

Alaska Workers' Compensation Appeals Commission

Randy A. Weed,
Appellant,

vs.

State of Alaska, Department of Public
Safety,
Appellee.

Final Decision

Decision No. 204 November 13, 2014

AWCAC Appeal No. 13-026
AWCB Decision No. 13-0154
AWCB Case No. 200416447

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 13-0154, issued at Fairbanks, Alaska, on November 26, 2013, by northern panel members Robert Vollmer, Chair, Zeb Woodman, Member for Labor, and Krista Lord, Member for Industry.

Appearances: Robert M. Beconovich, The Law Office of Robert M. Beconovich, for appellant, Randy A. Weed; Michael C. Geraghty, Attorney General, and Daniel N. Cadra, Assistant Attorney General, for appellee, State of Alaska, Department of Public Safety.

Commission proceedings: Appeal filed December 23, 2013; briefing completed August 15, 2014; oral argument was not requested.

Commissioners: James N. Rhodes, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, Randy A. Weed (Weed), worked for appellee, the State of Alaska, Department of Public Safety (State), as an Alaska State Trooper. While serving as a State Trooper in Tok, he was dispatched to a motor vehicle accident scene on June 6, 2004. When he responded, Weed found the body of a young child who was trapped beneath the vehicle. The experience made such an impact on Weed that he was subsequently diagnosed with posttraumatic stress disorder (PTSD). He never worked as a State Trooper again. Weed filed a workers' compensation claim on September 13, 2011. His claim went to hearing before the Alaska Workers' Compensation Board

(board), after which a board majority denied Weed's claim for mental injury, among other rulings. Weed appealed the board's decision to the Workers' Compensation Appeals Commission (commission). We affirm in part, reverse in part, and remand the matter to the board, as more fully set forth below.

2. Factual background and proceedings.

Weed was raised in North Dakota and graduated high school in 1974. He then served in the U.S. Army, completing advanced individual training and becoming a combat engineer. While in the Army, Weed came to Alaska; he was stationed at Fort Richardson. He briefly returned to North Dakota after leaving the Army, then returned to Alaska. Once back in Alaska, Weed worked for the Kenai Peninsula Borough Maintenance Department. Subsequently, he worked for seven-and-a-half years with the Department of Public Safety as a court services officer. Weed started work with the Alaska State Troopers in 1995. After completing the Academy, he was posted in Soldotna and worked the Kenai Peninsula until 1999, when he was posted to Tok.¹

On June 6, 2004, Weed was assigned to patrol duty in Tok, Alaska. He had just come on duty when he was dispatched to the scene of a motor vehicle accident approximately 8 miles south of the Tok cut-off. As Weed approached the scene, he could see a woman along the road yelling something at him. There were also three children present on the shoulder with her. When Weed exited his vehicle, the woman was saying she could not find her son. Weed could see the vehicle, a 2001 Dodge Durango, sitting upright in a ditch on the right side of the road. It had rolled over three times and came to rest in a marshy area with trees. Weed looked into the interior of the vehicle and did not see the woman's son. He then went further into the trees to look for the boy, but did not see him. When he turned around to come back, Weed saw a "little bear kind of shoe" sticking out from under the vehicle by the driver's side rear tire. He tried unsuccessfully to lift the vehicle himself. He retrieved a tree branch and tried to use it as a lever to lift the vehicle, but the branch broke. Weed crawled

¹ See *Weed v. State, Department of Public Safety*, Alaska Workers' Comp. Bd. Dec. No. 13-0154 at 5 (Nov. 26, 2013).

under the vehicle. He could see the boy's face but could not feel a pulse. Other people were arriving at the scene as Weed was backing out from under the vehicle. Emergency Medical Services personnel lifted the vehicle with a handyjack and blocks. A local physician, Dr. Steven Wahl of the Tok Medical Clinic, pronounced the ten-year-old boy dead. Weed delivered that news to the boy's mother.²

Weed learned the woman and her family were moving from Ketchikan and had taken the ferry. They spent the night in Tok and left town at about eight o'clock that morning. The family was traveling in three vehicles. The father was driving the lead vehicle, a U-Haul van; the mother was following in the 2001 Dodge Durango, and the grandmother was in the rear, driving a 2000 Dodge pickup truck. It was not unusual for the father to get out ahead of the other two vehicles during the trip and then pull over and wait for them to catch up. At the time of the accident, the father was "probably a couple of miles ahead" of the other vehicles and had "gone around the bend." The father returned looking for his family about a half-an-hour after Weed had arrived at the scene. Weed notified the father of his son's death.³

Weed, as an Alaska State Trooper, had responded to motor vehicle accident scenes before, including motorcycle accidents and all-terrain vehicle and snow machine rollovers. Some of the calls involved fatalities, including death from natural causes and suicides, as well as motor vehicle accident deaths. Weed found this accident particularly disturbing and stressful because it was his first fatality involving a child.⁴

Following the accident, Weed was unable to return to work. He lost all his self-confidence, and had difficulty with his memory and concentrating. He also stopped driving.⁵ According to Weed's counsel, June 10, 2004, was Weed's last day of work for the State.⁶

² See *Weed*, Bd. Dec. No. 13-0154 at 5.

³ See *id.* at 5-6.

⁴ *Id.* at 6.

⁵ Hr'g Tr. 125:23-126:4, 127:3-5, 140:22-23, 155:1-3, June 13, 2013.

⁶ R. 1144.

In August 2004, Weed travelled to Tucson, Arizona, for a planned vacation. The vacation was, at least in part, to get away from the stresses of his job. While in Tucson, he sought treatment from J. Michael Morgan, Ph.D. on August 10, 2004, and August 16, 2004. Weed reported driving avoidance, site avoidance, nightmares, withdrawal, subjective depression, passivity, lethargy, irritability, and an absence of enjoyment of previously enjoyable activities. Dr. Morgan diagnosed acute stress disorder and posttraumatic stress disorder.⁷

On August 30, 2004, Robert D. Dingeman, M.D., wrote a letter to Ronald Martino, M.D., at Fairbanks Psychiatric and Neurological Clinic, requesting Dr. Martino see Weed. Dr. Dingeman stated that Weed's wife at that time had contacted him "very distressed over her husband's distress." He also wrote Weed's former wife had reported Weed was "having . . . a lot of sleep disturbances, inability to drive his official vehicle or a private vehicle and other concerns after coming upon a dead little boy, who had a lot of physical resemblance to one of his own."⁸

Weed saw Mark A. Shields, Sr., LCSW, ACSW, Samaritan Counseling Center, for an initial evaluation on September 7, 2004. In his opinion, Weed presented with "[symptoms] and associated history consistent with posttraumatic stress disorder, severe." He thought the severity of Weed's presentation was work-related and "significantly compromises his ability to function, including inability to adequately execute his professional responsibilities at this time."⁹ Weed decided to pursue treatment with Frederick J. Schramm, D. Min., LMFT, LMHC; Executive Director of Samaritan Counseling Center.¹⁰

Weed's counsel contended that on September 15, 2004, the State terminated Weed's employment.¹¹ Weed had exhausted his available leave with the State as of

⁷ R. 1208.

⁸ R. 1222.

⁹ R. 1199.

¹⁰ R. 1203.

