Alaska Workers' Compensation Appeals Commission

Ricky Merritt, Appellant, vs. State of Alaska, Department of Transportation, Appellee.	Final Decision Decision No. 196 May 16, 2014 AWCAC Appeal No. 13-012 AWCB Decision No. 13-0070 AWCB Case No. 200211875

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 13-0070, issued at Fairbanks, Alaska, on June 20, 2013, by northern panel members Robert Vollmer, Chair, and Sarah LeFebvre, Member for Industry, with a partial dissent by Jeff Bizzarro, Member for Labor.

Appearances: Robert M. Beconovich, The Law Office of Robert M. Beconovich, for appellant, Ricky Merritt; Krista M. Schwarting, Griffin & Smith, for appellee, State of Alaska, Department of Transportation.

Commission proceedings: Appeal filed July 10, 2013; briefing completed January 21, 2014; oral argument held on May 8, 2014.

Commissioners: James N. Rhodes, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, Ricky Merritt (Merritt), was employed by appellee, State of Alaska, Department of Transportation (State), as an Airport Safety Officer at Fairbanks International Airport. In June 2002, during a disaster drill at the airport, he suffered a heart attack. Although Merritt was able to return to work, he was terminated in March 2007. The central issue in this appeal is whether Merritt was entitled to permanent total disability (PTD) benefits from March 15, 2007, the date he was fired from his job with the State, through May 14, 2010, when the State began paying him PTD benefits. According to the State, Merritt was fired for insubordination. In contrast, Merritt

maintained his dismissal for insubordination was a pretense. The true reason for his termination was his work-related health issues.

The Alaska Workers' Compensation Board (board) held a hearing over two days, March 14, and April 25, 2013, to receive evidence in these respects. The board issued a Final Decision and Order, in which it held that Merritt was not entitled to PTD benefits during the period in question.[1] Merritt appealed the board's decision to the Workers' Compensation Appeals Commission (commission). We affirm in part and vacate and remand the attorney fees issue to the board.

2. Factual background and proceedings.

On June 6, 2002, at the age of 46, Merritt suffered a heart attack during a mass casualty exercise while working for the State at the Fairbanks Airport.[2] He was treated at Fairbanks Memorial Hospital, where a myocardial infarction was diagnosed.[3] After being transferred to Providence Medical Center in Anchorage for cardiac catheterization, Merritt was discharged on June 16, 2002. On August 13, 2002, he began treating with Clay Triplehorn, D.O., who released Merritt to return to work.[4]

Later that month, on August 29, 2002, cardiologist Samuel S. Breall, M.D. performed an employer's medical evaluation (EME). Dr. Breall concluded that Merritt's employment was not a substantial factor in bringing about his heart attack or in aggravating or accelerating his underlying artherosclerotic coronary artery disease. In his opinion, the physical exertion during the mass casualty exercise did not cause or

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[1] *See Merritt v. State of Alaska, Dep't of Transportation*, Alaska Workers' Comp. Bd. Dec. No. 13-0070 at 36 (June 20, 2013). One board member, Jeff Bizzarro, partially dissented. *See Merritt*, Bd. Dec. No. 13-0070 at 38-39. The board had issued a prior Final Decision and Order, *see Merritt v. State of Alaska, Dep't of Transportation*, Alaska Workers' Comp. Bd. Dec. No. 07-0125 at 6 (May 14, 2007), in which the board awarded Merritt temporary total disability (TTD) benefits from December 20, 2006, through January 15, 2007.

[2] *See Merritt*, Bd. Dec. No. 13-0070 at 4 and Report of Occupational Injury or Illness, June 27, 2002. R. 0001.

[3] *See Merritt*, Bd. Dec. No. 13-0070 at 4.

[4] *See id*.

precipitate the heart attack. According to Dr. Breall, Merritt was medically stable as of the day of the EME.[5]

Merritt filed a workers' compensation claim on September 16, 2002.[6] Three days later, on September 19, 2002, the State controverted all benefits based on Dr. Breall's EME report.[7] On March 14, 2003, Samuel M. Sobol, M.D., a cardiologist, performed a second independent medical evaluation (SIME). Dr. Sobol thought Merritt's cardiac condition was substantially related to the stress from his exertion in performing some of his firefighting duties.[8] On May 29, 2003, the State accepted the compensability of Merritt's heart condition and provided TTD benefits, permanent partial impairment (PPI) benefits, reemployment benefits, and medical benefits.[9]

After more than three years passed, on December 11, 2006, Jeanne C. Chapman, PAC, performed a routine biannual fitness-for-duty evaluation. As a result of Merritt's intermittent chest pains and elevated triglyceride levels, PAC Chapman declined to approve his fitness to return to duty until he had undergone and passed cardiac testing. She referred him to Dr. Triplehorn for cardiac evaluation.[10]

The State filed a controversion on December 15, 2006, noting that Merritt had been determined medically stable as of August 2002, and denying additional TTD benefits.[11] Merritt filed a second claim dated December 19, 2006, requesting TTD benefits beginning December 11, 2006.[12] From December 20, 2006, through January 15,

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5 *See Merritt*, Bd. Dec. No. 13-0070 at 4-5.

6 *See id*. at 5.

7 *See id*.

8 *See id*.

9 *See id*.

10 Exc. 096.

11 *See Merritt*, Bd. Dec. No. 07-0125 at 2.

12 *See id*.

2007, based on his recent symptoms and restrictions associated with his heart attack, as found by PAC Chapman, the State would not allow Merritt to work.[13]

Following an evaluation, on January 15, 2007, Dr. Triplehorn noted Merritt would likely be cleared to return to work.[14] On January 22, 2007, the State permitted him to resume work.[15] The next day, Chief Michael Supkis (Supkis),[16] Merritt, his attorney at the time, a union representative, Airport Manager, Jesse Vanderzanden, and State Human Resources Consultant, May Green, attended a meeting to discuss the State's concerns regarding Merritt's continuing inappropriate behavior and refusal to provide necessary and required documentation verifying his fitness for duty and eligibility to use family leave.[17]

On January 24, 2007, the State answered the December 19, 2006, claim. It admitted liability for Merritt's heart attack, however, it denied that he was due additional TTD because he was medically stable since August 29, 2002.[18]

On March 6, 2007, Supkis wrote a lengthy memorandum to Merritt memorializing the January 23, 2007, meeting and expressing the State's concerns regarding his work performance issues. The memorandum stated that Merritt was being suspended for two shifts for his "continued pattern of intentional unprofessional and insubordinate behavior directed at [his] immediate chain of command and at other department officials and [his]

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[13] *See Merritt*, Bd. Dec. No. 07-0125 at 3.

