to an award of disability benefits because he voluntarily resigned his position with Employer. (*Id*.).

105) On December 23, 2024, Employee supplemented his attorney fees and costs following the December 19, 2024 hearing. He requested $28,493 in fees and $1,061.18 in costs for a total of $29,554.18 in fees and costs. These fees and costs were set forth on "Invoice #66," Invoice #67," and Invoice #68." (Affidavit of Attorney Fees, December 23, 2024).

106) On December 27, 2024 Employer objected to Employee's supplemental fee affidavit contending it had not been properly served on Employer and also requesting that any fee award be tailored to the benefits gained on Employee's behalf. (Objection, December 27, 2024). Employer did not object to the hourly rate billed by Employee's attorney or to any specific fee entry or cost entry. (Observation).

107) On January 17, 2025, a prehearing conference was called on the designee's own motion to offer Employer the opportunity to present LaBrosse's rebuttal testimony. The designee stated that rather than having concluded the December 19, 2024 hearing, it should have been continued for good cause under 8 AAC 45.074(b)(1)(H) to accommodate LaBrosse's unavailability, and that based on the mandates of AS 23.30.001(4) it was improper not to have allowed Employer to present LaBrosse's rebuttal testimony. The parties agreed to communicate with one another and the board to schedule a future date to conclude the hearing as soon as possible after February 11, 2025. (Prehearing Conference Summary, January 17, 2025).

108) During a March 13, 2025 prehearing conference, the parties agreed to an April 15, 2025 hearing to allow Employer to present the rebuttal testimony of LaBrosse. (Prehearing Conference Summary, March 13, 2025).

109) On April 15, 2025, the hearing on Employee's workers' compensation claim continued. LaBrosse testified no reemployment plans were "officially" developed for Employee, but rather

just a couple of vocational objectives: Park Ranger and Recreation Center Manager. Employee's doctor did not approve of the Park Ranger objective and LaBrosse never got medical approval for the Recreation Center Manager objective. Employee reported he was pursuing a degree on his own and reported he had a 3.8 GPA, but he never produced college transcripts. The VA does not allow for other sources of educational funding and since Employee could lose all his VA benefits, he "treaded lightly" with respect to Employee's VA educational pursuits. Employee was also getting housing assistance from the VA, so he let Employee's VA educational pursuits "fly under the radar." LaBrosse characterized Employee's VA educational benefits as an "all or nothing proposition." Employee was struggling financially and did not have a place to live, but he did have VA benefits. He encouraged Employee to go to school since the degree Employee was pursuing would fit in with the vocational objective he was trying to develop. LaBrosse also encouraged Employee to use his VA benefits, take some classes, get an associate of applied science degree, then get a bachelor's degree with his workers' compensation vocational rehabilitation benefits. It is expected that an injured employee will participate 40 hours per week in a reemployment plan but that expectation does not apply during plan development. Employee maintained contact with him, always replied to his inquiries, and remained involved during the reemployment process. LaBrosse last spoke with Employee a couple of months ago and Employee reported he had completed an associate's degree in applied business. Employee was easy to contact and always called him back. No party requested that Employee be found non-cooperative with vocational rehabilitation. (LaBrosse).

110) At the conclusion of the hearing on April 15, 2025, Employee did not request additional time following the hearing to supplement his attorney fees. Neither did Employee's attorney testify "about the hours expended and the extent and character of the work performed" following the filing of her previous affidavit in accordance with 8 AAC 45.180(d)(1). (Record).

111) On April 17, 2025, Employee filed a petition requesting an attached affidavit of attorney fees be considered. His stated reason for filing the petition was, "Attorney for claimant forgot to request additional time to submit an affidavit of attorney fees at the hearing on 4/15/2025." The attached amended affidavit of attorney fees requested $34,808 in fees and 1,434.81 in costs for a total of $36,242.81 in fees and costs. These fees and costs are set forth on "Invoice #66," "Invoice #67," "Invoice #68," and "Invoice #70." Employee emailed his petition to Employer's attorney that same day. (Petition, April 17, 2025; Affidavit of Attorney Fees, April 17, 2025). A

blank sheet of paper separates Employee's April 17, 2025 petition and his attorney's April 17, 2025 affidavit. The print on the attached image of "Invoice #66" is faint and blurry and the line-item entries are either very difficult to read or illegible. The print on the attached images of "Invoice #67" and "Invoice #68" is less faint and burry than on "Invoice #66" and line-item entries can be read with some difficulty. The print on "Invoice 70" is less faint and blurry than previous invoices and the line-item entries can be read with little, if any, difficulty. (Observations).