¹¹ R. 1144.

that date. In a Report of Occupational Injury or Illness dated September 20, 2004, Weed reported "POST TRAUMATIC STRESS DISORDER SEVERE" as a result of the June 6, 2004, accident.¹²

On September 29, 2004, Weed saw Dr. Martino, and reported he was very depressed, frequently tearful, suffered from nightmares, and felt anxious during the day. He also reported a constant preoccupation with the accident. Weed was worried he would not be able to return to work and stated he felt like he failed the 10-year-old boy victim. He felt he had seen enough death and did not know how he would react to another dead body. Weed stated he thought about his son, who looked a lot like the boy that was killed, when he was 10 years old. He also reported he keeps seeing little sneakers on the ground. Dr. Martino noted Weed was anxious and tearful throughout most of the interview and assessed severe posttraumatic stress disorder secondary to the June 6, 2004, accident. He also stated Weed's PTSD was complicated by "a major depression of at least moderate severity." Dr. Martino assessed a global assessment functioning (GAF) score of 40-45.¹³

On October 8, 2004, Dr. Schramm wrote the State indicating the medical consensus of Weed's treatment providers at Samaritan Counseling Center was that Weed had a "dysfunctional condition" that was "directly related to his service as a State Trooper." In Dr. Schramm's opinion, "[t]he last death experience he handled was so traumatic that it will take some time in therapy for him to be functional again." He also stated Weed was not fit for duty.¹⁴

On December 10, 2004, the State controverted benefits. The controversion notice contains the following language: "You will lose your right to compensation payments unless you file a written claim within two years of the date you knew the

¹² R. 0001.

¹³ R. 1200-02.

¹⁴ R. 1203.

nature of your disability and its connection with your employment and after disablement.”¹⁵

Weed continued periodic counseling with Mr. Shields at Samaritan Counseling Center. A December 16, 2004, chart note indicated Weed’s former wife was concerned with his alcohol consumption since the accident. Weed saw Mr. Shields for nine counseling sessions and then dropped out of treatment. His last session was December 16, 2004.¹⁶

On January 11, 2005, Weed’s former wife contacted the Tok Clinic concerned about his excessive drinking. Weed was sleeping all day and occasionally vomiting. She reported seeing blood in the toilet and stated Weed was “not normal.” R. E. Andreassen, D.O., advised Weed’s former wife that Weed needed an immediate evaluation and he would contact Emergency Medical Services. Weed later came to the clinic and reported drinking daily since the prior spring. He was having off-color stools. Dr. Andreassen noted Weed’s skin had a jaundiced appearance. Weed also had a distended abdomen and an enlarged, non-tender liver. Dr. Andreassen assessed “ETOH abuse acute/chronic hepatosplenomegaly–hepatitis jaundice–acute,” treated Weed with intravenous medications, and discharged him.¹⁷

Weed’s former wife telephoned Dr. Andreassen on January 12, 2005, and reported still seeing blood in the toilet after Weed’s bowel movements. Dr. Andreassen’s chart notes state, “she now realizes [Weed] needs to be in a hospital. He is no longer fighting her about this.” Dr. Andreassen advised Weed’s former wife to call the ambulance and notified Fairbanks Memorial Hospital (FMH).¹⁸ Weed was admitted to FMH that same day and was treated for alcohol withdrawal and liver failure for nearly a month. Records of Weed’s hospitalization are extensive.¹⁹

¹⁵ R. 0003-04.

¹⁶ R. 1767-68.

¹⁷ R. 1277-79.

¹⁸ R. 1230-31.

¹⁹ *See generally*, R. 1284-1541.

Kenneth C. Starks, M.D., evaluated Weed, who reported drinking "about a fifth every day and has done so for the last five years." The report states that Weed went through a divorce at that time with his wife of 23 years and Weed had been depressed ever since then. The report also noted "significant stressors" in his life, including a child being pinned under a car causing him a "great deal of grief." Weed was noted to have had panic attacks and severe depression since then. Dr. Starks' impression was presumed acute alcoholic hepatitis with hepatosplenomegaly.²⁰

On January 14, 2005, Anthony A. Bottone, M.D. performed a psychiatric consultation at Dr. Starks' request. Based on the history Weed provided, Dr. Bottone identified two precipitating factors: 1) Weed's divorce five years earlier from his wife of 23 years, and 2) the June 6, 2004, accident. Weed's depression reportedly worsened following the accident. And, in addition to his depression, he also developed symptoms of autonomic arousal with periods of rapid heart beating, sweating, shaking, and "basically having a panic attack." Weed also reported flashbacks to the June 6, 2004, accident scene, lowered self-esteem, less self-confidence, obsessive ruminations, psychic numbing, "which can relate to some of the posttraumatic stress disorder symptoms," and vegetative signs such as trouble sleeping and decreased energy. Dr. Bottone's diagnoses were: Axis I – Posttraumatic stress disorder, chronic. Major depressive disorder, recurrent. Panic disorder. Acute and chronic alcoholism. Axis II – Deferred. Axis III - Alcoholic hepatitis and hepatosplenomegaly. Axis IV – Stressors: Exposure to accident and divorce five years ago. Axis V – GAF=40. Dr. Bottone recommended an inpatient alcohol treatment program, preferably out-of-state, because of Weed's position as a State Trooper. He also discussed the use of antidepressants to treat Weed's posttraumatic stress disorder.²¹

On January 15, 2005, Victor Bell, M.D., performed a psychiatric evaluation. Weed told Dr. Bell he had been drinking about a fifth a day for approximately six months. He dated the onset of his drinking to the June 6, 2004, accident, which is

²⁰ R. 1293-94.

²¹ R. 1353-56.

described in the report. Dr. Bell noted "the patient may have been somewhat depressed following divorce from his first wife, about 5 years previously, following a 23-year marriage." Weed described "flashbacks to the incident, decreased self esteem, loss of confidence, and excessive ruminations about his role in the event." He also described "emotional changes of psychic numbing and depression, and vegetative signs of difficulty sleeping and decreased energy." Dr. Bell found further history "indicates an extended period of drinking in lesser amounts for 5 years preceding this hospitalization." Dr. Bell's diagnoses were: Axis I - Alcohol dependence, chronic, severe. Depressive disorder, with chronic and acute features, partially related to chronic alcohol abuse as well as marital and occupational stresses. Posttraumatic stress disorder, acute, severe, for 6 months' duration. Axis II - No disorder. Axis III - Alcoholic hepatitis, hepatosplenomegaly, acute. Axis IV - Stressors: Witnessing the death of a child, marital difficulties. Axis V - GAF=40.²²

Weed signed a resignation letter on January 18, 2005, resigning his position as an Alaska State Trooper.²³ Weed disputes certain facts concerning his resignation. He contends the State terminated him while he was hospitalized with liver problems. Weed acknowledges the signature on the January 18, 2005, letter as his, but testified the letter was written by his former wife. He testified he signed the handwritten resignation letter because he had already been effectively terminated by the State. Weed contends he was terminated by Colonel Julia Grimes the day before signing the January 18, 2005, letter. He also testified he does not remember signing the January 18, 2005, letter.²⁴

Dr. Bottone performed a follow-up evaluation on January 21, 2005. At the time of the evaluation, Weed's GAF was 35.²⁵ On January 28, 2005, Weed was discharged

²² R. 1371-73.

²³ R. 0997.

²⁴ Hr'g Tr. 137:6-139:11, 177:19-179:4.

