

The Seal of the State of Alaska is a circular emblem. It features a landscape with a large mountain range in the background, a body of water in the middle ground with a small boat, and a coastal town with buildings and a lighthouse in the foreground. The words "THE SEAL OF THE STATE" are inscribed along the top arc, and "OF ALASKA" is inscribed along the bottom arc.

Juneau, Alaska 99811-5512

Self-Insured Employer,
Defendant.

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Filed with AWCB Juneau, Alaska
on October 22, 2025

Employer requested its hearing brief be accepted. It attempted to file the brief by email on September 2, 2025, the deadline, but received an email stating it was undeliverable on September 3, 2025, at 5:35 p.m. Employer contended Employee received it at 8:25 a.m. on September 3, 2025. Employer re-filed the brief and its petition on September 3, 2025, at 6:20 p.m. It contended

there was no prejudice to Employee as Employer served him with the hearing brief by the deadline. It contended any prejudice could be remedied by allowing Employee the opportunity to file a post-hearing brief addressing the issues set forth in Employer's late-filed brief.

Employee objected to Employer's hearing brief and contended it should not be considered. He contended it was unfair and prejudicial for Employer to receive "extra accommodations." An oral order was issued granting Employer's petition and accepting its hearing brief.

1) Was the oral order accepting Employer's late-filed hearing brief correct?

Employer contends Employee failed to prove additional disability benefits are owed for past time-loss. It contends Employee testified he was aware of the work-related nature of his disability in late 2017 or 2018 and he reported his injury in 2019. Employer contends that an order should be issued barring disability benefits that occurred more than two years before he filed his claim under AS 23.30.105.

Employee contends he was not aware of the two-year rule in AS 23.30.105 and had he known, he would not have submitted the barred leave slips.

2) Are Employee's past disability benefits barred?

Employee requests an award of temporary partial disability (TPD) benefits in his claim. He also requests disability benefits for leave used when he was sick and unable to work due to the work-injury and for attending medical appointments for the work injury.

Employer contends Employee is not entitled to disability benefits taken for work-related treatment because he is not credible. Employer contends Employee lacked medical evidence showing he was disabled on the leave slip dates he was not paid disability benefits. It contends Employee failed to meet his burden of proving additional disability benefits are owed for past leave slips. Employer requests the panel find Employee's leave-slips do not now and will not in the future raise the presumption of compensability absent additional supporting evidence.

3) Is Employee entitled to disability benefits for leave taken for work-related illness and treatment?

Employer contends Employee knowingly made false statements when he submitted leave-slips for reimbursement that were not work-related and testified about them at deposition. It contends Employee was overpaid \$2,656.50, the full amount it paid him, because Employee admitted his statements were not reliable. Employer contends it should be allowed to recover any overpayments by reducing future payments by more than 20 percent. It contends Employer paid a substantial amount to uncover Employee's false statements and to defend against this case and it should be reimbursed for its attorney fees and costs. Employer requests an order directing Employee to make restitution.

Employee contends he relied upon his memory to select leave-slips for reimbursement and accidentally submitted leave-slips he did not intend to submit for reimbursement. He contends he did not knowingly make false statements when he submitted the leave-slips and testified at deposition. Employee opposes a restitution and other limiting order.

4) Should Employer's petition for a finding of fraud and a restitution order or other limiting order be granted?

Employer contends Employee was overpaid \$2,656.50, the full amount it paid him because Employee is not credible. Alternatively, Employer contends it overpaid Employee \$531.33 for leave that was not for disability or medical travel.

Employee does not dispute Employer should be reimbursed for payment of temporary total disability (TTD) benefits for leave that was not for disability or related medical treatment and travel.

5) Is Employer entitled to be reimbursed for overpayment of benefits?

Employee requests an order awarding medical and transportation costs because he wants to make sure he continues to receive the prescribed inhalers for his work injury and continuing medical appointments to treat his work injury.

Employer contends all medical benefits or requests for reimbursement submitted with a bill or a receipt have been paid with the exception of one improperly submitted bill. It requests the panel find Employee failed to meet his burden of showing additional medical benefits are due.

6) Is Employee entitled to an order awarding medical and transportation costs?

Employee requests permanent partial impairment (PPI) benefits. He contends he tried to obtain a PPI rating, but the physician recently informed him he was unable to perform the PPI rating.

Employer contends PPI benefits are not due because a PPI rating has not been provided.

7) Is Employee entitled to PPI benefits at this time?

Employee requests an order awarding him a compensation rate adjustment.

Employer contends Employee failed to provide evidence for a compensation rate adjustment.

8) Is Employee entitled to a compensation rate adjustment?

Employee contends Employer unfairly or frivolously controverted benefits in its third pre-claim controversion. He requests an order awarding him penalties and interest.

Employer contends Employee failed to prove it unfairly or frivolously controverted benefits and that he is entitled to additional disability or medical benefits. It requests an order denying penalty and interest.

9) Is Employee entitled to penalty and interest?

Employee requests an order awarding him attorney fees and costs.

Employer contends attorney fees and costs are not due because Employee is not an attorney.

10) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On September 10, 2019, Employer reported that Employee said the heating, ventilation and air-conditioning (HVAC) system at his job was disabled for 17 years, he had not received fresh air for the entire duration of his employment and he was ordered to clean up asbestos laden dust without protection after an Occupational Safety and Health Administration (OSHA) inspection and before any testing was performed to determine whether any asbestos was present. The date of injury was reported as May 22, 2012, and the date Employer first knew of the injury was reported as September 9, 2019. (First Report of Injury, September 10, 2019).

2) On October 25, 2019, Employer denied all benefits, contending:

The cause of the employee's condition is a highly complex medical issue requiring the production of medical evidence linking the cause of the employee's condition to his employment in order to attach the presumption of compensability. Burgess Construction Company v. Smallwood, 623 P.2d 312 (Alaska 1981); AS 23.30.120. No medical evidence has been produced demonstrating the employee's work activities on or before 05/22/2012 were the substantial cause of his condition. (Controversion Notice, October 25, 2019).

3) On February 14, 2023, Employee visited Alex Malter, MD, for coughing, shortness of breath, and lightheadedness. The chronic cough and dyspnea on exertion had "been bothersome for 5 or 10 years." Employee had allergies as a kid. He had been working in a shop exposed to asbestos and heavy dust with poor to no ventilation for 11 years. Other people from his job have Chronic Obstructive Pulmonary Disease (COPD), asthma or abnormal chest x-rays and Employee requested a workup for possible lung disease. Sometimes he had a burning sensation in the left side of his ribs and cramps from coughing. Employee had been prescribed amoxicillin in the past. Dr. Malter diagnosed a chronic cough and recommended repeat lung x-rays and pulmonary function testing. (Malter record, February 14, 2023).

4) On February 23, 2023, Employee underwent a chest x-ray and pulmonary testing (PFT) at Bartlett Regional Hospital. (Bartlett Regional Hospital Patient Order Summary and Complete Pulmonary Report, February 23, 2023).

5) On March 16, 2023, Employee followed up with Dr. Malter on his pulmonary symptoms, including a nonproductive cough. He thought the cough started when he was exposed to industrial solvents and dust at the mechanical shop where he works. It was bad over the last year or so.

Recent mitigation was completed, and the dust and fumes were largely better, but Employee was worried he damaged his lungs. Dr. Malter reviewed the recent testing and diagnosed pulmonary disease, moderate persistent reactive airway disease without complication and occupational exposure in workplace. He recommended a high-resolution computed tomography (CT) scan and prescribed a rescue inhaler plus Advair type treatments. (Malter record, March 16, 2023).

6) On May 30, 2023, Employee reported ongoing breathing problems and was concerned he had various exposures in his work environment with Employer. “PFTs showed some mil reversibility.” Subsequent Advair did not help, he never tried the albuterol at home, but he had some relief from a nebulizer treatment. Dr. Malter assessed pulmonary disease and shortness of breath, “perhaps associated with industrial work exposure. The PFTs showed mild reactive component and the patient had a bit of benefit from another nebulizer but does not want to use the rescue inhaler regularly.” He referred Employee to a pulmonologist in Seattle. (Malter record, May 30, 2023). Dr. Malter marked that Employee was released to work but was not medically stable for diagnosis of “non-specific lung symptoms” and complaints of “breathing problems due to work environment.” (Malter Physician’s Report, May 30, 2023).

7) On June 29, 2023, Employee underwent PFTs at Virginia Mason Medical Center in Seattle, which showed moderate airway obstruction with significant improvement in airway mechanics after inhalation of a bronchodilator. (A. Gerbino, MD, report, June 29, 2023).

8) On June 29, 2023, Employee saw Steve Kirtland, MD, on referral by Dr. Malter for protracted cough and shortness of breath for several years. He reported coughing so hard he felt lightheaded and wondered if it could be related to dust or diesel exhaust that he is exposed to at a shop. Employee said two other employees had become ill with pulmonary symptoms similar to his including cough and shortness of breath and have been removed. He has had a history of chronic sinus problems with drainage for many years, and has been known to have allergies to grass and house dust. Employee said he coughs day and night; it wakes him occasionally “so it is notable even away from work.” Dr. Kirtland reviewed the PFT and prescribed Symbicort. Dr. Kirtland stated it “very well could be cough variant of his asthma” but Employee “raise[d] the possibility of a hypersensitivity reaction to his work, and therefore, I think despite the normal DLCO [diffusing capacity of lungs for carbon monoxide] that we should pursue with high-resolution CT scanning on inspiratory and expiratory views.” He ordered blood testing as well and planned to see Employee after the testing was completed. (Kirtland record, May 30, 2023).

9) On July 6, 2023, Employee completed blood work and a chest CT scan at Bartlett Regional Hospital. (Bartlett Regional Hospital – Lab Summary Discharge Report and CT Scan Report, July 6, 2023).

10) On July 12, 2023, Employee visited Dana Richards, PA-C, to establish care for respiratory issues. PA-C Richards noted Employee was undergoing evaluation for chronic cough and had an abnormal exam and “wheezing that could be exacerbated by substances.” She provided a work note “on his behalf to avoid the environment that could worsen.” (Richards record, July 12, 2023).

11) On July 26, 2023, Employer denied a July 6, 2023 medical bill from Alaska Pathology, LLC contending a completed medical report was not provided. (Controversion Notice, July 26, 2023).

12) On July 31, 2023, Employee reported his shortness of breath and cough with airflow obstruction were worse at work and since Employer moved him out of his office and into a different office, his symptoms improved. Dr. Kirtland diagnosed dyspnea and chronic cough with airflow obstruction and recent inflammatory “tree-in-bud” opacities, which seemed to have improved. He noted Employee seemed to have an “allergic component with elevated IgE” but no significant eosinophiles. Dr. Kirtland stated, “Whether it is the sole cause or just exacerbating his underlying obstructive lung disease, his occupational exposure seems to have exacerbated it and thus, his recent work move has been beneficial.” (Kirtland record, July 31, 2023).

13) On August 7, 2023, Jeffrey Cary, MD, a pulmonary disease and internal medicine specialist, examined Employee for an Employer’s Medical Evaluation (EME). He stated the medical records and examination were not sufficient to render a medical opinion and he recommended the following testing: “1. PFTS Spiro w/BD, Lung Volume; 2. Exercise test-Asthma Protocol; 3. Labs-IGE/CBC with Differential looking at eosinophils.” (Cary EME report, August 7, 2023).

14) On October 4, 2023, Employee underwent pulmonary testing at Bartlett Regional Hospital. (Bartlett Regional Hospital Complete Pulmonary Report, October 4, 2023).

15) On November 22, 2023, Dr. Cary issued an addendum EME report and diagnosed “Type 2 eosinophilic asthma based on lab work and PFT’s. Work exposure to respiratory irritants because of inadequate ventilation of work office with exposure to shop fumes. Documented by environmental testing.” The type 2 asthma needed “to be treated with topical bronchodilators including rapid acting rescue inhaler and long-acting bronchodilators with anti-inflammatory properties and consideration of monoclonal ab to Il-5+ avoidance of exposure to respiratory irritants.” Dr. Cary opined:

Type 2 asthma is an “intrinsic condition which was worsened by volatile fumes and dusts which triggered airway hyperactivity with cough and shortness of breath. The [S]tate of Alaska is not the substantial cause. This is a pre-existing condition that was exacerbated by work exposure to dust, fumes, smoke and other shop activities yielding respiratory irritants that entered the claimant’s office because of inadequate protecting structures and poor ventilation. There had been no regular respiratory irritants encountered by the individual until he entered employment with the [S]tate of Alaska.

He stated the work exposures made Employee’s underlying asthmatic conditions permanently worse as documented by the need for regular asthma medications and abnormal pulmonary function tests. When asked to provide dates Employee would have been unable to work in his position due to the work injury, Dr. Cary stated, “The individual became symptomatic from a respiratory standpoint in 2019-2020 according to the history reviewed, this was the culmination of exposure and the individual would not have tolerated his job without amelioration of the environment several years ago with beginning of work exposures in 2022.” He recommended continued regular ongoing evaluation by a pulmonary specialist. When asked to provide a date of medical stability, Dr. Cary stated, “The type of 2 eosinophilic asthma will likely slowly improve over time with judicious medical therapy, avoidance of irritants and exacerbations but will remain in category 2-3 of classes of variable resp impairment for foreseeable future.” He did not provide a PPI rating under the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition; instead he referred to a specific page in the “Medical examiners handbook from Washington state July 2022 update.” (Cary EME report, November 22, 2023).

16) On February 6, 2024, Employer withdrew its controversion of Employee’s asthma condition but stated, “Other aspects of [Employee’s] claim (e.g., a preexisting jaw complaint) are unrelated to his asthma condition and no medical provider has indicated that work caused a disability or need for treatment other than for his asthma condition, so benefits related to other conditions are denied.” (Letter, February 6, 2024).

17) On April 1, 2024, PA-C Richards completed a State of Alaska Americans with Disabilities Act Accommodation Request form stating Employee had a long-term or permanent impairment for “respiratory disease, dyspnea + chronic cough.” She suggested the following workplace accommodation, “Limit or eliminate exposure to the dirty shop as the exposure to chemicals are

instigators to his symptoms.” (Richards, State of Alaska Americans with Disabilities Act Accommodation Request, April 1, 2024).

18) On October 7, 2024, Employee emailed his supervisor Erin Messing and asked to “take a couple days off at end of month to watch a Seahawks game.” He attached a leave slip for October 28 and 29, 2024. (Email, October 7, 2024).

19) On November 12, 2024, Employee underwent a chest CT. (CT Final Report, November 12, 2024). He also saw Dr. Kirtland at Virginia Mason Medical Clinic and said his work situation changed so he is not exposed to the “elements” he was before. Employee’s breathing was good, and he had minimal cough. Dr. Kirtland continued Symbicort and “initiated nebulized hypertonic saline.” (Kirtland record, November 12, 2024).

20) On December 11, 2024, Employee emailed Paige Marsh and Memoree Polleys at Penser, “Good afternoon, I would like to know where you are in the process of settling this claim? Thank you for your time and considerations regarding this question!” (Email, December 11, 2024).

21) On December 12, 2024, Employee emailed Employer’s attorney:

Good afternoon Sir, I am sending this Email to you because I am sickened by the lack of response and action regarding my claim. I truly feel that Penser Insurance of [N]orth America is dragging their feet on purpose and are acting in bad faith. After more than 2 years I have no idea what they are doing and I have no idea when this will be settled. [S]hould I expect a resolution or should I just sit back and tell my [c]hildren they will have to [f]ile a Wrongful Death [l]awsuit against the State of Alaska? (Email, December 12, 2024).

22) On December 12, 2024, Employer’s attorney responded to Employee’s email:

Hello Mr. Olivit,

I am scheduled to be out of the office for meetings tomorrow but can be flexible with my scheduled between Tuesday and Thursday of next week, if you would like to schedule a time to speak on those days. I am not familiar with the details of your case but can do some digging on Monday and talk next week, if you’d like to let me know what date and time works best for you. Also, please let me know if you’d like me to initiate the call, and if so at what number, or you could call me at the number in my signature. . . . (Email, December 12, 2024).

23) On December 13, 2024, Employee emailed a leave slip to Messing thanking her for letting him leave early that day. He attached a leave slip dated December 12, 2024, for two-and-a-half hours of leave. (Email, December 13, 2024). Messing emailed Employee back with an edited leave slip

changing the date to December 13, 2024 and stated, “Have fun at GCI [General Communications, Inc.] and enjoy watching tv at your home this weekend!” (Email, December 13, 2024).

24) On December 13, 2024, Employee emailed Employer’s attorney, “Good afternoon, I will contact you next week after Monday and set up a time to speak. Thank you for your quick response, it far exceeds my expectations in light of how Penser does not respond at all in most cases.” (Email, December 13, 2024).

25) On December 16, 2024, Employee emailed Employer’s attorney, “I am very sorry to have bothered you. I forgot I was on Penser Insurance’s [sic] 5 year plan of denial and delay. I am so tired of the nonsense. I think I will let my children sort this out after I die. [T]hanks.” (Email, December 16, 2024).

26) On December 17, 2024, Employer’s attorney emailed Employee:

Good morning Mr. Olivit,

I’m sorry for the frustration. I have quickly looked at the adjuster’s file and do not see an active “controversion” or denial of benefits. It appears they recently received and are processing bills from your November visit to Virginia Mason. I am not able to easily identify any unpaid medical bills but if you are receiving notice of unpaid bills from a provider that you believe should be covered, please let me know. Similarly, if there are other unpaid benefits I am happy to meet with you to find out what those are and to act as an intermediate with the adjuster and risk manager. However, if you do not wish to meet, that’s certainly okay as well.

If you decide you would like to talk, please let me know what dates and times work best for you and I will try to schedule a time to do so. (Email, December 17, 2024).

27) On December 17, 2024, Employee emailed Employer’s attorney:

Good morning, I was exposed to [t]oxic, [c]hemicals and [a]sbestos resulting in a permanent non repairable respiratory disability. The causation was directly due to an HVAC system being broken and abandoned. This is a clear indication of negligence that could and should have been avoided. I would like compensation for said injuries. Now I am suffering from anxiety issues and there does not seem to be an end in sight, which only is making it worse.

I get it, I may have to hire an attorney and file a lawsuit against the state. Thanks for letting me bend your ear. (Email, December 17, 2024).

28) On December 18, 2024, Employer’s attorney emailed Employee:

Hi Mr. Olivit,

I am happy to meet with you to discuss the workers' compensation process. Alternatively, since I represent the State and cannot offer you legal advice, you may want to talk to someone at the AWCBC [Alaska Workers' Compensation Board] if you have questions about the process.

. . . I do not see any denied medical bills in your file but please let me know if I have missed one.

. . . I don't see any denied or pending travel requests but please let me know if I have missed one.