[14] *See Merritt*, Bd. Dec. No. 13-0070 at 6.

[15] *See Merritt*, Bd. Dec. No. 07-0125 at 3.

[16] Supkis began his duties as police and fire chief at the Fairbanks Airport in February 2004. Hr'g Tr. 178:7 – 178:10.

[17] *See* n.19 and n.20, *infra*.

[18] *See Merritt*, Bd. Dec. No. 13-0070 at 6.

failure to comply with directives."[19] The memorandum also set forth a detailed account of events leading to the suspensions and explicit warnings to Merritt.[20]

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[19] Exc. 101.

[20] On December 11, 2006 you filed a workers [sic] comp claim due to on the job (during your physical) injury. On December 15 you were directed to report for administrative "light duty" and you were absent from work on December 18 and 19 for reason that you later reported was due to your earlier work injury. On December 20 you to [sic] reported to work, and informed me, that you had a qualifying family medical reason to be absent beginning that same day. On December 21, you notified the department that you were dealing with for [sic] your own health condition and then would be absent for family medical leave for an indeterminate amount of time. On January 2, 2007, I sent an email requesting that you provide specific documentation to support your absence from duty on December 18 and 19, 2006, and informed of [sic] the need for required documentations [sic] needed to support the emergency family leave you requested on December 20, 2006. I also advised [sic] that your time sheet had been processed based on information and documentation the department possessed at the time of submittal. The state has a policy and practice that requires certification of all medical leave taken under entitlement of the federal or state medical leave act. Also, medical leave claimed under your collective bargaining contract clearly stipulates the employer's right to request and receive supporting medical documentation (Article 14, Section 1(d). [sic].

From this straightforward advisory, you responded via email dated January 9, 2007, in a manner and tone that was unprofessional, disrespectful and insubordinate. You copied your response to the Governor, Acting DOT/PF Commissioner, DOA Commissioner and to the state Director of Personnel. Your response:

> Asserted that you are not obligated to maintain contact with supervisors while out on family emergency leave, [sic] because it was your own time.
>
> Challenged any employer expectation that required you to expedite requested Family Medical Leave documentation and requested proof of any obligation on your part to do so.
>
> Accused me, the chief of the department, of incompetence and improper alteration and processing of your time sheet and demanded immediate correcting action.

(Footnote continued on next page.)

> Accused me and the department of 'game playing' and defiantly asserted that you were more than willing to challenge my conduct.

Your email response was highly inappropriate and constitutes egregious employee behavior. It is inconceivable that any contrary conclusion could be made. Moreover, your persistent action to unsolicited copy [sic] other high ranking state officials in disrespectful written communications – even after agreeing to adhere to a dispute format reached during facilitated mediation – demonstrates the serious and clear lack of regard that you have for your supervisors and managers. It also demonstrates you are not as genuinely interested in resolving workplace concerns and issues, [sic] as you are committed to undertaking inflexible and defiant positions on issues that are intended to disrupt the business practices and decisions of your employer. Your improper behavior has continued to escalated [sic] without remorse and impervious to change. Such conduct will not be tolerated any longer.

Over the past year and a half, you have incurred four (4) disciplinary suspensions for improper employee conduct. This is your fifth (5^{th}). The department has afforded extraordinary effort and process that would permit you to show that you can consistently meet proper employee conduct, communication and demeanor expectations. The department and State has appropriately investigated and addressed the many complaints and allegations you have raised. The department and State has participated in a facilitated mediation to resolve a formal grievance and at which you agreed to follow an established process to air your disputes with management. None of these actions have served to resolve your dissatisfactions or to correct your intractable and insubordinate performance behavior. Moreover, you have failed to make any genuine effort to change your behavior.

Your performance has become typically defiant and resistant and you regularly show and express open contempt and disdain for department supervisors and managers. Substantially, you fail to cooperate even in the most routine employee management processes or requirements and regularly accuse your employer of corruption, gross mismanagement, dishonesty and deceitful actions. These characters [sic] make it impossible for anyone to effectively lead or manage your employment. Your presence on the airport police & fire team has become a liability to achieving our public safety mission. The department will no longer permit you to intentionally act in a pervasive and insubordinate manner that is contrary and disruptive to our management interests and our work processes.

(Footnote continued on next page.)

Another meeting was convened on March 13, 2007, attended by Supkis, Merritt, his union representative, Tamara Kleiner (Kleiner), Airport Manager, Jesse Vanderzanden, and Human Resources Consultant, May Green, in order to discuss email communications Merritt sent on March 7, 2007, and March 8, 2007.[21] Although present, Merritt chose not to respond to the State's accusations.[22] Two days later, on March 15, 2007, at the request of his union, Merritt, his union representative, Kleiner, Airport Manager, Jesse Vanderzanden, and Human Resources Consultant, May Green, attended another meeting to discuss Merritt's March 7th and March 8th emails. Merritt did not make any statements on his own behalf, however, Kleiner provided assurances that he understood the

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> Beginning now, it is your last chance to show you can maintain professional, cooperative and respectful work behaviors and communications, [sic] on all levels. You must comply with all appropriate administrative, supervisory and management processes and directives. As previously agreed to at facilitated mediation, your disputes must be filed in compliance with the standard chain of command/contractual process. For any dispute that involves and is directed within your immediate, internal chain of command, the dispute will be filed through a designated PSEA union representative. You will not engage in any behavior that is designed to slander, intimidate or to otherwise threaten your chain of command or to direct similar or like behavior to any other department employee or state official. This prohibited behavior includes any verbal or written communication with these parties on or off work that is designed to violate the intent of this direction. You can expect your department to apply considered and reasonable judgment to assess compliance with this instruction, just as we will expect the same reasonable judgment to be reflected in your own compliance behavior [sic] and actions.
>
> You are plainly advised and strongly cautioned. There can be no future occurrence of like or similar behavior on your part. Failure to meet these working conditions will result in your immediate dismissal from employment. . . . Exc. 101-103.