112) On May 6, 2025, Employer answered Employee's April 17, 2025 petition and objected to consideration of Employee's April 17, 2025 attorney fee affidavit because one page was blank, another page was blurry, and a third page was illegible. It also objected to consideration of the attorney fee affidavit because it was untimely filed under regulation and pointed out that Employee's attorney could have requested additional time at hearing to file the affidavit or she could have testified about the additional fees at hearing but did neither. Employer requested that Employee's additional attorney fees be considered waived. (Answer, May 6, 2025).

113) On May 14, 2025, the hearing chair reopened the record to receive Employee's April 17, 2025 petition and Employer's May 6, 2025 answer into the record. (Vollmer letter, May 14, 2025).

114) Payment reports show Employer paid Employee TTD from February 6, 2021 through September 23, 2021; and TPD from September 24, 2021 through September 30, 2021. (Annual Report, January 26, 2022). It also paid Employee TTD from October 11, 2022 through October 24, 2022; and reemployment stipend from August 16, 2022 through December 5, 2022. (Annual report, July 5, 2023).

115) Employee failed to submit evidence of specific payments made by the VA on his behalf, a log itemizing past transportation expenses, evidence of out-of-pocket payments, or unpaid medical bills. (Observations).

116) Employer has not sought the RBA's determination that Employee has not cooperated with the reemployment process. (Observations).

117) The agency file contains no records from the VA regarding Employee's military disability rating or the basis for the rating at the time of his discharge. (Observation).

PRINCIPLES OF LAW

> **AS 23.30.010. Coverage**. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability, death or the need for medical treatment of an Employee if the disability . . . or the Employee's 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 the 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. . . .

In *DeYonge v. NANA/Marriott*, 1 P.3d 90 (Alaska 2000), the Alaska Supreme Court reiterated that preexisting conditions do not disqualify a claim under the work-connection requirement if the employment injury aggravated, accelerated or combined with the preexisting infirmity to produce the disability for which compensation is sought. The Court stated so long as the work injury worsened the injured person's symptoms, the increased symptoms constitute an aggravation, "even when the job does not actually worsen the underlying condition." *Id*. at 96.

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . . .
>
> (k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages . . . .
>
> (n) After the employee has elected to participate in reemployment benefits, if the employer believes the employee has not cooperated, the employer may terminate reemployment benefits on the date of noncooperation. . . .

> (o) Upon the request of either party, the administrator shall decide whether the employee has not cooperated as provided under (n) of this section. . . .

In *Carter v. B&B Construction*, 199 P.3d 1150; 1159 (Alaska 2008), the Court agreed with a board decision that concluded an employee may be eligible for .041(k) benefits prior to approval or acceptance of a reemployment plan, so long as the employee had begun the "reemployment process." It decided the reemployment process begins when the employee begins his "active pursuit of reemployment benefits." *Id*. at 1160. In Carter's case, the Court explained:

> Because Carter began to actively pursue reemployment benefits on April 27, 1993 when he requested an eligibility evaluation, and because he continued to actively pursue those benefits by petitioning the board for review of the division's May 4, 1993 'decision,' by petitioning the board for a rehearing, and by appealing to the superior court, we conclude that the board did not err in awarding him reemployment benefits, beginning when his PPI payment was exhausted on July 14, 1994, for the statutory maximum period that a reemployment plan can last—two years. . . .

Id.

> **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. . . . 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. . . .
>
> (o) . . . an employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain.

Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The statute does not require continuing rehabilitative or palliative care be provided in every instance.

Rather, it grants the board discretion to award "indicated" care "as the process of recovery may require." *Id*. at 664.

