

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

PHYLLIS L. PETTIGREW, )  
Employee, )  
Claimant, ) FINAL DECISION AND ORDER  
v. )  
AWCB Case No. 201418096  
STATE OF ALASKA, )  
Self-Insured Employer, ) AWCB Decision No. 16-0058  
Defendant. ) Filed with AWCB Anchorage, Alaska  
on July 15, 2016  
\_\_\_\_\_ )

Phyllis Pettigrew's January 7, 2016 claim was heard on June 28, 2016 in Anchorage, Alaska. This hearing date was selected on May 10, 2016. Ms. Pettigrew (Employee) appeared, represented herself, and testified. Assistant Attorney General Jayme Keller appeared and represented the State Of Alaska (Employer). The record closed at the hearing's conclusion on June 28, 2016.

## ISSUE

Employee contends her October 30, 2014 work injury remains the substantial cause of her disability and need for medical treatment. Consequently, she maintains she is entitled to further temporary total disability (TTD) benefits and medical and transportation costs. She also asserts she is entitled to reemployment benefits. Employer contends Employee is not entitled to further benefits because her doctors have stated the work injury is no longer the substantial cause of her disability or need for medical treatment.

***Is the work injury the substantial cause of Employee's disability or need for medical treatment, and, if so, to what benefits is Employee entitled?***

FINDINGS OF FACT

The following facts and factual conclusions are undisputed or established by a preponderance of the evidence:

1. Employee worked seven twelve-hour shifts followed by seven days off as a nurse with the State of Alaska Department of Corrections. (Employee).
2. In 2010, Employee had reported joint pain, particularly knee pain, to her doctors. It was determined to be the result of medication and disappeared when her medication was changed. (Alaska Alternative Medicine Clinic, Chart Notes, November 16 and December 8, 2010).
3. On October 30, 2014, she tripped on the sidewalk at the Palmer Correctional Center and fell. She originally reported that she had injured her left knee, left hand, and right wrist. (First Report of Injury, November 3, 2014; Employee).
4. On November 3, 2014, Employee went to Mat-Su Regional Urgent Care where she was seen by Scott Peterson, PA-C. PA-C Peterson noted that Employee reported right knee pain for several months after a fall, and the recent fall at work worsened her symptoms. X-rays revealed mild degenerative changes, but no fractures, dislocations, or other abnormalities. PA-C Peterson restricted Employee from work until November 10, 2014. (Mat-Su Regional Urgent Care, Progress Note, Work Release, November 3, 2014).
5. Employee testified PA-C Peterson erred in stating she had right knee pain for several months. She explained that a month or so earlier, she hurt her knee when she stepped into a hole while mowing the yard. The pain resolved within three days, and she had no pain until the fall at work. (Employee). There is no indication in Employee's medical records that she sought treatment for or mentioned the knee pain to a provider at the time it happened. (Observation).
6. On November 5, 2011, an MRI of Employee's right knee revealed some degenerative changes, including a tear of the medial meniscus, but did not show an acute abnormality. (Mat-Su Regional Medical Center, MRI Report, November 5, 2014).
7. On November 12, 2014, Employee was seen by PA-C Brianna Nye at Denali Orthopedic Surgery. Employee reported continued pain, swelling, and some "popping" in her right knee. PA-C Nye reviewed the x-rays and MRI, examined Employee's knee. While the knee was tender, she found no swelling, effusion, erythema, or deformity. PA-C Nye diagnosed right knee pain due to degenerative joint disease, referred Employee to physical therapy, and

- restricted her from work for two weeks. (Denali Orthopedic Surgery, Chart Note, November 12, 2014).
8. On November 24, 2014, PA-C Nye released Employee to limited work. Employee was limited to desk work for reduced hours with no standing or “up/down.” (Certification of Health Care Provider, November 24, 2014).
  9. On December 22, 2014, Employee returned to PA-C Nye. Despite the physical therapy, Employee’s knee pain continued and she had back pain as well. Employee reported she had never had back problems prior to the fall and believed the fall was severe enough that it could have affected her back. PA-C Nye determined the back pain could be related to the work injury and referred Employee to Alaska Spine Institute. (Denali Orthopedic Surgery, Chart Note, December 22, 2014).
  10. On December 30, 2014, Employee was seen by Michael Gevaert, M.D., at Alaska Spine Institute. Employee reported to Dr. Gevaert that she had pain in her right hip, and thigh, and numbness in her right leg after walking, but she did not have back pain. Dr. Gevaert ordered a lumbar MRI to rule out neurogenic claudication. (Dr. Gevaert, Chart Note, December 30, 2014).
  11. A January 5, 2015 MRI revealed disc degeneration at levels L2 through L5, with some disc protrusion at the L5 level, but no obvious nerve root compression. (University Imaging Center, MRI Report, January 5, 2015).
  12. On February 6, 2015, Dr. Gevaert performed an epidural steroid injection at the L5-S1 level. (Alaska Spine Institute Surgery Center, Procedure Report, February 6, 2015).
  13. Employee returned to Dr. Gevaert on February 13, 2015 and reported only limited, short-term relief from the epidural steroid injection. Dr. Gevaert recommended Employee continue physical therapy and pain medication. He opined she would be unable to work for two months. (Dr. Gevaert, Chart Note, February 13, 2016).
  14. On February 19, 2015, PA-C Nye determined that, as to her right knee, Employee did not require further time off due to her knee, but should continue physical therapy. Employee was to follow up with Dr. Gevaert. (Denali Orthopedic Surgery, Chart Note, February 19, 2015).
  15. On March 4, 2015, Employee was seen by PA-C Michael Dyches on referral from Dr. Gevaert. PA-C Dyches examined Employee and reviewed the radiology reports, He recommended repeat epidural steroid injections, continued physical therapy, and a trial return