[21] The content of these emails is unknown. *See Merritt*, Bd. Dec. No. 13-0070 at 9.

[22] Exc. 105.

"unacceptable nature of [his] behavior," and would "refrain from personally disparaging remarks."[23]

On March 16, 2007, Supkis wrote to Merritt, terminating his employment on the basis of "repeated and unresolved insubordinate conduct." The letter referenced the March 13, and March 15, 2007, meetings with Merritt and his union representative and stated:

> We have carefully reviewed your employment record including five separate disciplinary suspensions over the last 21 months for resistant and insubordinate behavior. This includes your suspension and 'last chance' notice on March 6. In email communications to your employer on March 7 and 8, 2007, you violated this directive. . . . At our second meeting on March 15, your lack of active participation did not convince us that your intention was genuine. Ultimately, we have no realistic expectation that your conduct will rehabilitate. Your blatant disregard and constant refusal to comply with employer directives and conduct standards causes us to conclude nothing short of dismissal will correct this situation. . . .[24]

On May 14, 2007, the board handed down its first decision, awarding Merritt TTD benefits from December 20, 2006, through January 15, 2007. The decision states:

> [T]he record clearly reflects that the employee developed chest pains and some changes in blood chemistry in the months preceeding [sic] his work physical in December 2006. As noted above, the record reflects the physicians considered these symptoms related to the employee's cardiac condition. The employer's physician and the employer restricted the employee from continuing his work based on these symptoms. . . . We find the preponderance of the available evidence indicates that the employee developed newly-arisen cardiac related symptoms resulting in the employee's economic disability for the period he claims.[25]

In the wake of this decision, there was no case activity over the next three years.[26]

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[23] *See Merritt*, Bd. Dec. No. 13-0070 at 9.

[24] Exc. 106.

[25] *Merritt*, Bd. Dec. No. 07-0125 at 6.

[26] *See Merritt*, Bd. Dec. No. 13-0070 at 10.

In November 2008, Merritt moved to Sparta, Wisconsin. After he began treating at the Veterans Administration's (VA) facility in Sparta,[27] he started seeing Eric M. Rotert, M.D., on March 10, 2009. Merritt reported three episodes of angina since his heart attack. He stated one of them resulted in a catheterization that was "apparently normal." Merritt reported he had had no recent changes in his exercise tolerance and did not have angina, shortness of breath, diaphoresis, palpitations, or other symptoms.[28] Dr. Rotert signed a medical release-from-work form. The report lists Merritt as "retired," and ordered continued restrictions from September 2008.[29]

On May 14, 2009, Merritt was seen by Eric H. Locher, a VA staff physician. Dr. Locher's report states: "Moved here this past November. Wife has family in medicine so he wanted to get closer to local family."[30]

On July 30, 2009, Merritt wrote the Reemployment Benefits Administrator (RBA) and asked to be evaluated for reemployment benefits. He was previously found eligible for such benefits, however, he never had an approved plan.[31] On November 10, 2009, the State wrote the RBA and attached documentary evidence that Merritt was released to work without restrictions and contended he returned to work. Evidence that Merritt was terminated for cause was also provided.[32]

Later that month, on November 30, 2009, Merritt told one of his providers that he had worked as a cop and firefighter for about 12 years but "got to the point he could not do it any longer due to his vearious [sic] musculoskeletal problems."[33] In February 2010,

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27 *See Merritt*, Bd. Dec. No. 13-0070 at 10.

28 *See id*.

29 The record does not contain a medical report from September 2008. *See Merritt*, Bd. Dec. No. 13-0070 at 10.

30 *Id.*

31 *See id*.

32 *See id*.

33 *Id*. at 11.

on two occasions, Merritt told his counselor that he and his wife moved to Sparta to be closer to his wife's family that lives in Bemidji, Minnesota.[34]

When Merritt was seen at the VA for a check-up on March 9, 2010, no recent angina was reported.[35] On March 15, 2010, Merritt saw Dr. Rotert and told him he was discouraged by his workers' compensation case. Dr. Rotert's report stated that Merritt had a "[r]ecent reassuring stress test," and his coronary artery disease condition was "stable."[36]

Merritt filed a pro se claim on March 30, 2010, requesting PTD benefits ongoing from March 15, 2007, PPI, and reemployment benefits.[37] On April 9, 2010, the State controverted the claim on numerous grounds, including an allegation he voluntarily left the labor market.[38] The State also filed an answer to the claim, admitting liability for Merritt's heart attack, but denying any additional benefits were due. As for the PTD benefits Merritt was seeking, the State contended he had voluntarily left the labor market, no physician had offered an opinion that he lacked the physical capacity to work at the time he was terminated, and no physician had concluded that he was permanently and totally disabled.[39]

In February 2010, Gilda Winter, M.D., began treating Merritt for severe depression. On April 29, 2010, Dr. Winter completed a workers' compensation physician's report. She was of the opinion that his psychiatric condition was work-related and the result of mood deterioration following his heart attack.[40] Dr. Rotert completed a workers' compensation physician's report on May 12, 2010, in which he stated that Merritt was medically stable, but his injury permanently precluded him from returning to

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34 *See Merritt*, Bd. Dec. No. 13-0070 at 11.

35 *See id.* at 12.

36 *Id*.

37 *See id*.

38 *See id*.

39 *See id*.