²⁵ R. 1465-66.

from FMH.²⁶ Between January 29, 2005, and February 29, 2005, Weed completed an inpatient alcohol rehabilitation program.²⁷

On November 18, 2005, Weed was again admitted to FMH complaining of abdominal swelling and pain. Alcoholic hepatitis and ascites was diagnosed.²⁸ On November 29, 2005, he was discharged with a diagnosis of hepatic encephalopathy secondary to cirrhotic liver disease secondary to alcohol abuse, improved.²⁹

Other than some miscellaneous records from the Tok Clinic in 2007, very few medical records pertaining to Weed were generated until 2011.³⁰

Weed began employment with NANA Management Services (NANA) on May 11, 2006, where he worked as a security officer on the North Slope.³¹

On June 13, 2011, Weed underwent a psychiatric evaluation with Premkumar Peter, M.D., of the Alaska Psychiatric Institute. Dr. Peter is a tele-medicine provider. Weed stated he had not seen a psychologist or a counselor for the past five years. He had difficulty articulating his complaints. Weed said he was depressed, lacked confidence, and had difficulty sleeping. He stated he would not even go to the grocery store because of anxiety. Weed began by discussing his experience as a State Trooper, including the June 6, 2004, accident. He also stated he was divorced in 2006, however, he was still fond of his wife, and when she passed away recently from cancer, it “put him in a tailspin.” Weed reported drinking 10-12 beers per day, but denied drinking liquor. He reported he was given an “administrative separation” from the State. On his mental status examination, Dr. Peter noted:

He sat down with his head down and he said, “It is hard.” It took a long time for him to tell me his complaint. His mood was sad and anxious. . . . The patient’s whole affect was one of depression. His mentation was slow

²⁶ R. 1535-41.

²⁷ R. 1773-1852.

²⁸ R. 1544-45.

²⁹ R. 1693-94.

³⁰ R. 1258-60.

³¹ R. 0489; Hr’g Tr. 141:17-18, 142:18–143:6.

and it took time to answer questions. He was teary, I think at times. It took a long time to gather his thoughts and talk to me. He was oriented well. His affect was constricted. Thought process was organized well. Thought content showed pride in his work and pride in his habits of keeping everything in displays and neatness, etc. . . . His short term memory was good, but his concentration was somewhat impaired.

Dr. Peter's diagnoses were: Axis I – Major depressive disorder, recurrent, severe without psychotic features; posttraumatic stress disorder; alcohol abuse. Axis II – Obsessional traits. Axis III – Obesity. Axis IV – Stressors: Severe. Problems with primary support group; other psychosocial and environmental problems. Axis V – GAF=45. Dr. Peter recommended several medications, psychotherapy, and a "holistic approach," including losing weight, limiting drinking, improving his dietary habits, and walking every morning. Dr. Peter also stated: "As far as spirituality is concerned, he needs to go to church or read something or listen to some tapes to slowly get back into his spiritual feelings."³² On June 21, 2011, Dr. Peter saw Weed and noted he was improving. His GAF was 55.³³ On June 28, 2011, Weed saw Dr. Peter and reported he was "doing pretty well." His sleep had improved but he still worried "quite a bit." Dr. Peter administered supportive psychotherapy. Weed's GAF was 45.³⁴ On July 7, 2011, Weed's GAF was reported at 55.³⁵

Dr. Peter wrote the Security Manager at NANA on July 7, 2011, requesting a two-month leave of absence for Weed. Dr. Peter stated Weed was "depressed with sad mood, excessive guilt feelings, and a high degree of anxiety. His sleep is disturbed and his concentration is impaired."³⁶ Weed continued psychotherapy with Dr. Peter. His GAF remained at 55.³⁷

³² R. 1870-72.

³³ R. 1874-75.

³⁴ R. 1876-77.

³⁵ R. 1878-80.

³⁶ R. 0869.

³⁷ R. 1883-84, 1887-92, 1900, 1895-97.

On September 13, 2011, Weed filed a workers' compensation claim for "Psychological injury" and "Severe PTSD" seeking temporary total disability (TTD) for an "unknown" period, permanent partial impairment (PPI), medical and transportation costs, penalty, and interest. He later amended his claim to include permanent total disability (PTD).³⁸

Dr. Peter again wrote the Security Manager for NANA on September 14, 2011, requesting an additional two-month leave of absence for Weed, who "is suffering from severe symptoms of PTSD and Major Depression."³⁹

Weed saw Dr. Peter two more times. His GAF remained at 55.⁴⁰

On September 27, 2011, the State controverted all benefits.⁴¹ Three days later, on September 30, 2011, the State answered Weed's claim. The answer contains the following defense:

The Employee does not claim any specific period of disability in his claim. AS 23.30.105(a) bars compensation for disability unless a claim is filed within two years after the employee has knowledge of the nature of his disability and its relation to employment and after disablement. The Employer reserves the right to assert this statutory defense upon clarification of the Employee's claim and further discovery.⁴²

Weed was terminated from NANA on October 10, 2011, after not returning to work.⁴³

On October 21, 2011, Howard F. Detwiler, M.D., Bridges Counseling Connection, evaluated Weed. Dr. Detwiler diagnosed posttraumatic stress disorder, major depressive disorder, and ETOH (alcohol) dependence. He thought Weed's prognosis

³⁸ R. 0007-08, 2805-06.

³⁹ R. 1898.

⁴⁰ R. 1899, 1903-04.

⁴¹ R. 0005.

⁴² R. 0011-14.

⁴³ R. 0838, 0841; Hr'g Tr. 152:5-153:13.

was "fair," and opined Weed needed "extensive therapy" for his posttraumatic stress disorder and depression.⁴⁴

On December 19, 2011, S. David Glass, M.D., performed an employer's medical evaluation (EME). Dr. Glass administered a Minnesota Multiphasic Personality Inventory-2 (MMPI-2). Weed provided valid responses that were "markedly abnormal." He had marked elevations on 5 of the 10 clinical scales "reflecting longstanding neurotic symptomology including somatic preoccupation, depressive symptomology, histrionic psychodynamics, distrust[,] and situational distress." Dr. Glass's diagnoses were: Axis I – Alcohol dependence, in remission; nicotine dependence, recently in remission; history of posttraumatic stress disorder symptomology in remission with some lingering symptomology. Axis II – No diagnosis. Axis III – No diagnosis at present time. Axis IV – Moderate, concerns about finances. Axis V – GAF=80-85. Dr. Glass explained he thought Weed's posttraumatic stress disorder was in remission because he did not currently demonstrate criteria for that disorder, such as autonomic arousal, avoidance behavior, lack of involvement in life/relationships (psychic numbing), dysfunction, etc. Dr. Glass opined "prior and non-current concerns regarding the diagnosis of Posttraumatic Stress Disorder would relate to the incident in June 2004; however, around the time there were also other factors including drinking and the difficult relationship with [former wife]. . . ." Regarding Weed's drinking, Dr. Glass stated:

The diagnosis of Alcohol Dependence is made; however, this is mitigated somewhat by [Weed's] report that he did not drink excessively prior to 2004. . . . He subsequently was drinking excessive amounts to create a severe medical illness and relapsed, but he has been able to remain clean and sober with minimal formal drug treatment . . . Alcohol Dependence is not caused by the vicissitudes of adult life . . . in terms of Alcohol Abuse, life circumstances can be a precipitant of the alcohol use.