When a claim is reviewed for continued treatment beyond two years from the injury date, a panel had discretion to authorize "indicated" medical treatment "as the process of recovery may require." Given this discretion, a panel is not limited to reviewing the reasonableness and necessity of the particular treatment sought but has some latitude to choose among reasonable alternatives. *Phillip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999). The question of reasonableness is "a complex fact judgment involving a multitude of variables." However, where the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable. *Id*. at 732.

> **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 . . . .

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or

not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id*. An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V*., 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc*., 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion in light of the record as a whole. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds by *Huit*). If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller v. ITT Services,* 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief"

in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

Lindhag v. State, Dept. of Natural Resources, 123 P.3d 948; 955 (Alaska 2005) held a claim can fail for "failure of proof."

> **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 finding." *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 23.30.145. 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. . . .
>
> (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 a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A

controversion, actual or in-fact, is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-53.

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), the Court held attorney fees awarded should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on a claim's merits, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the employer's resistance, and the benefits resulting from the services obtained, are considerations when determining reasonable attorney fees for a claim's successful prosecution. *Id*. at 973, 975. Since a claimant is entitled to full reasonable attorney fees for services on which the claimant prevails, it is reasonable to award one-half the total attorney fees and costs where the claims on which the claimant did not prevail were worth as much money as those on which he did prevail. *Bouse v. Fireman's Fund Ins., Co.*, 932 P.2d 222; 242 (Alaska 1997).

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the Court clarified its holding in *Bignell*, and held "the Board must consider of the factors set out in Alaska Rules for Professional Conduct 1.5(a) when determining a reasonable attorney fee." *Id*. at 798-99. It emphasized, ". . . the Board must consider each factor and either make findings related to that factor or explain why that factor is not relevant." *Id*. at 799. The Court simultaneously noted:

> Alaska Rule of Professional Conduct 1.5(a) sets out eight non-exclusive 'factors to be considered in determining the reasonableness of a fee,' specifically:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
>
> (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily shared in the locality for similar legal services;

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

Id. at n. 51. An attorney fee award will only be reversed if it is "manifestly unreasonable" – this differs from the "substantial evidence" test used for review of factual determinations. *Id*. at 803.

AS 23.30.155. Payment of compensation.
. . . .

(p) An employer shall pay interest on compensation that is not paid when due. . . .

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.

In *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264; 265 (Alaska 1974), the Board had denied the claimant's disability claim, finding: "The Board believes that applicant does not want to work and that her husband, who did not want her to work before the work injury, probably keeps her from working now." The claimant appealed, and as a general proposition, *Vetter* concluded, "[i]f a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability." *Id*. at 266. However, *Vetter* found no substantial evidence to support the Board's finding the claimant was "unwilling to work" and remanded the case. *Id*. at 268.

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 motivation for leaving work. The issue is whether a claimant is able to work despite his injury, not why he decided to leave work.

Interpreting both *Vetter* and *Cortay*, the Alaska Workers' Compensation Appeals Commission, in *Strong v. Chugach Electric Assoc., Inc.*, AWCAC Decision No. 128 (February 12, 2010), 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. An employee's reasonable efforts to seek work within his physical restrictions may be considered when deciding if loss of earnings after a voluntary retirement is due to disability. *Id*. at 15.

When both work related and non-work related medical conditions prevent a disabled employee from returning to work, the non-work related condition does not necessarily destroy the causal link between the work injury and the loss of earning capacity and a worker may still be entitled to disability benefits. *Estate of Ensley v. Anglo Alaska Constr.*, 773 P.2d 955; 958 (Alaska 1989). Similarly, a disabled worker may be entitled to compensation even though he is unavailable for work for some other, personal reason. *Cortay* at 108 (Alaska 1990).

At the time of Employee's injury, the Act provided:

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .

The statutory compensability presumption applies to claims for PPI. *See Parker v. Safeway, Inc.*, AWCAC Decision No. 144 (December 28, 2010) (affirming the board's presumption analysis for a PPI benefit); *see also Murphy v. Fairbanks North Star Borough*, 494 P.3d 556; 565 (Alaska 2021) (writing in dicta that it was doubtful the legislature intended to exclude impairment claims

from the coverage presumption). A claim for PPI based on aggravation of a preexisting condition is a highly technical claim so medical evidence is necessary to attach the presumption. *Parker*. A claimant does not attach the presumption when he does not present medical evidence his PPI was related to the work injury. *Id*. Where a claim for PPI is contested, the employee is required to obtain a PPI rating if he does not agree with a rating by the employer's physician or a PPI rating has not already been obtained. *Settje.* "Stated simply, a PPI rating is necessary to obtaining an award of PPI benefits." *Id*.