40 *See id*.

his job at the time of injury. He also thought Merritt had suffered a permanent impairment based on "exertional angina," fatigue, and mood disorder.[41]

On June 30, 2010, Merritt filed an amended claim adding TTD benefits from March 15, 2007, ongoing, penalty, interest, and a finding of unfair or frivolous controversion of the benefits sought in his March 26, 2010, claim.[42] On July 19, 2010, the State voluntarily initiated the payment of PTD benefits starting May 12, 2010.[43]

On July 21, 2010, the State filed its answer to the June 2010 amended claim, denying liability for TTD and PTD from March 15, 2007, on the basis that Merritt voluntarily removed himself from the labor market, did not make timely claims for the benefits, and his treating physician deemed his conditions medically stable. It admitted he raised the presumption of compensability for PTD benefits as of May 12, 2010, based on Dr. Rotert's report, and stated it would commence immediate payments, and admitted a penalty was due on untimely paid PTD.[44] On August 23, 2010, attorney Robert M. Beconovich entered his appearance on behalf of Merritt.[45] Subsequently, on September 8, 2010, he withdrew Merritt's claims for TTD, PPI, and reemployment benefits.[46]

On October 1, 2010, Merritt was seen at the VA. The report references a recent stress test with negative preliminary results.[47]

A month later, on November 3, 2010, Dr. Breall conducted a cardiologic EME. In his opinion, neither Merritt's underlying atherosclerosis of the coronary arteries nor his

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41 *See Merritt*, Bd. Dec. No. 13-0070 at 12.

42 *See id*.

43 *See id*. The State paid PTD benefits through December 21, 2010, then converted benefits to AS 23.30.041(k) benefits on December 22, 2010, then converted benefits back to PTD on January 30, 2013. Exc. 233-34.

44 *See Merritt*, Bd. Dec. No. 13-0070 at 13.

45 *See id*.

46 *See id*.

47 *See id*.

acute myocardial infarction were caused, aggravated, or accelerated by work. Dr. Breall was unable to perform a stress cardiogram because of Merritt's "orthopedic problems." However, he rated Merritt at 40% whole person impairment under the 5th Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment (Guides)* in effect at the time of injury, and 23% impairment under the 6th Edition of the *Guides*. Dr. Breall stated Merritt was incapable of returning to work as an Airport Police and Fire Officer, although he thought Merritt was capable of performing sedentary or semi-sedentary work. He emphasized that his opinion of Merritt's ability to perform sedentary or semi-sedentary work was from a cardiac standpoint and not from either a psychiatric or orthopedic standpoint. Dr. Breall denied there was a work injury on June 6, 2002, and thought numerous, non-work risk factors were "the substantial cause" of Merritt's heart condition resulting in his current disability and impairment. In his opinion, Merritt's current work restrictions were "due to possible buildup, continued atherosclerotic obstruction, of his coronary arteries that have occurred since that time." Dr. Breall stated the date of medical stability was difficult to assess in this case, however, he noted Merritt continued to have increasing symptoms of chest pain and shortness of breath symptoms over the years.[48]

On November 25, 2010, Patricia A. Lipscomb, M.D., Ph.D., performed a psychiatric EME. She diagnosed numerous clinical and personality disorders and denied the June 6, 2002, work injury was a substantial factor in causing Merritt's current conditions. Dr. Lipscomb believed, to the extent Merritt worried about his health and safety on account of his underlying coronary artery disease, the pre-existing coronary artery disease was a substantial factor in the development of his depression and anxiety. She denied the June 6, 2002, heart attack aggravated, accelerated, or combined with another condition to cause Merritt's psychiatric condition. Dr. Lipscomb thought his depressive symptoms were originally medically stable on May 18, 2005, but based on Merritt's recent treatment in 2010, she left open the possibility he should continue to receive psychiatric

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[48] *See Merritt*, Bd. Dec. No. 13-0070 at 13-14.

treatment and counseling. She stated that Merritt did not have a permanent partial impairment resulting from a work-related psychiatric condition and she would not place any psychiatric work restrictions on him. Dr. Lipscomb also thought Merritt was not permanently and totally disabled on account of a psychiatric condition.[49]

On the basis of Dr. Breall's and Dr. Lipscomb's opinions that Merritt was capable of working in some capacity, on April 19, 2011, the State filed a controversion of PTD benefits after December 22, 2010, and further treatment for his cardiac condition.[50]

On May 7, 2012, the RBA designee found Merritt was not eligible for reemployment benefits based on the eligibility evaluation report by Merritt's reemployment specialist.[51]

Witnesses Joshua Moore, Kimberly Merritt, Ricky Merritt, and Jesse Vanderzanden testified on the first day of the hearing, March 14, 2013; Chief Supkis was the only witness whose testimony was presented on the second day of the hearing, April 25, 2013. In its decision, the board discussed each witness's testimony at length and made extensive credibility findings.[52]

Joshua Moore (Moore) is an experienced firefighter, having certifications as a Firefighter I and II and Fire Instructor. He worked at the Anchorage Airport until February 2005, and subsequently worked at the Fairbanks Airport. Moore knew Chief Supkis from his work at the Fairbanks Airport. He explained that the Firefighter I course is a basic introduction to firefighting with both classroom and physical components. The physical components involve setting up ladders, climbing, venting roofs, wearing self-contained breathing apparatus, and a burn exercise involving a hose team and a rescue team. The fire gear ("turn out") weighs between 55-75 pounds, more when wet. The

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49 *See Merritt*, Bd. Dec. No. 13-0070 at 14.

50 Exc. 063.

51 *See Merritt*, Bd. Dec. No. 13-0070 at 14.

52 *See id.* at 15-21.

rescue team has to carry a 165-185 pound rescue dummy. He characterized firefighting as a "heavy duty" occupation.[53]

Moore became acquainted with Merritt when he began work at the Fairbanks Airport and knew Merritt had been a firefighter for "some time." He stated the older firefighters did not have Firefighter I certifications, and the State's new requirement for them to become certified was an issue of concern to the older firefighters. Some of the older firefighters retired, some tried to complete the training. Moore was aware that Merritt was also concerned about the certification process because of health issues. He understood Merritt was terminated for not attending the Firefighter I course, which everyone had to take.[54]

The board found Moore credible.[55]

Merritt's wife, Kimberly Merritt (Mrs. Merritt), testified that she married him in 2006, after his heart attack. At the time, she had one daughter living at home and another daughter serving in the United States Army in Anchorage. Merritt had two children, a daughter living in Fairbanks and a son in Haines. Mrs. Merritt, who was originally from Bemidji, Minnesota, was not familiar with Sparta, Wisconsin before moving there. She maintained that they moved to Sparta because medical facilities were located there, including Mayo Clinic facilities. VA facilities were also located nearby in Tomah, Wisconsin. Mrs. Merritt knew Merritt when he was found unfit for duty in late 2006. She recalls Merritt having angina symptoms in 2006 and 2007, however, she did not remember how often. Mrs. Merritt recalled that stress or physical activity would precipitate Merritt's angina, so he would pace himself and avoid physical labor. On cross examination, Mrs. Merritt stated she did have family in northern Minnesota, about an eight-hour drive that she could manage by herself.[56]

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53 *See Merritt*, Bd. Dec. No. 13-0070 at 15.

