ALASKA WORKERS' COMPENSATION BOARD

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

TRAVIS L. HALL,	)	
Employee,	)	
Claimant,	)	FINAL DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201119557
	)	
NANA REGIONAL CORP., INC.,	)	AWCB Decision No. 13-0134
	)	
Employer,	)	Filed with AWCB Anchorage, Alaska
	)	on October 24, 2013
and	)	
	)	
	)	
ACE AMERICAN INSURANCE/ESIS,	)	
Insurer,	)	
Defendants.	)	
	)	

Travis L. Hall's January 11, 2012 workers' compensation claim was heard on September 12, 2013 in Anchorage, Alaska, a date selected on June 4, 2013. Attorney Joseph Kalamarides appeared and represented Travis L. Hall (Employee). Attorney Rebecca Holdiman-Miller appeared and represented Nana Regional Corporation, Inc. (Employer) and ACE American Insurance/ESIS (Insurer). Employee appeared and testified on his own behalf, and by previous deposition. Also testifying by deposition was Tamera Davis. Richard Gauntt appeared and testified for Employer. By oral stipulation, the hearing was limited to whether Employee was injured in the course and scope of his employment. The record was held open to receive Employee's supplemental affidavit of attorney fees, and Employer's opposition, if any. The record closed when the board next met on September 24, 2013.

ISSUES

Employee contends he was injured on November 14, 2011, while employed as an Emergency Medical Technician with the Employer-operated Community Service Patrol (CSP), when an inebriated patient stumbled while exiting the CSP van and landed, with a heavy winter boot, on Employee's left foot.

Employer contends Employee was not injured while in its employ and his claim should be dismissed.

1. *Was Employee injured in the course and scope of his employment on November 14, 2011?*

Employee contends he is entitled to an award of attorney fees and costs. Employer contends Employee will not prevail on his claim and therefore he is not entitled to an award of attorney fees and costs.

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

FINDINGS OF FACT

The following findings of fact and factual conclusions, limited to those necessary to address the issues presented, are established by a preponderance of the evidence:

1. On November 14, 2011, Employee was employed as an emergency medical technician I (EMT) with the CSP. Employee's duties included assisting inebriated people in the community by either treatment onsite or transport to the municipal "sleep off" facility. (Hall hearing and deposition testimony).
2. The municipal "sleep-off" center has a number of surveillance cameras positioned inside and outside the facility. One camera focuses on the outside entrance to the facility, its view encompassing the driveway and sidewalk immediately in front of the entrance, and the entrance doorway itself. (Gauntt; Hall; video footage; observation).
3. According to Employee, on November 14, 2011, while assisting an inebriated client from the rear of the CSP van, the client, DB, wearing large winter boots, missed a step while exiting the rear of the van and stumbled, landing on Employee's left foot before falling to the ground. Employee was familiar with DB, having helped him in the past. Employee picked DB up, steadied him and assisted him into the facility. (Hall; *See also* Deposition Transcript (Tr.) 11-12, 24; entryway video footage; observation).