> **AS 23.30.200. Temporary partial disability.** (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability. . . .

TPD is determined by comparing an employee's actual weekly earnings with her spendable weekly wage. *Lubov v. McDougall Lodge*, LLC, AWCAC Decision No. 257 (March 7, 2019). The burden is on the employee to provide sufficient evidence she could not earn the wages she was receiving at the time of injury due to the work injury. *Id*. Where the employee fails to provide evidence of her actual earnings, there is no evidence to determine a TPD calculation. *Id*.

> **8 AAC 45.063. Computation of time.**
> . . . .
>
> (b) Upon petition by a party and for good cause, the board will, in its discretion, extend any time period prescribed by this chapter.

In *Israelson v. Alaska Marine Trucking, L.L.C.*, AWCAC Decision No. 226 (May 27, 2016), an injured worker won his claim for workers' compensation benefits with the assistance of counsel, who filed his pre-hearing affidavit of services one day late, four days prior to the hearing. As a result, the panel awarded statutory minimum attorney fees. Under the facts of that dispute, the Commission did not see the regulation concerning avoiding manifest injustice as being the applicable one, but rather the regulation permitting an extension of time. Regarding extending time, it wrote:

> 8 AAC 45.0 63(b) does not expressly limit the Board's consideration of good cause to consideration of the reasons for failure to meet the deadline in the first place (*i.e.,* excusable neglect), nor does it expressly limit the Board's authority to grant an extension of time after the original deadline has passed. Accordingly, the regulation may reasonably be interpreted to provide the Board with discretion to grant extensions of time as may be appropriate under all of the circumstances, either before or after the applicable deadline. *Id*. at 9.

The Commission concluded the late filing of the affidavit of services was an implicit written request for an extension of time and was also concerned the statutory minimum fee award was "grossly disproportionate" to the services rendered in that case. *Id*. at 9. The Commission reversed and remanded, holding the injured worker's attorney has substantially complied with the regulation permitting an extension of time and in that case the delay was minimal, late filings were not a recurring event, the late filing was not disruptive to the orderly presentation of evidence, the affidavit was served on the opposing party the same day it was filed, and the opposing party did not contend or submit evidence it had been prejudiced. *Id*. at 9-10.

> **8 AAC 45.180. Costs and attorney's fees.**
> . . . .
>
> (b) . . . . An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.
> . . . .
>
> (d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.
>
> (1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit

> in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
> . . . .
>
> (f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. . . .

ANALYSIS

1) Is Employee entitled to continuing medical benefits and related transportation costs?

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the continuing medical care and related transportation benefits he seeks. *Carter*. He attaches the presumption with his October 4, 2022 deposition testimony describing being knocked off a K-loader at work, falling ten feet, landing on his head on concrete, losing consciousness, and waking up on the ground in a "big pool of blood." *Cheeks*. Employer rebuts the presumption with Drs. Zoltani's and Rangitch's EME opinions that Employee's work injuries required no further treatment. *Miller*. Employee is now required to prove he is entitled to continuing medical care by a preponderance of the evidence. *Koons*.

When a claim is reviewed for continued treatment beyond two years from the injury date, a panel has discretion to authorize "indicated" medical treatment "as the process of recovery may require." AS 23.30.095(a). Additionally, an employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary to enable the employee to continue in the employee's employment at the time of treatment, to enable the employee to continue to participate in an approved reemployment plan, or to relieve chronic debilitating pain. AS 23.30.095(o). In addition to being evaluated by the EME physicians, Drs. Zoltani and Rangitsch, Employee was also evaluated by the SIME physician, Dr. Kaveeshvar, who opined the work injury aggravated Employee's pre-existing migraine condition and, while Employee's migraine condition was medically stable, continuing treatment should include Ajovy for migraine management, ongoing physical therapy and chiropractic care to manage back pain,

