

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

KIRBY L. SILVEUS,)
Employee,)
Claimant,) FINAL DECISION AND ORDER
v.)
AWCB Case No. 201304926
ALASKA NATIVE TRIBAL HEALTH)
CONSORTIUM,) AWCB Decision No. 14-0068
Employer,) Filed with AWCB Anchorage, Alaska
and) on May 23, 2014
ALASKA NATIONAL INSURANCE CO.,)
Insurer,)
Defendants.)

Kirby Silveus' (Employee) November 25, 2013 workers' compensation claim for reinstatement of compensation at the Alaska resident rate, penalty and interest, and attorney's fees and costs was heard on April 15, 2014 in Anchorage, Alaska, a date selected on January 15, 2014. Attorney Chancy Croft appeared and represented Employee. Attorney Theresa Hennemann appeared and represented Alaska Native Tribal Health Consortium and Alaska National Insurance Co. (collectively, Employer). Employee appeared and testified. Dr. Robert Skala appeared telephonically and testified for Employee. Claims Adjuster Tamie Jo Banahan appeared and testified for Employer. At hearing Employee and Employer were asked to brief two issues: (1) what the indicia of residency in an Alaska workers' compensation case are; and (2) if Employee's benefits were improperly reduced, what legal authority supports the imposition of penalty and interest. The record closed on April 24, 2014.

ISSUES

Parties agree Employee has been living in Oregon since November, 2013, and receiving compensable care there for a complex medical problem since December, 2013, but dispute the effect these facts have on his disability benefits.

Employee contends he is entitled to total temporary disability (TTD) compensation at the Alaska resident rate calculated under AS 23.30.185. However Employee also contends the residency issue is moot: even if Employee is found not to be currently residing in Alaska, Employee contends he is exempt from a cost-of-living adjustment (COLA) under AS 23.30.175(b)(2) because his medical treatment in Oregon is not reasonably available in Alaska.

Employer contends Employee is not currently an Alaskan resident and therefore his compensation is subject to AS 23.30.175(b)(1) COLA provisions. Employer contends Employee is not eligible for a COLA exemption under AS 23.30.175(b)(2) because the medical services he is receiving in Oregon are reasonably available in Alaska.

1) Is Employee entitled to disability benefits at the Alaska resident rate?

Employee has been receiving TTD benefits at the reduced COLA rate since November 10, 2013. Employee contends this is unjustified, and he is owed a penalty and interest on all compensation not paid within seven days after it was due. Employer contends the COLA reduction was properly applied, so no penalty or interest is due.

2) Is Employee entitled to penalty and interest?

Employee contends if he is successful in his effort to reinstate compensation at the Alaska resident rate, he is entitled to attorney's fees and costs. Employer contends Employee should not prevail on his claim, so therefore no attorney's fees or costs are owed.

