# ALASKA WORKERS' COMPENSATION BOARD

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

| | | |
|---|---|---|
| SABAJET LENA,<br>Employee,<br>Claimant, | ) | FINAL DECISION AND ORDER |
| v. | ) | AWCB Case No. 201506641 |
| FRED MEYER STORES,<br>Self-Insured Employer,<br>Defendant. | ) | AWCB Decision No. 16-0135<br>Filed with AWCB Anchorage, Alaska on December 30, 2016 |

Sabajet Lena's August 10, 2015 claim was heard on December 7, 2016 in Anchorage, Alaska. This hearing date was selected on August 19, 2016. Attorney Keenan Powell appeared and represented Sabajet Lena (Employee) who testified on her own behalf. Attorney Vicki Paddock appeared and represented Fred Meyer Stores (Employer). Laura Spirlin and Anthony Gurule testified as witnesses. The record closed at the hearing's conclusion on December 7, 2016.

## ISSUES

Employee contends her work for Employer was the substantial cause of her disability and need for medical treatment. She also contends she timely reported the injury to Employer. Employer contends the substantial cause of Employee's disability and need for medical treatment is her preexisting condition, not her work for Employer. Employer also contends Employee did not timely report her injury.

***1. Did Employee timely report the injury to Employer?***

***2. Was her work for Employer the substantial cause of Employee's disability and need for medical treatment?***

Employee contends her attorney provided valuable legal services in securing her benefits, and she is entitled to attorney fees. Employer contends Employee is not entitled to additional benefits, and, consequently, is not entitled to attorney fees.

***3. Is Employee entitled to an award of attorney fees and costs, and, if so, in what amount?***

## FINDINGS OF FACT

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

1. Employee was hired by Employer in November 2008, and began working in Employer's deli department. The job required standing and walking for the entire eight hour shift, except for two 15 minute breaks. (Employee).
2. Laura Spirlin, Employer's corporate safety manager, explained Employer has long had a safety policy for employee footwear, but the specific requirements vary by department. Deli employees must have slip resistant soles, and Employer provided three options. First, Employees could use "CrewGuards," which are slip-on overshoes that employees can wear over their regular shoes. Employer provided CrewGuards at no cost to employees. Second, employees could purchase slip resistant shoes from Shoes for Crews, with the price of the shoes being deducted from the employee's paychecks. Third, employees could purchase slip resistant shoes from SRmax. (Spirlin).
3. Employee initially used the CrewGuards, but sometimes had problems with them coming off because not all sizes were always available. Although the exact date is unclear, about May 2014, Employee purchased a pair of slip resistant shoes from Shoes for Crews, and the price of the shoes was deducted from her pay. (Employee).
4. About June 11, 2014, Employee began experiencing pain in her right foot. She took ibuprofen hoping the pain would go away. (Employee; Employee Deposition).
5. On June 25, 2014, Employee went to First Care Medical Centers reporting pain in the second toe and ball of her right foot. An x-ray showed no fractures or arthritic changes. She was prescribed Motrin, taken off work for ten days, and referred to Carol LaRose, DPM. (First Care Chart Notes, June 25, 2014).