54 *See id.*

55 *See id*. at 16.

56 *See id*.

The board found Mrs. Merritt credible.[57]

Jesse Vanderzanden (Vanderzanden) testified that he has been the Fairbanks Airport Manager since July 7, 2003. He plans, directs, and organizes all airport functions and oversees all major airport departments, including the Police and Fire Department. He worked with Supkis from 2005 until 2007. Supkis brought Merritt's name to his attention because of disciplinary proceedings. Prior to his termination, Merritt had been suspended more than once. Vanderzanden explained that discipline is a progressive process and in Merritt's case, the process started small, then turned larger, leading to Merritt's termination. The Airport Safety Department Manual sets forth standard operating procedures and standards of conduct and explains what the chain of command is and how to utilize the chain of command process. It also contains a specific section on insubordination. This document was available to Merritt. Vanderzanden was present at Merritt's "last chance" meeting and the final meeting at the end of the disciplinary process. He thought that insubordination was the key issue in terms of Merritt's firing, specifically, his failure to follow department procedures. Vanderzanden was involved in the termination process and wanted to make sure the disciplinary process was fair and consistent. Vanderzanden stated Merritt had union representation and had filed a grievance regarding his discipline. The arbitrator upheld the State's actions. On cross examination, he denied Merritt was suspended for not attending Firefighter I training, but rather was suspended for insubordination. Vanderzanden testified that the police and fire department experienced some attrition at the time of Merritt's termination due to the availability of jobs in the market with competitive pay. Some department personnel retired, while others went to work for the Fairbanks and North Pole police departments, however, no personnel left in 2006 or 2007 because of the physical training requirements.[58]

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[57] *See Merritt*, Bd. Dec. No. 13-0070 at 16.

[58] *See id.* at 16-17.

The board found Vanderzanden credible.[59]

Merritt testified that when he was hired at the airport, he took a written test and a physical agility test. He then attended police academy, a 12 week course, and aircraft firefighter training, a four week course. When he had his heart attack, Merritt was airlifted to Anchorage, where Dr. Finley was his cardiologist. A stent was placed in an artery. Another artery was 70-80 percent blocked, but no stent was placed. It was decided to "medically manage" the other blocked artery. After he returned to Fairbanks, Merritt returned to work in 2002. His job required medical certification every two years. He twice passed the medical certification after returning to work.

When PAC Chapman found him unfit for duty in September 2006, it was due to chest pains he had been having for one year prior and because he had unusual blood work. Dr. Triplehorn then evaluated Merritt, who contended he wanted to return to work, but Dr. Triplehorn initially resisted releasing him because of the job requirements. Eventually, Dr. Triplehorn relented and released him for work. Merritt then worked from January 15, 2007, until March 15, 2007. He expressed concerns that he was being required to complete the Firefighter I course. He did not think he could do it because of his angina, which is triggered by physical exertion.[60]

Merritt stated he continued to have chest pains from the time he was terminated until the time he left Fairbanks. He contended he was unable to work after his termination from the airport. Regarding his move to Wisconsin, he denied that they moved to be closer to family. Merritt has children in Alaska, a daughter in Fairbanks, a son in Juneau, and he also has three grandchildren in Juneau. He acknowledged that while it was beneficial to be closer to his wife's mother, it was not the primary reason they moved. Once they moved, Merritt stated he was treating in the Mayo Clinic system,

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[59] *See Merritt*, Bd. Dec. No. 13-0070 at 17.

[60] *See id.* at 18.

but then started treating at the VA after the State's controversion. He would like to return to the Mayo system.[61]

On cross examination, Merritt stated that the Firefighter I training requirement was discussed with him in 2005, when he was reprimanded for not doing the training. He denied that the Firefighter I training was a state requirement. He did not recall being given the option of just completing the classroom portion of the training. Merritt provided no medical documentation that he could not complete the training. He did not provide medical documentation because Supkis was on a "headhunting expedition" and Merritt thought that if he brought in medical documentation for his condition, he would be found unfit for duty. Merritt confirmed he emailed his complaints to the Governor, the Department of Administration, and the personnel department. He did not recall whether he also emailed legislators or the union representative. Also, Merritt did not recall the unfavorable decisions he received from his Equal Employment Opportunity Commission (EEOC) complaint or his complaints to the State Human Rights Commission.[62]

The board found Merritt generally credible, with some specific exceptions. He was not credible when he testified that 1) the Firefighter I training was not a state requirement, 2) when he stated he did not recall being given the option of just completing the classroom portion of the training; 3) when he did not recall whether he emailed legislators; 4) when he did not recall the union representative instructing him to use the chain of command; and 5) when he contended that he did not recall unfavorable decisions from his EEOC complaint and his complaints to the Human Rights Commission.[63]

Supkis testified that he was formerly employed as the Police and Fire Chief at the Fairbanks International Airport and he is currently employed as a fire chief for a fire protection district in Oregon. He started at the airport in February 2004, and got to know

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61 *See Merritt*, Bd. Dec. No. 13-0070 at 18.

62 *See id.* at 19.

63 *See id*.