regular neurological follow-ups for headache management, acupuncture and massage therapy as adjunct treatments, and psychological counselling to address depression and coping strategies for chronic pain. He thought that these treatments would help manage symptoms and improve functionality, provide temporary relief from chronic pain, aid in the recovery of individual pain episodes, limit the progression of symptoms, and enable continued participation in educational activities, future work and reemployment efforts. *Id*. Because Dr. Kaveeshvar is an independent examiner of the Board's own choosing who is "double-boarded" in neurology and pain management, and because he reviewed the most recent and comprehensive medical records, his opinion on medical treatment is afforded the most weight. AS 23.30.122; *DeRosario*; *Smith*. Accordingly, with the exception noted below, Employee is entitled to palliative care as recommended by Dr. Kaveeshvar as reasonably effective and necessary for his process of recovery. *Hibdon*.

Employee's treatment history with NP Geraci shows his process of recovery requires a modification to Dr. Kaveeshvar's treatment recommendations. AS 23.30.095(a). NP Geraci documented the trials and failures of many traditional migraine treatment methods, including Nortriptyline, Rizatriptan, Indomethacin, Naratriptan, Topiramate, Ubrelvy, Nurtec, and Botox. Employee then tried Aimovig and Qulipta, which were also ineffective. Given Employee's history with these trials, his medical provider should not be limited to only prescribing Ajovy for migraine management, as Dr. Kaveeshvar recommends, but she should be free to try alternatives to Ajovy based on the medication's efficacy for Employee. *Hibdon*.

2) Is Employee entitled to past medical benefits and related transportation costs?

In the absence of substantial evidence to the contrary, Employee is presumed entitled to past medical care and the related transportation costs he seeks. *Carter*. He attaches the presumption with his October 4, 2022 deposition testimony describing the work injury. *Cheeks*. Employer rebuts the presumption with its EME opinions that Employee required no further medical care past the dates specified in the EME reports. *Miller*. Employee is now required to prove he is entitled to his past medical care by a preponderance of the evidence. *Koons*.

Even if controverted past medical care for Employee's back and head injuries were resolved in his favor, Employee's claim for past medical costs suffers fundamental evidentiary infirmities. He failed to submit evidence of specific payments made by the VA on his behalf, or any out-of-pocket payments he may have personally made. Neither did he submit a log itemizing past transportation expenses nor evidence of unpaid medical bills. Since this evidence was not submitted, there is no evidence to consider beyond Employee's contention that the VA paid for some of his past medical treatment and should be reimbursed. Employee has failed to meet his burden of production and persuasion and his claim seeking past medical costs will be denied for failure of proof. *Saxton*; *Lindhag*.

3) Is Employee entitled to additional TTD or TPD benefits?

The parties do not dispute Employee suffered a work-related disability following his injury; rather, they dispute the medical stability date at which temporary disability benefits would have ceased. AS 23.30.185; AS 23.30.200(a). This is a factual dispute to which the compensability presumption applies. *Sokolowsky*. The dispute arises from Dr. Kaveeshvar's June 2, 2024 SIME report, which sets forth two medical stability dates: May 20, 2023 at page 84, and May 20, 2024 at page 86. Employee attaches the presumption he is entitled to a greater period of temporary disability benefits with the later date, *Cheeks*, and Employer rebuts the presumption with the earlier date. *Miller*. Employee is now required to prove he is entitled to temporary disability benefits until May 20, 2024 by a preponderance of the evidence. *Koons*.

Because Dr. Kaveeshvar examined Employee on May 20, 2024, his May 20, 2023 date was a typographical error, and his intended date of medical stability is the date of his evaluation. *Rogers & Babler*. For the reasons described above, Dr. Kaveeshvar's medical stability opinion is afforded the most weight, and Employee is entitled to temporary disability benefits until May 20, 2024, when he was medically stable. AS 23.30.185.