In Dr. Glass's opinion, the "predominant cause" of Weed's posttraumatic stress disorder was the June 6, 2004, accident, but the accident "ceased to be the cause for any lingering or current psychiatric symptomology/distress." Rather, Dr. Glass thought other factors, such as Weed's concerns about the future and worries over finances,

⁴⁴ R. 1211-16.

were now the cause of his symptoms. Dr. Glass stated it "is important to appreciate that his ability to return to police work (security on the North Slope) and work there, apparently, successfully rule out Posttraumatic Stress Disorder (PTSD)." Dr. Glass recommended an exercise program, alcohol avoidance, and counseling. He thought Weed did not present a permanent psychiatric impairment, but rather thought Weed suffered a temporary impairment in 2004-2005 that was now resolved. He stated Weed was medically stable and had no psychiatric work restrictions at that time.⁴⁵

The State specifically asked Dr. Glass to opine on whether Weed's prior treatment was reasonable and necessary. Dr. Glass did not render an opinion, but rather recommended future counselling.⁴⁶

On December 6, 2012, Ronald G. Early, Ph.D., M.D., performed a second independent medical evaluation (SIME). Dr. Early prefaced the clinical interview section of his report with the following remarks:

In today's evaluation Mr. Weed described the traumatic incident of June 6, 2004 in a manner consistent with what is included in all of the records. Mr. Weed had some difficulty describing the event and was obviously emotionally upset in doing so. He has not resolved his emotional response that [sic] incident and both his emotional response in the office and the acknowledgement verify that he still has considerable psychological distress when he thinks about that incident.

Dr. Early administered the Beck Depression Inventory. Weed's score of 36 was consistent with "severe depression." In the "summary and conclusions" section of his report, Dr. Early repeatedly mentions Weed's lack of psychiatric treatment:

However, the medical records reflect that the only ongoing therapy he received within the first years after the onset of PTSD was some counseling from a . . . Christian counseling service. . . .

. . .

He was provided with some psychiatric care via telecast on a monthly basis for a while. However, he never had the intensive treatment by a psychiatrist that PTSD requires. The lack of intensive care and the

⁴⁵ R. 1703-21.

⁴⁶ R. 1703-21.

inadequacy of medication management resulted in chronic symptoms and development of severe depression.

. . . .

It is unfortunate that his claim was not accepted, and he was not given intensive psychiatric treatment early in the period following . . . psychological trauma. Over the . . . years, without intensive treatment, the PTSD evolved into serious [sic] combination of anxiety and depression as often occurs. Without treatment, he could not overcome the symptoms of PTSD, and was unable to continue as a State Trooper.

Dr. Early concluded:

He is . . . not nearly the person he was in June 2004, but he is trying to improve his situation. He does not have the marked symptoms of PTSD, and his depression is better. However, he remains vulnerable to relapse into more severe PTSD symptoms if he has more psychological trauma. He is at risk for relapse if he remains in the isolated community and has no ongoing treatment to . . . prevent relapse. He should have ongoing therapy and assessment for medication.

Dr. Early's diagnoses were: Axis I – Posttraumatic stress disorder, in partial remission; major depressive disorder, in partial remission; anxiety disorder, in partial remission; Alcohol dependence, in remission. Axis II – No diagnosis. Axis III – No diagnosis except hepatitis, now in remission. Axis IV – Stressors, including living in a small community and issues related to Weed's ex-wife. Axis V – GAF=50. Dr. Early thought the posttraumatic stress disorder symptoms that began following the June 6, 2004, accident are solely related to that incident. He twice noted: "there was no problem with alcohol prior to June 6, 2004," and there is "no history of preexisting alcohol abuse." Regarding his diagnosis of posttraumatic stress disorder, Dr. Early wrote the "basis for reaching that diagnosis includes all of the criteria identified in 309.81." He then discussed each of the criteria as they pertained to Weed, such as feelings of helplessness and overwhelming emotion, vivid flashbacks and nightmares, driving and location avoidance, withdrawal from meaningful activities, sleep disturbance, irritability, anger reactions, problems concentrating, hypervigilance, and startle reactions. He also thought Weed's anxiety was the primary symptom complex in the initial phase of his posttraumatic stress disorder, but subsequent events, such as the marriage to his former wife, also contributed. Dr. Early stated the June 6, 2004,

accident did not aggravate, accelerate, or combine with any preexisting mental health problems to cause Weed's conditions but added Weed's accumulation of experiences as a State Trooper was a pre-disposing factor. "There is no alternate cause for the PTSD symptoms described following the June 6, 2004 incident." Dr. Early opined the treatment Weed received was both inadequate and ineffective. Regarding treatment recommendations, he stated:

At this time, the condition of Post-Traumatic Stress Disorder is chronic and he will continue to have varying levels of symptoms over the course of time. Any individual who experiences Post-Traumatic Stress Disorder is vulnerable to relapse and recurrence of symptoms under conditions of stress, especially if inadequately treated. Untreated Post-Traumatic Stress Disorder becomes incurable after a period of time and symptoms continue throughout life to varying levels of severity depending on stressful circumstances. Therefore, treatment at this time would not be curative, but would be directed at diminishing symptoms and assisting Mr. Weed in developing coping skills and strategies for preventing major relapse and assisting him in moving forward with a productive lifestyle. Inasmuch as he no longer has his career as a State Trooper, he needs assistance in developing a meaningful alternative career. Failure to find a suitable alternative career will make him more vulnerable to relapse.

Dr. Early thought Weed was medically stable but his condition remained vulnerable to worsening. Dr. Early assigned Weed a 15 percent PPI rating.⁴⁷

On December 11, 2012, Weed filed an affidavit of readiness for hearing (ARH), swearing he had completed the necessary discovery, obtained the necessary evidence, and was fully prepared for a hearing on his claim.⁴⁸

At a January 14, 2013, prehearing conference (PHC), the parties requested a hearing date on Weed's claim. The issues for hearing were his claim for PTD, TTD, PPI, medical and transportation benefits, penalty, interest, and attorney fees and costs. The hearing was scheduled for June 13, 2013, "pursuant to the regulations," and the

⁴⁷ R. 1956-2000.

⁴⁸ R. 0018.

summary contains an order stating: "evidence must be filed 20 days prior to hearing pursuant to 8 AAC 45.120."⁴⁹

On May 31, 2013, the State filed a medical summary containing a June 7, 2012, report by Wandal Winn, M.D. The report is titled a "Psychiatric Review Technique," and was apparently prepared by Dr. Winn for purposes of Weed's eligibility determination for social security disability benefits. The report consists of 15 pages, the first 10 of which are check-box answers listing various psychiatric conditions. The last 5 pages of the report consist of a "Consultant's Notes" section and a "Case Analysis" section. Dr. Winn's case notes state: "Per the Psych. Eval. Dated 12/11: All the clmt's records trough [sic] the years have been reviewed, and all his psych. and medical history and conditions have been discussed in the evaluation." It cannot be determined from the report what specific records Dr. Winn reviewed. The report's case analysis section contains numerous documented contacts with the State's adjuster. Dr. Winn thought Weed did not demonstrate the criteria for PTSD and concluded there was "[n]o evidence of any significant impairment."⁵⁰

On June 4, 2013, Weed filed a request for cross-examination of Dr. Winn.⁵¹ Three days later, Weed filed an affidavit of attorney fees and costs totaling \$25,023.54, including \$2,518.54 in costs and \$22,505.00 in fees. Attorney fees were billed at \$350.00 per hour.⁵² Dr. Winn did not appear and testify at hearing.⁵³

Linda Gregory Weed (Mrs. Weed) testified on his behalf. Weed and Mrs. Weed met on the internet and they started dating in 2010, when she lived in Wasilla. Weed worked for NANA at the time and he would see her when he was on leave from the North Slope. In June 2011, Mrs. Weed moved to Tok. They were married on October 14, 2012. She is Weed's third wife. Mrs. Weed stated Weed's condition

⁴⁹ R. 2805-06.