Merritt, who had no medical restrictions in place at the time. He stated the Operations and Procedures Manual explains the chain of command, reporting lines, and insubordination. He explained that the requirement for Firefighter I certification was in place before he started at the airport, however, the process of getting all the firefighters certified had not been completed yet. Supkis attributed imposition of the Firefighter I training requirement to the State and explained the rationale was because police are certified to a state standard, firefighters should be too. The Firefighter I training was done haphazardly before he started work at the airport, so he created a Firefighter I certification academy.[64]

Supkis testified that he authored numerous disciplinary memos regarding Merritt. In June 2005, he disciplined Merritt for not attending the Firefighter I course after having been directed to attend. He noted that Merritt did not provide documentation of any medical restrictions. Supkis contended Merritt was verbally instructed and instructed in writing that accommodations would be made for medical issues. He explained that Merritt was advised regarding progressive discipline up to and including dismissal. Supkis also wrote a disciplinary memo to Merritt for not attending the Firefighter I course a second time. He testified progressive discipline, up to and including dismissal, was again explained to Merritt, who was suspended on this occasion. Supkis suspended Merritt again in December 2005 for gross insubordination after Merritt's sergeant told him to go home and he refused, preferring instead to argue. Supkis suspended Merritt in early 2006 for violating the chain of command. Specifically, Merritt emailed allegations of improper conduct by his supervisors to those supervisors, as well as many other senior state officials. Supkis again suspended Merritt in March 2006, for a continued pattern of insubordination and failure to comply with directives. A meeting was held on January 23, 2007, to discuss Merritt's work conduct. In response to the State's request for Merritt to provide medical documentation in support of his Family and Medical Leave, Merritt sent emails to the Governor and other senior state officials. Merritt was suspended again and

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[64] *See Merritt*, Bd. Dec. No. 13-0070 at 19-20.

given a final warning. On March 16, 2007, Supkis authored the final dismissal letter. He testified that Merritt would complain about the conduct of his fellow officers and Merritt contended nothing would be done about their conduct. Supkis denied these assertions, stating the matters were investigated, however, Merritt would not have been privy to those matters since they were between the individual employees and their supervisors. He denied that Merritt was fired because of his workers' compensation claim or his physical condition. From his perspective, Merritt was performing his essential job functions while at work. Regarding the Firefighter I training, Supkis contended that Merritt could have attended the training, although he would not necessarily have to participate in the physical portions of the training. Merritt's termination was upheld by the grievance officer.[65]

On cross examination, Supkis stated he had broad-based management experience and acknowledged he was aware of a state "whistleblower" statute. He confirmed Moore's testimony that Firefighter I training involved a classroom component with a written final examination as well as a performance exam. Not all the firefighters completed the training. Some chose to leave the department and went to other agencies or retired. However, he stated no one left because they could not complete the Firefighter I program. Supkis denied it was significant that Merritt did not complete the Firefighter I training, but rather contended the issue was his failure to attend. He explained the medical fit for duty certification questionnaire, and stated if an employee did not pass he would have spoken to human resources about accommodations that could have been made. However, Supkis did not recall if he followed this procedure in Merritt's case. He maintained that Merritt was fired because he could not follow supervisory directives. The Firefighter I class was a state program that is accepted as meeting the national standard. Supkis explained that the state required Firefighter I certification. He denied that he selectively enforced department standards, imposing them on Merritt and not others, and denied Merritt was terminated for not attending the

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[65] *See Merritt*, Bd. Dec. No. 13-0070 at 20-21.

training. He also stated that Merritt did not provide medical documentation he could not attend the training. Supkis maintained that Merritt could have completed the training, although he would not have been certified, and that work was available to him.[66]

The board found Supkis generally credible. However, according to the board, his testimony regarding Merritt's training, 1) that he did not have to actively participate, and 2) that it was not significant that Merritt did not complete the training, were not credible.[67]

3. Standard of review.

"The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."[68] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[69] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law"[70] and therefore independently reviewed by the commission.[71]

The board has the sole power to determine the credibility of a witness[72] and a board finding concerning the weight to be accorded a witness's testimony is conclusive even if conflicting or susceptible to contrary conclusions.[73]

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66 *See Merritt*, Bd. Dec. No. 13-0070 at 21.

67 *See id.*

68 AS 23.30.128(b).

69 *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors,* 948 P.2d 454, 456 (Alaska 1997)(internal quotation marks omitted).

70 *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007)(citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

71 *See* AS 23.30.128(b).

72 *See* AS 23.30.122 and AS 23.30.128(b).

73 *See* AS 23.30.122.

A board award of attorney fees and costs is reviewed under the abuse of discretion standard. If not manifestly unreasonable, an award should be upheld.[74]

4. Applicable Law.

a. Statutes and regulations.

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[.]

. . . .

AS 23.30.121. Presumption of coverage for disability from diseases for certain firefighters.

(a) There is a presumption that a claim for compensation for disability as a result of the diseases described in (b) of this section for the occupations listed under (b) of this section is within the provisions of this chapter. This presumption of coverage may be rebutted by a preponderance of the evidence. The evidence may include the use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

(b) For a firefighter covered under AS 23.30.243,

(1) there is a presumption that a claim for compensation for disability as a result of the following diseases is within the provisions of this chapter:

(A) respiratory disease;

(B) cardiovascular events that are experienced within 72 hours after exposure to smoke, fumes, or toxic substances;

. . . .

(2) notwithstanding AS 23.30.100(a), following termination of service, the presumption established in (1) of this subsection extends to the firefighter for a period of three calendar months for each year of requisite service but may not extend more than 60 calendar months following the last date of employment;

(3) the presumption established in (1) of this subsection applies only to an active or former firefighter who has a disease described in (1)

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[74] *See Bouse v. Firemen's Fund Ins. Co.*, 932 P.2d 222, 232 (Alaska 1997).

of this subsection that develops or manifests itself after the firefighter has served in the state for at least seven years and who

(A) was given a qualifying medical examination upon becoming a firefighter that did not show evidence of the disease;

(B) was given an annual medical exam during each of the first seven years of employment that did not show evidence of the disease; and

. . . .

(c) The presumption set out in this section applies only to a firefighter who, at a minimum, holds a certificate as a Firefighter I by the Department of Public Safety under firefighter testing and certification standards established by the department under authority of AS 18.70.350(1) or other applicable statutory authority.

(d) The provisions of (b)(1)(A) and (B) of this section do not apply to a firefighter who develops a cardiovascular or lung condition and who has a history of tobacco product use as established under (e)(2) of this section.

(e) The department shall, by regulation, define

. . . .