Employer cites *Vetter* to support its contention that Employee is not legally entitled to additional disability benefits because he voluntarily resigned his job with Employer after the work injury. In *Koberg I*, Blauvelt and LaBrosse explained that Employer had modified Employee's job

duties following the work injury to accommodate the physical restrictions prescribed by his physicians. In the meantime, Employee testified that the reasons he left his job with Employer were because of the modified job duties and his physical restrictions, which left him feeling like he was stuck in place and not really advancing toward a new job. Since Blauvelt's, LaBrosse's and Employee's unrebutted testimony establish that Employee's modified job, and his reasons for leaving it, were not "unconnected to his injury," *Vetter* does not apply.

Regardless of Employee's reasons for leaving his modified job with Employer, the issue is whether Employee was able to work despite his injury, not why he decided to leave work. *Cortay*. In his June 2, 2024 SIME report, on which this decision relies, Dr. Kaveeshvar opined Employee's disability from his work injury was continuing so Employee's resignation is not a basis to deny disability compensation. *Id*. Moreover, an employee's reasonable efforts to seek work within his physical restrictions may be considered when deciding if loss of earnings after a voluntary retirement is due to disability. *Strong*. Employee's part-time, seasonal work at the fairgrounds and his academic efforts towards earning a degree business management demonstrate he has been seeking work within his physical restrictions and should not be denied disability compensation because he left the modified job with Employer. *Id*.

In his May 2, 2023 claim, Employee sought both TTD and TPD benefits. His TPD benefit claim is presumably for the period Employee worked on a part-time, seasonal basis at the fairgrounds. According to Employee's deposition testimony, this employment was for three months and ended on August 15, 2022. TPD is determined by comparing an employee's actual weekly earnings with his spendable weekly wage. *Lubov*. The burden is on the employee to provide sufficient evidence he could not earn the wages he was receiving at the time of injury due to the work injury. *Id*. Employee did not do so here, so there is no evidence from which to calculate TPD. Consequently, Employee is not entitled to PTD benefits from May 15, 2022 through August 15, 2022. *Id*.

4) Is Employee entitled to reemployment stipend benefits?

As a preliminary issue, Employer contends Employee is not legally entitled to stipend benefits because he did not cooperate in the reemployment process. The Act sets forth a procedure for a party to seek the RBA's determination that an injured worker has not cooperated. AS 23.30.041(o). Employer did not seek, let alone obtain, such determination. *Rogers & Babler*. Moreover, Employer's contention that Employee has not cooperated in the reemployment process is contradicted by LaBrosse's unrebutted testimony that Employee maintained contact with him, always replied to his inquiries and remained involved during the reemployment process. Furthermore, Employee was easy to contact and always returned LaBrosse's calls. Considering this evidence, Employer's contention that Employee did not cooperate in the reemployment process is rejected. *Saxton*.

Employee may be eligible for reemployment stipend prior to approval or acceptance of a reemployment plan so long as he had begun the reemployment process. *Carter*. In this case, Employee began his "active pursuit of reemployment benefits" long ago, beginning with his benefit election and continuing through the development of vocational objectives, including Park Ranger and Recreation Center Manager. Employee is entitled to reemployment stipend benefits to be paid pursuant to AS 23.30.041(k).

5) Is Employee entitled to additional PPI benefits?

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the PPI benefit he seeks. *Murphy*. He attaches the presumption with Dr. Kaveeshvar's June 2, 2024, whole person rating of four percent for migraines aggravated by the work injury. *Parker*. Since Dr. Kaveeshvar's rating is the only one in the record for aggravation of Employee's migraines, Employer is unable to rebut the presumption, and Employee is entitled to Dr. Kaveeshvar's four percent PPI rating. *Miller*.

Regarding additional PPI issues, although Employer contends, since it has already paid Employee a three percent PPI benefit, and Employee would be entitled to a one percent PPI benefit "at most" based on the SIME physician's opinion, its contention is incorrect. The three percent PPI benefit Employer previously paid was for Dr. Rangitch's three percent whole person

rating of Employee's thoracic spinal impairment, not impairment from aggravation of his migraines. Therefore, Employer owes Employee an additional four percent PPI benefit.