3. Is Employee entitled to attorney's fees and costs, and, if so, in what amount?

FINDINGS OF FACT

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

- 1) On March 15, 2013, Employee injured his upper right arm and shoulder in the course and scope of work for Employer. Employer accepted compensability and, effective April 16, 2013, began paying Employee \$1,070.70 weekly TTD under AS 23.30.185. (Report of Occupational Injury or Illness, April 10, 2013; Compensation Report, July 26, 2013.)
- 2) On April 16, 2013, orthopedic surgeon Dr. Elisha Powell, M.D., performed “[r]ight shoulder arthroscopy, labral debridement, arthroscopic subacromial decompression; open biceps tenodesis; open rotator cuff repair” due to a “[v]ery large rotator cuff tear involving the entire supraspinatus tendon; significant right shoulder biceps tear, subacromial spurring, and labral tearing.” (Powell operative notes, Alaska Regional Hospital, April 19, 2013.)
- 3) On May 3, 2013, Employee’s treating family physician, Dr. Robert Skala, M.D., treated Employee for a urinary tract infection. He ordered Employee’s urinalysis results sent “to [infectious disease specialist Dr. Robert Bundtzen, M.D.] as [Employee] may have another infection due to surgery.” (Skala chart notes, May 3, 2013.)
- 4) On June 25, 2013, Employee presented at the Emergency Department of Mat-Su Regional Medical Center with a “right shoulder abscess with concern for surgical infection.” Dr. Michael Alter, M.D., performed an incision and drainage (I&D), and sent Employee back to see Dr. Powell the same morning. (Alter chart notes, Mat-Su Regional Medical Center, June 25, 2013.)
- 5) On June 25, 2013, Dr. Powell diagnosed a “deep purulent infection” in Employee’s right shoulder after a “failed” repair and “re-tear [sic]” of a “massive rotator cuff tear.” Dr. Powell performed an open irrigation and debridement, and planned to obtain an infectious disease consult and a [hospitalist] consult “as this patient has multiple medical problems including a history of stroke, DVT, myocardial infarction, and MRSA [methicillin-resistant Staphylococcus aureus] infection in the past.” (Powell operative report, Alaska Regional Hospital, June 25, 2013.)
- 6) On June 27, 2013, Dr. Bundtzen noted the cultures taken at the June 25, 2013 surgery were growing Staphylococcus aureus. “It is pretty clear this is the pathogen. Whether this is MRSA or not remains [to be seen]. . . . My main question is whether there is any hardware in his shoulder and whether there was any significant probability of bone involvement at surgery. This

will make a difference in regard to how long we treat him.” (Bundtzen chart notes, August 22, 2013.)

7) On July 9, 2013, Employee saw Dr. Skala for evaluation of daily pain and stiffness in his shoulder, and lack of improvement in his range of motion. (Skala chart notes, July 9, 2013.)

8) On August 20, 2013, Employee returned to Dr. Skala with continuing pain and a post-surgical abscess in his shoulder. Dr. Skala referred Employee back to Dr. Bundtzen “so this infection is brought to a conclusion.” (Skala chart notes, August 20, 2013.)

9) On September 3, 2013, Dr. Skala evaluated Employee for daily shoulder pain and stiffness, “severely restricted” range of motion, and “recurrent infections.” (Skala chart notes, September 3, 2013.)

10) On September 6, 2013, Dr. Skala opined Employee should remain off work indefinitely. “He continues to develop complications of his shoulder injury and post-operative infection that prevent complete healing.” (Skala letter, September 6, 2013.)

11) On September 18, 2013, Employee presented to Dr. Skala with an infected surgical wound, shoulder pain, and “persistent reduction in range of motion and strength.” Employee’s right shoulder was spontaneously dislocating daily, and Dr. Skala noted Employee was “largely NON-functional beyond getting his hand in a shirt & toileting.” Dr. Skala planned to refer Employee to Oregon Health & Science University (OHSU) for a second opinion on his shoulder. (Skala chart notes, September 18, 2013; emphasis original.)

12) On October 8, 2013, Employee presented to Dr. Skala with shoulder pain and “profound weakness in the shoulder girdle musculature.” (Skala chart notes, October 8, 2013.)

13) On October 14, 2013, Employee returned to Dr. Skala with a rapidly expanding shoulder lesion, which Dr. Skala lanced and drained. (Skala chart notes, October 14, 2013.)

14) At hearing Claims Adjuster Tamie Jo Banahan testified Employee told her on October 14, 2013, he would be moving back to Oregon at the end of the month. (Banahan.)

15) On October 24, 2013, Dr. Skala referred Employee to Dr. Adam Mirarchi of the OHSU Orthopedics and Rehabilitation Department. Dr. Skala requested a consult regarding further treatment options, noting a history of “Rotator cuff / Labral tear/repair & subsequent joint infection & cleanout. Persistent loss of ROM & strength.” The referral noted Employee needed an appointment after November 15, 2013. (Skala OHSU Consultation Request, October 24, 2013.)

16) In early November, 2013, Employee began a road trip to the home in Oregon where his wife resides, which he reached by November 8, 2013. (Silveus; Banahan adjuster note, November 8, 2013.)