⁵⁰ R. 2001-16.

⁵¹ R. 0906.

⁵² R. 1157-63.

⁵³ *See Weed*, Bd. Dec. No. 13-0154 at 1.

deteriorated during the time they have been together. Weed would self-medicate with alcohol, was often teary-eyed, had sleeping problems, and would not eat. "He was a mess," and was "going to pieces." Weed "had no interest in anything." He became "withdrawn and isolated." She testified that Weed does not like to go outside their home and they can't even go out to dinner. If they go to the grocery store, Weed stays in the truck. He does not socialize. Regarding his sleep disturbances, Mrs. Weed said he is "up every hour." They sleep apart. Weed sleeps in a recliner and they can't "normally cohabitate." Trying to get Weed to perform normal chores, such as cutting wood, is a "significant fight." Regarding his driving ability, Mrs. Weed testified lights, accidents, and locations of previous trauma cause Weed to have "panic attacks." It is one mile to the grocery store and that is the extent of his ability to drive. Mrs. Weed knows the location of the June 6, 2004, accident and they "don't go there." They have been on that road three times and each time it was a "traumatic event." Mrs. Weed explained that Weed has a large family and he does not interact with them. She described a recent trip to North Dakota for a family reunion. She drove there and back. Weed's family had not seen him in 27 years, but Weed spent most of the time in his camper. He "did not make sense." Weed's parents were upset and his family expressed concern about his self-medication and his overall mental state. Giving examples of Weed's symptoms, Mrs. Weed testified they stayed in a hotel the night before the board hearing. The police were called to the hotel for some reason, which caused Weed to become "anxious." He broke into a sweat and got "cold and clammy." Also, a car alarm went off during the night and Weed "jumped." Mrs. Weed explained "daily life activities are a daily battle." Weed's level of stress is "off the wall." Neither she, nor Weed, interact with their respective children. Weed won't interact and Mrs. Weed can't interact with her children because she takes care of Weed and can't leave him. Weed's daughter came to visit him last year for Father's Day. She had planned to stay for four days, but spent one night and left the next day because she "could not stand to see her father like that."

On cross-examination, Mrs. Weed stated she is not employed. She makes the house payments from social security disability benefits and acknowledged an award

would help her family. She testified Weed's drinking is "sporadic," he could go a week or a day without drinking. The period of time he drinks is equal to the period when he does not drink. She adamantly stated that Weed just drinks beer, not liquor, and stated she does not monitor how much he drinks. Mrs. Weed denied she buys him beer and explained she is a smoker and he buys beer when they go to the store for her to buy cigarettes. She stated she is more concerned about Weed's mental condition than his drinking. When questioned about participating in activities with him, Mrs. Weed stated they used to do things like go hunting, fishing, and boating together, but not anymore. She and Weed have not gone camping in "forever." She tries to get him to sit on the deck or do something in the yard. She got Weed a dog, thinking that would help. He will respond to the dog one day, and push the dog away the next, "like he does to [her]."⁵⁴

In response to a question concerning Weed's "recent medical problems," Mrs. Weed stated he "has a very severe case of stress-related Type II diabetes, according to Dr. Wahl." The State objected on the basis of hearsay and because Weed had not filed diabetes-related medical records on a summary as required by regulation. The designated chair sustained the objection.⁵⁵

Weed contended evidence of his diabetes should be considered in a permanent total disability (PTD) determination, including his and Mrs. Weed's testimony. He also sought an opportunity to introduce medical records pertaining to that condition after the hearing. He contended all his conditions, both work-related and non-work-related, must be considered in his claim for PTD.⁵⁶

Weed did not address any issues relating to the diabetes condition in his post-hearing brief.⁵⁷ In its post-hearing brief, the State presented detailed and

⁵⁴ Hr'g Tr. 36:17–37:15, 38:24–39:8, 42:19–43:6, 45:9–49:13, 49:22–51:2, 57:23–59:21, 60:19–63:21, 64:12–65:7, 68:21–22, 69:8–9, 70:13–16, 70:19–72:6, 73:9–75:8.

⁵⁵ Hr'g Tr. 51:3–53:17.

⁵⁶ Hr'g Tr. 15:14–16, 193:7–199:5.

⁵⁷ R. 1144-53.

comprehensive arguments against the admissibility and consideration of Weed's diabetes condition.⁵⁸

The board found Mrs. Weed was generally credible, but not credible when testifying about Weed's drinking and how he obtains alcohol.⁵⁹

Captain Burke Barrick testified on behalf of the State. For the last 23 years, he has been employed by the State of Alaska, Department of Public Safety, Division of Alaska State Troopers. Captain Barrick is a detachment commander. He supervises two lieutenants, one rural and one in Fairbanks, who, in turn, supervise patrol units. He attended the Training Academy in Sitka in 1990, then was assigned to three months of field training where he worked with other officers. After that he was released to work on his own. In 2004, he was assigned to Galena, where he also worked the surrounding villages. After three years, he was promoted and became an Academy instructor. Later he was promoted and assigned to Nome, where he worked as a supervisor. He was next assigned to Fairbanks as the deputy commanding officer, and later became the commanding officer. During the course of his duties as a State Trooper, Captain Barrick has experienced homicides, suicides, and motor vehicle fatalities. At the Academy, Captain Barrick taught "practicals," such as tactics and scenarios. Academy training used to involve Emergency Medical Technician training, but now only first aid is taught. He testified any State Trooper is expected to be an initial responder. He stated being an initial responder is not "extraordinary" duty, "it is expected."

At the time of the June 6, 2004, accident, Weed was assigned to the patrol division, D Detachment, Tok, Alaska. His duties involved taking calls for service, including unexpected or unattended deaths, motor vehicle accidents, conducting searches and investigations, domestic violence, etc. Duties of a State Trooper sometimes involve examining and transporting dead bodies. These duties are "reasonably known" to cadets at the Academy. Captain Barrick explained some State

⁵⁸ R. 1170-84.

⁵⁹ See *Weed*, Bd. Dec. No. 13-0154 at 20.

Troopers experience more deaths in their duties, some fewer deaths, and acknowledged he has experienced stress in his line of work. He explained every death circumstance is different and it affects each State Trooper differently. Captain Barrick stated all motor vehicle accidents are different. In Tok, it is not unusual to be the sole responder or the only one on duty. It is "much more likely" to be an initial responder in Tok than in Fairbanks. State Trooper duties include notifying the next-of-kin in death cases, although not all Troopers have had to deliver death notices. State Trooper duties also include dealing with distressed people.

On cross-examination, Captain Barrick acknowledged every person "processes" trauma differently. Although he was trained to use a firearm, he stated some Troopers might never fire their firearm in their career. Captain Barrick agreed the ability to talk about traumatic events is important and an important tool. Weed was in Captain Barrick's detachment in Tok. He knew Weed, but not well. Captain Barrick was in the National Guard and he has "dealt with" vets with "emotional" behavior and has seen changes in personality.⁶⁰

The board found Captain Barrick was credible.⁶¹

Weed testified on his own behalf. As a State Trooper, he handled motor vehicle accidents, though they were never "routine." Just the procedure was routine. After the accident on June 6, 2004, he and Trooper Miller returned to take measurements. He never finished the accident report, Trooper Miller did. He finished work that day and worked the next couple of days. He had trouble doing his job. He was not confident. He stated he does not remember events clearly after the accident. At the time, Weed was seeking treatment from Dr. Schramm, however, he contended the State sent him to Dr. Martino for a second opinion. Weed denied alcohol was a problem at the time, but stated his consumption changed after the accident and became a physical problem because of his dependence. He was hospitalized in Fairbanks as a consequence. Weed

⁶⁰ Hr'g Tr. 83:20–84:5, 84:23–85:5, 85:15–87:1, 87:20–22, 88:9–17, 89:2–90:2, 90:15–91:9, 91:13–92:20, 94:4–95:3, 95:10–96:7, 98:4–21, 102:1–8, 102:15–103:9, 104:8–105:1, 106:13–107:6.