Employer also points out that Dr. Kaveeshvar testified that the basis of Employee's service-related disability could potentially impact his PPI rating. However, the actual disability rating Employee received when he was discharged from the military, attributable to his concussion and headaches, is unclear in the agency file. In his deposition Employee indicated he received a 60 percent disability rating for injuries to his ankle, back and head; however, during his December 18, 2021 EME with Dr. Zoltani, he indicated having received a 30 percent service-related disability upon discharge based on his concussion and his ongoing headaches. The agency file does not include any records relating to Employee's disability rating when he was discharged from military service or the basis of any disability rating. Therefore, any potential impact of Employee's service-related disability rating to Dr. Kaveeshvar's PPI rating remains speculative and does not diminish the four percent PPI rating he has already provided. *Saxton*.

Meanwhile, although Employee requests a Board referral back to Dr. Kaveeshvar for a spinal PPI rating in the hopes that his rating would be greater than Dr. Ranitch's rating, his request is denied since it was his responsibility to obtain a PPI rating if he disagreed with the rating Dr. Ranitch provided. *Parker*; *Settje*.

6) Is Employee entitled to interest?

A workers' compensation award accrues legal interest from the date it should have been paid. *Rawls*. Therefore, Employee is entitled to interest on unpaid TTD, PPI, and reemployment stipend. AS 23.30.155(p).

7) Is Employee entitled to attorney fees and costs?

Since Employer resisted paying benefits by continuing to litigate its liability for them and necessitating this hearing on the merits of Employee's claim, an award of reasonable attorney fees is appropriate. *Moore*. Pursuant to the Alaska Supreme Court's prescription in *Rusch*, the

factors set forth under Rule 1.5(a) of the Alaska Rules of Professional Conduct are consulted to arrive at a reasonable, fully compensatory attorney fee award. *Bignell*. Because the parties did not present evidence or argument concerning two of those factors, and because the relevance of those factors is not self-evident, they will not be used to either support or lessen Employee's claimed fees. Included in this group are any unique time limitations imposed by Employee as a client, Rule 1.5(a)(5), and how the nature or length of the professional relationship with Employee should affect the fee, Rule 1.5(a)(6). However, other factors under Rule 1.5(a) are relevant and discussed below.

Employee's attorney has billed her time at $415, $435, and $450 per hour and Employer did not object to those hourly rates. Employee's attorney is well known among both the workers' compensation bar and workers' compensation hearing officers. She is an experienced attorney who has successfully represented injured workers for many years. Rule 1.5(a)(7). Employee'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, and Employee's hourly billing rates, though lofty, are appropriate given the contingent nature of representation. Rule 1.5(a)(8).

The merits of workers' compensation claims are often litigated. Controlling law and relevant decisional authorities for the issues presented here are well known among workers' compensation practitioners and can be readily ascertained by other attorneys. The parties deposed just two witnesses, and the SIME medical records span a little over 1,000 pages, which is not unusual for a workers' compensation case. The complexity of litigation, including the time and skills required for prosecution of Employee's claim was average. Rule 1.5(a)(1). Claimants' attorneys are rarely, if ever, precluded from other employment due to conflicts of interest or because they represent notoriously unpopular clients; and neither was Employee's attorney precluded from other employment due to the complexity of the issue presented here. Rule 1.5(a)(2).

Employee prevailed in obtaining most benefits sought by his claim. He secured continuing medical benefits and related transportation costs, a significant amount of past TTD, continuing

reemployment stipend benefits, and an additional PPI benefit. Employee was unsuccessful in his pursuit of three months' TPD and past medical costs. Despite these losses, on balance, this litigation resulted in a "win" for Employee. Rule 1.5(a)(4).

The law provides attorney fees and costs to compensate an injured worker who enlists the assistance of counsel in the successful prosecution of a claim. *Moore*. Attorneys only receive fee awards when they prevail on a claim's merits. *Bignell.* Given Employee's overall victory in this case, and since his fees are supported by factors set forth under Rule 1.5(a) of the Alaska Rules of Professional Conduct, Employee should be awarded all his claimed fees and costs. *Rusch*. However, post-hearing litigation ensued over what claimed fees and costs should be included in the award.