4. When Employee and his partner drove up to the facility with DB on November 14, 2011, another CSP van was parked immediately in front of the facility's entrance. Employee and his driver parked their van behind the first van. As a result, only the front portion of the van in which Employee and DB arrived at the facility is visible in the surveillance video. The rear of the van, from which clients enter and exit, is not visible in the video footage. (Entryway video footage; observation.).
5. Accordingly, DB's stumble from the rear of the van, if it occurred as Employee testified, his landing on Employee's foot, and Employee's stabilizing DB after his fall, are not visible in the video footage. When Employee and DB come into view from the back of the van, Employee is seen assisting DB toward the facility entrance, steadying him before he opens the door, and assisting DB into the facility. Once Employee and DB come into the surveillance camera's view, DB's unsteadiness is apparent. (Entryway video footage; Hall Tr. 24; Gauntt; observation).
6. Once inside the facility, the indoor surveillance video captures Employee and his partner processing DB's admission, emptying his pockets, and administering a breathalyzer test. DB's unsteadiness is evident in this video footage. (Admission area video footage; observation).
7. After processing DB at the admissions counter, Employee and his partner are then seen flanking DB while escorting him to a floor mat in the "sleep-off" area of the facility. DB's unsteadiness remains apparent. (Sleep area video; observation).
8. While escorting Employee to the "sleep-off" mat, Employee is observed at one point distancing his body from DB. This subtle movement is consistent with Employee's deposition and hearing testimony that while escorting DB to the mat, fearing DB would again step on his foot, he quickly pulled away, telling DB "Don't step on my foot again." DB did not step on Employee's foot in the "sleep-off" area. (Sleep area video; observation; Hall hearing testimony; Hall Depo. Tr. 13-14).
9. Within a day or two of this incident, Employee's foot became swollen, red, hot to the touch and painful. (Hall).
10. On November 16, 2011, Employee completed an Employer "Incident Report." In his report, Employee stated "while bringing Mr. [DB] into the transfer station, I was helping DB to a mat and he stepped on top of my foot. The top of my left foot is now swollen and hard to

walk on. A tape has been made of the incident from the cameras in the transfer station, please contact Richard Gauntt. This incident occurred on the 14th of November 2011." Employee's report of injury was timely. (Incident Report, November 16, 2011; AS 23.30.100).

11. Richard Gauntt was Employee's supervisor at the time of injury, and "oversaw the whole operation." He has been the manager of CSP since March, 2006, after 25 years in law enforcement, with 12 years in criminal investigation, followed by security management. (Gauntt).
12. Also on November 16, 2011, Employee was seen by physician's assistant (PA-C) Sharon Sturley at Orthopedic Physicians Anchorage (OPA) "Prompt Access" walk-in clinic. for chief complaint "Left foot pain." PA-C Sturley reported the history of present illness as "This is a 24 year old male who is employed as an EMT working for the City. He was assisting a client on November 14, 2011 who was intoxicated and with big, winter boots stepped back onto his ankle. He has been icing and taking ibuprofen, however, has increasing discomfort. . ." PA-C Sturley noted Employee's orthopedic history as a previous left foot chevron bunionectomy and Akin osteotomy performed in April, 2010 by Eugene Chang, M.D., also of OPA. She indicated "Date of current injury is November 14, 2011. This is a Workmen's Compensation claim." After x-ray, PA-C Sturley assessed "left ankle contusion." Employee was placed in a Cam walker, issued crutches, and instructed to begin attempting weight bearing as tolerated. A light duty work slip was issued, and Employee was instructed to return in 10 days, sooner if problems or questions arose. (Chart notes, OPA, November 14, 17, 2011).
13. On November 17, 2013, Employee returned to OPA reporting his pain much worse, now with significant calf pain. PA-C Sturley ordered venous Doppler, which ruled out deep vein thrombosis (DVT). Employee was to return on November 23, 2011, sooner if necessary. (OPA Patient Chart Report, November 17, 2011; Diagnostic Health General History, Screening, November 17, 2011; L.E. Venous Sonogram Preliminary Findings, November 17, 2011). The OPA "patient report" states Employee's injury began November 14, 2011, and lists "ESIS WEST WC CLAIMS" as the insurance plan name for the reported work injury. (OPA Patient Chart Report).