Generally speaking, the adjuster will also pay time loss benefits (e.g., temporary total disability benefits) for the time periods that you are incapable of working due to the work injury. They'll generally ask for a medical note or record to support the time loss. I am not aware of you having any unpaid periods of disability, based on my quick review of the file, but if that is incorrect, please let me know. . . . (Email, December 18, 2024).

29) On December 18, 2024, Employee emailed Employer's attorney, "Thank you that was the most informative response I have received. I am a little concerned regarding time loss benefits, does that include the 1200 plus hours of medical leave taken over 10 plus years for constantly coughing and being ill/nauseous? Thank you for your time Mr. Rhodes, I wish you and your family a nice holiday!" (Email, December 18, 2024).

30) On January 23, 2025, Employee emailed Marsh, Polleys, and Employer's attorney "leave slips for compensation" "as instructed by the Dept. of Law." The first leave slip was dated February 23, 2018, the last was dated January 7, 2025, and there were leave slips for March 1, 20, April 17, May 30, June 5, June 13, 23, 28, 29, 30, July 3 and 5, July 12, August 7, October 4 and 6, November 3 and 9, and December 11 and 15, 2023; January 8, 23, and 24, February 12 and 26, April 8, June 21, July 12, and November 12 and 13, 2024; and April 8, 2024. The last six leave slips pages were for leave on September 17, October 28 and 29, November 12, 13 and 29, and December 13, 2024, and January 7, 2025, and the "workers' compensation" box was not checked on those leave slips. The "workers' compensation" box was also not checked on the leave slip for April 25, 2023, and February 16, April 12, and November 29, 2024. The April 25, 2023 leave slip was on the same page as the April 17, 2023 leave slip, which the box was marked for "workers' compensation." The leave slip for February 16, 2024, was copied on the same page as the leave slip for February 12, 2024, on which the box was marked for "workers' compensation." The leave slip for April 12,

2024, was copied on the same page as the leave slip for April 8, 2024, on which the box was marked for “workers’ compensation.” A leave slip for July 3 and July 5, 2023, was included for eight hours each day; the leave slip did not include leave for July 4, 2023. A leave slip was submitted for the following dates with the box was marked for “workers’ compensation” on each: May 30, June 29, July 12, August 7, and October 4, 2023, and November 12, 2024. The hours on the leave slips varied; the leave slips for April 25, July 12, October 4, and October 6, 2023, and February 16, April 12, September 17, and December 13, 2024, were for partial days’ leave of varying hours and the remaining leave slips were for an entire workday. The leave slips for June 28, 2023, and June 30, 2023, were signed by Employee on July 7, 2023; the leave slip for December 12, 2023, was signed by Employee on December 26, 2023; the leave slip for February 21, 2024, was signed February 20, 2024, and all had the box marked for “workers’ compensation.” Two leave slips were submitted for July 19, 2024; one was dated June 17, 2024, and had the box marked for “workers’ compensation”; the other was dated July 18, 2024, and the box was not marked for “workers’ compensation.” Two leave slips were submitted for July 22, 2024, dated July 17, 2024, and August 5, 2024; both had the box marked for “workers’ compensation.” The leave slips showed Employee’s union changed from “LTC” [Labor, Trages and Crafts] to “GGU” [General Government Unit]. (Email with attached leave slips, January 23, 2025).

31) On January 23, 2025, Employee emailed Employer’s attorney:

Good morning, I have filed a complaint with the EEOC and intend to file a lawsuit against the State of Alaska DOT for Discrimination resulting in [p]hysical injury and permanent [d]isability. Management for DOT knew that my work station was hazardous to my health and left me there for 5 years longer than necessary. 5 years prior to my removal 1 person was removed from the area after knowledge of [h]azardous conditions[;] that person was in the “Supervisors Union” and was the 1 and only 1 removed from the area at that time. Now after my removal in July of 2023 several things occurred regarding : HVAC repairs, [p]artition walls being constructed, [e]xhaust stack height increased and cleaning of ducting of [a]sbestos and [h]eavy dust. In August of 2024 I was “[r]eassigned” a new job altogether in a new location, Dept and union. These actions constitute proof of [d]iscrimination and I will be seeking compensatory and punitive damages. If you would like to discuss this issue please contact me by mail. . . . (Email, January 23, 2025).

32) On February 6, 2025, Employer denied requests for compensation for February 12, 16 and 26, April 8 and 12, June 21, July 12, 19 and 22, September 17, October 28 and 29, November 13 and 29, and December 13, 2024, and January 7, 2025:

The employee has failed to establish the presumption of compensability by submitting a medical opinion that links his absence from work for the dates identified in the specific benefits section of this notice. Under Alaska law, “in cases involving complex medical issues, medical evidence is typically required to demonstrate the connection.” See *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). Because the employee has not provided a medical opinion showing that his employment was the reason for his missed work time, the employer denies all compensation claims that lack supporting medical evidence. The employer is paying time loss for the dates provided by the employee that correspond to compensable medical treatment but not for the dates reported for which there was no compensable medical treatment records provided and for which the employee has not submitted a supporting doctor’s report or note.

Employer denied requests for compensation for February 23, April 4 and 16, June 4, July 9, August 17 and 31, October 19, November 15, December 21 and 24, 2018; January 22, February 15, March 15, April 15, June 19, September 6, November 27 and 29, and December 6, 2019; February 5 and 6, March 20, June 12, August 3, December 4 and 31, 2020; August 19 and 20, September 17, October 19, and November 8, 15 and 24, 2021; February 14, April 15, 20 and 21, May 27, June 6 and 13, August 19, October 3 and 17, November 4 and 25, and December 16 and 23, 2022; March 1 and 20, April 17 and 25, June 5, 14 and 23, July 3, 4 and 5, October 6, November 3 and 9, and December 15, 2023; and January 8, 23 and 24, 2024:

Additionally, AS 23.30.105 states: “The right to compensation for disability . . . is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee’s disability and its relation to the employment and disability. However, the maximum time for filing the claim in any event, other than arising out of an occupational disease, shall be four years from the date of injury . . . except that, if payment for compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of the last payment of [time loss] benefits.” Therefore, any requests for compensation for time loss before 1/26/2023 are time-barred under this statute, at least based on the information currently produced to the employer, in addition to the employee not submitting medical documentation indicating the absences on those dates were work-related. (Controversion Notice, February 6, 2025).

33) On February 18, 2025, Employee emailed Marsh, Polleys, and Employer’s attorney:

Good morning, I repudiate your decision to controvert my “Leave Compensation Requests”[:] your request for a contemporaneous Dr. note is “Unreasonable” given the nature and time frame of the claim. I have included the IME from Dr. Cary as

proof the injuries sustained were due to prolong exposure. Common sense dictates my claims of illness due to [c]hemical and [e]xhaust exposure should and would facilitate my being sick regularly. I have also included the “State of Alaska’s Position” on my disability, these facts are no longer in question! What gives you the right to controvert any of my leave claims? Please compensate for leave as requested. Thank you. (Email, February 18, 2025).

34) On February 25, 2025, Employee sought TPD, PPI, a compensation rate adjustment, medical and transportation costs, a penalty for late-paid compensation, interest, a finding of an unfair or frivolous controversion, “lost wages due to sick leave over a 12 year time frame,” and attorney fees and costs. He stated, “I was exposed to [c]hemicals, [e]xhaust, [a]sbestos and [h]eavy [d]ust for 12 years, resulting in a permanent [sic] Respiratory [sic] disability, I had a tumor removed from my jawline without explanation of cause and I have coughed myself into [h]eadaches, [c]ramps and [b]ack pain. NO FUNCTIONING HVAC.” (Claim for Workers’ Compensation Benefits, February 25, 2025).

35) On March 13, 2025, Employer filed a Medical Summary with Dr. Malter’s May 30, 2023 medical record marked, “Received by Penser 8/1/2024 AGO;” Dr. Kirtland’s June 29, 2023 medical record marked “Received by Penser 11/20/2023 AGO;” PA-C Richards’ July 12, 2023 medical record marked “Received by Penser 11/16/2023 AGO;” Dr. Kirtland’s July 31, 2023 medical record marked “Received by Penser 11/01/2023 AGO;” Dr. Cary’s August 7, 2023 EME report marked “Received by Penser 8/30/2023;” Bartlett Hospital’s October 4, 2023 medical record marked “Received by Penser 3/21/2024;” Dr. Cary’s November 22, 2023 EME report marked “Received by Penser 1/5/2024 AGO;” the November 12, 2024 CT report was marked “Received by Penser 12/09/24 AGO;” and Dr. Kirtland’s November 12, 2024 medical record was marked “Received by Penser 12/03/24.” (Medical Summary, March 13, 2025).

36) On March 19, 2025, Employer answered Employee’s claim contending he failed to raise the presumption of compensability for disability benefits on dates for which he had not submitted medical evidence or a medical note indicating he was disabled from his employment, his claim is partially or fully time-barred under AS 23.30.105, PPI benefits are not due as no rating had been received, and Employee failed to provide his wage information for a compensation rate adjustment. It contended it had not denied transportation or medical costs, and it paid medical costs submitted with the exception of a July 19, 2023 bill submitted by Alaska Pathology, LLC, because the

supporting medical report was not provided. Employer denied it filed an unfair or frivolous controversion. It contended:

In the winter of 2024, the employee demanded the employer “settle” his case. The employer notified the employee that the claim was not controverted and it had paid the medical bills submitted to it. The employee demanded a monetary settlement. The employer explained that it pays time loss benefits but to its knowledge, time loss had not been reported. The employer told the employee if he had time loss, he should submit the leave slips and any doctor’s notes that indicated he was disabled at that time. The employee then submitted a series of leave slips dating back to 2018. The submitted leave slips were not accompanied by a medical note indicating the employee was disabled at those times due to a work injury. The leave slips are State of Alaska leave slips, which employees are required to submit with an explanation for the leave. The leave slips have a section that can be marked “ANN/PERS” if the leave is for personal reasons, and a section that can be marked “SICK/PERS” if the leave is used for sick leave or an illness. The employee marked all of the leave slips at the time of submission as “ANN/PERS” and not “SICK/PERS.” Upon information and belief, the employee also appears to have altered the leave slips after they were initially filed and prior to submission to the employer for time loss, to mark them “WRKS COMP.” The employee did not produce any medical notes or documentation indicating that he was disabled as a result of a work injury on the dates he submitted time loss benefits for. While the employer did not receive requested medical evidence from the employee, the employer reviewed the available medical records and paid the employee time loss benefits for dates that he submitted a leave slip for and for which there was a treatment record indicating some type of medical appointment on the day of the employee’s leave. (Answer, March 19, 2025).

37) On March 25, 2025, Employer and Employee attended a prehearing conference:

Discovery is the gathering, sharing and filing of information between the parties and with the Alaska Workers’ Compensation Board. Both parties are responsible for conducting discovery. Employee must file information he wishes the Board to consider at a hearing on his claim and serve it on Employer. The Board designee explained that medical records filed by Employer on the March 13, 2025 medical summary form do not need to be filed again by Employee; Employee can rely on the medical records attached to Employer’s medical summary. . . .

. . . .

The parties are reminded a petition is the form used to request the Board to take some particular action in a proceeding. A notice of intent to rely form must accompany non-medical documents filed with the Board and provides notice to the Board a party will be relying at hearing on the documents listed in the notice. Medical documents must be filed with a medical summary form. An ARH is a formal request for a hearing and is filed once discovery is complete and the parties

are fully prepared for hearing. The Board designee will include a petition, notice of intent to rely, ARH, and medical summary form with this prehearing conference summary. Board forms are also available at http://www.labor.alaska.gov/wc/pdf_list.htm.

The Alaska Supreme Court said in *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska 1963), the workers' compensation Board owes every claimant a duty of fully advising the claimant as to all the real facts which bear upon the claimant's condition and right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law. The Board designee advised Employee AS 23.30.105 provides the right to compensation for disability is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement.

The Board designee advised Employee the presumption of compensability applies to any claim for compensation under the Act. AS 23.30.120(a); *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). A three-step analysis is used to determine a claim's compensability. To attach the presumption, the claimant must establish a "preliminary link" between the "claim" and the injured worker's employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach the presumption of compensability varies, depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). An employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). Because the employer's evidence is not weighed against the employee's evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999). If the employer's evidence is sufficient to rebut the presumption, it drops out and the claimant must prove his case by a preponderance of the evidence. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011) (reversed on other grounds, *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016)). This means the claimant must "induce a belief" in the factfinders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). At this last step, evidence is weighed, and credibility considered.

Employee is advised pursuant to *Richard* to obtain a medical opinion regarding issues relating to his claim, including causation, compensability, treatment, degree of impairment, and medical stability prior to a hearing on his claim.

The Board designee also advised Employee he should provide copies of his W-2 forms, wage stubs or other written documentation proving his earnings with a notice intent to rely form and file it with the Board and serve it on Employer for his request for a compensation rate adjustment. He was also advised to provide actual travel expenses, including mileage, to Employer for reimbursement.

The Board designee encourages the parties to seek the assistance of a Workers' Compensation Technician at (907) 465-2790 (Juneau), (907) 269-4980 (Anchorage) or toll free at (877) 783-4980, if a party has any questions pertaining to this case. (Prehearing Conference, March 25, 2025).

38) On March 25, 2025, Employee emailed Employer's attorney, "Good morning, that was exciting. I would like to know your intentions, is the State interested in a settlement or No they are not? Thank you for your time." (Email, March 25, 2025).

39) On March 26, 2025, Employee was served with the March 25, 2025 Prehearing Conference Summary by first-class mail to his mailing address of record; the "Workers' Compensation and You" pamphlet was mailed with the Prehearing Conference Summary. (Prehearing Conference Summary Served, March 26, 2025).

40) On April 2, 2025, Employer's attorney emailed Employee:

Hello Mr. Olivit,

I am writing to follow-up on our conversation. You asked whether the State was willing to consider a settlement. From the Division of Risk Management's perspective, the only issue in dispute is whether additional time loss is owed in the absence of medical records indicating you were disabled on the days you reported due to a work injury. To evaluate the claim for potential settlement, I am writing to ask for additional information:

- (1) Will you please provide any wage documentation you have for the following years: 2010 and 2011? . . .
- (2) Will you please tell me whether you have any medical notes or reports indicating you could not work on the dates of reported time loss, and if so will you provide those to me? Alternatively, if there is a medical provider who has verbally told you that you were disabled on those dates, will you please tell me that provider's name and we will request that person's records to make sure we haven't overlooked something, and/or schedule a time to speak with that provider?

This is the type of information we will typically collect to evaluate a workers' compensation claim. If you do not have the above information and instead would like to propose a lump sum settlement, I will take that offer to my client. But

without the information described above, I think a settlement offer will be lower than you would like. (Email, April 2, 2025).

41) On April 3, 2025, Employee emailed Employer's attorney that he would "work on your requests and get back to you asap. Thank you." (Email, April 3, 2025).

42) On April 8, 2025, Employee saw Karen Harris, PA-C, "to request a letter in regards to his chronic respiratory condition." He established care with PA-C Harris "as a new PCP [primary care provider]," but was established at the clinic in 2023. PA-C Harris noted Employee was under the care of pulmonologist Dr. Kirtland and Employee stated he was sick with an upper respiratory infection two months ago and he continued to use his inhaler. She reviewed his medical records and performed a medical evaluation. PA-C Harris noted Employee had "lungs end expiratory wheezes" and coughed during the exam. She diagnosed "COPD without exacerbation" and noted his history revealed a longstanding diagnosis of respiratory disease attributable to prior occupation exposure to chemical and dust, which contributed to chronic respiratory symptoms. PA-C Harris discussed Employee's need to continue seeing his pulmonologist. She also diagnosed wheezing, prescribed antibiotics, ordered chest x-rays, and directed Employee to continue to use his inhaler. (Harris record, April 8, 2025).

43) On April 11, 2025, PA-C Harris, wrote a letter addressed "To Whom It May Concern:"

I am writing on behalf of my patient [Employee]. Patient has been under our care at Southeast Medical Clinic since 2023. I most recently evaluated and provided care to the patient on April 8, 2025.

A comprehensive review of the patient's medical history reveals a longstanding diagnosis of respiratory disease, which is attributed to prior occupations exposure to chemicals and dust. These environmental exposures have contributed to respiratory symptoms, including a persistent cough and recurrent episodes of shortness of breath.

The patient is currently under the care of a pulmonary specialist who actively monitors and manages these chronic conditions. Due to the nature of the disease and the respiratory symptoms involved, episodes often require an extended period of recovery, particularly when shortness of breath is exacerbated.

The patient has shared that over the years, this condition has impacted his ability to consistently attend work, resulting in missed days. Given the chronic and episodic nature of his respiratory illness, these absences are medically justified and directly related to his underlying health condition.

If further information is needed to support this medical assessment, please feel free to contact my office. (Harris letter, April 11, 2025).

44) On April 14, 2025, Employee emailed Employer's attorney the April 11, 2025 letter from PA-C Harris. (Email, April 14, 2025).

45) On April 21, 2025, Employer's attorney emailed Employee:

I have reached out to my client about your claim. The medical note you submitted did not provide any dates of time loss. However, you previously submitted the attached email with leave slips attached. You indicated that those were "leave slips for compensation."

Will you verify for me that the leave slips that you attached to your 1/23/2025 email (attached to this email for your review) were leave slips for dates that you missed work due to the work injury? . . .

With respect to the compensation rate adjustment request you made, I reviewed the documents you provided. Relying on the wage information you submitted would actually reduce your compensation rate, so we are not going to do that. . . . The adjuster relied on your hourly wage at the time to calculate your gross weekly earnings, taxable withholdings, spendable weekly wage, and temporary total disability rate. An alternative method, at least arguably, would be to rely on your income in the prior two years to see if that would have provided you a higher rate. Going that route actually lowered your compensation rate a little. . . . Since the wages you submitted did not increase your rate, at this time the employer does not believe the weekly compensation rate needs to be increased. However, I have also asked the adjuster to run the numbers using employment wages from later during your employment, in 2019. Since you worked for the state at that time, the employer should be able to provide us that additional payroll information and once it is received, if it could change the compensation rate. The adjuster is submitting a request to the employer's payroll folks and when that information is received, I will provide you an update. . . . (Email, April 21, 2025).

46) On April 21, 2025, Employee replied by email to Employer's attorney, "Yes I did intend on being re-imbursed for the leave slips turned in on 1/23/2025. I feel it to be reasonable to say that I was regularly sick as a result of the working environment. I know this is still subjective. [T]hanks." (Email, April 21, 2025).

47) On April 22, 2025, Employer's attorney followed up with Employee by email,

Thank you for explaining that you intended to be reimbursed for the leave, and that you feel it is reasonable to say that you were regularly sick, but I am confused by

your statement that “this is all subjective.” We do not expect you to be a medical provider but I do want to clarify what you mean by that.