The regulation requires attorney fee affidavits seeking reasonable fees more than the statutory minimum fee to be filed three working days prior to a hearing unless good cause exists to excuse the late filing. 8 AAC 45.180(d)(1). Employee's attorney did not file a supplemental fee affidavit in advance of the April 15, 2025 hearing, and neither did she testify about her supplemental fees and costs at the hearing, nor did she request additional time at the hearing to supplement her fees and costs afterwards. Instead, two days after the hearing, Employee petitioned to have an attached supplemental fee affidavit considered. Employer objected to consideration of Employee's late-filed affidavit and contended those fees should be considered waived.

Employee's reason for the late-filed affidavit was that his attorney "forgot" to request additional time at the hearing to supplement her fees afterwards. While this is not a particularly compelling reason, especially since Employee's attorney has over a decade's experience in workers' compensation law, our consideration of what constitutes good cause is not limited to consideration of the reasons for failure to meet the deadline in the first place. *Israelson*. Rather, the regulation governing extensions of time provides this panel with discretion to grant extensions of time as may be appropriate under all circumstances present, either before or after the applicable deadline. *Id*.

As a preliminary matter, Employer's objections to the blank, blurry and illegible pages associated with Employee's petition and affidavit lack merit. The blank page of which Employer complains that separates Employee's April 17, 2025 petition and his attached fee affidavit is likely meaningless. *Rogers & Babler*. Also, while the pages of previously filed invoices do appear blurry in Employee's April 17, 2025 filing, the invoice setting forth Employee's new, supplemental fees can be read with little, if any, difficulty. Thus, Employer was permitted an opportunity to review and object to any new fees and costs with which it might have disagreed.

Similar to *Israelson*, in this case the delay in filing was minimal. Employee filed his affidavit, and served it upon Employer, two days after the hearing, which is when he likely would have filed it had his attorney requested additional time at the hearing. *Rogers & Babler*. Employer was also in receipt of Employee's affidavit for 19 days before it answered Employee's petition and, when it did, it did not contend it had been prejudiced by the delay in filing. Here, the late filing was not disruptive to the orderly presentation of consideration of relevant evidence and was not contrary to the quick, efficient and fair conduct of the hearing, consistent with Employer's due process rights. Employee's petition requesting that his late filed supplemental affidavit of fees and costs be considered is granted and he will be awarded all his claimed fees and costs. *Israelson*.

CONCLUSIONS OF LAW

1) Employee is entitled to continuing medical benefits and related transportation costs.
2) Employee is not entitled to past medical benefits and related transportation costs.
3) Employee is entitled to additional TTD benefits but not TPD benefits.
4) Employee is entitled to reemployment stipend benefits.
5) Employee is entitled to additional PPI benefits.
6) Employee is entitled to interest.
7) Employee is entitled to attorney fees and costs.

ORDERS

1) Employee's May 2, 2023 claim is granted in part and denied in part.

2) Employee's May 2, 2023 claim seeking continuing medical care and related transportation costs is granted. Employer shall provide Employee with palliative care as set forth above.
3) Employee's May 2, 2023 claim seeking past medical care and related transportation benefits is denied.
4) Employee's May 2, 2023 claim seeking TTD is granted. Employer shall pay Employee TTD benefits from September 22, 2021 through May 20, 2024, plus interest, excepting May 15, 2022 through August 15, 2022, and less amounts of TTD and reemployment stipend previously paid between August 16, 2022 through December 5, 2022.
5) Employee's May 2, 2023 claim seeking TPD is denied.
6) Employee's May 2, 2023 claim seeking reemployment stipend is granted. Employer shall pay Employee reemployment stipend benefits from May 21, 2024 and continuing, plus interest on past due amounts.
7) Employee's May 2, 2023 claim seeking PPI is granted. Employer shall pay Employee a four percent whole person PPI benefit, plus interest.
8) Employee's May 2, 2023 claim seeking attorney fees and costs is granted. Employer shall pay Employee $36,242.81 in attorney fees and costs.

Dated in Fairbanks, Alaska on July 23, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Lake Williams, 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 CASEY KOBERG, employee / claimant v. EVERTS AIR FUEL, INC., employer; NATIONAL UNION FIRE INS. CO. OF PITTSBURG, insurer / defendants; Case No. 202101408; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified US Mail on July 23, 2025.

/s/
Whitney Murphy, Office Assistant II