14. On November 18, 2011, Employee returned to OPA's "Prompt Access" clinic for follow up for left foot and ankle pain. PA-C Sturley noted Employee reporting "extreme pain in the ankle along with swelling, with analgesic earlier provided not helping with pain. Objective examination revealed swollen left foot and ankle, pain with plantar flexion and dorsiflexion, Employee non-weight bearing on the left foot, and "appears extremely uncomfortable." PA-C Sturley ordered a magnetic resonance imaging (MRI) of Employee's left ankle due to clinical history of foot and ankle pain and swelling. Radiologist John McCormick, M.D. reported extensive subcutaneous edema, large joint effusion, with the fluid's etiology undefined. Blood was drawn for pathology testing. (OPA chart note, November 18, 2011; Diagnostic Imaging of Alaska, MRI report, November 18, 2011).
15. On Saturday, November 19, 2011, Employee appeared at the Providence Alaska Medical Center (PAMC) emergency room, reporting pain and swelling to left foot for the past four days. The attending provider assessed "Left foot, swollen, hot to touch, red along sides. Tender to touch, pt unable to tolerate even the slightest touch." Lab results reflected abnormal CBC (comprehensive blood count), and high CRP (C-reactive protein), sedimentation rate and white blood cell count. Employee was given intravenous antibiotic, morphine and anti-nausea injections, and released with prescription antibiotic orally. (Emergency Department Notes, PAMC, Sue Metcalf, RN; lab results November 19, 2011).
16. In a November 21, 2011, telephone call to PA-C Sturley, Employee reported he had not realized relief from the antibiotic, was experiencing increased pain and swelling, and thought he might be running a fever. In consultation with an OPA physician, PA-C Sturley referred Employee to Infectious Disease Specialist, Robert Bundtzen, M.D. (OPA chart note, November 21, 2011).
17. On November 29, 2011, Dr. Bundtzen noted Employee unable to bear weight on left foot without crutches since trauma of November 14, from which he developed a secondary infection. (Dr. Buntzen notes, November 29, 2011).
18. Also on November 29, 2011, Richard Gauntt, Employer's supervisor, and manager of the CSP "sleep-off" center, after reviewing Employee's van log and the facility surveillance video from November 14, 2011, authored a "Memo of Record." In the memo Mr. Gauntt noted Employee was involved in four "drops" of eleven clients during his shift, and "No one

was observed ever stepping on Travis Hall's foot…" (Memo of Record, November 29, 2011).

19. Mr. Gauntt does not believe Employee was injured on the job because the video footage does not show DB stepping on Employee's foot while being escorted to a "sleep-off" mat, and because Employee did not return to work at CSP after being shown video footage from November 14, 2011 which did not reflect DB stepping on Employee's foot. Gauntt conceded that if DB stepped on Employee's foot while exiting the rear of the van, it would not have been visible on CSP's surveillance video given the direction of the video cameras. (Gauntt).
20. On December 7, 2011, Arwen Arnold, Employer's Workers' Compensation Claims Manager, completed a Report of Occupational Injury (ROI). At that time, Employer did not indicate it doubted the validity of Employee's injury. (ROI, December 7, 2011).
21. Employee's physicians continued following him conservatively, but on December 9, 2011, opined he remained totally disabled from work. (OPA Disability Status, December 9, 2011).
22. Employer's first contact with its workers' compensation insurance adjuster concerning Employee's reported injury appears to have occurred on December 8, 2011:

> INTL ("Initial") ER ("Employer") INVEST[IGATION] . . . PC NMS/ARWEN ARNOLD: THE EE ("Employee")WORKS AS AN EMT AT ANCH SAFETY CENTER. HIS DOH ("date of hire") WAS 08/17/11 AND HASN'T WORKED FOR THEM THAT LONG. THE EE BRINGS THE INEBRIATES INTO THE FACILITY, PROCESSES THEM AND THEN TAKES THEM TO THE MATS TO SLEEP IT OFF. THE EE TOLD HIS SUPR. RICHARD GAUNTT, THAT A SPECIFIC CLIENT STEPPED ON HIS LEFT FOOT WHILE HE WAS PLACING THE CLIENT ON HIS MAT. THE SUPR, RICHARD GAUNTT REVIEWED THE SURVEILLANCE VIDEO THEY HAVE AND THERE IS NO INCIDENT OF SOMEONE STEPPING ON THE EE'S FOOT. ARWEN HAS ALSO REVIEWED THE VIDEO AND DID NOT SEE ANYTHING. ARWEN ADVISED THAT RICHARD CONFRONTED THE EE ABOUT THIS AND THE EE TOLD HIM THAT SOMEONE MUST HAVE STEPPED ON HIS FOOT BECAUSE THIS HAPPENED AT WORK. THE EE HAS NOT WORKED THERE LONG ENOUGH FOR HEALTH INSURANCE, THAT MAY BE WHY HE ISWANTING TO CLAIM THIS AS WC. I TOLD ARWEN THAT THE EE TOLD ME THAT HE DID NOT KNOW WHO STEPPED ON HIS FOOT OR WHERE HE WAS WHEN IT OCCURRED. HE JUST REMEMBERS IT HAPPENING WHILE HE WAS TAKING A (sic) INEBRIATED MAN INTO THE BUILDING. ARWEN WILL SEND ME WHAT SHE HAS AND WE WILL DISCUSS THIS FURTHER. SHE ALSO HAS A SIGNED RELEASE FROM THE EE AND HAS REQUESTED MEDICAL RECORDS FROM OPA. ADVISED I WOULD STILL OWE THE EE TTD SINCE I COULD NOT DENY W/IN 14 DAYS SINCE THE CLAIM

> WAS REPORTED SO LATE. ARWEN STATES THAT RICHARD DID NOT REPORT THE CLAIM BECAUSE HE THOUGHT THAT THE EE WOULD DROP IT AFTER HE WAS CONFRONTED W/ THE SURVEILLANCE TAPE, BUT THE EE HAS NOT DROPPED THE CLAIM.

(Adjuster notes).

23. The adjuster's initial contact with Employee concerning his injury also occurred on December 8, 2011. Reporting Employee's statements, the adjuster wrote:

> INJURY OCCURRED THE EVENING OF 11/14/11. HE WAS AT THE TRANSFER STATION (DRUNK TANK). HE STATES THAT THIS IS AN OPEN ROOM, BUT THERE IS A FENCE BETWEEN WHERE THEY PUT THE FEMALE CLIENTS VS THE MALE CLIENTS. HE STATES THAT HE WAS BRINGING SOMEONE INTO THE BUILDING. HE BELIEVES IT WAS A MAN. THE MAN STEPPED ON HIS LEFT FOOT. THIS WAS THE TOP OF HIS LEFT FOOT, CLOSER TO THE ANKLE. HE HAD ON TACTICAL BOOTS, LIKE XTRA TUFF BOOTS, W/A GOOD RUBBER SOLE, BUT NO SUPPORT ON TOP – JUST RUBBER. HE COULD NOT TELL ME EXACTLY WHERE THIS OCCURRED (AS IN RELATION TO THE BUILDING) JUST THAT IT WAS ON HIS WAY INTO THE BUILDING.
>
> . . . HE TOLD RICHARD ABOUT THE INJURY ON 11/16 AND FILLED OUT PAPERWORK. HIS JOB W/ THIS ER IS AN EMT. HE BRINGS INEBRIATES INTO THE TRANSFER STATION SO THEY CAN SLEEP OFF THE ALCOHOL. THEY GET CALLS, GO P/UP THE PEOPLE IN THE VAN, GET THEM OUT OF THE VAN, BRINGS THEM INTO THE STATION AND MONITORS THEM AT THE STATION. WE DISCUSSED WC BENES. HE WILL FAX ME HIS WAGE INFO. I TOLD HIM THAT I WOULD CALL HIM WHEN I REC'D IT AND GO OVER THAT W/ HIM. HE WILL CALL IF HE HAS ANY QUESTIONS.

(*Id.*).