6. Employee was seen by Dr. LaRose on July 16, 2014. Employee reported continued pain, and was particularly painful over the second metatarsal head. Although an x-ray showed no visible fracture, Dr. LaRose did not rule out a stress fracture affecting the intermetatarsal nerve. She prescribed a cast-boot, and released employee to work with the restriction she be able to sit occasionally. (Alliance Foot & Ankle, Chart Note, July 16, 2014).
7. On July 24, 2014, Employee returned to Dr. LaRose who noted she was still very tender. Employee brought her work shoes to the exam. Dr. LaRose examined the shoes, noting they were extremely flexible in the MPJs" (metatarsophalangeal joints), and stated "I could see how these would aggravate any neuroma or metatarsalgia." Dr. LaRose gave Employee an injection at the second interspace and restricted her from work until September 24, 2014. (Alliance Foot & Ankle, Chart Note and Excused Absence Form, July 24, 2014).
8. Employee continued to be seen by Dr. LaRose. Employee reported she was able to walk after the injection, but still had pain. Dr. LaRose examined stiff-soled shoes that Employee had brought in, and recommended she try them at home. (Alliance Foot & Ankle, Chart Notes, August 4, August 14, and August 27, 2014).
9. On August 27, 2014, Dr. LaRose completed a short-term disability checklist provided by Employer. In response to a question as to why Employee was unable to perform her job duties, Dr. LaRose stated "Patient had severe foot pain due to inappropriate shoes," but Employee "should be able to work with good supportive, stiff-soled shoes." (Kroger, Disability Checklist, August 27, 2014).
10. Dr. LaRose released Employee to work on September 9, 2014, with the restriction that she needed to wear a custom shoe or cast while working and she could not work on greasy floors. (Alliance Foot & Ankle, Release to Work Form, September 8, 2014).
11. Dr. LaRose on July 15, 2014. Employee reported continued pain in her foot that became worse when she worked in the deli. She stated that Employer would accommodate her for two or three days, and then she would be reassigned to the deli, and her pain would increase. Dr. LaRose diagnosed metatarsalgia to the second metatarsophalangeal joint aggravated with activity, but noted the problem was better with orthotics and the shoes Employee was presently wearing. It is unclear what shoes Employee was wearing, but Dr. LaRose recommended she continue with thicker soles. (Alliance Foot & Ankle, Chart Note, July 15, 2015. Observation).

12. On October 20, 2014, Employee returned to Dr. LaRose with continued tenderness. Employee reported she had been unable to stay off her feet at work. Dr. LaRose took Employee off work for two months. (Alliance Foot & Ankle, Chart Note and Work Restriction, October 20, 2014).
13. On December 10, 2014, Dr. LaRose again released Employee to work, with the restriction that she wear specialty shoes with thick soles. (Alliance Foot & Ankle, Release to Work Form, December 10, 2014).
14. Dr. Larose continued Employee's restricted reduced work hours. (Alliance Foot & Ankle, Release to Work Forms, January 12, 2015 & February 16, 2015).
15. On February 19, 2015, Dr. LaRose completed Employer's form for a disability claim. In the form, she indicated the condition was work-related. (Employer Short-Term Disability Checklist with Dr. LaRose's Response, February 15, 2015).
16. On April 3, 2015, Employee filed a Workers' Compensation Claim seeking temporary total disability (TTD) and temporary partial disability (TPD), permanent partial impairment, medical costs, transportation costs, compensation rate adjustment, penalty, interest, attorney fees and costs, and alleging an unfair or frivolous controversion. (Claim, April 3, 2015).
17. Dr. LaRose prescribed eight to twelve weeks of physical therapy on March 16, 2016. (Physical Therapy Referral, March 16, 2016).
18. On April 24, 2015, Dr. LaRose fitted Employee for custom orthotics and continued her restricted work hours. (Alliance Foot & Ankle, Chart Note and Release to Work Form, April 24, 2015).
19. On July 11, 2015, Employee was seen by Scot A. Youngblood, M.D., for an employer's medical evaluation (EME). Dr. Youngblood stated that wearing soft-soled, non-skid shoes, such as the Shoes for Crews, for one month would not have caused Employee's metatarsalagia or second MTP joint capsulitis. He noted that Employee has worn soft-soled shoes to the evaluation that were very pliable. Dr. Youngblood stated the potential causes of her second toe metatarsophalangeal joint capsulitis were age, genetics, and inherent foot anatomy. In response to a question asking if the work activities aggravated a preexisting condition, Dr. Youngblood replied "Not applicable. No pre-existing condition is identified." He opined Employee was medically stable and needed no further medical treatment. (Dr. Youngblood, EME Report, July 11, 2015).