(2) for purposes of (d) of this section, the nature and quantity of a person's tobacco product use; the standards adopted under this paragraph shall use or be based on existing medical research.

. . . .

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.

AS 23.30.128. Commission proceedings.

. . . .

(b) The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole

record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

. . . .

AS 23.30.145. Attorney fees.

(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

. . . .

AS 23.30.175. Rates of compensation.

. . . .

(b) The following rules apply to benefits payable to recipients not residing in the state at the time compensation benefits are payable:

. . . .

> (2) the calculation required by (1) of this subsection does not apply if the recipient is absent from the state for medical or rehabilitation services not reasonably available in the state;

. . . .

AS 23.30.180. Permanent total disability.

(a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. If a permanent partial disability award has been made before a permanent total disability determination, permanent total disability benefits must be reduced by the amount of the permanent partial disability award, adjusted for inflation, in a manner determined by the board. . . . In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be

(1) area of residence;

(2) area of last employment;

(3) the state of residence; and

(4) the State of Alaska.

(b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not, by itself, constitute permanent total disability.

8 AAC 45.180. Costs and attorney's fees.

. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:

. . . .

(2) court reporter fees and costs of obtaining deposition transcripts;

. . . .

(13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;

. . . .

b. The presumption of compensability.[75]

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, Employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id*. Employee need only adduce "some," "minimal" relevant evidence (*Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987)) establishing a "preliminary link" between the "claim" and the employment. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). The witnesses' credibility is of no concern in this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once the preliminary link is established, the presumption is raised and attaches to the claim. Employer has the burden to overcome the raised presumption by coming forward with substantial evidence rebutting the evidence Employee adduced to raise the presumption. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Id.* at 1046. Employer can rebut the presumption by either producing affirmative evidence the injury is not work related or by eliminating all reasonable possibilities the injury is work related. *Smallwood.* Employer's evidence is viewed in isolation, without regard to Employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded Employer's evidence is deferred until after it is decided if Employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

If an employer, in appropriate cases not involving "work-relatedness," produces substantial evidence rebutting the presumption, the presumption drops out, and the

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[75] This discussion is taken verbatim from the board's decision. *Merritt*, Bd. Dec. No. 13-0070 at 24-25.

employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381, *citing Miller v. ITT Services,* 577 P.2d 1044, 1046. The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

5. Discussion.

a. AS 23.30.121 does not apply.

In his brief to the commission, Merritt argued, for the first time, that the board erred in not applying the firefighter presumption statute, AS 23.30.121.[76] In opposition, the State argued that he should not be allowed to make a new legal argument on appeal.[77] In the commission's view, in addition to the reason offered by the State, there are other grounds for not applying the statute here.

First, the effective date of the statute was August 19, 2008, six years after Merritt suffered his heart attack. The Alaska Supreme Court (supreme court) presumes that statutes have only prospective effect "unless a contrary legislative intent appears by express terms or necessary implication."[78] We are not aware of any contrary legislative intent with respect to the prospective application of AS 23.30.121.

Second, the evidence in this matter reflects that Merritt never obtained his Firefighter I certification. AS 23.30.121(c) provides that the statute's presumption only applies to those firefighters with Firefighter I certification.

The foregoing law leads us to conclude that the board did not err in this respect.

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[76] *See* Appellant's Br. at 10-12.

[77] *See* Appellees' Br. at 23-25.

[78] *Thompson v. United Parcel Service*, 975 P.2d 684, 688 (Alaska 1999) citing and quoting *Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947 (Alaska 1989).

b. Merritt is not entitled to PTD benefits from January 15, 2007, through March 10, 2010.

The board bifurcated its analysis of the PTD issue.[79] First, it applied a presumption of compensability analysis to the factual question whether Merritt had proved he was PTD in that timeframe. Second, the board considered whether Merritt had voluntarily removed himself from the labor market.

The board found that Merritt had attached the presumption through his and Mrs. Merritt's testimony that his angina, triggered by physical exertion, made it impossible for him to work. We agree. It also found that the State had rebutted the presumption with the evidence provided by Dr. Triplehorn in his January 15, 2007, report and release of Merritt to return to work.[80] The commission concurs in this finding as well. In terms of the third step of the presumption analysis, it was incumbent on Merritt to prove he was PTD by a preponderance of the evidence. According to the board, "[t]here is no evidence in the record of a physician ordering [Merritt] off work or imposing restrictions of any kind on [Merritt's] employment subsequent to the January 15, 2007[,] return to work form until Dr. Winter's and Dr. Rotert's physician report forms in the spring of 2010."[81] Moreover, the board found that even though the Merritts were credible, "their testimony is at odds with contemporaneous medical evidence from three different doctors: Drs. Judkins, Zuckerman, and Triplehorn."[82] Specifically, the board ruled their evidence "has less probative value and is afforded less weight than the physicians' opinions in this case."[83] Because a finding by the board concerning the weight to be accorded testimony,

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[79] *See Merritt*, Bd. Dec. No. 13-0070 at 30-34.

[80] The board also found that the State rebutted the presumption with evidence that Merritt was terminated for cause, *see Merritt*, Bd. Dec. No. 13-0070 at 30, although the commission views this evidence as relating to the issue whether Merritt voluntarily left the labor market.

[81] *Merritt*, Bd. Dec. No. 13-0070 at 31.

[82] *Id.* at 32.

[83] *Id.*

including medical testimony and reports, is conclusive,[84] the commission must defer to the board with respect to this weight finding. In the end, the commission concludes that substantial evidence supported the board's holding that Merritt did not prove his entitlement to PTD benefits between January 2007 and March 2010 by a preponderance of the evidence.

On the related question whether Merritt voluntarily removed himself from the workforce, he would not be entitled to PTD benefits in this timeframe if he was terminated for cause unconnected with his heart attack, workers' compensation claim, or fitness for duty. Setting aside any medical considerations, there was substantial evidence Merritt had disciplinary problems over a considerable period of time, having been suspended at least four times before he was terminated in March 2007. Even though Merritt attributed the suspensions, etc., to Supkis unfairly singling him out for such discipline, we note that the EEOC and the Human Rights Commission upheld the disciplinary action taken by the State against Merritt. There was, in the commission's view, substantial evidence that Merritt was terminated for cause, as the board found.

c. The board did not err in deciding that a COLA[85] was proper.