⁶¹ See *Weed*, Bd. Dec. No. 13-0154 at 21.

contended he did not successfully complete the alcohol recovery program. He stated the program was difficult because he was the only law enforcement officer in the facility and he was in the program with rapists, burglars, etc. Weed testified he did not report to work after returning from his trip to Arizona. He explained he found the NANA job on the internet. It involved working two weeks "on," followed by two weeks "off." He worked with 125 officers, including some former State Troopers. Lack of confidence was a problem for Weed. He was not getting treatment at the time. After he met Mrs. Weed, she encouraged him to seek treatment at the Tok Counseling Center; however, Weed contends the doctor there, Dr. Rich Hamilton, said he was not qualified to treat PTSD. He started seeing Dr. Peter once every two weeks, then he sought treatment from Dr. Detwiler. Weed stated he only saw Dr. Detwiler three times. After talking with Dr. Detwiler, he never went back to his job with NANA and was terminated. Weed explained that Tok is limited in terms of employment opportunities. A couple of months after being terminated from NANA, he spoke with a man at the grocery store about a job with "weights and scales," but the job was moved from Tok to Fairbanks. Weed is not looking for work now because he cannot find anything in Tok and he cannot afford to move away from Tok. Weed does not feel like his son and daughter want to have "anything to do with [him]." He stated he does not communicate well, so people think he just does not care. He is apprehensive about going into public and prefers not to.

Weed also stated he has developed diabetes, which causes pain in his legs. He explained he tries to not think about death or drive by the location of the June 6, 2004, accident, but he still has dreams about it. Weed can sleep for an hour-and-a-half at a time, then he is awake for one to three hours trying to get back to sleep. He has thoughts of people harming him and others. He gets startled at times.

On cross-examination, Weed acknowledged that he has not really tried to find work. He did not know if he held an armed security guard license and a commercial driver's license. Weed stated he is not good with computers and is not interested in being trained in computers. When asked if he was interested in a job with Weights and Measures, he replied "no." Weed is not interested in any employment because "his legs

burn so bad” as a result of his diabetes. He was also asked about his drinking. He stated he prefers beer and started drinking liquor after the June 6, 2004, accident. He would drink up to a ½ gallon of vodka daily. When asked about who was working the night of the accident, Weed explained he was working days and Trooper Miller was working nights. He stated his stress was different than Trooper Miller’s because of the different shifts. Weed also explained, when you respond to an accident scene, “you always leave a little bit there, and always take a little with you.” It is a difference, Weed stated, between “being stoic and robotic” versus “a person who has feelings.”⁶²

The board found that Weed’s presentation at hearing was decidedly distinct and unusual. He appeared aloof, staring straight ahead most of the time and avoiding eye contact. Weed appeared to have a difficult time remembering events when testifying.⁶³ The board found that although Weed made certain factual errors during his testimony, such as why he saw Dr. Martino, he was credible.⁶⁴

During his opening statement at hearing, Weed for the first time specified he was seeking TTD benefits from June 10, 2004, to May 8, 2005, a period he referred to as the “gap period.”⁶⁵ However, in his post-hearing brief, his counsel contended Weed was seeking TTD from June 10, 2004, to May 8, 2006.⁶⁶ During its opening statement at hearing, the State asserted an AS 23.30.105 defense to Weed’s claimed period for TTD benefits.⁶⁷ Weed objected to that defense, contending it was not timely raised.⁶⁸ The parties raised other objections at hearing. Weed objected to Dr. Winn’s June 12,

⁶² Hr’g Tr. 118:23–119:16, 124:24–126:4, 126:15–127:5, 127:15–129:14, 132:4–133:21, 134:24–135:2, 142:6–144:24, 145:8–148:19, 151:2-3, 152:5–153:1, 153:14–154:18, 154:19-24, 155:10–156:3, 156:25–158:4, 161:14–162:15, 162:25–163:10, 164:20-23, 168:8-13, 168:17–169:5, 169:10–170:22, 171:9-16, 174:22–175:22, 179:14–182:4.

⁶³ See *Weed*, Bd. Dec. No. 13-0154 at 22.

⁶⁴ *Id.* at 23.

⁶⁵ Hr’g Tr. 10:1–11:4, 15:14-18, 15:24–16:3.

⁶⁶ R. 1144-53.

⁶⁷ Hr’g Tr. 23:21–24:1.

⁶⁸ Hr’g Tr. 33:3-11.

2012, report and entered a “*Smallwood* objection” to it; the State objected to the admission of evidence concerning Weed’s diabetes.⁶⁹

The medical record does not contain evidence Weed has diabetes or evidence his diabetes is related to his employment as a State Trooper.⁷⁰

Each of the prehearing conference summaries list Weed’s September 2011 claim as the sole issue for hearing. The summaries do not contain any references to his diabetes condition.⁷¹

On July 19, 2013, Weed filed a supplemental affidavit of attorney fees and costs in the total amount of \$36,352.93, including \$2,518.54 in “RMBLO costs,” \$627.19 in client costs, and \$33,352.93 in attorney fees. Attorney fees were billed at \$350.00 per hour.⁷²

3. Relevant law.

a. Statutes.

When Weed was injured on June 6, 2004, AS 23.30.010 read as follows:

AS 23.30.010. Coverage.

Compensation is payable under this chapter in respect of disability or death of an employee.

As part of the 2005 amendments to the Alaska Workers’ Compensation Act, AS 23.30.010 was amended to read as follows:

AS 23.30.010. Coverage.

(a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a

⁶⁹ Hr’g Tr. 193:7–194:3, 210:1-7.

⁷⁰ *See Weed*, Bd. Dec. No. 13-0154 at 23.

⁷¹ R. 2784-85, 2789-92, 2805-06, 2809-10.

⁷² R. 1185-93.

demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

(b) Compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer.

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. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.

...

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.

...

AS 23.30.110. Procedure on claims.

...

(c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . .

...

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;
- (2) sufficient notice of the claim has been given;
- (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;

(4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

...

(c) The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress.

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 23.30.135. Procedure before the board.

(a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.

...

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 23.30.155. 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. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating

- (1) that the right of the employee to compensation is controverted;
- (2) the name of the employee;
- (3) the name of the employer;
- (4) the date of the alleged injury or death; and
- (5) the type of compensation and all grounds upon which the right to compensation is controverted.

...

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the

board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.

...

(p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.

...

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. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. 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.

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, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.

. . .

At the time the June 6, 2004, accident occurred, AS 23.30.30.395(10) and (17) provided:⁷³

AS 23.30.395. Definitions.

In this chapter . . .

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

. . .

(17) "injury means accidental injury or death arising out of and in the course of employment, and occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury; . . . "injury" does not include mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer.

⁷³ AS 23.30.395(10) has been renumbered AS 23.30.395(16) and AS 23.30.395(17), with some revision, is now codified in AS 23.30.010(b).