We have a medical provider’s note saying she believes you would be periodically sick due to the work injury. She does not identify any dates of disability. We do not expect you to be a medical provider but we do need to know from you whether you were out of work for the dates of leave you submitted because you were disabled due to breathing issues, an illness/sickness, or other medical condition or doctor’s appointment that you believe were work-related. Since the medical provider did not identify any dates of disability, we are looking for documentation to support the benefits being paid were necessitated by the work injury. You submitted a series of leave slips. Were you unable to work on those dates due to breathing difficulties, illness, or sickness that you believe was related to your work injury? . . . (Email, April 22, 2025).

48) On April 22, 2025, Employee replied by email to Employer’s attorney:

I was told by Penser Insurance to use 5/31/2012 as the state date of my injury. Knowing full well I would not be able to obtain a “[c]ontemporaneous” Dr. note dated back to 5/21/2012. I supplied [l]eave slips dating back to 2018 because that is all I have access to, how are you going to re-imburse me for time I can’t cover without leave slips?? I am not sure how to respond as I barely graduated [h]igh school. Forgive my ignorance to the definition. Thanks. (Email, April 22, 2025).

49) On April 22, 2025, Employer’s attorney emailed Employee:

Because you’ve sent a few email chains now, I’m going to copy my most recent email to you below as this is the question we need an answer to:

I want to know if the leave slips that you supplied are for dates of leave that you could not work because you had breathing problems, were sick, or were ill and you believe that those problems were due to your work injury. That would be in contrast to taking leave because you had some other non-work issue, whether that would be for a dentist appointment, a doctor’s appointment for some non-work related issue, vacation time, etc.

I don’t mean to ask you something legally complex. I’m just asking you to confirm that the dates of leave you submitted were for breathing problems/illness/sickness you believe were work-related as opposed to leave slips for something else, like a dentist appointment or other personal leave that isn’t related to an illness or sickness that you believe was work related. (Email, April 22, 2025).

50) On April 22, 2025, Employee again emailed Employer’s attorney:

The answer is “Yes” the leave slips submitted were for being sick due to bad work environment. I did go thru the slips and remove[d] any I thought were not related to my claim. I tried not to submit reg leave for vacation and appointments not related to my work injury claim. The slips submitted are for leave taken due to [r]espiratory issues and associated [h]eadaches, muscle cramps and fatigue due to a constant cough!

I hope this answers your questions clearly. [T]hanks. (Email, April 22, 2025).

51) On April 23, 2025, Employer’s attorney emailed Employee:

I am writing to provide you an update regarding your case.

The adjuster relied on the medical notes, leave slips, and your statements to issue a new payment for time loss benefits. Payment was entered today and I anticipate it will issue in the next day or two. The amount is for \$2,656.50, which I understand covers the periods of reported time loss that do not appear to be time barred and that were not previously paid. . . . The employer will be filing an amended controversion based on the time bar defense so this does not resolve your case but does resolve a portion of it.

My client has declined to offer to settle the remainder of the case, regarding time loss claimed that occurred more than two years before you filed your claim, and has asked me to conduct additional discovery. That said, as mentioned in the separate email chain, I have requested wage information for you covering the 2018-2019 time period and I will provide you copies of those documents once they are received. That discovery request is to address your compensation rate adjustment claim. Once those documents are received from DOA/payroll, I will follow-up with additional discovery requests. (Email, April 23, 2025).

52) On April 29, 2025, Employer reported it paid Employee \$2,656.50 for TTD benefits from March 1, 2023, through April 8, 2025, on April 23, 2025. (SROI).

53) On May 2, 2025, attorney Carson Honeycutt emailed Employee, “I spoke with David Rhodes yesterday. He told me he doesn’t believe the state will be interesting in settling the claim now. Since the state has no duty to settle the claim, and only the block leave has been denied, I cannot assist with your case. Please feel free to stay in touch with my office if anything changes. For now, I will close your file.” (Email, May 2, 2025).

54) On May 2, 2025, Employee emailed Employer’s attorney, “I would [like] to know why the State is not interested in settling my claim in light of the fact that you have already settled with my old co-worker for the same claims. I also would like to know how long the State can drag this out if not indefinitely? Thank you for your time.” He also emailed separately, “I have reached out to

my [d]octor at Virginia [M]ason and he has retired. I have made a request to get a PPI rating for your records. Also I would like to know if the State will pay for me to go to a new doctor for further evaluation in light of the fact that they are not interested in settling? [T]hanks.” (Emails, May 2, 2025).

55) On May 5, 2025, Employer’s attorney emailed Employee about his availability for a deposition and that it intended to depose PA-C Harris. (Email, May 5, 2025).

56) On May 5, 2025, Employee replied to Employer’s attorney’s email:

You have instructed Penser insurance not to respond to my requests??

You have not informed me about future medical evaluations and treatment?? Does this mean the State is no longer going to pay for treatment??

What about my prescriptions??

Is there a reason you cannot submit deposition questions in writing to me??

You intend to depose a doctor I spoke with for 20 minutes?? Why not Dr. Richards or Dr. Kirtland or Dr. Cary your IME doctor?? (Email, May 5, 2025).

57) On May 5, 2025, Employer’s attorney emailed Employee, “I have only told Penser it need not respond to litigation discovery requests. There is no controversion in your case except for time loss that predates your WCC by more than 2 years. Your medical and prescriptions are unchanged. My client would like me to depose you. . . .” (Email, May 5, 2025).

58) On May 5, 2025, Employee emailed Employer’s attorney,

Thank you for the response regarding [m]edical responsibility questions in my previous Email.

. . . .

I would like to know this case is to be handled like its “State of Alaska vs. Jake Olivit” instead of “Jake Olivit [v]s. State of Alaska” and I want to know why my perception is that I am the criminal or guilty party here? Are you intentionally trying to make me feel that I will not get a fair and honest settlement from the State?

Thank you for your time Mr. Rhodes[;] I am sorry you have to deal with me. I did try to get a lawyer to help but he said no. (Email, May 5, 2025).

Employee later added in a separate email, “What I should have written at the bottom is the [l]awyer declined to represent me after speaking to you Dave.” (Email, May 5, 2025).

59) On May 7, 2025, Employee emailed Marsh and Employer's attorney:

Good morning, I just heard back from Virginia Mason and they want me to come back and see a new [r]espiratory specialist for the PPI rating you have requested. As I have informed you Dr. Kirtland has retired and is not available.

I will need Airline Tickets and [h]otel reservations similar to my last Dr. appt at Virginia Mason. I will let you know after confirming [a]ppt. same as last time.

Mr. Rhodes do you think it better to get this taken care before we have our [d]eposition session or does it not really matter? (Email, May 7, 2025).

60) On May 7, 2025, Employer's attorney replied to Employee, "Once you have a referral and appointment date, please let us know. The deposition does not need to wait on a PPI rating. . . ." (Email, May 7, 2025).

61) On May 22, 2025, Employee emailed Marsh and Employer's attorney:

Good afternoon, [t]he folks at Virginia Mason want me to come down on Wednesday the 25th of June so I can make an 8:00 am appt on Thursday the 26th. (Breathing tests and PPI rating interview) with Dr. Gerbino.

I would like to stay at the same [h]otel you booked me last time so I can utilize the [l]ight rail for transportation. Thank you for your time and assistance with this request. If you believe this is not needed or necessary let me know and I will cancel appt. (Email, May 22, 2025).

62) On May 27, 2025, Marsh emailed Employee, "Our office has confirmed the appointment. We will start working on the travel arrangements and do our best to book you at the hotel you have requested. We will send you confirmation details once the itinerary is available." (Email, May 27, 2025).

63) On June 22, 2025, Noah Gosnell, a claims assistant at Penser, emailed Employee the itinerary for the June 26, 2025 appointment and noted a check for \$212.07 was issued for per diem/taxi fares." (Email, June 22, 2025).

64) On June 4, 2025, Employee filed a civil complaint against the State of Alaska DOT, Brad Bylsma, and Vickie Roberts for negligence, discrimination, harassment/hostile work environment, and intentional infliction of emotional distress. (1 JU-25-00662 CI, June 4, 2025).

65) On June 4, 2025, Employee testified at deposition he was last deposed in 2002 in a civil case. (Zoom Video Deposition of Jake D. Olivit, Sr., June 4, 2025 at 5). His current job title is

Procurement Specialist I for the Department of Corrections, and he held that job for about 10 months. (*Id.* at 7). Prior to that, he was Parts Services Journey III for the Department of Transportation. (*Id.*). Employee said Penser told him to write down the first day of his employment in 2012 when he filed the claim,

So from my perspective I believe that if my injury started from the first day and there was an accumulation of time until I started coughing, from the time I started coughing until the time I stopped working in the environment I should be compensated for the leave for me calling in and taking sick as long as it's not associated with something like Covid or -- even pneumonia is a respiratory. But for the majority of my illness was related to coughing, and coughing, and coughing, and it would exacerbate an ear issue that I've had since I was a child. But the air issue that I was having was due to my coughing. So as soon as I was moved from the working environment in July of 2023 my coughing started to diminish and go away because I was not breathing all that crud or crap, however you want to say it. Pardon my language. And now, since I've been working at Department of Corrections in a totally different location, in a clean building, my coughing has almost ceased to exist. (*Id.* at 11-12).

When asked if the leave slips he submitted are for days where you experienced those kinds of symptoms, Employee answered, "Yes. Because the only time I was calling in sick to miss work was because of that issue." (*Id.* at 13). Employee differentiated his vacation time and any time he missed multiple days of work rather than one at a time because he generally felt that might not have actually been associated so he did not include every time he had a common cold or flu or seasonal allergies. (*Id.*). He did not review any documents or materials to help remember why he took leave on the days he submitted; he relied on his memory. (*Id.* at 14). When Employee was asked if he "remembered things that happened more recently more easily than things that happened long ago," he answered, "No. I have an excellent memory" and "I could tell you things that happened to me when I was a baby and I've said those things to my mother[,] and she was shocked that I could even remember such a thing." (*Id.*). He first started worrying he had a work injury from the work environment about a year before he filed an OSHA complaint in the end of 2017 or the beginning of 2018. (*Id.* at 15-16). On February 23, 2018, Employee had a chronic cough which would lead to a headache; sometimes he coughed so hard he would pull a neck muscle or lower back muscle. (*Id.* at 16). When Employee went through his leave slips to determine what he felt was "workman's comp and what wasn't," he re-marked the slip to indicate workers' comp in addition to the personal leave. (*Id.* at 18-19). If Employee was not going to be at work, he

called and spoke with his supervisor or left a message on the supervisor's answering machine. (*Id.* at 19). He said he relied on his memory and procedure to determine what leave slips were for his work injury. (*Id.*). When asked about his leave slip for January 7, 2025, Employee noted it was "not marked workman's comp" and if it made it into the package, it was a mistake." (*Id.* at 23). He always takes his birthday off from work every year. (*Id.* at 24). Employee said he did not believe he was paid for his birthday. (*Id.* at 25). He received a check from Employer for the leave slips he submitted but not for everything he submitted and if he was paid for his birthday, he would be happy to reimburse Employer, "It was not my intent to create any kind of fraudulent action against the State. That was an accident." (*Id.* at 25). When asked about the December 13, 2024 leave slip, Employee stated that leave slip was also accidentally submitted as he "did not check it as Workman's Comp." (*Id.*). He stated further, "All of the [leave slips] that I intended to be compensated for were double marked in most cases Workman's Compensation annual leave. So this -- when I had my two stacks together somehow a couple of them got mixed up. So, like I said, I had no intent of creating an issue like this and I'm more than happy to reimburse you guys for any mistakes that were made." (*Id.* at 26). Employee said work was slow on December 13, 2024, and he left early. (*Id.*). Employee believed he was ill and "felt crappy" on November 12 and 23, 2024, and he checked the workers' comp box on the leave slip. (*Id.* at 26-27). When asked if it would "jog" his memory that the slips were for travel to a medical appointment if he was told he went to Virginia Mason on November 12 and 13, Employee said, "It's very possible that that's what that was, yeah" and if he was at Virginia Mason, he was not calling in sick. (*Id.*). Employee reviewed the leave slip for October 28 and 29, 2024, which did not have a workers' comp box checked and was asked if he made another mistake. (*Id.* at 27-28). He stated, "Well, Mr. Rhodes, you've got me so confused right now I just can't answer that directly with 100 percent assurance," and could not recall whether it was an illness or something else. (*Id.* at 28). Employee thought he tried to make sure that everything he submitted was work-related. (*Id.*). He recalled traveling to Seattle for medical and personal and he attended a Seahawk game on October 27, 2024, but he did not recall the score. (*Id.* at 28-29). Employee stated, "So obviously I've made several mistakes with submitting the leave slips in haste" and "I honestly thought I went through and pulled all that stuff out." (*Id.* at 29). After reviewing the October 19, 2018 leave-slip and seeing the date he signed it, Employee stated, "Obviously that was not a sick day, sir. I signed it before -- I signed it beforehand, so it was not a sick day." (*Id.* at 30). It was an "absolute mistake" to include it in the

leave-slip pile. (*Id.*). When Employer stated Employee had a medical appointment that day, Employee said it may have been that day, but he did not want to guess at this point. (*Id.* at 31). Employee could not remember whether the two days of leave from December 21-24, 2018, were medical related or not but the leave-slip was marked for workers' comp and dated December 7, 2018. (*Id.*). Employee said, "I mean you've done your job well. You've spotted inconsistencies and failures on my part that I cannot deny. Nothing that was submitted was intentional to create an issue. I did make an effort and I did this rather hastily. I had a 2-inch stack of documents to go through and I went through it a couple times and I just wasn't very smart about some of it. That's -- that's all I have to say." (*Id.* at 33). He again stated he did not consult medical records or anything to help him remember which leave-slips to submit. (*Id.* at 33-34). Employee was upset at having to come up with the contemporaneous doctors' note and he threw the leave-slips together super-fast and shipped it out and did not double-check when he should have. (*Id.* at 34). He apologized and stated it was not his intention to create an issue or to make false representations. (*Id.*). Employee was not aware of the time limits for disability benefits, and it was never explained to him; the only thing Employer's attorney requested was any leave-slips Employee believed were legitimate to his work injury be submitted with contemporaneous doctors' note. (*Id.* at 35). When asked if he remembered the reason he left early on December 13, 2024, Employee said he may have had a medical appointment; he was "honestly" "unclear at this point." (*Id.* at 36). It was "quite possible" it was a meeting with GCI to get the television set up when suggested by Employer's attorney. (*Id.*). Employee expected Employer to go and correlate any medical billing with the time-slips. (*Id.* at 37). He was sure that there are several slip slips that are related to the work injury but "whether I could pick them out at this point with you at this moment is going to be pretty darn difficult." (*Id.* at 38). When asked how he eliminated sick days for illnesses unrelated to the work injury, Employee said he knew he had Covid for four days; he went to see his mom in hospice care, which he knew was not work related. (*Id.* at 39). He tried not to include the leave-slips he obviously knew was not work-related, "I mean it's not my intent to defraud or misrepresent any of this stuff." (*Id.*). He did not expect to get paid for any of the leave-slips and was surprised to get a check, even after he submitted the doctor's note. (*Id.*). Employee was upset as the whole process was stressful and frustrating when he got a negative response and was informed he would have to supply a contemporaneous doctor's note for each day or the days he was sick. (*Id.* at 40). It made Employee angry to think he was being requested to provide

something that was impossible to provide. (*Id.*). He “wholeheartedly apologized” for making numerous mistakes. (*Id.* at 40-41). Employee was only looking for fair and reasonable compensation for the work injury. (*Id.* at 41). Under the circumstances, he would say that Employer could not rely on him, but he still firmly believed that a good portion of the leave-slips for sick-leave are directly attributed to his work-related illness. (*Id.*). “Is it possible for me to single out each one [leave-slip] and tell you symptoms other than coughing because that was the general symptom that started and ended everything? To say that with 100 percent assurity[sic], I cannot do that. I’m sorry.” (*Id.* at 41-42).

66) On June 4, 2024, Employee emailed Employer’s attorney:

Hello, well that really hurt -- I feel like you spanked me pretty good! From this day forward I will keep a detailed log of all medical appts, travel and missed work do to work man comp claim.

As I said during the Deposition, I apologize for the mistakes made and I had and have no intention to mis represent or defraud the State for any reason. I have all funds received in the bank and will gladly return any funds I was paid by mistake. Thank you and have a nice day!! (Email, June 4, 2025).

67) On June 9, 2025, Employee emailed Employer’s attorney:

Good morning, I have a couple of questions and a couple of concerns. I spoke with [a]ttorney Carson Honeycutt on Wednesday April 20th at 4:45pm for 6 minutes, Carson wanted a letter of permission from me to speak to you. The letter had to be written very specifically to insure that I did not have the wrong impression of what he was willing to do for me “he absolutely had no intention of pursuing my [l]eave [r]e-imbusement [c]ontroversion’ and I quote ‘I cannot i[n] good conscious take action that I know will hurt your settlement.’ Why did he try and warn me off, how did Carson Honeycutt know beyond doubt that you intended to crucify my integrity at the [l]eave [c]ontroversion [d]eposition on June 4th, before I gave him permission to speak to you?

I asked you during [d]eposition[,] “How did you invade my [p]rivacy to determine where and exactly what I was doing on a specific Sunday in Seattle[.]” Your Response “ It wasn’t easy[.]” I did not try to get reimbursed for that Sunday so how did you know? And I informed you several times during deposition that mistakes were made and some of the [l]eave [s]lips you kept referring to were clearly not marked as being meant for reimbursement. Mistakes were made by both parties not just me. I also have issues with you wanting to schedule a mediation hearing in 6 months because I don’t have a settlement attorney -- well that is your fault! Not mine! Just how far are you willing to go to see to it I do not receive a

fair and honest settlement? And if you say its just the opposite it[']s my job to see that you only receive what's fair then I would have to say there should be no issues with the "Board" and 6 months seems overtly excessive! I intend to forward my concerns and complaints on to 1 State Legislative Rep., [t]he State ombudsman office and the AK Bar. (Email, June 9, 2025).

68) On June 16, 2025, Employee emailed Mark Cucci:

Good morning, your name and information was supplied to me by the Ombudsman office, I would like to make a formal complaint against Mr. Rhodes for intentionally interfering with my obtaining legal representation for a workman comp claim and I also believe he violated my right to privacy and due process. I have zero confidence that Mr. Rhodes can perform his job without prejudice in regards to me and my claim. (Email, June 16, 2025).

69) On May 16, 2025, Cucci emailed Employee, "Mr. Olivit. No one is intentionally interfering with your ability to obtain legal representation. Mr. Rhodes represents the State of Alaska in this matter. Why you may not like that your workers' compensation claim is being litigated, Mr. Rhodes will continue to represent the State in this matter. If you have a complaint arising out of the litigation, I suggest you file something with the Board." (Email, May 16, 2025).