20. On August 14, 2015, Employer filed a controversion notice denying all benefits. Relying on Dr. Youngblood's EME report, Employer asserted the work activities were not the substantial cause of Employee's need for medical treatment. (Controversion Notice, August 13, 2015).
21. On November 4, 2015, Employee was seen by Jennifer Jansma, DPM, who encouraged Employee to wear wide-toe box shoes with orthotics. Dr. Jansma informed Employee she may need surgery. (Alaska Foot & Ankle Specialists, Chart Note, November 11, 2015).
22. On December 30, 2015, Dr. Jansma wrote a "to whom it may concern" letter on Employee's condition. She explained Employee was being treated for capsulitis with pre-dislocation of the 2nd metatarsophalangeal joint, which could be aggravated by work activities. Dr. Jansma stated that Employee's condition persisted because of her long hours of standing and walking at work. Dr. Jansma stated surgery might be required if conservative treatment was not effective. (Dr. Jansma, Letter, December 30, 2015).
23. On January 25, 2016, Dr. Jansma performed surgery on Employee's foot. (Alaska Foot & Ankle Specialists, Chart Note, January 25, 2016).
24. On February 2, 2016, Dr. Jansma completed a disability insurance form for Employee. In response to a question asking if the condition was work-related, Dr. Jansma said it can be considered an aggravation of symptoms. (MetLife Disability Questionnaire with Dr. Jansma's Responses, February 2, 2016).
25. On April 22, 2016, Dr. Jansma released Employee to restricted work as of May 1, 2016. Employee was to wear a walking boot, and limited to five hours per day. (Alaska Foot & Ankle Specialists, Work Release, April 22, 2016).
26. On June 2, 2016, Employee was seen by Carol Frey, M.D., for a board-ordered second independent medical evaluation (SIME). Dr. Frey diagnosed capsulitis and synovitis at the second MTP, explaining that it was secondary to a long second metatarsal, decreased flexibility of the Achilles, plantar fascia, and a flexible-soled shoe. She attributed 51 percent of the causation to the shoe, and explained that once a person has an inflamed second MTP and irritation of the nerve, prolonged standing, over four hours, could contribute to the problem. Dr. Frey stated Employee's preexisting condition would likely have required treatment at some point, but she estimated the need for treatment was likely accelerated by five years because of the work injury. Dr. Frey also stated that a screw placed during

Employee's surgery might be causing nerve irritation. She concluded that Employee would not be medically stable until the screw had been removed and Employee had recovered from the surgery. (Dr. Frey, SIME Report, June 2, 2016).

27. On August 25, 2016, Dr. Jansma released Employee to restricted work; Employee was to wear a walking boot and was limited to four hours per day. (Alaska Foot & Ankle Specialists, Work Release, August 25, 2016).
28. Dr. Youngblood was deposed on September 27, 2016, and reiterated his previous opinions. He explained that the Shoes for Crews shoes were typically the type of supportive shoe recommended to prevent or treat metatarsalgia. He noted that Employee had come to the evaluation wearing thin-soled flats that did not offer much support. (Dr. Youngblood, Deposition, September 27, 2016).
29. Employee's work in the deli required her to stand and walk for an entire eight-hour shift with the exception of two fifteen minute breaks, and, if they were particularly busy, she might get only one break. She had never had problems with her feet before June 2014. Initially she began taking ibuprofen for the pain, but at the end of one shift she told her manager, Lenita, that she needed to see a doctor for the foot pain. After going to First Care Medical Centers on June 25, 2014, Employee spoke to Pam in human resources and gave her the off-work slip. She gave all of her doctors' reports to her manager in the deli or to the food manager. Later, Steve Dash in human resources gave her the short-term disability forms that Dr. LaRose signed on August 27, 2014. Employee stated that neither Dr. Youngblood nor Dr. Frey examined the Shoes for Crews shoes. (Employee).
30. Employee's testimony regarding the work injury and communications with her supervisor and Employer's human relations department is credible. (Observation, Experience).
31. An examination of the Shoes for Crews shoes showed them to have a thin, firm sole. The shoes were flexible with little if any cushioning or support. (Observation).
32. Anthony Gurule is currently Employer's regional safety manager. Previously, he was food manager which included supervision of the deli in which Employee worked. He explained that Employer's workers can report a work injury to their direct supervisor, other managers, or human resources. At the time of Employee's injury, her direct supervisor in the deli was named Lenita. Employees may also report non-work injuries, and may apply for short-term

disability coverage under MetLife. Mr. Gurule was aware of Employee's foot problems, but did not begin working in that store until August 2014. (Gurule).