17) Effective November 10, 2013, Employer applied a cost-of-living adjustment, reducing Employee's TTD weekly compensation rate from \$1,070.70 to \$838.36, due to Employee's relocation to Oregon. (Compensation report, November 22, 2013.)

18) On November 15, 2013, Employee's attorney's legal assistant wrote to opposing counsel, stating Employee had not permanently changed residences, but had "only gone to Oregon for treatment at OHSU" on a referral from Dr. Skala, and his first appointment was scheduled for December 17, 2013. (Jones letter, November 15, 2013.)

19) On November 25, 2013, Employee filed a claim for reinstatement of compensation back to the Alaska rate, \$1,070.70, from November 10, 2013 and continuing; penalty and interest; and attorney's fees and costs. The claim stated Employee "is currently seeking treatment at OHSU upon the referral of Dr. Skala. He is and intends to remain a resident of the State of Alaska." (Claim, November 25, 2013.)

20) On December 2, 2013, Dr. Skala wrote, "Presently [Employee] is being referred for a second opinion as to his treatment options since the failure of his right shoulder surgery. He is recommended to a specialist in Oregon who has particular expertise in handling complex surgical cases like that of [Employee]. Dr. Skala added, "[Employee's] case is particularly challenging to predict. He has experienced grave injuries and suffered unusual post-surgical outcomes. In conversations with [Employee] and his surgeon it is unlikely he'll ever resume full duties. It is important to obtain the opinion of the specialists in Oregon to see if he can be offered a functional recovery, however." (Family Medical Leave Act (FMLA) Certification of Health Care Provider for Employee's Serious Health Condition, December 2, 2013; emphasis original.)

21) On December 17, 2013, Employee presented to OHSU's Dr. Mirarchi for evaluation of persistent right shoulder pain and dysfunction since his June 25, 2013 operation with Dr. Powell. "He has profound immobility. The pain is constant . . ." Dr. Mirarchi opined, given Employee's history of massive rotator cuff tear, he would "more than likely" require a reverse total shoulder arthroplasty (TSA); however "it would be prudent" to first make sure infection was no longer an issue. Employee was scheduled for an open biopsy and placement of an antibiotic spacer, to be

followed by a frozen section reverse TSA if he was clear of infection. (Mirarchi chart notes, December 22, 2013.)

22) On December 19, 2013, Employer answered the November 25, 2013 claim, stating: “Upon learning of [Employee’s] relocation to Oregon with an intent to remain there for more than 30 days, and seek treatment that is believed to be available in Alaska, [Employer] accordingly made an adjustment to ongoing payment of temporary total disability benefits – namely a COLA adjustment.” (Answer, December 19, 2013.)

23) On December 26, 2013, Employee presented at Mercy Medical Center emergency room, in Roseburg, Oregon, with right shoulder infection and pain. Dr. Daniel McGee, M.D., performed an I&D, and diagnosed osteomyelitis and a deep abscess involving the joint. Dr. McGee explained to Employee’s wife, “this is a more serious infection than just an abscess.” Dr. McGee attempted to contact Dr. Mirarchi, who was not available. Employee was advised to consult Dr. Mirarchi the next day to determine “whether to do his surgery immediately or wait.” (McGee operative report, December 27, 2013.)

24) On December 31, 2013, OHSU clinical support staff educated Employee on the use of a nerve block home pump. Employee was “verbally instructed to have a competent person over the age of 18 with [him], 24 hours a day, for the entire time the pump is functioning and in place.” (Jason Sherfield chart notes, December 31, 2013.)

25) On January 8, 2014, Dr. Mirarchi performed an I&D on Employee’s shoulder. Dr. Mirarchi noted the right “humeral head was necrotic and obviously infected. . . The entire humeral head was removed due to the osteomyelitis and necrosis.” Dr. Mirarchi placed an antibiotic spacer in the humeral shaft, and ordered the insertion of a peripherally inserted central catheter (PICC) line (Mirarchi operative notes, January 9, 2014).