70) On May 16, 2025, Employee responded to Cucci:

Thank you for your quick response, it makes me feel that you are taking me seriously. It is not so much that I dislike the litigation it is the fact that I am being treated like a [r]ape victim you do not believe, no matter what the evidence says. While I can respect that you folks don't like me, it does not change the facts. I also believe being a State employee makes me responsible to the [p]eople just as I believe you are responsible to the people all of us not just the [g]overnor. That should include me, should it not? I do not intend to beat a dead horse with regards to Mr. Rhodes. I am scheduled to go receive a PPI rating next week and when I return I will contact Mr. Rhodes about a meeting if you are still interested. (Email, May 16, 2025).

71) On June 17, 2025, Employer contended Employee knowingly made false statements in writing and under oath for the purpose of obtaining benefits. It requested an order permitting recovery of overpayments in excess of 20 percent and for a restitution order or "other limiting order" under AS 23.30.250. (Petition, June 17, 2025).

72) On June 17, 2025, Employee filed a response to Employer's June 17, 2025 petition:

I Jake D. Olivit Sr. categorically deny any attempts to defraud the State of Alaska Re: Leave [r]e-imbursement or for any other reason. I have included Exhibits 1 thru 4 to support my claim.

Exhibit 1 dated June 4th 2025 at 3:24pm (6 hours after deposition).

Mr. Rhodes clearly is acknowledging mistakes were made Re: Leave [r]e-imbursement and that it seemed not to be a big deal. "At [m]ediation , maybe we just agree to an offset so that we would pay you what is owed for the PPI". From Mr. Rhodes marked EXH 1.

Exhibit 2 dated June 4th at 11:10 am (2 hours after deposition).

I reached out to Mr. Rhodes Re: repayment of any monies received by mistake!!! From Jake Olivit marked EXH 2.

Exhibit 3 dated June 9th at 10:20 am.

Questions for Mr. Rhodes and concerns [r]egarding his communications Re: settlement with Carson Honeycutt and his interference also [r]egarding the [t]enure of the [d]eposition and [o]verpayment of leave re-imbursement by mistake. Payments made on leave slips not marked for workman comp. From Jake Olivit marked EXH 3.

Exhibit 4 dated May 5th at 11:14AM.

Email from Carson Honeycutt stating he had spoke to Dave Rhodes and was not going to take my case because the State had no intention of settling. From Carson Honeycutt marked EXH 4.

I Jake Olivit request a hearing before the board to discuss my response and Exhibits. I acknowledge I was paid monies by mistakes made by myself and Penser Insurance, at no time have I acted in bad faith -- I honestly believed that Penser Insurance was going to perform an audit of my leave and the mistakes were made due to haste and accident not intentional. (Response to Petition for Overpayment and Fraud, June 17, 2025).

73) On June 18, 2025, Employee emailed Employer:

I was up all night going thru your Deposition (Exh. 1-70 pgs. [o]f [l]eave slips) [p]age 1 being my email request for [r]e-imbursement. Pages 2 thru 64 are all marked with 2 x's, once in the ANN/PERS box and once in the Workcomp box. Except for 2 pages #50 and #57. They are marked Workcomp only. That leaves pages 65 thru 70 which are not marked in 2 spots and were not intended for review like the others. Now if you look at the whole picture pages 2 thru 48 are moot and barred for review by time and [r]ule. [T]hat leaves 22 [l]eave [s]lips, the last 6 were not meant for review as stated above. Now we only have 14 left all of which were

marked in the Workcomp box save for the 2 listed above. I say 12 of them can be argued for both [p]arties ([t]ies going to me) leaving only 2 that are questionable and probably needed more review before there [sic] inclusion. I know you will say “but page #67 was marked Workcomp only[.]” I believe it was not meant for review until I confirmed that it [had] not been previously submitted. I know it’s a little long winded by the gist is we both know I was not intending [f]raud. I did not intend to paid for page 65, I did not intend to be paid for page 66 ([t]ravel [a]ssoc with NFL game) I did not intend to be paid for page 67 until further review for previous payment. I did not intend to be paid for page 68 (annual leave). I did not intend to be paid for page 69 (GCI [a]ppt). I did not intend to be paid for page 70 ([m]y [b]irthday) none of these pages were marked in the same fashion as 2 thru 64, that is important. There [sic] inclusion was an honest mistake, and [h]ad I known the first 48 were barred I would not have waisted [sic] so much time and effort.

Please withdraw your Petition for [o]verpayment and [f]raud and I will agree to all stipulations from your June 9th E mail, I will reach out to Mr. Honeycutt and beg him to help me with settlement, in an effort to rectify past issues. I will pay back any monies I was wrongfully paid due to mistakes made by myself and Penser due to my [h]aste. I will stop making complaints and I will keep my eyes open and mouth shut. Please I am sorry and am begging you for mercy, I cannot take any changes losing my [c]overage and [m]edication. (Email, June 18, 2025).

74) On June 18, 2025, Employer requested an oral hearing on its June 17, 2025 petition and Employee’s February 25, 2025 claim. (Affidavit of Readiness for Hearing (ARH), June 18, 2025).

75) On June 18, 2025, Employer requested cross-examination of PA-C Harris on her April 11, 2025 letter “to determine the bases for her opinion, and whether she supports employee’s allegations.” (Request for Cross-Examination, June 18, 2025).

76) On June 20, 2025, Employee emailed the Division, Employer’s attorney, and Marsh:

I would like to make a formal complaint against Mr. Rhodes for interfering with my ability to obtain legal representation and for interfering in my receiving information from Penser insurance. And for playing games and messing with my head!

Mr. Rhodes has made several requests from me and I have done nothing but comply!

- (1) Tax information for years 2010 and 2011
- (2) Leave slips dating from 2018 thru 2025
- (3) Contemporaneous [d]octors['] note
- (3) Deposition for [l]eave [c]ontroversion?

Do you have any idea the lengths I went to fulfilling these requests. First I had to call the [m]ayor of Juneau and speak to 1 of her accountants, the [m]ayor (Beth Weldon) was kind enough to stop what she was doing and in 1 day she went to a storage facility and went thru boxes to find what I needed. DO YOU KNOW I SUED THIS PERSONS FAMILY IN FEDERAL COURT! She went out of her way to help me out of [r]espect! Do you understand how hard it was for her to help me and how hard it was for me to ask? Do you?

The [l]eave slip dating from 2018 thru 2025 -- you should have told me to only go back to 2022, in fact why didn't you? You knew I thought I was supposed to go back to 2012. The date I was told was the start of my injuries!

The contemporaneous Dr. [n]ote, are you kidding me? Dr. Harris delicately responded to your request with an extremely responsible letter.

Deposition -- you were in possession of [l]eave slips for 3 months, I asked you during deposition if you knew that paying me for certain slips was a mistake and then why did you pay them?

1st you don't want to settle, then you do want to settle then you don't want to settle again and now you accuse me of [f]raud? (Email, June 20, 2025).

77) On June 26, 2025, Employee underwent pulmonary testing and blood work at Virginia Mason Medical Center. Dr. Gerbino examined him and observed mild anterior expiratory wheezing and coarse posterior breath sounds at the bases. He diagnosed "bibasilar bronchiectasis with chronic airflow obstruction elevated IgE with history of allergic rhinitis" and "COPD likely with an asthma component in this never smoker with normal Alat level." Dr. Gerbino prescribed hypertonic saline, Aerobika valve, and a trial of Spiriva and continued Symbicort. He informed Employee that Dr. Kirtland may be doing clinic in Juneau and would provide him an opportunity to be seen locally, otherwise, he would see Employee back in six months by video. (Gerbino record, June 26, 2025).

78) On July 3, 2025, Employee emailed Marsh at Penser and Employer's attorney, "Good afternoon, [a]t my last Dr. visit at Virginia Mason I was prescribed a new medication "SPIRIVA RESPIMAT 2.5 MCG INH" please add this to my prescriptions. Thank you." (Email, July 3, 2025).

79) On July 9, 2025, Employee and Employer attended a prehearing conference:

The Board designee asked Employee whether he opposed scheduling a hearing on his claim and Employer's petition. He stated he did not oppose setting a hearing and that he was traveling for the next two weeks and will be unavailable. . . .

. . . .

The Board designee advised Employee a notice of intent to rely form must accompany non-medical documents filed with the board and provides notice to the board a party will be relying at hearing on the documents listed in the notice. Medical documents must be filed with a medical summary form. Board forms are available at http://www.labor.alaska.gov/wc/pdf_list.htm.

....

The Board designee discussed the next available hearing dates with the parties. The parties agreed to schedule an oral hearing in Juneau, Alaska on September 9, 2025 for 8.0 hours on Employer's June 17, 2025 petition and Employee's February 25, 2025 claim and the issues are whether an order to recoup overpayment in excess of 20 percent under AS 23.30.155(j) and a restitution order or "other limiting order" under AS 23.30.250 should be issued and whether Employee is entitled to TPD, PPI, compensation rate adjustment, medical and transportation costs, penalty for late paid compensation, interest, attorney fees and costs, and other: lost sick leave.

The Board designee directed the parties to serve upon all parties and file with the Board witness lists and hearing briefs by close of business on September 2, 2025; she also directed the parties to serve upon all parties and file with the Board exhibits or other documentary evidence by close of business on August 20, 2025. (Prehearing Conference Summary, July 9, 2025).

80) On July 9, 2025, the Division served Employer and Employee with the July 9, 2025 Prehearing Conference Summary, along with the September 9, 2025 hearing notice, by certified mail, return receipt requested. (Prehearing Conference Summary Served; Hearing Notice Served; Envelope, July 9, 2025).

81) On August 11, 2025, Employee emailed Employer's attorney and Cucci:

Good morning, I have 3 questions for you Today.

- 1) What day did you contact my current supervisor Re: [l]eave slips for NFL football game and a Friday afternoon GCI appt.?
- 2) Did you [i]ntentionally overpay me to enable you the opportunity to manufacture the Issue of "Fraud/Overpayment."
- 3) How much \$ did you overpay me?

In light of my receiving 2 separate checks the first 1 on Feb 6th with a letter of [c]ontroversion. The 2nd check I received on April 23rd with no explanations. Your [t]iming and [i]ntentions are [s]uspect.

During the [d]eposition you hounded me on the 1st page of your Exhibit (1) dated 2018, which I was not reimbursed for because it was barred by rule and time, so any and all testimony would be "[m]oot" as there was no "[h]arm" to the State.

Then you jumped right to the back of your Exhibit (1) and tried to bait me into a trap. I was completely [h]onest about the last 6 [l]eave slips and they were not marked or meant for [r]e-imbursement. “You recognized that my responses and reactions were [h]onest” that is what brought you to suggest settlement mediation.

There is only 1 person who could supply you with the details that I went to a [f]ootball game and a GCI appt. The first time I asked you how you invaded my privacy you should have been more [h]onest!

So I ask again did you [i]ntentionally overpay me a knowing that there would be no actual [h]arm to the State, as a settlement would offset any over payment? (Email, August 11, 2025).

82) On August 11, 2025, Employee emailed Employer’s attorney, Marsh and the Division, “I have paid for 2 months of this prescription at 35\$ [sic] each and Aetna is picking up the other part. This is wrong and needs to be corrected. See email from 7/3/25 below. Thank you for your considerations!” (Email, August 11, 2025).

83) On August 11, 2025, Marsh replied to Employee by email:

Thank you for the update.

As with your past prescriptions: to have your prescriptions processed through workers’ compensation, you should notify your pharmacy so they can send me the necessary authorizations and billing information. If you’re still using the same Fred Meyer pharmacy as in the past, your pharmacy should already have your workers’ compensation pharmacy card details on file so that it may process the billing. However, please let me know if you need a new copy of the prescription card to provide them. At this time, I do not have record of any unpaid bills or pending requests for authorization from your pharmacy, but I will be on the lookout for those in the coming days. (Email, August 11, 2025).

84) On August 20, 2025, Marsh signed a notarized affidavit stating she was the claims adjuster for Employer assigned to this case. Employee submitted leave-slips to Employer on January 23, 2025, and requested compensation. Marsh reviewed the reviewed the leave-slips and could not locate a medical report indicating Employee was disabled on the dates of alleged disability. On April 14, 2025, Employee submitted a letter from PA-C Harris dated April 11, 2025, which he contended supported his assertion that the leave was work-related. On April 23, 2025, Employer paid Employee \$2,656.20 in TTD benefits for dates after February 25, 2023, based upon his written request for reimbursement, the April 11, 2025 medical record and his April 22, 2025 written statement. The amount was calculated by using the gross weekly earnings provided by the Alaska

Department of Administration and the prior adjuster, which was \$806.40, which yielded a weekly TTD benefit rate of \$531.22. Dividing the weekly TTD benefit rate of \$531.22 by seven came to a daily rate of \$75.90. Employer paid for 35 dates of TTD: March 1 and 20, April 17 and 25, June 5, 14 and 23, July 3, 4 and 5, October 6, November 3 and 9, and December 15, 2023, January 8, 23 and 24, February 12, 16 and 26, April 8 and 12, June 21, July 12, 19, 22, September 17, October 28 and 29, November 13, November 29, and December 13, 2024 and January 7 and April 8, 2025. July 22, 2024 was listed twice. Penser paid all medical bills received by more than 30 days prior to the date of the affidavit except the controverted medical bill. As of the date of the affidavit, Marsh had not received a bill or request for authorization for the prescription medication Employee emailed about on August 11, 2025. She arranged travel for Employee to see Dr. Gerbino at Virginia Mason Hospital for a PPI rating and as of the date of the affidavit, Employer had not received a PPI rating report from Dr. Gerbino or Virginia Mason Medical Center. (Affidavit of Paige Marsh, August 20, 2025).

85) On August 20, 2025, Messing signed a notarized affidavit stating she is employed with the Alaska Department of Corrections and supervises Employee. She reviews Employee's leave requests. Messing was contacted by the Alaska Department of Law for the first time on June 17, 2025, regarding Employee's case and the Alaska Department of Law provided her copies of emails referenced in her affidavit for her to review. On October 7, 2024, Employee emailed her and indicated he would like to use personal leave at the end of the month to see a Seattle Seahawks game. Messing reviewed and approved a leave-slip, which she identified as taking place from October 28 at 7:30 am through October 29 at 4:30 pm. She did not recall Employee telling her he was requesting leave for that period due to a work injury. On December 13, 2024, Employee emailed Messing and asked to use leave that afternoon. She "became aware of why [Employee] was requesting leave" and replied that he should have fun at GCI and hoped he would enjoy watching television at his home over the weekend. Messing did not recall Employee requesting leave for that period due to a work injury. Attached as Exhibit 1 was the leave-slip Employee submitted for October 28 and 29, her reply email, and the leave-slip she approved; Exhibit 2 was the December 13 email Employee sent requesting leave, a copy of her email back and the leave-slip she approved; and Exhibit 3 was copies of emails from Employee to her on January 17, 2025 and December 26, 2024 and the attachments. Employee had signed a State of Alaska, Division of Personnel & Labor Relations Statewide Policy Acknowledgement Form, dated August 19, 2024,

certifying he had read, acknowledged, and would abide by the policies listed on the form, including the Business Use/Acceptable Use (ISP172-Personal Use of Office Technology Policy). (Affidavit of Erin Messing, August 20, 2025).

86) On August 20, 2025, Employee filed a document entitled, “Documentary Evidence Rebuttal” which stated:

I would like to first acknowledge and have never denied that a mistake was made regarding leave re-imbursement. Mr. Rhodes supplied me before deposition his EXH 1 consisting of 70 pages of my leave slips oldest to newest, dating from 2018 thru 2025.

The leave slips in this EXH have been submitted to this board so I will not duplicate. The 1st leave slip dated 2018 thru slip #48 dated 2022/23 were barred for reimbursement by rule, therefore any testimony should and would be moot as no harm was done to the State.

The last 6 leave slips were added by accident and were not marked or meant for reimbursement as all of the others were!! Mr. Rhodes is trying to intimate that I intentionally committed [f]raud against the State, that is [f]alse and I believe Mr. Rhodes is trying to blame me for his lack of [re]view or his [i]ncompetence!

The remaining 16 [l]eave slips were intended for “REVIEW” I fail to understand how this occurred, the leave slips in question had already been the subject of “Controversion” so why is Mr. Rhodes acting like he was in a hurry?? Stating he only had 14 days to reimburse? [H]e had them for 2 months.

Mr. Rhodes still has not informed me how much I was overpaid!??

I admitted during deposition that a mistake was made and I stated I would [r]e-pay the State for any mistake made. There is no and was no [i]ntent to [d]efraud the State.

Mr. Rhodes I did not see you ask Erin Messing if she thought I was intentionally trying to commit [f]raud. You seem to only ask and acknowledge what suites [sic] your narrative. I believe you have a serious issue with [e]thics!! And lastly my filing civil suit for damages not covered by workman [c]omp has no relevance to this proceeding your inclusion shows your weakness.

I apologize to the Board for wasting your time on “Intentional Fraud” what I truly believe is a non issue! (Documentary Evidence Rebuttal, August 20, 2025).

87) On August 25, 2025, Employee filed a document entitled, “Objection to Premise of Hearing/ Formal Complaint” which stated:

The premise of this hearing is that I lied during deposition to [f]raudulently obtain [l]eave [r]eimbursement. That is blatantly false!

I charge that the AG office and Dave Rhodes “[i]ntentionally [o]verpaid [m]e” and then tried to use the deposition to entrap me. The fact that they knew they were overpaying me [e]liminates [a]ny and [a]ll elements of [f]raud on my part. Not to mention I have never denied that I aided in the over payment by making mistakes and supplying leave slips that should not have been included. Now had the State acted [f]airly and [r]eviewed the leave slips accordingly then this would not have happened as it did.

I also charge that Dave Rhodes accessed my work computer and bypassed my E mail password to spy on me and gain access to [a]ll work performed over the last year. I believe this violates his [o]ath of [o]ffice, [e]thics and the [s]tandards of [f]air play and [e]qual considerations. Dave Rhodes knew on June 4th before deposition all details re: NFL game and GCI appt. I thought that info could only be supplied by one [p]erson however the affidavit supplied for that [p]erson says June 17th. That’s 2 weeks after the deposition held on June 4th. Dave Rhodes also supplied copies of Emails from GCI to the Board in his last filing that were sent to my [O]utlook account, [c]onfirming my privacy had been invaded.

How would any of you feel if Dave Rhodes [b]ack [d]oored your computer and bypassed your E mail password and accessed everything you have done for a year? Dave Rhodes would not have done this if I worked for a local car dealership or McDonalds, he only did this because I am a State [e]mployee! Tell me how that is not [p]rejudicial against me.

I am upset, hurt and feel violated. I recently received an E mail from Dave[’]s[] supervisor chastising me for using my work time and computer to respond and file complaints against the State and then my current supervisor was contacted in an effort to get me in trouble and to attempt to sway “[o]ffice [o]pinion “ against me.