33. On October 13, 2016, Employee filed an affidavit of attorney fees itemizing $18,040.50 in fees and $667.19 in costs. At the December 7, 2016 hearing, Employee's attorney represented she had incurred an additional $4,080.00 between the date the affidavit was filed and the hearing, plus 3.8 hours at $400.00 per hour ($1,520.00) for the day of the hearing, for total fees of $23,640.50 and costs of $667.19.

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.

In *City and Borough of Juneau v. Olsen*, AWCAC Decision No. 11-0185 (August 21, 2013), the commission explained the application of "the substantial cause" in cases where a work injury aggravates, accelerates or combines with a preexisting condition. When an employee asserts a work injury caused the aggravation or acceleration of a preexisting condition, the board must evaluate the relative contribution of both the preexisting condition and the work injury. To establish causation, the employee must show the work injury played a greater role in the disability or need for medical treatment than did the preexisting injury. *Olsen, 17-18.* When an employee asserts his disability or need for medical treatment arose as a result of a combination of his work injury and a preexisting condition, the employee must establish two additional facts to prevail, first, that the disability or need for treatment would not have happened "but for" the work injury, and second that reasonable persons would regard the work injury as the substantial cause of the disability or need for medical treatment. *Olsen, 18-19.*

> **AS 23.30.100. Notice of injury or death.**
> (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.
>
> (b) The notice must be in writing, contain the name and address of the employee, a statement of the time, place, nature, and cause of the injury or death, and authority to release records of medical treatment for the injury or death, and be signed by the employee or by a person on behalf of the employee, or, in case of death, by a person claiming to be entitled to compensation for the death or by a person on behalf of that person.
>
> (c) Notice shall be given to the board by delivering it or sending it by mail addressed to the board's office, and to the employer by delivering it to the employer or by sending it by mail addressed to the employer at the employer's last known place of business. If the employer is a partnership, the notice may be given to a partner, or if a corporation, the notice may be given to an agent or officer

> upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.
>
> (d) Failure to give notice does not bar a claim under this chapter
> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
>
> (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
>
> (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

In *Tinker v. Veco*, 913 P.2d 488, 491-92 (Alaska 1996) the Supreme Court explained a failure to give timely written notice be excused under AS 23.30.100(d)(1) if two requirements were met: "first, knowledge of the injury by the employer, in-charge agent, or carrier, and second, a lack of prejudice to the employer or carrier." The court then set out the test for determining whether the employer had been prejudiced:

> we must first ask whether this written notification would have informed Veco of anything about which Tinker had not already told [his supervisors]. If a legally sufficient written notification would have only duplicated the same information Tinker already had communicated verbally to Veco through its in-charge agents, it would require an exceptional set of circumstances for this difference in the form by which the information was conveyed to prejudice the employer. *Id*. at 492.

In *Kolkman v. Greens Creek Mining Co.*, 936 P.2d 150 (Alaska 1997), the employer was aware the employee had a heart attack soon after it happened, but did not know the employee was alleging work was the cause. Supreme Court rejected the proposition that notice to an employer must include notice the injury was work related.

> **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. If the employer can present substantial evidence demonstrating that "a cause other than employment played a greater role in causing the [need for medical treatment], etc., the presumption is rebutted." *Runstrom v. Alaska Native Medical Center,* AWCAC Decision No. 150 (Mar. 25, 2011) at 7. "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, 611-612 (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).