4. *Standard of review.*

Only the board has the power to determine the credibility of witnesses; its findings concerning the weight to be accorded witnesses' testimony, including medical testimony and reports, are conclusive.⁷⁴ The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record. Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion.⁷⁵ 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.⁷⁶ We exercise our independent judgment when reviewing questions of law and procedure.⁷⁷

5. *Discussion.*

a. *The law applicable to Weed's claim.*

Generally, the law applicable to a workers' compensation claim is the law in effect at the time of injury.⁷⁸ On June 6, 2004, the date Weed was injured, AS 23.30.010 read in its entirety: "Compensation is payable under this chapter in respect of disability or death of an employee." However, AS 23.30.120(a), which provides for a presumption of compensability which is ordinarily applicable to workers' compensation claims, "does not apply to a mental injury resulting from work-related stress."⁷⁹

Furthermore, prior to the 2005 amendments to the Alaska Workers' Compensation Act, for a claim to be compensable, the claimant had to demonstrate that

⁷⁴ See AS 23.30.122.

⁷⁵ See, e.g., *Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁷⁶ See *Wasser & Winters Co., Inc. v. Linke*, Alaska Workers' Comp. App. Comm'n Dec. No. 138, 5 (Sept. 7, 2010).

⁷⁷ See AS 23.30.128(b).

⁷⁸ See, e.g., *Seward Marine Services, Inc. v. Anderson*, 643 P.2d 493, 496 (Alaska 1982).

⁷⁹ AS 23.30.120(c).

employment was *a substantial factor* in causing the injury or condition at issue. Subsequent to those amendments, as stated in AS 23.30.010(a): “Compensation or benefits under this chapter are payable . . . if, in relation to other causes, the employment is *the substantial cause* of the disability or death or need for medical treatment.”⁸⁰ Thus, unless a different rule were to apply to Weed in the circumstances of this case, given his date of injury, Weed would be entitled to compensation if employment was a substantial factor in causing his PTSD. However, as it turns out, by statute, a different standard is applicable to claims such as Weed’s.

Relatively recently, the Alaska Supreme Court (supreme court) provided an overview of work-related mental injuries. In *Kelly v. State, Department of Corrections*,⁸¹ the supreme court noted: “Work-related mental injuries have been divided into three groups for purposes of analysis: mental stimulus that causes a physical injury, or “mental-physical” cases; physical injury that causes a mental disorder, or “physical-mental” cases; and mental stimulus that causes a mental disorder, or “mental-mental” cases.”⁸² The board, in both the majority and dissenting opinions,⁸³ concluded that Weed’s claim was a mental-mental claim to which the presumption of compensability did not apply. The commission concurs. The mental stimulus consisted primarily of viewing the deceased child at the accident scene and having to inform the child’s parents of his death. The mental disorder resulting from the incident was the PTSD Weed experienced shortly thereafter.

Nevertheless, under Alaska statutory law in effect in June 2004, the evidentiary showing that had to be made to qualify a mental-mental injury as compensable was as follows:

⁸⁰ Italics added. *See also Pietro v. Unocal Corp.*, 233 P.3d 604, 616 n.31 (Alaska 2010).

⁸¹ 218 P.3d 291 (Alaska 2009).

⁸² *Kelly*, 218 P.3d at 298 (footnote omitted).

⁸³ *See Weed*, Bd. Dec. No. 13-0154 at 41-43 (majority opinion) and at 46-47 (dissenting opinion).

“[I]njury” does not include mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was *the predominant cause* of the mental injury. The amount of work stress shall be measured by actual events.⁸⁴

Based on the foregoing, the commission concludes that, for Weed’s mental-mental claim to be compensable, without the benefit of the presumption of compensability, he had to show by a preponderance of the evidence that his PTSD was 1) extraordinary and unusual in comparison, and 2) was predominantly caused by the work-related incident.⁸⁵

b. Is Weed’s claim for mental injury compensable?

There is no doubt that the pivotal issue in this appeal is whether Weed has proven he suffered a compensable mental-mental injury. This much is clear. The nearly unanimous medical consensus is that Weed suffered PTSD as a result of the June 6, 2004, accident. Drs. Morgan, Martino, Bottone, Bell, Peter, Schramm, Detwiler, Glass, and Early all diagnosed him with PTSD, and most, if not all of these doctors, attributed the PTSD, at least in part, to the June 2004 incident. The lone dissenter was Dr. Winn. Consequently, there was substantial evidence in the record on which the board could base a finding that Weed suffered a mental injury in the form of PTSD. In light of this evidence, the commission concludes that Weed’s employment was the predominant cause of his PTSD.

The remaining question is whether Weed’s work stress was extraordinary and unusual in comparison to that experienced by individuals in a comparable work environment. The board majority noted that although the Act does not define “individuals in a comparable work environment,” it has been interpreted to mean other

⁸⁴ AS 23.30.395(17) as it read when the incident occurred in 2004 (italics added).

⁸⁵ See *Williams v. State, Department of Revenue*, 938 P.2d 1065 at 1071 (Alaska 1997).

employees holding the same position for another employer.”⁸⁶ Thus Weed’s stress should be compared to that experienced by other State Troopers. Continuing its analysis, the majority utilized Captain Barrick’s testimony to conclude that Troopers are expected to be initial responders, and as such, their duties sometimes involve dealing with dead bodies and delivering death notices to next of kin. Because these encounters by Troopers are expected, they are not extraordinary or unusual.⁸⁷

As distinguished from the majority, the dissent concluded that under the relevant guidelines, Weed did experience extraordinary and unusual stress in comparison to that experienced by other Troopers. The dissent reasoned:

[M]erely because other State Troopers, like Captain Barrick, respond to fatal motor vehicle[] accidents and deliver death notices as part of their expected duties does not mean that another State Trooper, like [Weed], cannot suffer a compensable mental injury while performing those same duties. The dissent would focus more on the unique circumstances of the June 6, 2004[,] accident, like in *Kelly*, where it was held a posttraumatic stress disorder claim by a prison guard was not precluded on the basis other prison guards had also experienced death threats.⁸⁸

In *Kelly*, the supreme court stated that the focus of the inquiry whether an incident is “extraordinary and unusual” should be on the character and quality of the event, that is, the inquiry ought to focus on the surrounding circumstances that may be unique to a particular event.⁸⁹ The court noted that the prison guard in that case was alone and unarmed when confronted by a prisoner who had already been convicted of murder.⁹⁰ Similarly, in the dissent’s view, the June 6, 2004, event is comparable. “The circumstances here involved a ten[-]year-old boy who was violently ejected from, and crushed by, a motor vehicle. The boy lay trapped under the vehicle. . . . Ultimately,

⁸⁶ *Williams*, 938 P.2d at 1071-72.

⁸⁷ *See Weed*, Bd. Dec. No. 13-0154 at 41-43 (majority opinion).

⁸⁸ *Id.* at 46 (dissenting opinion).

⁸⁹ *See id.* at 46 (dissenting opinion).

⁹⁰ *See Kelly*, 218 P.3d at 301-2.

[Weed's] efforts [to free him] were unsuccessful and the child was pronounced dead at the scene."⁹¹

The commission agrees with the dissent that, given the character and quality of the June 6, 2004, accident, it is certainly conceivable that Weed could be affected by the event, whereas other State Troopers might not be. A Trooper responding to a motor vehicle accident is neither extraordinary nor unusual; however, responding to one in which the occupants of the vehicles suffer serious injuries or death is another matter; and, responding to an accident involving fatal injuries to a child who could not be freed from the wreckage is potentially devastating. The fact of the matter is that people, Alaska State Troopers included, react differently in different situations. One person may not be affected by a particular event, whereas another may be profoundly affected. It would be presumptuous of the commission to say that Weed's response to the incident should not have had the effect on him that it did, resulting in his having suffered PTSD, yet the evidence amply demonstrates that is what happened.