Please take note that I have not said one word to anyone in my office about any aspect of my [w]orkmans comp claim. I am a very private person. My current supervisor is just now getting an idea because she was dragged into this by Dave Rhodes.

Why am I being treated with such disdain and dis-respect?

Is it that Dave Rhodes thinks I am a bad person and I deserve the [i]njuries suffered due to prolonged [i]ndustrial [e]xposure of [c]hemicals, [e]xhaust and heavy [d]ust laden with [a]sbestos??

I am asking for a [f]ormal [i]nvestigation of Dave Rhodes for interfering with my attempts to gain legal council [sic] and for violating elements of the 14th

Amendment Re: [d]ue [p]rocess and [e]qual [p]rotection of the [l]aw, and for violating my privacy and for violating his code of Ethics.

I am also asking that the hearing regarding “[f]raud be [d]ismissed” and that any overpayment be dealt with during settlement mediation as offered by Dave Rhodes and then rescinded. (Objection to Premise of Hearing/ Formal Complaint, August, 25, 2025).

88) On September 2, 2025, Dr. Gerbino addressed a letter “To whom it may concern:”

I am a pulmonary physician at Virginia Mason Medical Center and evaluated the above patient for the first time in the absence of my colleague Steve Kirtland, MD who has recently left his position at our medical center. Dr. Kirtland previously performed workmen’s [sic] compensation evaluations.

I saw the above patient at the Virginia Mason Medical Center on 6/26/2025 and performed a routine pulmonary evaluation for his ongoing pulmonary disease. I did not perform and am not qualified to perform workmens [sic] compensation evaluations or ratings of permanent partial impairment.

Mr[.] Olivet [sic] scheduled the follow up visit with me in Seattle expecting that a workmens [sic] compensation evaluation with PPI would be performed as it had been in the past by Dr[.] Kirtland. While ongoing routine pulmonary care is necessary for this patient and appropriate testing was performed for a routine pulmonary evaluation, he will need an evaluation by a physician capable of performing workmens [sic] compensation assessments for the purposes of a PPI rating. (Gerbino letter, September 2, 2025).

89) On September 2, 2025, Employer filed its witness list. (Employer’s Witness List, September 2, 2025).

90) On September 3, 2025, at 8:25 a.m. Employee emailed the Division and Employer:

Good morning, I received your brief and read it this morning. This whole matter of “[f]raud” was just meant to get me riled up? This has been about you punishing me for [f]iling civil suit against the State. You have put me thru hell over 550 to 2650 dollars . I am truly sorry I let you get under my skin to the point of acting brashly. This is not a personal matter between the 2 of us this is about being physically injured due to some one else’s negligent and discriminative actions while working for the State of Alaska DOT. While I still have reservations about your intent and competence, I apologize for taking your crap personally. Thank you. (Email, September 3, 2025).

91) On September 4, 2025, Employer filed fee affidavits for Rhodes and paralegals Sara Scott and Jennifer Cruz. Using a market rate of \$300 per hour for Rhodes and paralegal rates of \$125 per

hour, the affidavits documented total fees and costs of \$23,117.50, including 64.1 hours by Rhodes (64.1 hours x \$300 = \$19,230), 5.8 hours for Cruz (5.8 hours x \$125 = \$725), and 25.3 by Scott (25.3 hours x \$125/hour = \$3,162.50). (Affidavit of M. David Rhodes in Support of Petition Re Employee's False Statements, September 4, 2025).

92) On September 4, 2025, with an email dated September 3, 2025 at 6:20 p.m., Employer requested acceptance of its late-filed hearing brief contending it attempted to file it on September 2, 2025 but it received an email on September 3, 2025 at 5:35 p.m. indicating it was undeliverable to the Division's email address. It contended Employee confirmed receiving the brief and reading it on September 3, 2025, at 8:25 a.m. (Petition, September 4, 2025).

93) On September 4, 2025, with an email dated September 3, 2025, at 6:20 p.m., Employer filed its hearing brief. It contended Employee is not a credible historian because he admitted his testimony was not reliable, he had specific memories of time-loss for leave-slips not marked "workers' comp.," and continued to claim specific memories of time loss for dates of leave with a leave-slip not marked "workers' comp." Employer contended "in the absence of medical evidence of a disability on a date of claimed disability that [has] not been paid," the panel "should conclude Employee did not meet his burden of proving that additional disability benefits are owed for past time loss." It contended Employee knowingly made false statements because he was angry. Employer contended Employee submitted leave-slips for dates which he originally indicated were for disability but were signed for in advance of the requested leave for August 21, October 19, December 21-24, 2018; February 15, March 15, November 27, and December 6, 2019; December 31, 2020; August 19, September 17, October 19 - 22, 2021; May 27 and December 23, 2022; November 9, 2023; July 19- 22, October 28-October 29, November 12, and December 13, 2024. Of those dates, Employee was paid benefits for November 9, 2023, July 19 and 22, 2024, October 28 and 29, 2024 and December 13, 2024. At minimum, Employer contended it overpaid Employee by \$531.33 for leave for the Seahawks trip on October 28 and 29, 2024, the GCI leave on December 13, 2024, his birthday leave on January 7, 2025, and the leave slips signed before the dates of leave Employee took for trips that were not for disability or medical travel. It contended Employee was overpaid by \$2,656.50, the full amount it paid him, because Employee admitted his statements were not reliable. Employer contended it should be allowed to recover any overpayments by reducing future payments by more than 20 percent. It requested the panel find Employee's leave-slips do not now and will not in the future raise the presumption of

compensability absent additional supporting evidence. Employer requested an order directing Employee to make restitution. It contended Employer paid a substantial amount to uncover Employee's false statements and to defend against this case and it should be reimbursed for its attorney fees and costs. Employer contended Employee is angry and believes he is owed millions of dollars and he thought he could get away with making false statements to obtain benefits but "he is pounding tables and yelling like hell" since he knows his claim is not supported by fact or law. (Employer's Hearing Brief, September 4, 2025).

94) Employer contended Employee failed to meet his burden of proving additional disability benefits are owed for past time-loss. Employer contended that an order should be issued finding Employee's claims for more time-loss that occurred more than two years before he filed his claim are barred under AS 23.30.105. It contended Employee testified he was aware of the work-related nature of his disability in late 2017 or 2018 and he reported his injury in 2019. Employer contended it overpaid Employee, and PPI benefits are not due at this time as it paid for a PPI examination, but a PPI rating has not been received. It contended that all medical benefits or requests for reimbursement submitted with a bill or a receipt have been paid with the exception of one improperly submitted bill. Employer requested the panel find Employee failed to meet his burden of showing additional medical benefits are due. It contended no penalties or interest are due because Employee failed to show he is entitled to additional time-loss or medical benefits or that Employer unfairly or frivolously controverted benefits. Employer contended attorney fees and costs are not due because Employee is not an attorney. (Employer's Hearing Brief, September 4, 2025).

95) On September 4, 2025, Employee emailed the Division and Employer:

Good morning, I received a new "Petition" from Dave Rhodes last night. It appears the AG office did not file their [b]rief in time. The petition very clearly states I have 20 days to respond in writing, [and] it is my belief that any acceptance of the [b]rief by the Board would in fact be [p]rejudicial in light of the fact the hearing is in 5 days. I see Mr. Rhodes is asking you the "Board" to accept his "[e]xcuse" as being reasonable yet [h]e refuses to accept the truth regarding my adding leave slips for review by accident as being reasonable. I fail to see a distinguishable difference, Mr. Rhodes you are not being or acting fairly. (Email, September 4, 2025).

96) On September 5, 2025, Employee emailed the Division:

Good morning, I am asking the Board to review Dr. Harris['] letter regarding lost leave re-imbursement. The overpayment in question was the subject of a “[c]ontroversion”. I have steadfastly maintained that Dave Rhodes manufactured the issue of “[f]raud” and overpaid me on purpose. (Email, September 5, 2025).

97) On September 5, 2025, Employee objected to consideration of Employer’s late-filed hearing brief:

I formally object to Dave Rhodes['] late filings and add acceptance would in fact be [p]rejudicial against me. Mr. Rhodes has offered the weakest of excuses, I have been a state employee for 13 years and the only reason to receive a “[n]ot [d]eliverable” notice is by putting in the wrong E mail address. Mr. Rhodes has been using his Email for some time and has not had any issues with any filings before or since, so why just this one time? Dave Rhodes filed late and does not deserve extra accommodations. I ask wouldn't Dave Rhodes protest if the situation was reversed? Objection to Board receivership of [l]ate [f]ilings. (Objection to Board receivership of Late Filings, September 5, 2025).

98) On September 5, 2025, Employee emailed Employer’s attorney and the Division:

Good morning, I have a few questions for the Board in relation to our upcoming hearing.

- 1) Am I allowed to make objections? Such as Mr. Rhodes leading a witness or if he asks for personal opinion from a [m]edical person instead of [m]edical facts?
- 2) Am I allowed to plead the 5th if I feel Mr. Rhodes is trying to entrap me into self incrimination?
- 3) Do I have to say anything more beyond the documents already filed?

I am not an [a]ttorney and I do not have representation as a direct result of Dave Rhodes interference, so I am looking for clarification.

Thank you. (Email, September 5, 2025).

99) On September 8, 2025, Employer responded to Employee’s September 5, 2025 email and asked the Board to inform Employee that (1) it may ask leading questions of an adverse witness, (2) he is not required to present evidence but he may be called as witness by Employer, and Employee may assert his right against self-incrimination under the Fifth Amendment if it is reasonable to believe that his answer to a question may be used against him in a criminal proceeding, (3) the Special Investigation Unit (SIU) has discretion to refer a case to the District Attorney for charges and this matter has been referred to the SIU for investigation, (4) it is “well settled” that an adverse party may ask for an adverse inference from the assertion of the Fifth

Amendment right, and (5) Employee may waive his Fifth Amendment right by affirmatively raising an issue when testifying regarding his leave-slips and his state of mind or intent in producing the records to Employer and Employee may not refuse to answer questions on cross-examination. (Response to Employee's 9/5/2025 Request for Information, September 8, 2025).

100) On September 8, 2025, Employee emailed Employer's attorney and the Division:

Good morning, it is my intention to co-operate fully with the Board and [h]earing tomorrow. I have done nothing wrong with actual "[i]ntent". I think Mr. Rhodes using this format for Retaliation is reprehensible and he should be reprimanded.

Thank you. (Email, September 8, 2025).

101) On September 8, 2025, Employee emailed Employer's attorney and the Division:

You know Mr. Rhodes you have not mentioned even once that I was removed from my [j]ob and lost over 160.0 [h]ours of [e]arnable [i]ncome over the course of a year just in that single action. I went from 80.0 pay periods to 75.0 pay periods and I went from accruing 11.05 to accruing 10.23 hours of annual leave. That's 28 pay periods times 5 equals 140.0 and 28 times apprx. .75 or about 22.96 hours of leave. So just in the move I am out over 6000.0 dollars of earnable annual income. 1/12 of my yearly earnings. That's huge why aren't you concerned with that???????

I do not like being called a "[f]raud" I do not like being called a "[l]iar" I am an [h]onorably [d]ischarged [v]eteran and I did not have [r]espiratory Issues before , during or after my service until working for the State of Alaska DOT 7 mile. You are rude and offensive. Your actions and comments are reprehensible and support my claims of you being "[i]ncompetent"!

Have a nice Day! (Email, September 8, 2025).

102) On September 8, 2025, Employee emailed the Division and Employer's attorney:

The main reason I filed suit in State court was to make the situation public and common knowledge and to insure the State is [h]eld accountable for its employee[']s [n]egligent and [d]iscriminative actions and to finish clean up and repairs as stated to AKOSH by DOT. This is not happening and the State has already placed a new employee in harms way. There is no accountability!!

I am looking at filing a Class Action lawsuit against the State in Federal Court, I believe that the State should act responsibly towards the 100 or more people who

worked at DOT 7 mile Juneau and provide anyone with [r]espiratory [i]ssues compensation and medical care, because it's the right and honorable thing to do! (Email, September 8, 2025).

103) At hearing on September 9, 2025, Employee relied upon the arguments in his objection to Employer's hearing brief. (Record).

104) On September 9, 2025, Employer relied upon *Snoddy v. Olgoonik Development, LLC*, AWCB Dec. No. 12-0054 (March 14, 2012) to contend Employee was not prejudiced by the late-filed brief because he received the hearing brief on the deadline. (Record).

105) Employer reiterated its hearing brief arguments. It contended Employee's previous civil lawsuits demonstrated he is litigious. Employer contended Employee's email responses to Employer's attorney's emails with questions about the leave-slips were evasive. It contended it is not possible for Employee to remember being a baby; common sense provides most people have memories back to about three-and-a-half or four years old. Employer contended the low-level the Board uses to raise the presumption of compensability creates a risk to Employers because it puts Employer on a timeline to pay or controvert benefits. It contended that it takes time to obtain employment records and investigate. Employer contended Employee's deposition testimony shows his intent to mislead Employer and obtain benefits as it changed when confronted with evidence and Employee became aggressive with Employer's attorney. (Record).

106) On September 9, 2025, Employee contended Employer failed to show he knowingly and intentionally made a false or misleading statement when he submitted leave-slips for reimbursement and testified at deposition about the leave-slips. He contended Employer was not prejudiced by his misstatement at deposition about leave on November 12 and 13, 2024, because the leave-slips were work-related because he obtained medical treatment for the work injury. Employee contended leave-slips barred under AS 23.30.105 are moot since Employer was not prejudiced by his accidental inclusion of leave-slips for reimbursement as no benefits were paid. He contended he was not aware of the two-year rule in AS 23.30.105 and had he known, he would not have submitted the barred leave slips. Employee contended his previous lawsuits are not relevant and do not show a pattern of being litigious. He contended that the February 6, 2025 controversion was unfair and frivolous. Employee contended Employer also failed to properly investigate his leave-slips before reimbursing him as it could have caught his mistakes and not overpaid him. (Record).

107) On September 9, 2025, PA-C Harris testified at hearing that she is a mid-level medical provider at SEARHC and is licensed in Alaska and New York. She first met Employee in April 2025, as his previous primary physician left. Employee visited her to establish care and to get a letter for workers' compensation. He reported a chronic cough and shortness of breath and presented with wheezing. PA-C Harris reviewed about 30 pages of records after the 30-minute appointment; the record review took about three hours. She recommended further evaluation by a pulmonologist. PA-C Harris did not have dates Employee missed work due to the work injury in the medical record. She believes he missed work over many years due to the persistent cough and shortness of breath. Employee could ask for leave in advance when he was exposed to triggers which could cause predictable flares of his coughing and shortness of breath. (Harris).

108) On September 9, 2025, Employee testified he marked leave-slips for reimbursement by checking the workers' compensation box on the leave slip. He accidentally submitted leave-slips he did not intend to include for reimbursement, and he should not have been paid for those leave slips; he only wants benefits he is entitled to under the Act. The money Employer paid him is still in his bank account. Employee believes Employer's petition for fraud is retaliation for his civil lawsuit and that Employer is abusing the system. He thinks Employer's attorney created a false narrative of fraud and invaded his privacy and that Employer failed to properly investigate his leave-slips before paying him. Employee submitted leave-slips in advance for medical treatment. Employee misspoke at the deposition for leave on November 12 and 13, 2024. He owned up to the mistakes during his deposition when he included leave-slips not marked for repayment and is willing to repay Employer. Employee stated his symptoms always included coughing and he always contacted his supervisor when he was sick and stayed home due to his work injury because it was the responsible thing to do. When he contacted his supervisor because he was sick that day, he did not submit leave-slips in advance. The last six leave-slips he submitted for reimbursement were a mistake; they were not marked for workers' compensation, and he did not intend to submit them; it was an accident. He did not remember the score of the Seahawks game because he left the game early since they were losing. Employer had the leave-slips for two months before it paid him benefits, it controverted benefits before it paid, and he was paid about a month after Employer controverted. He believes Employer's attorney is a bully, liar, and fraud. (Employee).

109) Employee recalled submitting documents to Penser for treatment at Virginia Mason for out-of-pocket expenses due to a coding error for unknown dates, totaling a few thousand dollars. He

paid \$35 per month for the second inhaler prescribed for the work injury for the last three months as the pharmacy processed it under his health insurance instead of workers' compensation. No one told him he had to submit medical bills to the Board. Employee wants to make sure he continues to receive the prescribed inhalers for his work injury and continuing medical appointments to treat his work injury. He checked the boxes on the claim form because Division staff told him to ask for everything he thought he was entitled to, and he did not remember that the benefits he sought in his claim were also set for hearing. (Employee).

110) Employee invoked his Fifth Amendment right when asked about the leave-slip for October 19, 2018. (Record).

111) On September 9, 2025, Employee declined to keep the record open for post-hearing briefing to address the issues set forth in Employer's late-filed brief. (Record).

112) On September 11, 2025, Employer filed Dr. Gerbino's September 2, 2025 letter. (Medical Summary, September 11, 2025).

113) On September 15, 2025, Employee requested the panel review his deposition in its entirety:

Mr. Rhodes is asking the Board to make a very serious decision that could affect my life negatively. I am asking the Board to review the [d]eposition from June 4th in its entirety.

I was very upset during the [h]earing on 9/9/2025 and it was obvious.

Mr. Rhodes would like you to believe that it was how the [d]eposition went and that would not be true, [because] I was not up on my heels at the [d]eposition because Mr. Rhodes had not called me a [l]iar, [f]raud and [b]ully up to that point.

Mr. Rhodes made an offer of [s]ettlement [m]ediation 6 hours after the [d]eposition and he asked me to make several concessions to him[[]]; this does not read like he felt sorry for me or that I was a [l]ying [f]raud. Quite the opposite! Mr. Rhodes did not rescind the offer in an E mail[[]]; "NO" he sent a Petition of [f]raud to the Board after he received my [c]ivil [s]uit. If that is not by definition an act of [r]etaliation then please explain to me what is.

I have never denied making mistakes with the submission of leave slips, but look at the effort Mr. Rhodes put into attempting to show I was a fraud[[]]; where was this effort before the overpayment or where was any effort for that matter.

Claiming he was acting in a hurry because the Board did not favor [e]mployers is hoooy! [H]e possessed all leave slips for over 2 months and the first 48 were barred by time and rule leaving only 22 slips the last 6 I have consistently stated were added by accident.

Why was there no effort to review before overpayment?

I have a right to be judged by all of the facts and I have the right to seek legal redress of all grievances without enduring acts of retaliation.

Thank you for your considerations. (Petition for Board Review of June 4 Deposition in its Entirety/Visually, September 15, 2025).

114) On September 16, 2025, Employer stated it had no objection to the Board reviewing the deposition transcript. (Response to Petition for Review of June 4 Deposition, September 16, 2025).