A fundamental principle in workers' compensation law is the "eggshell skull doctrine," which states an employer must take an employee "as he finds him." *Fox v. Alascom, Inc.*, 718 P.2d 977, 982 (Alaska 1986), citing *S.LW, v. Alaska Workmen's Compensation Board*, 490 P.2d 42, 44 (Alaska 1971); *Wilson v. Erickson, All* P.2d 998, 1000 (Alaska 1970). A pre-existing condition does not disqualify a claim if the employment aggravated, accelerated or combined with the pre-existing condition to produce the disability or need for medical treatment for which compensation is sought. Under the Act, there is no distinction between the aggravation of symptoms and the aggravation of the underlying condition. *DeYonge v. NANA/Marriott*, 1 P.3d 90, 96 (Alaska 2000); *Peek v. SKW/Clinton*, 855 P.2d 415, 416 (Alaska 1993).

> **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.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150-51 (Alaska 2007), the Supreme Court explained fee awards under AS 23.30.145(a) and (b):

> Subsection (a) authorizes the Board to award attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim. . . . In contrast, subsection (b) requires an employer to pay reasonable attorney's fees when the employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim.

Subsections (a) and (b) are not mutually exclusive, however.

> Subsection (a) fees may be awarded only when claims are controverted in actuality or fact. Subsection (b) may apply to fee awards in controverted claims, in cases in which the employer does not controvert but otherwise resists, and in other circumstances. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152, at 15 (May 11, 2011) (Citations omitted).

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990).

## ANALYSIS

### *1. Did Employee timely report the injury to Employer?*

Employer contends it was unaware Employee was claiming a work injury until she filed her workers' compensation claim on April 3, 2015. Employee does not contend that she gave Employer written notice of the injury with 30 days as required by AS 23.30.100(a). Rather, she contends she told her manager before she first sought treatment and orally notified her manager and other supervisory personnel shortly after she first sought treatment.

Employee's testimony regarding notice to Employer is credible. When Employee was taken off work for 10 days on June 25, 2016, she gave the off-work slip to the human resources department. Employer argues it did not know the injury was work related until much later.

While Mr. Gurule testified he did not know Employee's injury was work related until she filed her claim, that does not necessarily conflict with Employee's testimony. Mr. Gurule testified that he did not start working at the same store as Employee until August 2014, well after Employee testified she first informed Employer. Consequently Employee's testimony about her initial reporting of the injury is uncontradicted. Additionally, *Kolkman* is clear that notice to an employer need not include notice the injury was work related. Employer had notice Employee was injured on June 25, 2014.

Under *Tinker* failure to give timely written notice can be excused under AS 23.30.100(d)(1) if the employer or its in-charge agents knew of the injury and there was no prejudice to the employer or carrier. Employer offered no evidence as to what it would have learned from the written notice that it did not know from Employee's oral notification. Employer knew of the injury on June 25, 2014, and offered no evidence as to how it was prejudiced by the late written notice. Employee's failure to timely file a written notice of the injury is excused under AS 23.30.100(d)(1).

***2. Was her work for Employer the substantial cause of Employee's disability and need for medical treatment?***

The cause of Employee's disability or need for medical treatment is a factual issue subject to the presumption analysis. A pre-existing condition or disposition does not disqualify a claim if the employment aggravated, accelerated, or combined with the pre-existing condition to produce the disability or need for medical treatment for which compensation is sought. *Fox*; *DeYonge*; *Olsen.*

At the first step of the analysis, Employee was required to show a preliminary link between her metatarsalgia or MTP joint capsulitis and the employment. At this step, credibility is not considered, nor is the evidence weighed against competing evidence. Employee's testimony that she never had foot problems before wearing the Shoes for Crews shoes, together with Dr. Jansma's letter stating the capsulitis could be aggravated by work activities and could persist due to long hours standing and walking at work, and Dr. Frey's opinion that 51 percent of the cause was the flexible soled shoes plus the prolonged standing is sufficient to attach the presumption.

Because Employee raised the presumption, Employer was required to rebut it. Again, credibility is not considered at this step, and the evidence is not weighed against competing evidence. Employer rebutted the presumption through the testimony of EME physician Dr. Youngblood. Dr. Youngblood's opinion that wearing soft-soled non-skid shoes for one month would not have caused the metatarsalgia or MTP joint capsulitis is sufficient to rebut the presumption.