24. On December 12, 2011, Employer filed a Report of Occupational Injury (ROI), Form 07-6101, with the Division of Workers' Compensation for this November 14, 2011 reported injury. (Department of Labor (DOL) Receipted ROI).
25. Employer was required to file a ROI within 10 days from the date it had knowledge of Employee's reported injury, or by November 26, 2011. (AS 23.30.070(a), Employee's Incident Report, November 16, 2011).
26. Employer filed the ROI 17 days late. (Record).

27. On December 16, 2011, Employer paid Employee temporary total disability (TTD) for the period November 16, 2011 through December 20, 2011. (Compensation Report, December 21, 2011).
28. On December 19, 2011, Dr. Chang ordered a bone scan, and recommended Employee's left foot be casted for "3.5-4 weeks," with no weight-bearing. (OPA chart note, December 19, 2011).
29. On December 27, 2011, Employer controverted all benefits, stating:

> The left foot condition did not occur in the course and scope of employment . . . The injured worker advised [Employer] that a client stepped on the top of his left foot at a specific time, date and location. Video does not reflect any incident occuring (sic) to the injured workers' left or right foot, as described by the injured worker, on 11/14/11.

(Controversion Notice, filed December 27, 2011).

30. On January 11, 2012, Dr. Chang removed the cast from Employee's left foot, noted the swelling was "dramatically down," and Employee should gradually increase his activity as tolerated. Dr. Chang released Employee to work with no restrictions. (OPA chart note, Disability Status work release, January 11, 2012).
31. Also on January 11, 2012, Employee filed a workers' compensation claim (WCC or claim) for "traumatic left foot injury; foot pain; foot infection," and seeking TTD, permanent partial impairment (PPI), medical costs incurred and continuing, transportation costs for medical visits, interest on TTD withheld, a reemployment benefits eligibility evaluation, and attorney fees and costs. (WCC, January 11, 2012).
32. On February 21, 2012, Employer answered the claim, disputing all benefits requested, and filed a further Controversion Notice identical to the first. (Controversion Notice, February 21, 2013).
33. On October 2, 2012, Employee made an informal discovery request for all of Employer's surveillance video footage. (Prehearing conference summary, December 27, 2012).
34. On November 21, 2012, Employee filed a petition to compel Employer to respond to Employee's October 2, 2012 informal discovery request. (Petition to Compel, November 21, 2012).
35. On December 11, 2012, Employer opposed the petition to compel. (Opposition, December 11, 2012).

36. Employee filed an affidavit of readiness for hearing (ARH) on its petition to compel on January 30, 2013, and Employer opposed on February 8, 2013. (ARH, Opposition). The matter was set for hearing on July 23, 2013. (Prehearing Conference Summary, June 4, 2013).
37. On June 24, 2013, Employer produced viewable copies of the November 14, 2011 surveillance video footage. (Letter from Holdiman-Miller to Kalamarides, June 24, 2013).
38. On July 2, 2013, the parties stipulated Employer had complied with Employee's informal discovery request, and agreed the hearing on the petition to compel its production should be cancelled. (Stipulation, July 2, 2013).
39. Employee seeks an award of attorney fees at $350.00 per hour, and paralegal fees at $150.00 per hour, through September 12, 2013, in the amount of $9,393.00. Costs incurred and for which reimbursement is sought total $23.14. (Affidavits of counsel and Mr. Johnson).
40. Employer did not dispute Employee counsel's hourly rate or the time expended, the paralegal's hourly rate or time expended, or any of the claimed costs. (Record).

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;
>
> 2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
>
> 3) this chapter may not be construed by the courts in favor of a party;
>
> 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).

AS 23.30.010. Coverage.
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 23.30.045. Employer's liability for compensation.
(a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 - 23.30.215….

AS 23.30.070. Report of injury to division. (a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall send to the division a report setting out

(1) the name, address, and business of the employer;

(2) the name, address, and occupation of the employee;

(3) the cause and nature of the alleged injury or death;

(4) the year, month, day, and hour when and the particular locality where the alleged injury or death occurred; and

(5) the other information that the division may require.

. . .