115) On September 25, 2025, the panel reopened the record to receive arguments from the parties regarding how Employee's union contract provisions for LTC and GGU bargaining units, which state that the use of leave shall be reduced by the amount of wage payments under the Alaska Workers' Compensation Act may affect the parties' positions on the issues; the record closed on October 6, 2025. (Letter, September 25, 2025). The letter was served by first-class mail and email to the parties. (Served, September 25, 2025).

116) On September 25, 2025, Employee emailed the Division, Employer's attorney and Marsh stating, "I have looked at both Union Contracts and I do not understand what you are trying to convey! At this time I will not be able to respond in any other fashion." (Email, September 25, 2025).

117) On September 28, 2025, Employee emailed the Division and Employer's attorney:

The Board has re-opened the hearing for further arguments. Upon review of the letter supplied by Karen Harris on 4/11/2025 it is clear she is not a [d]octor and does not have the credentials to respond as such and the letter itself is too ambiguous to make any assumptions regarding sick leave. This letter does not meet the requirements as set forth by rule. [T]herefore any payment made to me was in fact a mistake, why this was not found sooner is a mystery, this not only eluded me but it also eluded Dave Rhodes and his entire team. [T]o punish me financially beyond the over[-]payment itself would be prejudicial and would not serve the essence and foundation of workman's comp and that is to help individuals who have been injured on the job. I respectfully request the Board to deny Mr. Rhodes requests for financial punishment beyond the overpayment of \$2600.00 appx. (Mr. Olivit Response to Board Letter Dated 9/25/2025, September 30, 2025).

118) On October 6, 2025, Employer filed a supplemental hearing brief contending that the union contract provisions do not make an issue pending before the Board more or less likely, given the

lack of evidence presented by the parties and the lack of jurisdiction over matters outside of worker's compensation. It contended the panel should not rely on the contract provision to make a factual or legal determination. (Employer's Supplemental Hearing Brief, October 6, 2025).

119) The "Workers' Compensation and You" pamphlet revised February 15, 2025 states:

If payment is not made by the 7th day after payment is due, an additional amount commonly called a "penalty" equal to 25% of the amount then due must be paid to you by the insurer. If a payment was not paid when it was due, the insurer also owes you interest at the rate set by law. Payment is complete when placed in an envelope bearing the correct name and address of record and postmarked in the mail.

....

Insurer's Obligation to Pay. Provide your doctors, the hospital, or other medical providers with the insurer's name and address and **ask them to bill the insurer.** The insurer will pay covered costs directly to the billing provider. If for some reason you pay medical bills, **save your receipts** and provide them to the insurer **with proof of service, and keep a copy for yourself.** The insurer has 30 days to pay a medical bill once it receives a medical report and the accompanying bill. **If the insurer does not pay within 30 days, a penalty and interest may be due to the medical provider.**

The insurer's obligation to pay medical expenses is controlled by the Alaska Workers' Compensation Medical Fee Schedule. Covered costs include doctor's and nurse's fees, hospital and physical therapy charges, prescribed medicine, crutches, artificial limbs, dentures, glasses, hearing aids, medical supplies, ambulance charges, reasonable transportation costs to and from the nearest place of treatment for your injury, and reasonable meal and lodging costs when you must be treated away from your home city.

....

EVIDENCE: Any document that you want the Board to consider at a hearing, including but not limited to photographs, medical records, itemized medical bills, receipts for out-of-pocket expenses, witness statements, and affidavits, all constitute "evidence" that may be admissible before the Board at a hearing. **Be sure to file and serve all your evidence within the deadline set forth in the administrative regulations or set by the Board designee in a prehearing conference summary. Failure to timely file and serve your evidence may result in the Board not considering it.** (Workers' Compensation and You, revised February 15, 2025).

120) Employee is entitled to disability benefits for leave dated March 1, 20, April 17, May 30, June 5, June 13, 23, 28, 29, 30, July 3 and 5, July 12, August 7, October 4 and 6, November 3 and

9, and December 11 and 15, 2023; January 8, 23, and 24, February 12 and 26, April 8, June 21, July 12, and November 12 and 13, 2024; and April 8, 2024. (Experience, judgment, and observations).

PRINCIPLES OF LAW

The Board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the Board’s “experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above.” *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987).

In *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 35-37 (Alaska 2007) (*AKPIRG*), the Alaska Supreme Court (Court) stated, “The legislature may constitutionally delegate some adjudicative power to an executive agency, but it may not delegate judicial power.” “Neither the Appeals Commission nor the Board has jurisdiction to hear any action outside of a workers’ compensation claim.”

Lindeke v. Anchorage Grace Christian School, AWCB Dec. No. 11-0400 (April 18, 2011) noted there was no specific statutory or regulatory provision requiring the parties to submit to mediation, but the Act contained broad authority for resolving disputes. The Act requires process and procedure to be as “summary and simple as possible,” and is to be interpreted to ensure the “quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost” to employers. That goal and the intent had not been met in *Lindeke* as the case had languished and “gone nowhere” for over six years. *Lindeke* noted that mediation is relatively quick, usually taking only one business day, very efficient because it normally resolves the entire case with very little Division resources, and fair because both parties must agree to a mediated settlement. Also, costs to the employer for a mediated settlement are likely to be significantly less than continued litigation. Consequentially, *Lindeke* ordered the parties to mediate, but advised they were not required, or forced, to resolve that case through mediation.

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

nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. . . .

. . . .

(o) Notwithstanding (a) of this section, 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. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection. A claim for palliative care is subject to the requirements of (c)-(n) of this section. If a claim for palliative care is controverted by the employer, the board may require an evaluation under (k) of this section regarding the disputed palliative care. A claim for palliative care may be heard by the board under AS 23.30.110.

When the Board reviews a claim for medical treatment made within two years of an undisputed work-related injury, its review is limited to whether the treatment sought is reasonable and necessary. *Philip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727 (Alaska 1999). *Hibdon* addressed reasonable medical treatment:

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. (Citations omitted). *Id.* at 732.

When reviewing a claim for continued treatment beyond two years from the date of injury, the Board has discretion to authorize “indicated” medical treatment “as the process of recovery may require.” *Id.* With this discretion, the Board has latitude to choose from reasonable alternatives rather than limited review of the treatment sought. *Id.*

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

AS 23.30.097. Fees for medical treatment and services. . . .

(d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later.

The former AS 23.30.105(a) version applicable to Employee's injury date stated:

AS 23.30.105. Time for filing of claims. (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, and the right to compensation for death is barred unless a claim therefor is filed within one year after the death, except that, if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding.

(b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the provisions of (a) of this section are not applicable so long as the person has no guardian or other authorized representative, but are applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of a guardian or other representative, or, in the case of a minor, if no guardian is appointed before the person becomes of age, from the date the person becomes of age.

Morrison-Knudsen Co. v. Vereen, 414 P.2d 536 (Alaska 1966) said AS 23.30.105's purpose is to ensure employers have a reasonable, timely opportunity to investigate and defend against claims. *W.R. Grasle Co. v. Alaska Workmen's Compensation Board*, 517 P.2d 999, 1002 (Alaska 1974) held:

A disability which becomes apparent immediately upon the occurrence of some mishap will be more quickly barred by the two-year limitation; . . .

Hammer v. City of Fairbanks, 953 P.2d 500, 505 (Alaska 1998) held the word "knowledge" was not a "term of art." In context, it meant no more than "awareness, information, or notice of the injury. . . ." *Egemo v. Egemo Constr. Co.*, 998 P.2d 434, 441 (Alaska 2000) concluded, "In order for the statute of limitations under former AS 23.30.105(a) to begin running, the claimant must know of the disability and its relationship to employment and must actually be disabled by that disability." A claim is not "ripe," requiring filing under AS 23.30.105(a) until the work injury causes wage loss. *Id.* at 438-439. *Collins v. Arctic Builders, Inc.*, 31 P.3d 1286, 1289 (Alaska 2001) noted AS 23.30.105 required a claimant to file his claim within two years of his actual or chargeable knowledge of his disability and its relationship to his employment. *Collins* held the injured worker had actual knowledge of his work-related asbestos injury when a physician told him his work-related asbestos exposure with his employer was probably the cause of his disease. When an employee knew of his disability is a factual question reviewed under the substantial evidence standard. *Id.* Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Alaska Housing Authority v. Sullivan*, 518 P.2d 759, 760-761 (Alaska 1964).

In *Fox v. Alascom, Inc.*, 783 P.2d 1154 (Alaska 1989), an employee began to experience mental stress as a result of work. The Board found the employee knew or reasonably should have known the seriousness of her injury and its connection to work by August 1, 1980. Consequently, the Board determined that under AS 23.30.100 the employee should have provided notice to the employer by August 31, 1980 and, under AS 23.30.105, she should have filed a claim by August 1, 1982. In November 1982, the employee filed a claim for mental stress, listing the date of injury as February 1982, the date she had a breakdown. The Board found the claim to be untimely. The Court reversed stating:

Fox does not dispute that she had experienced work-related stress prior to the breakdown. While it may be that she could have claimed disability benefits for the stress she had experienced prior to her 1982 breakdown, she cannot be penalized for absorbing the costs of her earlier stress, and seeking Workers' Compensation benefits only when that stress culminated in a breakdown. An employee need not claim disability for every pang of pain in order to claim disability benefits for a more fully developed injury. Thus, the relevant limitations periods for filing her breakdown-related claim did not begin to run when Fox began to suffer from work-related stress. Rather, the limitations periods started to run as of the date she became aware of her work-related breakdown. *Id.* at 1159.

Murphy v. Fairbanks North Star Borough, 494 P.3d 556, 493 (Alaska 2021) stated:

Claims for medical treatment are governed by a different limitations framework. AS 23.30.095(a); *see also Egemio v. Egemio Constr. Co.*, 998 P.2d 434, 440 (Alaska 2000) (“[N]ew medical treatment entitles a worker to restart the statute of limitations for medical benefits.”). New medical treatment that results in wage loss allows a new disability claim that restarts the statute of limitations in AS 23.30.105(a). *Id.* at 439.

In *Larson's Workers' Compensation Law*, Prof. Larson discussed issues to consider in determining whether a limitations statute for filing a workers' compensation claim has begun to run:

The time period for notice of claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury or disease. (7 Arthur Larson & Lex Larson, *Larson's Worker's Compensation Law* §126.05[1], at 126-18 (2001)).

AS 23.30.120. Presumptions. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter. . . .

Benefits sought by an injured worker are presumed compensable. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). The presumption applies to any claim for compensation under the workers' compensation statute. *Id.* The presumption involves a three-step analysis. To attach the presumption, an employee must first establish a “preliminary link” between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Credibility is not examined at the first step. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

Once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991). “Substantial evidence” is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603 (Alaska 1999). At the second step of the analysis, the employer’s evidence is viewed in isolation, without regard to the claimant’s evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers’ Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer’s evidence is sufficient to rebut the presumption, it drops out, and the employee must prove his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). This means the employee must “induce a belief” in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn, and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

AS 23.30.185. 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 *Orbeck v. University of Alaska*, AWCB Dec. No. 04-0123 (May 24, 2004) the Board declined to reduce the employee’s entitlement to TTD or TPD benefits for receiving sick leave benefits or vacation pay, citing the majority rule in Larson’s treatise, because there is no statutory basis for offsetting or barring time loss benefits for receipt of sick-leave or vacation-pay. According to Professor Larson, the majority rule is that offset provisions for sick-leave pay should be strictly construed and unless expressly made deductible, they should not be treated as a benefit for which compensation payments are to be reduced. 32 *Larson’s Workers’ Compensation Law*, §157.04.

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 finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

AS 23.30.155. Payment of compensation. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury. . . . On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days. . . .

(c) The insurer or adjuster shall notify the division in a format prescribed by the director that the payment of compensation has begun or has been increased, decreased, suspended, terminated, resumed, or changed in type. . . .

(d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury. . . .

(e) If any installment of compensation payable without an award is not paid within seven days after becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.

. . . .

(j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

....

(o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

(p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate . . . in effect on the date the compensation is due. . . .

A controversion notice must be filed "in good faith" to protect an employer from a penalty. "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). Evidence the employer possessed "at the time of controversion" is the relevant evidence to review. *Id.* If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155(e). *Id.* at 359.

Bauder v. Alaska Airlines, Inc., 52 P.3d 166, 176 (Alaska 2002) stated, "When an employer neither timely pays nor controverts a claim for compensation, AS 23.30.155(e) imposes a 25% penalty," but only if "if the employer is ultimately found liable for the disputed compensation."

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

Vue v. Walmart Associates, Inc., 475 P.3d 270, 289-90 (Alaska 2020) held though it is proper for a reviewing body to consider evidence an employer had when it filed a controversion, "an insurer has a continuing obligation to consider new evidence that comes to its attention and to modify or withdraw controversions based on that new evidence or face a possible penalty or referral to the

Division of Insurance.” *Vue* requires a review to see if a controversion remains appropriate as a matter of law.

AS 23.30.155(j) permits withholding up to 20 percent of future compensation installments and can be invoked at an employer’s discretion. *Davenport v. K&L Distributors, Inc.*, AWCBC Dec. No. 92-0180 (July 22, 1992). It does not, however, provide any criteria or factors that should be considered in determining whether a higher withholding rate is appropriate. Thus, decisions have entertained various considerations when deciding appropriate withholding amounts. For example, *Barnett v. Lee’s Custom Designs*, AWCBC Dec. No. 99-0146 (July 8, 1999) considered the financial hardship the employee would suffer as result of a higher withholding rate; *Decker v. Price/Northland J.V.*, AWCBC Dec. No. 930304 (November 24, 1993) considered the length of time employee was expected to be disabled and whether the overpayment could be recouped within that time at 20 percent; and *Bathony v. State*, AWCBC Dec. No. 98-0101 (April 22, 1998) considered the fact the overpayment arose or was exacerbated by the employee’s resistance to providing correct information to the employer.

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.

AS 23.30.190. Compensation for permanent partial impairment; rating guides.

(a) In case of impairment partial in character but permanent in quality . . . the compensation is \$177,000 multiplied by the employee’s percentage of permanent impairment of the whole person. . . .

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. *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC Dec. No. 153 (June 14, 2011).

An employee is entitled to a PPI rating from his own physician, or from someone to whom his physician refers him for rating, for each work-related condition and at an employer's expense. *Redgrave v. Mayflower Contract Services, Inc.*, AWCB Dec. No. 09-0188 (December 7, 2009).

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.

(b) The wage-earning capacity of an injured employee is determined by the actual spendable weekly wage of the employee if the actual spendable weekly wage fairly and reasonably represents the wage-earning capacity of the employee. The board may, in the interest of justice, fix the wage-earning capacity that is reasonable, having due regard to the nature of the injury, the degree of physical impairment, the usual employment, and other factors or circumstances in the case that may affect the capacity of the employee to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future.

AS 23.30.220. Determination of spendable weekly wage. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

. . . .

(4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;

(5) if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees. . . .

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

Wilson v. Eastside Carpet Co., AWCAC Dec. No. 106 (May 4, 2009) held an employer may presume that for an hourly worker, AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the employee's wages at the time of injury in most cases. The hourly employee has the burden to challenge the compensation rate established under §220(a) if it does not represent the equivalent wages at the time of the injury. The Board "must look at the evidence and decide the facts in each case" when determining the spendable weekly wage. *Id.* at 4. In *Wilson*, the Commission found the Board could not have ascertained the wage equivalent from Wilson's small self-employment record and therefore was required to use a different §220(a) subsection to fit these circumstances. *Wilson* further held though tax records may be used to prove reported income, the Board is not limited to federal tax returns as proof of an employee's earnings. *Id.* Once an injured worker claims a compensation rate adjustment, "the board must conduct a broader inquiry" to obtain evidence sufficient to determine the spendable weekly wage. *Id.*

Further, *Straight v. Johnston Construction & Roofing, LLC.*, AWCAC Dec. No. 231 (November 22, 2016) held "while not including a fairness provision in AS 23.30.220(a), the legislature codified a fairness provision applicable to the whole Act in AS 23.30.001. The Court held on numerous occasions a fair compensation rate must take into consideration the injured worker's probable future earnings capacity. This doctrine may be what the legislature intended when it adopted AS 23.30.220(a)(5), which provides for calculating an injured worker's spendable weekly wage "if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees." *Straight*. AS 23.30.220(a)(5) in conjunction with AS 23.30.001 and the mandates from the Alaska Supreme Court to look to the future earnings capacity when deciding if an injured worker's compensation rate has been fairly determined requires looking into an employee's probable future earnings capacity before it can be determined whether AS 23.30.220(a)(4) is the proper method for determining the correct compensation rate. *Id.* The burden is on the employee to provide evidence of what his future earning capacity would have been but for the work injury. *Id.*

AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions. (a) A person who (1) knowingly makes a false or misleading statement,

representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of workers' compensation insurance premiums; or (4) employs or contracts with a person or firm to coerce or encourage an individual to file a fraudulent compensation claim is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception as defined in AS 11.46.180, and may be punished as provided by AS 11.46.120 - 11.46.150.

(b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained. Upon entry of an order authorized under this subsection, the board shall also order that person to pay all reasonable costs and attorney fees incurred by the employer and the employer's carrier in obtaining an order under this section and in defending any claim made for benefits under this chapter. If a person fails to comply with an order of the board requiring reimbursement of compensation and payment of costs and attorney fees, the employer may declare the person in default and proceed to collect any sum due as provided under AS 23.30.170(b) and (c).

(c) To the extent allowed by law, in a civil action under (a) of this section, an award of damages by a court or jury may include compensatory damages and an award of three times the amount of damages sustained by the person, subject to AS 09.17. Attorney fees may be awarded to a prevailing party as allowed by law.

Unocal v. DeNuptiis, 63 P.3d 272, 277 (Alaska 2003) affirmed the Superior Court's holding that the appropriate standard of proof required to bar an employee's claim under AS 23.30.250 and to order benefits forfeiture is the "preponderance of the evidence" standard. *Municipality of Anchorage v. Devon*, 124 P.3d 424 (Alaska 2005) adopted the Board's test for fraud under AS 23.30.250(b). To prevail on a fraud claim an employer must show (1) the employee made statements or representations; (2) that were false or misleading; (3) that were made knowingly; and (4) that resulted in the employee obtaining benefits. *Devon*, 124 P.3d at 429. In *Arctec Services v. Cummings*, 295 P.3d 916 (Alaska 2013), the Court held that as used in AS 23.30.250(b), the term "knowingly" requires the subjective intent to defraud.

Shehata v. Salvation Army, 225 P.3d 1106, 1114 (Alaska 2010) held employers are not required to prove all elements of fraud in pursuing reimbursement under AS 23.30.250(b). However, *Shehata*

required “a causal link between a false statement or representation and benefits obtained by the employee. Subsection .250(b) states the Board ‘shall order reimbursement’ when it finds a person has ‘obtained compensation . . . by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit.’ The plain language of the statute requires causation.” *Id.* at 1113. *Shehata* went on to say, “Read as a whole, the statute requires the false statement or representation be a causal factor in the employer’s payment of workers’ compensation benefits.” *Id.* at 1115. When determining whether the false statement was a causal factor in the payment of benefits, *Shehata* required consideration of whether the false statement influenced the adjuster in paying benefits after the statement was made, whether the adjuster was deceived and, if not, whether the adjuster acted reasonably to investigate the false statement. *Id.* at 1118.