Because Employer rebutted the presumption, Employee must prove by a preponderance of the evidence that the employment was the substantial cause of her disability or need for medical treatment. At this stage, competing evidence is weighed, and credibility is considered.

The least weight is given to Dr. Youngblood's report and testimony. First, he did not examine the Shoes for Crews shoes. His assumptions and characterization of the shoes are inconsistent with the panel's examination of the shoes. In his deposition, Dr. Youngblood referred to the shoes as the "type of supportive shoe" recommended to treat metatarsalgia and that the "thin-soled flats" that Employee wore to the evaluation did not offer much support. However, the examination of the shoes for Crews shoes revealed them to be thin-soled flats that offered very little support. Second, Dr. Youngblood appears to misunderstand the concept of aggravation of a preexisting injury. He stated Employee's disability and need for medical treatment were due to age, genetics, and inherent foot anatomy, inherently preexisting conditions, yet when asked if the work activities aggravated a preexisting condition, he stated there were no preexisting conditions. Additionally, while Dr. Yougblood was asked about aggravation, he was not asked whether the employment accelerated Employee's condition.

Dr. LaRose examined the shoes, noted they were very flexible, and stated they could aggravate any metatarsalgia. Dr. Jansma stated the capsulitis could be aggravated by work activities, and the condition could persist because of long hours standing and walking at work. However, neither Dr. LaRose nor Dr. Jansma weighed the relative contribution of work against other causes. While their observations and testimony are helpful, they do not answer the question of whether work was the substantial cause of Employee's disability or need for medical treatment.

The most weight is given to Dr. Frey's opinion. Dr. Frey noted that while Employee had several conditions that were either preexisting or predisposed her to capsulitis and synovitis, 51 percent of the cause was the flexible-soled shoes. She explained that while Employee may well have required treatment at some point, work accelerated the need for treatment by about five years. The preponderance of the evidence is that Employee's work for Employer was the substantial cause of the aggravation or acceleration of her predisposition or preexisting condition.

***3. Is Employee entitled to an award of attorney fees and costs, and, if so, in what amount?***

Employee seeks attorney fees under either AS 23.30.145(a) or (b). Under AS 23.30.145(a), an employer is required to pay reasonable attorney's fees when the employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes her claim. *Harnish.* When an employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim, fees may be awarded under AS 23.30.145(b). *Id*. However fees may also be awarded under subsection (b) if the employer has controverted benefits. *Uresco.*

Here, Employer controverted all benefits on the grounds work was not the substantial cause of Employee's need for medical treatment. Employee has established that work was the substantial cause of her disability and need for medical treatment, and, consequently, she is entitled to benefits under the Act. Employee is entitled to reasonable attorney fees and costs under either AS 23.30.145(a) or (b), and will be awarded fees under subsection (b). Because Employer did not object to either Employee's attorney's hourly rate or the time expended, Employee will be awarded the requested attorney fees and costs.

## CONCLUSIONS OF LAW

1. Employee timely reported her the injury to Employer.
2. Employee's work for Employer was the substantial cause of her disability and need for medical treatment.
3. Employee is entitled to an award of attorney fees in the amount of $23,640.50 and costs of $667.19.

## ORDER

1. Employee's June 2014 work injury was the substantial cause of her subsequent disability and need for medical treatment.
2. Employer shall pay Employee attorney fees of $23,640.50 and costs of $667.19.
3. Jurisdiction is retained as to Employee's entitlement to specific benefits.

Dated in Anchorage, Alaska on December 30, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Rick Traini, Member

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

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

## APPEAL PROCEDURES

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

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

## RECONSIDERATION

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

## MODIFICATION

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

## CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of SABAJET LENA, employee / claimant; v. FRED MEYER STORES, self-insured employe / defendant; Case No. 201506641; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on December 30, 2016.

/s/
Vera James, Office Assistant I