to work with restrictions. She was to follow up with Mark Flanum, M.D. (Orthopedic Physicians Anchorage, Chart Note, March 4, 2015).

16. On April 15, 2015, Employee was seen by Dr. Flanum who recommended nonoperative treatment and weight loss as well as continued physical therapy. Dr. Flanum referred Employee to AA Spine & Pain Center. (Orthopedic Physicians Anchorage, Chart Note and Referral Slip, April 15, 2015).
17. On April 28, 2015, Employee was seen by Luke Liu, M.D., at AA Spine & Pain Center. Dr. Liu ordered piriformis and femoral nerve blocks. (AA Spine & Pain Center, Chart Note, April 28, 2015).
18. On June 9, 2015, Employee was seen by Douglas Bald, M.D. for an employer's medical evaluation (EME). Dr. Bald concluded Employee suffered a contusion or strain of her right knee as a result of the injury at work which was the substantial cause of her need for medical treatment until February 19, 2015. He opined she did not need further treatment for her knee and was capable of returning to work, although not necessarily in the corrections system. He concluded the October 30, 2014 fall did not contribute to Employee's low back symptoms. Rather, the cause of Employee's back condition was a congenital abnormality and moderately severe degenerative disc disease. (Dr. Bald, EME Report, June 9, 2015).
19. On June 29, 2015, Employer controverted all benefits based on Dr. Bald's report. (Controversion Notice, June 26, 2015).
20. On August 18, 2015, Dr. Liu agreed with Dr. Bald that Employee would not have a permanent impairment as a result of the work injury. (Dr. Liu, Response to Reemployment Specialist Inquiry, August 18, 2015).
21. On September 1, 2015, the reemployment benefits administrator designee determined Employee was ineligible for reemployment benefits based on Dr. Liu's prediction she would have the physical capacities to perform her job at the time of injury. The copy of the determination letter sent to Employee was returned as "unclaimed," and the letter was mailed again on November 25, 2015. (Eligibility Determination Letter with Annotations, September 1, 2015).
22. On October 14, 2015, Dr. Liu released Employee to work with instructions to avoid running, bending, overhead reaching, and lifting more than 25 pounds. (AA Spine & Pain Center, Chart Note, April 28, 2015).

23. On January 8, 2016, Employee filed a claim seeking ongoing TTD and medical benefits and review of the reemployment eligibility determination. (Claim, January 7, 2016).
24. On February 26, 2016, Dr. Gevaert responded to questions from Employer's attorney. He stated Employee had suffered a lumbar strain/sprain as a result of the October 30, 2014 injury, that she became medically stable on March 21, 2015, needed no further treatment for the work injury, and the injury was not the substantial cause of her current need for treatment. (Dr. Gevaert Responses to Employer Letter, February 26, 2016).
25. On March 2, 2016, Dr. Flanum responded to similar requests from Employer's attorney. Dr. Flanum stated Employee incurred a lumbar strain as a result of the work injury, became medically stable six weeks after the injury, needed no further treatment for the work injury, and the injury was not the substantial cause of her current need for treatment. (Dr. Flanum Responses to Employer Letter, March 2, 2016).
26. Employee testified that prior to the October 30, 2014 fall, she had no low back pain; the pain began shortly after the fall and continues. The injections by Dr. Liu helped, but Employer controverted further benefits before she could obtain additional injections. She still had significant back and right leg pain at the time of the hearing. Employee stated she had been a nurse for thirty years, and explained that misunderstandings or errors in charting, such as PA-C Peterson's statement that she had experienced knee pain for several months after an earlier fall, continued to influence later providers. She questioned Dr. Gevaert's and Dr. Flanum's 2016 opinions as to whether the injury was the cause of her current need for treatment as they had not seen her for over a year. (Employee).
27. Employee's testimony was credible. (Observation).

#### PRINCIPLES OF LAW

**AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

.....

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

**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 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.

**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 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. . . .

**AS 23.30.120. Presumptions.**

- (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
- (1) the claim comes within the provisions of this chapter . . .