Concerning when a failure to disclose information constitutes a misrepresentation under AS 23.30.250(b), *Shehata* noted:

The plain language of the statute does not authorize the board to order reimbursement based on silence, nondisclosure, or omissions: it requires a finding that a person made a “false or misleading statement or representation.” The first element of the test in *Devon* is that the employee “made statements or representations.” . . . The legislature’s failure to include omissions or nondisclosure in the statutory language suggests that ordinarily an omission or nondisclosure could not serve as a basis for a reimbursement order under subsection .250(b). Nonetheless, we recognize that in the common law, silence can be a misrepresentation when a person has a duty to speak. We have also held that silence in the face of a statutory duty to disclose can “amount[] to the concealment of a material fact” for purposes of estoppel. . . .

The parties agreed that no statute or regulation explicitly imposes on an employee the duty to inform the employer, the adjuster, or the board that he is working. The commission cited none. Neither the commission nor the Salvation Army pointed to anything in the record imposing such a duty. Nevertheless, at oral argument before us, the Salvation Army advocated finding an implicit, narrow duty to disclose employment when an employee is receiving TTD benefits. In the absence of a statute or regulation requiring an employee to tell the board, the adjuster, or his employer that he is working, we are reluctant to find a specific affirmative duty to disclose employment, even when an employee is receiving TTD benefits. . . . *Id.* at 1116-17 (citations omitted).

AS 23.30.395. Definitions. In this chapter,
. . . .

(16) “disability” means incapacity because of injury because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

. . . .

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

Disability is not based on medical impairment but on the loss of earning capacity related to the impairment. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990); *Vetter v. Alaska Workmen’s Compensation Board*, 524 P.2d 264 (Alaska 1974). The employer “may be liable for TTD benefits while the employee was not medically stable and for any time period when he was temporarily . . . incapable because of injury to earn wages from work.” *Johnson v. Municipality of Anchorage*, AWCB Dec. No. 09-0120 at 10 (June 24, 2009). An employee may have multiple periods of disability. *Id.*

8 AAC 45.070. Hearings. . . .

(i) At hearing, the board will consider a legal memorandum only if it is in accordance with 8 AAC 45.114.

8 AAC 45.114. Legal memoranda. Except when the board . . . determines that unusual and extenuating circumstances exist, legal memoranda must

(1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established;

ANALYSIS

1) Was the oral order accepting Employer’s late-filed hearing brief correct?

Hearing briefs must be filed and served at least five working days before the hearing unless unusual or extenuating circumstances exist. 8 AAC 45.114. However, a procedural requirement may be waived or modified if manifest injustice to a party would result from a strict application. 8 AAC

45.195. But a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law. *Id.* Five working days before the September 9, 2025 hearing was September 2, 2025. The Board designee directed the parties to serve upon all parties and file witness lists and hearing briefs by close of business on September 2, 2025, at the July 9, 2025 prehearing conference.

Employer attempted to file its hearing brief on September 2, 2025, but the email was undeliverable to the Division and Employer was informed it was undeliverable on September 3, 2025, at 5:35 p.m. Employee's September 3, 2025 email at 8:25 a.m. shows he received Employer's hearing brief and read it. Therefore, Employer served Employee with its hearing brief timely on September 2, 2025. 8 AAC 45.114(1). Employer failed to file the brief timely because it successfully filed its brief on September 4, 2025, by an email dated September 3, 2025, at 6:20 p.m. *Id.* Employer did not disregard the hearing brief deadline because it attempted to comply with the deadline by emailing it by the deadline to the Division and to Employee. 8 AAC 45.195. Employee was not prejudiced by Employer's late-filed hearing brief because he received it timely. Furthermore, Employee had an opportunity to file a post-hearing brief addressing issues set forth in Employer's late-filed brief. Based upon these facts, there were unusual and extenuating circumstances justifying the late filing of Employer's hearing brief. Therefore, the oral order granting Employer's objection and accepting its late filed brief was correct.

2) Are Employee's past disability benefits barred?

Employer contended Employee's leave-slips for date prior to January 26, 2023, are barred under AS 23.30.105 because was aware of the work-related nature of his disability in late 2017 or 2018 and he reported his injury in 2019. AS 23.30.105(a) acts as a "bar" to a claim for compensation for "disability" unless a claim for it is filed within two years after Employee had knowledge of the nature of his disability, its relationship to his employment, and "after disablement." This section ensures that employers have a reasonable, timely opportunity to investigate and defend against claims. *Vereen*. Employer has the burden to prove Employee failed to file his claim timely. *Egemo*.

Employee first submitted a request for reimbursement to Employer on January 23, 2023, in an email. However, did not file his January 23, 2023 request with the Board. Employee sought TPD benefits and disability benefits for “lost wages due to sick leave over a 12 year time frame” in his claim filed on February 25, 2025. Before AS 23.30.105(a) defense can be considered, it must be raised and all parties given an opportunity to respond at the first hearing on Employee’s claim. AS 23.30.105(b). This requirement is met. Employer denied leave-slip dates on February 6, 2025, in its controversion notice and on March 19, 2025, in its answer based upon AS 23.30.105. The September 9, 2025 hearing was the first in Employee’s case and both parties were given the opportunity to be heard. AS 23.30.105(b).

The limitations statute begins to run only when the injured worker (1) knows of the disability, (2) knows of its relationship to the employment, and (3) is actually disabled. *Egemo*. The first step in determining if Employee’s TTD and TPD claims are barred under AS 23.30.105(a) is to determine when the two-year clock began to run for the indemnity benefits he claimed.

Knowledge means “awareness, information, or notice of the injury.” *Hammer*. Disability means incapacitation due to injury to earn the wages which Employee was receiving when he was allegedly injured. AS 23.30.395(16). His education, intelligence, and experience must be considered when deciding when he knew or should have known his disability’s nature and its relation to his employment. *W.R. Grasle Co.* Employee graduated high school and has worked as a Procurement Specialist for Employer since 2012. Employee testified he first started worrying that he had a work injury from the work environment about a year before he filed an OSHA complaint at the end of 2017 or the beginning of 2018. He reported the injury on September 9, 2019 according to the first report of injury. Employee provided leave-slips to Employer for disability benefits going back to February 23, 2018, on January 23, 2025. He first began missing work and experiencing a loss of earning capacity in 2018. He first sought a medical workup for his work-related cough on February 14, 2023, and said it had “been bothersome for 5 or 10 years.” Dr. Kirtland opined the work exposure exacerbated his underlying obstructive pulmonary lung disease on July 31, 2023. Therefore, Employee knew or should have reasonably known he was injured at work on in the end of 2017 or the beginning of 2018 when he filed an OSHA complaint for the work exposure, and that he could not perform his job duties on February 23, 2018, when

he first began losing wages. *Egemo; Hammer; W.R. Grasle Co.; Sullivan; Collins; Fox; Rogers & Babler.*

Two years after February 23, 2018, when the first period of disablement began was February 23, 2020. Employee filed his claim on February 25, 2025, more than two years after he knew his work injury caused him to miss work. New medical treatment recommendations may restart the AS 23.30.105(a) statute of limitations for indemnity benefits. *Murphy.* As stated before, Employee first sought medical treatment for the work injury on February 14, 2023. Two years before Employee's February 25, 2025 claim was February 25, 2023. Disability benefits would be barred under AS 23.30.105(a) prior to February 25, 2023. *Murphy; Fox.* Employee's claim for disability benefits before February 25, 2023, will be barred under AS 23.30.105(a). His claim for disability benefits after February 25, 2023 will not be barred under AS 23.30.105(a).

3) Is Employee entitled to disability benefits for leave taken for work-related illness and treatment?

Employee sought disability benefits for days he used leave because he was unable to work due to his work injury, either because he was ill or because he attended medical appointments or an EME for the work injury. Employer contended Employee submitted leave for days which were not work-related, including leave to attend a Seahawks game, for a personal GCI appointment and for Employee's birthday. It contended Employee was overpaid by at least \$531.33 for leave slips which were not work-related. Alternatively, it contended Employee was overpaid by the entire amount it paid for the leave-slips Employee submitted because he is not a credible historian. Employer contended Employee was not credible because he admitted his testimony was not reliable, he had specific memories of time-loss for leave-slips not marked "workers' comp.," and continued to claim specific memories of time-loss for dates of leave with a leave-slip not marked "workers' comp." It requested an order granting recoupment of the entire TTD payment.

Employee must have been either temporarily or totally disabled and not medically stable on the leave dates to be entitled to disability benefits. AS 23.30.185; AS 23.30.200. An employee may be entitled to disability benefits when he was not medically stable for any period of time he was temporarily incapable to earn wages from work due to the work injury. *Cortay; Vetter; Johnson.*

More than one period of disablement is allowed for an injury. *Egemo; Johnson; Murphy*. An employee is entitled to disability benefits even when receiving sick-leave benefits or vacation-pay. *Orbeck*. Disability benefits are presumed compensable. AS 23.30.120(a); *Meek*.

To establish the presumption, without examining credibility, Employee must establish a “preliminary link” between his injury and the employment. *Tolbert*. Employee raised the presumption that the work-injury is the substantial cause of his disability on the dates of leave, except for the last six leave-slips, with his testimony that he had coughing and shortness of breath on those days that affected his ability to work, and with PA-C Harris’s April 11, 2025 letter stating “these absences are medically justified and directly related to his underlying health condition,” given the chronic and episodic nature of his respiratory illness that affected his ability to attend work and resulted in missed days. He also raised the presumption with Dr. Cary’s EME opinion the “work exposures” permanently worsened his underlying asthmatic condition and that Employee would not have tolerated his job without environmental amelioration. Employee raised the presumption he was not medically stable with Dr. Malter’s May 30, 2023 record stating his work-related breathing complaints were not medically stable, and with Dr. Cary’s November 22, 2023 EME report that stated, “The type of 2 eosinophilic asthma will likely slowly improve over time with judicious medical therapy, avoidance of irritants and exacerbations but will remain in category 2-3 of classes of variable resp impairment for foreseeable future.”

Employer rebutted the presumption with Employee’s testimony that he would say that Employer could not rely on him under the circumstances, the last six leave-slips were submitted by accident, he took leave on January 7, 2025 for his birthday, and the emails which documented Employee’s leave use on October 28 and 29, 2024, was for a Seahawks game and on December 13, 2024, was for a personal GCI appointment at Employee’s home. *Kramer; Tolbert*. It also rebutted the presumption Employee was disabled for leave-slips dated after May 30, 2023, with Dr. Malter’s May 30, 2023 record stating Employee was released to work. *Id*. Employer provided no evidence showing Employee was medically stable. *Norcon; Wolfer*.

As Employer did not rebut the raised presumption that Employee’s medical instability continued, Employee prevailed on medically instability. *Williams*. Because Employer rebutted the

presumption that Employee was disabled, Employee must prove he was disabled by a preponderance of the evidence. *Koons*. He must induce a belief that the facts asserted are probably true - that he was temporarily or totally disabled due to the work injury on the dates of leave-slips he submitted. *Saxton*. Evidence must be weighed, inference must be drawn, and credibility must be considered. *Steffey*.

The medical record in this case shows Employee suffered from shortness of breath and coughing due to the work-injury. Dr. Malter documented the coughing and shortness of breath in 2023, as did Dr. Kirtland in 2023. PA-C Harris documented wheezing on April 9, 2025. PA-C Harris' April 11, 2025 letter is consistent with Dr. Cary's November 22, 2024 opinion that work exposures contributed to Employee's symptoms, including coughing and shortness breath, and that Employee would not have tolerated his job without improvement of the work environment. PA-C Harris' testimony and letter stating Employee missed work due to the cough and shortness of breath and that exposure to triggers could flare his symptoms are credible. AS 23.30.122.

Employee credibly testified that the work injury caused him to cough and have shortness of breath, which caused him to miss work and that he selected the leave-slips he submitted by relying only on his memory. AS 23.30.122; *Smith*. Employee was clearly overconfident in his ability to remember every leave date he submitted was work related when he testified at deposition he has an "excellent memory" and could remember things from when he was a baby and initially testified he was sick for each leave request submitted and then recalled taking leave for a Seahawks game, GCI appointment and for his birthday on leave-slips he submitted. His deficient memory does not require an inference that Employee was not credible for each date of leave for which he sought reimbursement from Employer. For instance, Employee was not able to recall immediately at deposition that he attended a medical appointment at Virginia Mason on November 12, 2024, but said it was possible the leave-slip was for a medical appointment at deposition. Furthermore, Employee immediately admitted to including non-work injury leave requests when shown evidence that showed some leave requests were not work-related, such as for September 17, October 28, 29, December 13, 2025 and January 7, 2025, and conceded that harmed his credibility. But he has consistently affirmed that the inclusion of those leave-slips was accidental.

Employer characterized Employee's email responses to its attorney's emails with questions about the leave-slips as evasive. Employer's attorney's emails dated April 22, 2025, informed Employee that it needed to know whether he was out of work for the dates of leave submitted because he was "disabled due to breathing issues, an illness/sickness, or other medical condition or doctor's appointment that you believe were work-related," asked him "Were you unable to work on those dates due to breathing difficulties, illness, or sickness that you believe was related to your work injury?" and stated "I'm just asking you to confirm that the dates of leave you submitted were for breathing problems/illness/sickness you believe were work-related as opposed to leave slips for something else, like a dentist appointment or other personal leave that isn't related to an illness or sickness that you believe was work related." Employee said he submitted leave-slips for dates he believed "were for being sick due to bad work environment. I did go thru the slips and remove any I thought were not related to my claim. I tried not to submit reg leave for vacation and appointments not related to my work injury claim. The slips submitted are for leave taken due to [r]espiratory issues and associated [h]eadaches, muscle cramps and fatigue due to a constant cough!" Employee clearly stated he submitted leave-slips for leave he believed he used due to his chronic work-related respiratory issues and chronic cough, and he tried to remove leave for unrelated vacations and appointments in the emails. Employee's emails were not evasive and his testimony at deposition that he relied on his memory to remove unrelated leave-slips is consistent with his email stating that he tried to remove leave-slips for non-work-related leave. *Id.*

Employee credibly testified he checked the box for "workers' compensation" on the leave-slips he intended to seek reimbursement for while reviewing them before he emailed them to Employer. Employee's testimony that he did not check the box for leave-slips for October 28, 29 and December 13, 2024, when reviewing them before submission for Employer because they were not work related, was corroborated by the emails showing he took leave for non-work-related purposes. The leave-slips on April 23, 2023 and February 16 and April 12, 2024, on which the box for "workers' compensation" was not marked were included on the same pages as leave-slips which the box for "workers' compensation" was marked. This panel finds it credible that Employee accidentally included non-work-related leave-slips in his January 23, 2025 email requesting reimbursement. He continues to admit to his mistakes, and has continuously offered to

repay Employer for any mistakes. The panel finds Employee credible when he testified he only wants benefits he is entitled to under the Act. AS 23.30.122; *Smith*.

Employer contended Employee's previous civil lawsuits and his current civil lawsuit against the State of Alaska for the work-injury demonstrated he is litigious. Employee's past civil lawsuits are about 20 years old. He is permitted to pursue separate civil lawsuits regarding his employment with Employer. Employee is not "litigious." AS 23.30.122; *Smith*; *Rogers & Babler*.

The preponderance of evidence shows Employee was unable to work and earn wages due to the work-injury either due to the symptoms caused by the work-injury or for medical appointments for the work-injury and was temporarily or totally disabled due to the work-injury. *Koons*; *Saxton*; *Steffey*. He is entitled to disability benefits for leave-slips when he was unable to work due to the work-injury, either because he was ill and unable to work or because he attended a medical appointment or an EME. *Cortay*; *Vetter*; *Johnson*.

4) Should Employer's petition for a finding of fraud and a restitution order or other limiting order be granted?

Employer requested the panel find Employee intentionally made false statements when he submitted the leave-slips for reimbursement and testified regarding them. Employee contended he did not knowingly make false statements when he submitted the leave-slips and testified. He contended he relied upon his memory to select leave-slips for reimbursement and he accidentally submitted leave-slips he did not intend to submit for reimbursement.

To prevail on a fraud claim under AS 23.30.250, Employer must show by a preponderance of the evidence that (1) Employee made statements or representations; (2) that were false or misleading; (3) that were made knowingly; and (4) that resulted in Employee obtaining benefits. *Devon*. As determined above, Employee is credible and he accidentally submitted leave for reimbursement that was not work-related. AS 23.30.122; *Smith*; *Rogers & Babler*. Employer has failed to show by a preponderance of the evidence that Employee knowingly made false or misleading statements or representations when he submitted leave-slips for reimbursement and testified. *Devon*.

Furthermore, Employer must show a causal link between a false statement or representation and benefits obtained by Employee. *Shehata*. As Employee is not entitled to and was not paid for leave-slips for dates before February 25, 2023, a causal link for benefits obtained cannot be found for any statements or representations for those dates.

The panel must also consider whether Employer was deceived and whether the adjuster acted reasonably to investigate the false or misleading statement. *Shehata*. Employee contended Employer failed to properly investigate and review his leave-slips before reimbursing him and it also made mistakes. Employer contended the low-level needed to raise the presumption of compensability created a risk to Employer because low-level put Employer on a timeline to pay or controvert benefits. It contended that it takes time to obtain employment records and investigate.

The law requires Employer to pay or controvert timely and provides the presumption of compensability analysis that applies. AS 23.30.155; AS 23.30.120(a). It is unclear in the record when Employer sought and received the emails regarding the October 28, 29 and December 13, 2024 leave-slips. Employer could have asked Employee why he submitted leave-slips which did not have the “workers’ compensation” box marked before it paid him benefits for those dates, but it did not. The panel is unable to determine whether Employer failed to properly investigate and review the October 28, 29 and December 13, 2024 leave-slips. However, one could surmise that Employer was trying to entrap Employee.

A review of the leave-slips and record shows Employer also made mistakes when it reviewed the leave-slips and paid TTD benefits. Employee submitted leave-slips for May 30, June 29, July 12, August 7, and October 4, 2023, and November 12, 2024 for reimbursement. The Medical Summary Employer filed on March 13, 2025, shows Employer received those records on August 1, November 20, November 16, and August 30, 2023, and March 31, December 3, and 9, 2024, well in advance of Employee’s January 23, 2025 request for reimbursement. Employee had medical appointments for the work-injury on May 30, June 19, July 12 and October 4, 2023, and November 12, 2024. He attended an EME on August 7, 2023. Yet, Employer did not pay Employee disability benefits for those dates according to Marsh’s affidavit. Employer is liable for disability benefits for leave for Employee to attend medical appointments for the work-injury and

for Employee to attend an EME on May 30, June 29, July 12, August 7, and October 4, 2023, and November 12, 2024. *Johnson*.