Again, under Alaska law, one of the elements a claimant is required to show for a mental-mental claim is that the work stress is extraordinary and unusual in comparison to the pressures and tensions experienced by individuals in a comparable work environment. We respectfully disagree with the board majority that the June 2004 accident was not extraordinary and unusual for Weed, nor would it be for other State Troopers. Weed's claim is therefore compensable.

Our conclusion that Weed's claim is compensable has a ripple effect in terms of the disposition of some of the other issues in this appeal. Many of the benefits that were denied him, including medical and transportation benefits, PPI, interest, penalty, and attorney fees and costs, are once again at issue, given our disposition of the compensability issue. On remand, the board should address these issues.

c. Is Weed entitled to TTD?

At hearing, Weed sought TTD benefits from June 10, 2004, to May 8, 2006, the latter date corresponding to when he went to work for NANA on the North Slope. In

⁹¹ See *Weed*, Bd. Dec. No. 13-0154 at 46 (dissenting opinion).

September 2004, Weed reported he had PTSD as a result of the June 6, 2004, accident. AS 23.30.105(a) provides that the right to compensation for disability is barred if a claim is not filed within two years after the employee has knowledge of the nature of the disability and its relation to employment or four years in any event. Weed filed his claim on September 13, 2011, seven years after he was aware of his disability and its relation to employment and three years past the absolute four-year deadline for claims.

However, complicating the inquiry is Weed's assertion that the State waived its defense under AS 23.30.105(a). In rejecting this argument, the board majority pointed out that the State had filed an answer to the claim which 1) noted that TTD benefits were being claimed for an unspecified period of time, and 2) reserved a defense pursuant to AS 23.30.105.⁹² Moreover, consistent with AS 23.30.105(b), once Weed specified the period for which he was seeking TTD benefits at the start of the hearing before the board, the State objected. This objection was placed in the record in the State's opening statement⁹³ "at the first hearing of the claim in which all parties in interest were given reasonable notice and opportunity to be heard."⁹⁴ Weed's arguments against the assertion of this defense, that it is inconsistent with AS 23.30.105(b) and that it was never raised in the answer,⁹⁵ are at odds with the record.

We affirm the board majority's conclusion that Weed was not entitled to TTD benefits.

d. Is Weed entitled to PTD?

The board majority declined to award Weed benefits for permanent total disability because he had not suffered a compensable injury and he was not disabled.⁹⁶ The dissent concurred in part, pointing out that 1) Weed's departure from his

⁹² See *Weed*, Bd. Dec. No. 13-0154 at 40-41 (majority opinion).

⁹³ Hr'g Tr. 23:15-24:1.

⁹⁴ AS 23.30.105(b).

⁹⁵ Appellant Br. at 10.

⁹⁶ See *Weed*, Bd. Dec. No. 13-0154 at 43 (majority opinion).

subsequent employment on the North Slope as a security guard was unexplained; and 2) an employee is required to prove his or her loss of earnings was due to a work-related injury and resultant disability, not a voluntary retirement.⁹⁷ As we have eliminated the compensability of Weed's mental injury as a basis for denying him benefits, the sole ground on which the board could deny him PTD benefits, in our view, was that Weed was not disabled. Although the majority opinion did not elaborate on its reasoning in this respect, the dissent cited two Alaska cases, one from the supreme court and one from this commission,⁹⁸ for the proposition that, when Weed voluntarily removed himself from the labor force, his inability to earn wages was not attributable to a disability, therefore he was not disabled. While the evidence presented to the board at hearing in this regard was not extensive, the commission concludes that it was nevertheless substantial, thus supporting the board's findings.

We affirm the board's decision that Weed is not entitled to PTD benefits.

e. Is Weed's diabetes relevant to the PTD determination?

Weed argued that evidence of his diabetes should have been admitted and taken into account in deciding whether he was PTD. As authority, he cites a supreme court case in which it was held that work-related and non-work-related factors in combination can be considered in determining whether a claimant is PTD.⁹⁹ This argument would have some traction if it were not for the fact that the board had decided that Weed was not disabled, for a reason other than a medical one. The board found that Weed had voluntarily left the labor force, in which case it is irrelevant whether Weed's diabetes is considered when making the PTD determination. Consequently, we affirm the board's exclusion of evidence of Weed's diabetes.

⁹⁷ See *Weed*, Bd. Dec. No. 13-0154 at 50 (dissenting opinion).

⁹⁸ See *id.* at 50 (dissenting opinion) citing *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264 (Alaska 1974) and *Strong v. Chugach Elec. Ass'n, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 128 (Feb. 12, 2010).

⁹⁹ See *Providence Washington, Inc. v. Fish*, 581 P.2d 680 (Alaska 1978).

f. Should Dr. Winn's report have been admitted?

Finally, Weed argues that Dr. Winn's report should not have been admitted. Considering the extensive medical evidence from numerous providers and evaluators that Weed's PTSD was the result of the June 6, 2004, accident, Dr. Winn's contrary opinion is of little evidentiary value and its admission into evidence was harmless error.

6. Conclusion.

The commission REVERSES the board majority's decision in part, AFFIRMS the decision in part, and REMANDS this matter to the board for further proceedings consistent with this decision.

Date: 13 November 2014 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Laurence Keyes, Chair

This is a final decision on the merits of this appeal as to the appeals commission's affirmation of the board's decision in part. This is a non-final decision as to the appeals commission's remand of the matter in part to the board. The final decision portion of this decision becomes effective when distributed (mailed) unless proceedings to 1) reconsider the final decision portion are instituted (started), pursuant to AS 23.30.128(f) and 8 AAC 57.230, or 2) unless proceedings to appeal the final decision portion to the Alaska Supreme Court, pursuant to AS 23.30.129(a) are instituted. See Reconsideration and Appeal Procedures sections below.

The non-final portion of this decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted. See Petition for Review section below.

To see the date of distribution look at the box below.

RECONSIDERATION

A party may request the commission to reconsider this decision as to the final decision portion by filing a motion for reconsideration. AS 23.30.128(e) and 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 (mailed) to the parties. If a request for reconsideration of a final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

APPEAL PROCEDURES

The commission's final decision portion becomes effective when distributed unless proceedings to appeal to the Alaska Supreme Court are instituted (started). 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 distributed¹⁰⁰ 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 and the workers' compensation board are not parties.

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/>

¹⁰⁰ A party has 30 days after the distribution of a final decision of the commission to file an appeal with 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:

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.

PETITION FOR REVIEW PROCEDURES

A party may petition the Alaska Supreme Court for review of that portion of the commission’s decision that is non-final. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.¹⁰¹

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition the Alaska Supreme Court for review, 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:

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I certify that this is a full and correct copy of Final Decision No. 204, issued in the matter of *Randy A. Weed vs. State of Alaska, Department of Public Safety*, AWCAC Appeal No. 13-026, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on November 13, 2014.

Date: November 14, 2014



Signed

K. Morrison, Appeals Commission Clerk

¹⁰¹ A party has 10 days after the distribution of a non-final decision of the commission to file a petition for review with the Alaska Supreme Court. If the commission’s decision was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c). See n.238 for Rule of Appellate Procedure 502(c).