Under AS 23.30.120, benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce "some" "minimal" relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Kramer* at 473-74, quoting *Smallwood* at 316. To rebut the presumption, an employer must present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment or (2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, OP. No. 7111 (Alaska June 17, 2016). "Substantial evidence" is

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381. At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

The timing of the onset of pain relative to an injury may be evidence of causation, but as the Supreme Court recently reiterated in *Buchinsky v. The Arc of Anchorage*, Memorandum Opinion No. 1585 (Alaska May 25, 2016), continuing pain following a work injury does not invariably lead to the conclusion that the work injury caused the pain.

**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 23.30.395. Definitions.**

In this chapter,

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



The Alaska Supreme Court has held that disability depends on earning capacity: The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 105 (Alaska 1990) (citations omitted). Additionally, once established disability and need for medical benefits are presumed to continue. *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 672 (Alaska 1991); *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665 (Alaska 1991).

#### ANALYSIS

***Is the work injury the substantial cause of Employee's disability or need for medical treatment, and, if so, to what benefits is Employee entitled?***

Employer acknowledges Employee was injured at work; it accepted the claim and paid medical and disability benefits until the June 29, 2015 controversion. Consequently, the issue becomes whether the work injury remains the substantial cause of Employee's disability or need for medical treatment after June 29, 2015.

To attach the presumption, an employee must first establish a preliminary link between his or her injury and the employment. The preliminary link requires only some relevant evidence. In some cases, it is within a lay person's experience whether a particular mechanism of injury might cause a specific condition. In more complex medical cases, medical evidence may be needed to establish the link. In determining whether the presumption is met, credibility is not considered nor is the evidence weighed against competing evidence.

Whether the October 30, 2014, injury remains the substantial cause of Employee's disability or need for medical treatment after June 29, 2015, is a complex issue requiring medical evidence. Here, it is undisputed Employee fell at work. Employee successfully raised the presumption through her testimony that her knee and low back pain began at the time of the injury as well as the opinions of Drs. Bald, Fl anum, and Liu that Employee was injured as a result of the fall.

To rebut the presumption, an employer is required to present substantial evidence that either something other than work was the substantial cause of the disability or need for medical treatment or that work could not have caused the disability or need for medical treatment. Again, credibility is not considered nor is the evidence weighed against competing evidence at this step. Employer successfully rebutted the presumption through the opinions of Drs. Bald, Flanum, and Liu that the work injury was no longer the substantial cause of Employee's disability or need for medical treatment by June 29, 2015.

Because Employer successfully rebutted the presumption, Employee needed to prove by a preponderance of the evidence that the work injury remained the substantial cause of her disability or need for medical treatment after June 29, 2015. She did not do so.

As a nurse for 30 years, Employee has more medical knowledge than a typical employee. Consequently, her opinions on medical matters are given more weight than would be accorded the opinions of a typical employee. As Employee notes, the medical records show no low back problems prior to the injury and only one minor incident causing knee pain for a few days, yet after the injury she has had continued significant pain. While the timing of the onset of the pain suggests the work injury was the cause, as the Supreme Court stated in *Buchinsky* that does not invariably lead to the conclusion that the work injury caused the pain. For that reason, the opinions of Drs. Bald, Flanum, and Liu are given the most weight.

As to Employee's right knee, Dr. Bald concluded Employee had suffered a contusion or strain which was the substantial cause of her disability and need for medical treatment until February 19, 2015. As to Employee's low back, Dr. Flanum concluded Employee suffered a lumbar strain as a result of the October 30, 2014 work injury, and was medically stable and needed no further treatment six weeks later, or by December 11, 2014. Dr. Gevaert concluded Employee suffered a strain or sprain as a result of the injury but was medically stable by March 2015 and needed no further treatment. All three of the doctors determined Employee was medically stable and needed no further treatment for the work injury well before Employer's June 29, 2015 controversion. While Drs. Gevaert and Flanum did not render their opinions until about a year after they had last seen Employee, the timing does not detract from their diagnoses and dates of medical stability. The

preponderance of the evidence is that Employee was medically stable and needed no further treatment after June 29, 2015. Consequently, the October 30, 2014 work injury was no longer the substantial cause of her disability or need for medical treatment after that date. Employee's claim will be denied.

CONCLUSION OF LAW

The work injury is not the substantial cause of Employee's disability or need for medical treatment after June 29, 2015, and Employee is not entitled to further benefits.

ORDER

Employee's January 7, 2016 claim is denied.

Dated in Anchorage, Alaska on July 15, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/

\_\_\_\_\_  
Ronald P. Ringel, Designated Chair

/s/

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Pamela Cline, Member

/s/

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David Ellis, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of PHYLLIS L. PETTIGREW, employee / claimant; v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201418096; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on July 15, 2016.

/s/

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Nenita Farmer, Office Assistant