(f) An employer who fails or refuses to send a report required of the employer by this section or who fails or refuses to send the report required by (a) of this section

> within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.

AS 23.30.070(f) provides a civil penalty for an employer's failure to report injuries, punishing employers for impeding employees' ability to pursue claims, and "(to some degree)" compensating employee's for the delay and hardship the delay causes. An employer's failure to timely report an injury is an integral part of its resistance to an employee's claim. *Nickels v. Napolilli*, AWCB Decision No. 02-0055 (March 28, 2002).

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(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute. *Carter,* 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V*., 818 P.2d 669, 675 (Alaska 1991).

Application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment, by producing "some, "minimal" relevant evidence. *See, e.g., Cheeks v. Wismer & Becker/G.S. Atkinson, J.V*., 742 P.2d 239, 244 (Alaska 1987); *Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

If the employee establishes the preliminary link, then "if the employer can present substantial evidence that demonstrates 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." *Fireman's Fund Am. Ins. Companies v. Gomes*, 544 P.2d 1013, 1015 (Alaska 1976). Because the employer's evidence is considered by itself and not weighed at this step, credibility is not examined at this stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

If the presumption is raised and not rebutted, the claimant need produce no further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Runstrom* at 8.

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g.*, *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005). The board has the sole discretion to determine the weight of the medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision No. 087 (August 25, 2008) at 11.

> **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.

Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* In this latter scenario, reasonable fees may be awarded. *Id.* at 152-153.

In determining a reasonable fee under AS 23.30.145(b), the board is required to consider the contingent nature of the work for an employee in workers' compensation cases, the nature, length and complexity of the services performed, the resistance of the employer or carrier, and the benefits resulting from the services performed, *Wise Mech. Contractors v, Bignell*, 718 P.2d 971, 973, 975 (Alaska 1986).

ANALYSIS

3. Was Employee injured in the course and scope of his employment on November 14, 2011?

This is a factual question to which the presumption analysis applies. The first step of the presumption analysis requires an employee to establish some causal link between the employment and his disability or need for medical care. The preliminary link requires only

"some" or "minimal" relevant evidence. In determining whether the presumption is met, credibility is not considered nor is the evidence weighed against competing evidence.

Employee raised the presumption his injury occurred at work through his testimony that on November 14, 2011, an inebriated client, DB, stepped on his foot while he was assisting DB from the CSP van to a sleeping mat in the "sleep-off" facility. The presumption is further supported by the objective pain and swelling PA-C Sturley noted in Employee's left foot on November 16, 2011, injuries consistent with Employee's description of the time and mechanism of injury.

To rebut the presumption, Employer is required to present substantial evidence demonstrating that a cause other than employment played a greater role in causing Employee's disability and need for medical treatment. Again, credibility is not considered nor is the evidence weighed at this step. Employer has failed to rebut the presumption of compensability by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

None of Employer's reasons for denying coverage are supported by or constitute substantial evidence. That the reported injury is not visible on Employer's surveillance video is not persuasive evidence the injury did not occur at work where Employer's surveillance camera coverage is limited. By Mr. Gauntt's admission, the surveillance cameras did not include a wide enough area at the facility's entrance to capture the rear of the CSP van where the injury occurred.

Employer's narrow reading of Employee's initial incident report, to maintain that since DB did not step on Employee's foot at "the mat" he did not step on his foot at all, is unreasonable and unconvincing. In his initial incident report Employee wrote: "<u>While bringing Mr. [DB] into the transfer station</u> . . . I was helping [DB] to a mat and he stepped on the top of my foot." Employee's report is consistent with knowledge his foot was injured on November 14, 2011, while he was assisting DB, a client with whom he was familiar. Employer's insurance adjuster, in her first interview with Employee on December 8, 2011, noted Employee stating the injury

occurred while he was "TAKING A (sic) INEBRIATED MAN INTO THE BUILDING" . . . "BRINGING SOMEONE INTO THE BUILDING" . . . , and "HE COULD NOT TELL ME EXACTLY WHERE THIS OCCURRED (AS IN RELATION TO THE BUILDING) JUST THAT IT WAS ON HIS WAY INTO THE BUILDING." Finally, Employer produced no medical evidence to contradict Employee's medical providers who concurred Employee suffered a traumatic injury to his left foot at work on November 14, 2011. Because Employer has failed to rebut the presumption of compensability, Employee prevails on the raised and unrebutted presumption.