In his brief to the commission, Merritt maintained that he relocated to Wisconsin in order to obtain appropriate cardiac medical treatment that was not available to him in Alaska.[86] Therefore, relying on AS 23.30.175(b)(2), which states that the compensation rate provided for in §.175(b)(1) "does not apply if the recipient is absent from the state for medical or rehabilitation services not reasonably available in the state[,]" he argues that the board erred in applying a COLA, which had the effect of lowering his compensation rate. For its part, the State argued that Merritt moved to

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[84] *See* AS 23.30.122.

[85] COLA is the acronym for cost of living adjustment. *See Heustess v. Kelley-Heustess*, 259 P.2d 462, 473 (Alaska 2011).

[86] "Evidence at hearing established that *at the time of Mr. Merritt['s] heart attack*, there were no dedicated cardiac services or facility in Fairbanks." Appellant's Br. at 12 (italics added).

Wisconsin in order to be closer to his wife's relatives in Bemidji, Minnesota, and that appropriate medical care was available in Alaska.[87]

The board found that "[t]he record, as the parties left it, i[s] insufficient to determine whether or not cardiac services were, or were not, reasonably available to [Merritt] in the state *at the time of his move*."[88] Nevertheless, it held that, "[a]lthough the Act only requires a minimal showing from [Merritt] to cause the presumption [of compensability] to attach to his claim at the first step of the analysis, in this case, [Merritt] did not even adduce minimal evidence cardiac services were not reasonably available to him in the state *at the time of his move*[.]"[89] Furthermore, the board found that Merritt: 1) "presented no evidence how or why travel to Anchorage would have been unreasonable[;]" and 2) did not produce other potentially critical information such as how frequently he needed dedicated cardiac services and whether he had any travel restrictions.[90]

We agree with the board's findings. As the board pointed out, to attach the presumption of compensability an employee need only demonstrate a preliminary link between employment and the claim; this threshold showing is minimal.[91] According to the board, Merritt was unable to do so, as he introduced insufficient evidence that he needed to relocate for appropriate medical care. Moreover, the Merritts moved to Wisconsin in November 2008, approximately six years after his heart attack in June 2002. In that timeframe, Merritt was apparently satisfied with the cardiac treatment he was receiving in Alaska, and from the record, that treatment was not extensive following the catheterization procedure in Anchorage in June 2002. Therefore, it was reasonable for the board to conclude that at the time he moved, Merritt did not relocate

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87 *See* Appellees' Br. at 25-26.

88 *See Merritt*, Bd. Dec. No. 13-0070 at 35 (italics added).

89 *Id.* (talics added).

90 *See id*.

91 *See Gillespie v. B&B Foodland*, 881 P.2d 1106, 1109 (Alaska 1994)(citations omitted).

for purposes of appropriate cardiac treatment. Consequently, the board's imposition of a COLA was supported by the evidence.

d. Attorney fees.

The board declined to award Merritt attorney fees and costs because the State accepted Merritt as PTD in May 2010, before Mr. Beconovich filed his appearance in late August 2010.[92] Nevertheless, Merritt argues for an award of statutory minimum attorney fees pursuant to the provisions of AS 23.30.145(a),[93] which provides in pertinent part: "When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded." The State submits that Merritt is not entitled to an award of attorney fees with respect to those issues on which he lost before the board.[94]

Given the commission's holding that Merritt was not owed PTD benefits from March 15, 2007, through May 14, 2010, and our holding that a COLA was proper, clearly Merritt did not prevail on these issues and would not be entitled to an attorney fees award relative to them. However, as Merritt points out in briefing,[95] on April 19, 2011, long after Mr. Beconovich had been retained, the State controverted "PTD

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[92] *See Merritt*, Bd. Dec. No. 13-0070 at 36-37.

[93] *See* Appellant's Br. at 7-9. Merritt also argued for an award of attorney fees in accordance with the supreme court's decision in *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190-1191 (Alaska 1993). In *Childs*, the employer initially controverted benefits; it then subsequently began to voluntarily pay them. The supreme court held that the voluntary payment of benefits, under the circumstances, was the equivalent of a board award of those benefits, entitling Childs to an award of attorney fees. *Childs* is distinguishable. His counsel's efforts "were instrumental to inducing" the voluntary payment of benefits. Here, Mr. Beconovich had yet to be retained by Merritt when the State commenced its voluntary PTD payments in May 2010, thus, it would be problematic to say his representation was instrumental to inducing the State's PTD payments.

[94] *See* Appellees' Br. at 27-28.

[95] *See* Appellant's Br. at 7.

Benefits After 12/22/10" and "Further Medical Treatment and Medications for Cardiac Condition[.]"[96] In the commission's view, this controversion might serve as a basis for an award of attorney fees under AS 23.30.145(a), for PTD, §.041(k), and medical benefits that were paid to Merritt after December 22, 2010. Therefore, the board's denial of an award of attorney fees may constitute an abuse of discretion. Accordingly, a remand to the board so that it might revisit the attorney fees issue is appropriate.

6. Conclusion.

We AFFIRM the board's decisions denying PTD benefits from March 15, 2007, through May 14, 2010, and applying a COLA. We VACATE the board's decision denying Merritt an award of attorney fees and REMAND the issue to the board for further proceedings consistent with this decision.

Date: *16 May 2014* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).[97] For the date of distribution, see the box below.

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[96] Exc. 063. December 22, 2010, was the date that the characterization of Merritt's compensation payments was converted from PTD to §.041(k). They were converted back to PTD on January 30, 2013. Exc. 233-34.

[97] A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

(Footnote continued on next page.)

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[98] and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that this is a full and correct copy of Final Decision No. 196 issued in the matter of *Ricky Merritt vs. State of Alaska, Department of Transportation*, AWCAC Appeal No. 13-012, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 16, 2014.

Date: *May 19, 2014*

Signed

K. Morrison, Appeals Commission Clerk

Additional Time After Service or Distribution by Mail. Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

98 *See id*.