Employer did not act reasonably in investigating the alleged false or misleading statements when Employee submitted the May 30, June 29, July 12, August 7, and October 4, 2023 and November 12 and 13, 2024 leave slips for reimbursement. AS 23.30.122; *Shehata; Rogers & Babler*. Employer failed to prove by a preponderance of the evidence that Employee knowingly made false or misleading statements or representations that resulted in him obtaining benefits. AS 23.30.250; *Devon*. Employer's petition for a finding of fraud and a restitution order or other limiting order will not be granted.

5) Is Employer entitled to be reimbursed for overpayment of benefits?

If Employer overpaid benefits, it is entitled to reimbursement by withholding up to 20 percent of unpaid installments of compensation due without an order. AS 23.30.155(j). More than 20 percent can be withheld with an order. *Id.* According to Marsh's affidavit, Employer paid Employee TTD benefits twice for July 22, 2024, and paid Employee TTD benefits for July 4, 2023, a national holiday for which Employee did not submit a leave-slip. This resulted in an overpayment of two days. Based on Employee's credible testimony that he checked the "workers' compensation" box on leave-slips for which he intended to request disability benefits, he is not entitled to disability benefits for nine days: April 25, 2023, February 16, April 12, September 17, October 28 and 29, November 29, and December 13, 2024, and January 7, 2025. As Employer paid those days according to Marsh's affidavit, Employer overpaid Employee for those days.

Based on Employee's credible testimony that he did not submit leave-slips in advance if he called in sick for the work injury, he is not entitled to disability benefits for three days, February 21, July 19 and 22, 2024. Employer paid Employee TTD benefits for those three days, resulting in an overpayment. Based on the medical record, Employee is entitled to disability benefits for leave slips for May 30, June 29, July 12, August 7, and October 4, 2023, and November 12, 2024, to attend medical appointments and attend an EME for the work-injury, for which Employer has not paid disability benefits, resulting in an underpayment.

Employer paid Employee a full day of TTD benefits for October 6 and November 3, 2023, and January 24, 2024, when Employee's leave-slips were for partial days, resulting in an overpayment. When an injured worker is partially incapable of earning wages due to a work-injury, the injured worker is entitled to TPD benefits, not TTD benefits. AS 23.30.200. Because neither party submitted evidence regarding Employee's wage-earning capacity, the panel is unable to calculate TPD benefits. Therefore, the panel is unable to calculate whether there has been an overall overpayment or underpayment of benefits. Employer will be ordered to pay Employee either TTD or TPD benefits for leave dated March 1, 20, April 17, May 30, June 5, June 13, 23, 28, 29, 30, July 3 and 5, July 12, August 7, October 4 and 6, November 3 and 9, and December 11 and 15, 2023; January 8, 23, and 24, February 12 and 26, April 8, June 21, July 12, and November 12 and 13, 2024; and April 8, 2024. Employer is entitled to a credit against all TTD benefits previously paid. If Employer underpaid disability benefits, it will be ordered to pay Employee the difference between what is owed and the \$2,656.50 it already paid him.

Employee stated he still had the money Employer paid him in his bank account and he is still employed with Employer and working. There is no evidence Employee would suffer a financial hardship as a result of withholding at a higher rate. *Barnett*. The PPI rating is unknown and is the only compensation outstanding to be paid to Employee; therefore, it is unknown whether the possible overpayment could be recouped at 20 percent. *Decker*. Errors made by Employee and Employer contributed to miscalculation of the disability benefits Employee is entitled to for the leave-slips he submitted. *Bathony*. Employer will be permitted to withhold up to 100 percent of future compensation installments should an overpayment have occurred. AS 23.30.155(j).

Employee is advised that after medical stability, Employee is not entitled to TTD or TPD benefits even if he is disabled, unless he presents clear and convincing medical evidence showing that he is no longer medical stable. AS 23.30.185; AS 23.30.200; AS 23.30.395(16). He is advised that medical stability is the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be

presumed in the absence of objectively measurable improvement for a period of 45 days; and this presumption may be rebutted by clear and convincing evidence. AS 23.30.395(28).

6) Is Employee entitled to an order awarding medical and transportation costs?

Employee requested an order awarding medical and transportation costs because he wants to make sure he continues to receive prescribed inhalers for his work-injury and continuing medical appointments to treat it. He testified that he paid out-of-pocket for one of the inhalers for the last three months as it was covered by his private insurance rather than workers' compensation at the pharmacy. Employer contended all medical benefits or requests for reimbursement submitted with a bill or a receipt have been paid with the exception of one improperly submitted bill. It requested the panel find Employee failed to meet his burden of showing additional medical benefits are due.

An employer must furnish medical treatment for the period for which the nature of the injury or the process of recovery requires. AS 23.30.095(a). Employee has the right to a prospective determination of compensability for medical treatment to help him decide whether to pursue the medical treatment. AS 23.30.135(a); *Summers*. Employee requests an order awarding medical and transportation costs because he wants to make sure he continues to receive the prescribed inhalers for his work injury and continuing medical appointments to treat his work injury. He is presumed to be entitled to continuing medical care, and he attached the presumption with PA-C Harris's April 9, 2025 discussion that Employee needed to continue seeing his pulmonologist and Dr. Gerbino's June 26, 2025 record prescribing two inhalers and recommending Employee follow up with him in six months. *Id.* Because Employer did not offer substantial evidence to rebut the presumption, Employee's request for a prospective order finding future medical treatment and related transportation costs will be granted. Employer will be directed to pay for the two inhalers, continuing pulmonary appointments, and other reasonable and necessary medical treatment for Employee's work injury, all subject to the Act, administrative regulations, and the Alaska Medical Fee schedule.

Employee provided no bills or receipts for medical costs he paid out-of-pocket. He provided no evidence of outstanding unpaid transportation costs. The designee advised Employee "to provide actual travel expenses, including mileage, to Employer for reimbursement" at the March 25, 2025

prehearing conference, that he is responsible for conducting discovery to prove his claims, and how to file evidence. He was also provided the “Workers’ Compensation and You” pamphlet, which states he must provide a copy of the bill or receipt for medical costs to Penser and that he must file any document he wanted considered at a hearing, including medical bills and receipts for out-of-pocket expenses. The designee directed the parties to file evidence for hearing by August 20, 2025, and again informed Employee how to file evidence for hearing at the July 9, 2025 prehearing conference. Employee’s request for an order awarding past medical and transportation costs will be denied.

Employee reserves his right to seek medical treatment. He is advised that he must ask the pharmacy to bill his insurance for his inhaler and he must provide Penser copies of receipts and bills for medications prescribed for his work-injury for reimbursement. He must also provide Penser with medical records from his provider who is prescribing the medications. AS 23.30.097(d). Penser must pay a medical bill within 30 days once it received a medical report and the accompanying bill. *Id.* Employee is also advised that should Employer controvert medical treatment, he may file a claim. He is advised that after medical stability, Employer is not liable for palliative care unless the palliative care is reasonable and necessary to enable him to continue his employment at the time of treatment or to relieve chronic debilitating pain; a claim for palliative care must be accompanied by a certification of his attending physician that the palliative care meets the requirements. AS 23.30.095(o). Employee is advised that an “attending physician” under AS 23.30.095(a) includes a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy. Finally, he is advised that no party can be required or forced to resolve a case through mediation and settlement. *Lindeke*.

7) Is Employee entitled to PPI benefits at this time?

Employee requested an award of PPI benefits. AS 23.30.190. 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*. Employer contended PPI benefits are not due as no rating had been received. Employer has not denied Employee’s entitlement to a PPI rating based upon compensability. Unfortunately, Dr. Gerbino was unable to provide a PPI rating as he stated in his September 2, 2025 letter and there is no rating in the record despite both

parties' efforts to obtain it from Dr. Gerbino. While an actual PPI rating is required before Employee could be awarded PPI benefits, there is nothing in the Act, regulations or decisional law suggesting Employee could not claim PPI benefits without having a PPI rating. *Settje*. Employee is entitled to a PPI rating; he is not entitled to PPI benefits at this time as his claim was premature. *Redgrave; Egemo*. Employee's claim for PPI benefits will be denied without prejudice.

"Without prejudice" means, pursuant to the Act, Employee can always file another claim for PPI benefits. Employee is advised he retains the right to obtain a PPI rating at Employer's expense. *Redgrave*. He should be careful not to inadvertently change attending physicians in violation of the law. If Employer does not promptly pay a properly rated PPI rating or controverts Employee's right to the PPI benefits after the PPI rating is completed, Employee may also file a claim at that time for PPI benefits. Employee is encouraged to contact either an attorney familiar with workers' compensation cases or speak to a Workers' Compensation Technician.

8) Is Employee entitled to a compensation rate adjustment?

Employee requested a compensation rate adjustment. AS 23.30.220. Employer contends Employee failed to provide wage information for a compensation rate adjustment. The statutory presumption of compensability does not apply to this issue, because Employee bears the burden of proving his claim for a compensation rate adjustment. *Abood*. Although the designee advised Employee to "provide copies of his W-2 forms, wage stubs or other written documentation proving his earnings with a notice intent to rely form and file it with the Division and serve it on Employer for his request for a compensation rate adjustment" on March 25, 2025, at a prehearing conference, Employee did not provide any evidence showing he is entitled to a compensation rate adjustment. Employee failed to prove that his current compensation rate does not reflect his probable future earning capacity by a preponderance of the evidence. *Wilson; Straight; Saxton*. His compensation rate adjustment claim will be denied.

9) Is Employee entitled to penalty and interest?

Employee contended Employer unfairly or frivolously controverted benefits in its third pre-claim controversion. Employer contends Employee failed to prove it unfairly or frivolously controverted benefits and that he is entitled to additional disability or medical benefits.

Penalties are imposed when employers fail to controvert in good faith or fail to pay compensation when due. AS 23.30.155(e); *Haile*. To avoid a penalty, a controversion must be filed in good faith. *Abood*; *Harp*. For a controversion to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the claimant would not be entitled to benefits. *Id.* “An insurer has a continuing obligation to consider new evidence that comes to its attention and to modify or withdraw controversions based on that new evidence.” *Vue*. The Act requires that a controversion notice state “the type of compensation and all grounds on which the right to compensation is controverted.” AS 23.30.155(a)(5). Controversions thus give notice of disputed issues, which an employee can use to evaluate whether to pursue a claim. *Vue*.

The first controversion in the record, filed on October 25, 2019, denied all benefits because Employee provided no medical evidence demonstrating his work activities were the substantial cause of any condition. Employee’s treating physician, Dr. Kirtland, stated his work exposure was either the sole cause of or exacerbated his underlying obstructive lung disease on July 31, 2023. Employer received the July 31, 2023 medical record on November 1, 2023; it had knowledge of the alleged injury on November 1, 2023. Employer had until the 21st day to controvert or pay benefits after it received the July 31, 2023 record. AS 23.30.155(b), (d), (e). It had a continuing obligation to consider the July 31, 2023 medical record. *Vue*. Employer lacked the legal basis to continue denying all benefits due to a lack of medical evidence and its controversion no longer remained appropriate after it received the July 31, 2023 medical report. It withdrew the October 25, 2019 controversion on February 6, 2024. Employer failed to timely withdraw the Controversion Notice or controvert with a good-faith basis after it received the July 31, 2024 medical report. It unfairly and frivolously controverted benefits and a penalty under AS 23.30.155(e) is required. *Vue*. Employer will be ordered to pay Employee a penalty for an unfair or frivolous controversion under AS 23.30.155(e).

Employer's second controversion notice, dated July 26, 2023, denied a July 6, 2023 medical bill from Alaska Pathology, LLC, contending a completed medical report was not provided. No evidence has been submitted showing that a medical report had been provided. *Harp*. Employer's July 26, 2023 Controversion Notice was made in good faith.

Employee contended Employer's third controversion, dated February 6, 2025, unfairly or frivolously controverted benefits. The February 6, 2025 Controversion Notice denied benefits based on AS 23.30.105(a). Employer did not pay disability benefit for leave-slips before February 25, 2023. As determined above, Employee's claim for disability benefits before February 25, 2023 will be barred under AS 23.30.105(a). Employer possessed sufficient evidence in support of its controversion based upon AS 23.30.105(a) that if Employee did not introduce evidence in opposition, he would not be entitled to benefits for disability benefits before February 25, 2023. *Abood; Harp; Vue*.

Employer's February 6, 2025 Controversion Notice also denied specific dates of leave for lack of a medical opinion showing his work-injury was the reason for his missed work in the February 6, 2025 controversion. On February 25, 2025, there was no medical opinion showing his work-injury was the reason for his disability. However, Employee's physician opined his work exposure exacerbated his obstructive lung disease on July 31, 2023, and Employer received that report on November 1, 2023. Employee submitted leave-slips for May 30, June 29, July 12, August 7, and October 4, 2023 and November 12, 2024, for reimbursement and on those dates, Employee obtained medical treatment for the work-injury and attended an EME. The Medical Summary Employer filed on March 13, 2025, shows Employer received those records on August 1, November 20, November 16, and August 30, 2023, and March 31, December 3, and 9, 2024. Yet, Employer did not pay Employee disability benefits for those dates and the February 25, 2025 controversion notice did not deny those dates. When an employer neither timely pays nor controverts, AS 23.30.155(e) imposes a penalty if the employer is found liable for the disputed compensation. *Bauder*. Employer was found liable for those disputed leave-slips, above. Employer will be ordered to pay Employee a penalty under AS 23.30.155(e) for leave-slips for May 30, June 29, July 12, August 7, and October 4, 2023, and November 12, 2024.

A penalty may be due if Employer did not pay disability benefits within seven days after payments became due. AS 23.30.155(e). Payment is due on the 14th day after Employer had knowledge of the injury. AS 23.30.155(b). Employee first requested reimbursement for leave slips on January 23, 2025. Payment was due by February 6, 2025 (January 23, 2025 + 14 days = February 6, 2025). Employer controverted some leave dates based upon a lack of medical evidence, others were controverted for being barred under AS 23.30.105 in its February 6, 2025 controversion notice. Employee's August 11, 2025 email stated he received the first check for disability benefits on February 6, 2025. Employer's first payment was not late. AS 23.30.155(b), (e). Employee's August 11, 2025 email stated he received a second check on April 23, 2025 and Employer's April 23, 2025 email confirms payment was issued around that date for dates that were not barred by AS 23.30.105, which Employer had not yet paid. Employee provided PA-C Harris's April 11, 2025 letter to Employer on April 14, 2025 in an email. Fourteen days after April 14, 2025 was April 28, 2025. Employer's April 23, 2025 payment was not late. Based upon Employee's statements as to when payments occurred, Employer did not pay disability benefits late. *Id.* Employee is not entitled to a penalty for late paid compensation.

The panel is unable to calculate whether there has been an overall overpayment or underpayment of benefits. If Employer underpaid disability benefits, it owes Employee interest on the amount it underpaid. If Employer overpaid disability benefits, it does not owe Employee interest. Employer will be directed to make the appropriate calculations to determine interest.

10) Is Employee entitled to attorney fees and costs?

Employee did not retain an attorney. He is not entitled to an award of attorney fees and costs. AS 23.30.145.

The panel has no jurisdiction over Employee's claims of retaliation, invasion of privacy and intentional interference with obtaining legal representation by Employer's attorney. *AKPIRG*. He may raise those issues before the Superior Court and the applicable Bar Association. *Id.*

CONCLUSIONS OF LAW

- 1) The oral order granting Employer's petition to accept its late filed hearing brief was correct.
- 2) Employee's past disability benefits are barred.
- 3) Employee is entitled to disability benefits for leave taken for work-related illness and treatment.
- 4) Employer's petition for a finding of fraud and a restitution order or other limiting order should not be granted.
- 5) Employer is entitled to be reimbursed for an overpayment of benefits if Employee was overpaid disability benefits.
- 6) Employee is entitled to an order awarding future medical treatment and related transportation but is not entitled to an order awarding past medical and transportation costs.
- 7) Employee is not entitled to PPI benefits at this time.
- 8) Employee is not entitled to a compensation rate adjustment.
- 9) Employee is entitled to penalty and may be entitled to interest if Employee was underpaid disability benefits.
- 10) Employee is not entitled to attorney fees and costs.

ORDER

- 1) The oral order granting Employer's petition to accept its late-filed hearing brief was correct.
- 2) Employee's February 25, 2025 claim is denied in part and granted in part.
- 3) Employee's claim for PPI benefits is denied without prejudice because it is premature.
- 4) Employee retains his right to file a claim for PPI benefits.
- 5) Employee's claim for disability benefits before February 25, 2023, is barred under AS 23.30.105(a); his claim for disability benefits after February 25, 2023 is not barred under AS 23.30.105(a).
- 6) Employer is ordered to pay Employee either TTD or TPD benefits for leave dated March 1, 20, April 17, May 30, June 5, June 13, 23, 28, 29, 30, July 3 and 5, July 12, August 7, October 4 and 6, November 3 and 9, and December 11 and 15, 2023; January 8, 23, and 24, February 12 and 26, April 8, June 21, July 12, and November 12 and 13, 2024; and April 8, 2024 with a credit against all TTD benefits previously paid. If Employer underpaid disability benefits, it is ordered to pay Employee the difference between what is owed and the \$2,656.50 it already paid him.

- 7) Employer will be directed to pay for the two inhalers, continuing pulmonary appointments, and other reasonable and necessary medical treatment for Employee's work injury, all subject to the Act, administrative regulations, and the Alaska Medical Fee schedule.
- 8) Employee's compensation rate adjustment claim is denied.
- 9) Employee's claim for a penalty is granted.
- 10) Employer is ordered to pay Employee a penalty under AS 23.30.155(e) for leave-slips for May 30, June 29, July 12, August 7, and October 4, 2023, and November 12, 2024, and for its failure to timely withdraw the October 25, 2029 Controversion Notice.
- 11) Employee's claim for interest is granted if he was underpaid disability benefits; Employer is directed to make the appropriate calculations to determine interest.
- 12) Employer's June 17, 2025 petition for reimbursement for an overpayment of benefits is granted if Employee was overpaid disability benefits; Employer is permitted to withhold up to 100 percent of future compensation installments should an overpayment have occurred.
- 13) Employer's June 17, 2025 petition for a finding of fraud and a restitution order or other limiting order is denied.

Dated in Juneau, Alaska on October 22, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Debbie White, Member

/s/
Brad Austin, Member

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

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

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Jake David Olivit, employee / claimant v. State of Alaska, employer; State of Alaska, insurer / defendants; Case No. 201912356; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on October 22, 2025.

/s/
Lorvin Uddipa, Workers' Compensation Technician