Even if Employer's evidence is viewed as rebutting the presumption, the preponderance of evidence weighs in Employee's favor. In this final analysis, all evidence is weighed and witness credibility is assessed. Employee is a credible witness. His hearing and deposition testimony, his reporting to his Employer, its adjuster, and his physicians, has been consistent. Because the rear of the CSP van is not captured on the video footage, but Employee's movement away from DB when escorting him to the mat is captured, the available video footage enhances, not diminishes, Employee's credible testimony. All of the medical evidence is consistent with the timing and mechanism of injury as Employee described it.

Employer's allegation Employee is a liar and "changed his story" after viewing the uncut video surveillance footage received from Employer on June 25, 2013, first reporting DB stepped on his foot while he brought DB to the mat, and later stating the injury occurred when DB fell out of the van, is disingenuous in light of the adjuster's notes stating that on December 8, 2011, Employee reported to her the injury occurred "while he was taking a (sic) inebriated man into the building," "he was bringing someone into the building," and "He could not tell me exactly where this occurred (as in relation to the building) just that it was on his way into the building."

Employer's suggestion Employee lied about the injury occurring at work because he had a pre-existing foot problem and no health insurance is similarly unconvincing. The medical evidence is uncontradicted that Employee had fully recovered from the left bunionectomy and osteotomy previously performed by Dr. Chang at OPA, and the sole cause of Employee's symptomatic left foot and resulting infection was the November 14, 2011 work injury.

4. Is Employee entitled to an award of attorney fees and costs?

Where an injured worker employs an attorney in the successful prosecution of the claim, the board shall make an award of reasonable attorney fees. In making such an award, the board will consider the contingent nature of the work for an employee in workers' compensation cases, the nature, length and complexity of the services performed, the resistance of the employer or carrier, and the benefits resulting from the services performed. Here Employer vigorously resisted Employee's claim, denying an injury even occurred, and delaying Employee's efforts to obtain discovery of the surveillance video. Counsel's efforts on Employee's behalf have resulted in a finding of compensability from which other benefits available to an injured worker under the Act will now flow to Employee.

Employee seeks an award of attorney fees at $350.00 per hour, and paralegal fees at $150.00 per hour, through September 12, 2013, in the amount of $9,393.00. Costs incurred and for which reimbursement is sought total $23.14. Employer did not dispute Employee counsel's hourly rate or the time expended, the paralegal's hourly rate or time expended, or any of the claimed costs. Counsel's hourly rate, and time expended on Employee's behalf are reasonable given his many years of experience, and will be awarded in full.

CONCLUSIONS OF LAW

1. Employee was injured on November 14, 2011, in the course and scope of his employment with Employer.
2. As the prevailing party, Employee is entitled to an award of attorney fees and costs.

ORDER

1. Employee's claim he was injured on November 14, 2011, in the course and scope of his employment with Employer is granted.
2. Employer shall pay Employee attorney fees and costs totaling $9,416.14.

Dated in Anchorage, Alaska on October 24, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Linda M. Cerro, Designated Chair

Robert Weel, Member

Mark Talbert, Member

If compensation is payable under the 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 is awarded, but not paid within 30 days of this decision, the person to whom the compensation is payable may, within one year after the default of payment, request from the board a supplementary order of 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 filling 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 TRAVIS L. HALL v. NANA REGIONAL CORPORATION, INC.; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, on October 24, 2013.

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Anna Subeldia, Office Assistant