26) On January 9, 2014, OHSU’s Dr. Eric Yang, M.D., infectious diseases fellow, and his attending physician, Dr. Marissa Maier, M.D., evaluated Employee. After confirming with Mercy Medical Center that the cultures from Employee’s December 26, 2013 procedure indicated methicillin-sensitive Staphylococcus aureus (MSSA), the OHSU physicians started Employee on a course of antibiotic therapy anticipated to last six weeks. (Yang and Maier chart notes, January 9-10, 2014.)

27) On February 28, 2014, Employee returned to Mercy Medical Center emergency room complaining of right shoulder pain and fever. He reported he had stopped taking antibiotics and

the PICC line was pulled on February 18, 2014. “Over the past couple of days, he is having worsening pain.” Dr. Ryan Petersen, M.D., spoke with Dr. Mirarchi and the OHSU emergency room, and sent Employee to OHSU for further evaluation and treatment. (Petersen chart notes, March 1, 2014.)

28) On March 1, 2014, OHSU’s Dr. Yee-cheen Doung, M.D., performed surgery on Employee, including a curettage of osteomyelitis of the right humerus, and debridement of right arthrotomy and right shoulder joint. The postoperative diagnoses were septic arthritis, right shoulder joint, and osteomyelitis, right humerus. Dr. Doung’s postoperative plan read: “The patient should probably not carry more than a coffee cup in his right upper extremity. . . I suspect he will not have any active range of motion of the shoulder given the amount of damage there was in the glenohumeral joint. . . . We need to call Infectious Disease, and he will likely need to be tailored to a different antibiotic with another PICC line. . . .” (Doung operative notes, March 3, 2014).

29) On March 2, 2014, Employee received an infectious disease consult from OHSU’s Dr. Thomas Ward, M.D., and Dr. Jarred McAteer, M.D., internal medicine resident, due to recurrent right humeral head osteomyelitis and a new joint infection after finishing a six-week antibiotic regimen. Dr. Ward noted a “complex, recurrent infection of shoulder” following the Dr. Powell’s April 16, 2013 rotator cuff surgery. Dr. Ward opined, “[Employee] will need prolonged IV antibiotic therapy, likely with vancomycin alone to cover MSSA.” (Ward and McAteer chart notes, March 2, 2014.)

30) On March 5, 2014, Dr. Mirarchi operated on Employee, who was described as having “recurrent right shoulder osteomyelitis due to prior rotator cuff surgery.” Dr. Mirarchi performed an excisional biopsy, removed the existing antibiotic spacer and replaced it with an Exactech antibiotic space implant. Dr. Mirarchi opined Employee would need a PICC line. (Mirarchi operative report, March 5, 2014.)

31) On March 7, 2014, Kimberly Feleer, PA-C, of OHSU’s outpatient parenteral antibiotic treatment (OPAT) team started Employee on daily antibiotic infusions. Ms. Felder described OPAT as an outpatient branch of the infectious diseases “team,” and stated OPAT’s role was “to monitor the antibiotics that are being used to treat the infection,” ensuring the patient is on the right antibiotic(s), the infection is responding to treatment, and the patient is monitored closely for antibiotic side effects. PA Felder noted:

We discussed bone infection. I explained how bacteria can make a slime and go to sleep under it. They also like to hide on any bone that is devitalized or on prosthetic material. I explained that initially we kill the bulk of bacteria, but antibiotics are needed for a long time so that we can kill any remaining bacteria when they wake up. I explained there is no set duration of antibiotic treatment for bone infection. I explained that we usually start with 6 weeks, but the duration will be customized to each patient according to their clinical progress. Some patients may need additional antibiotics by mouth after IV antibiotic treatment is completed, often for 6 months or longer. Some patients may even need antibiotics by mouth (pills) for life. (Felder chart notes, March 7, 2014.)

32) On March 18, 2014, Dr. Penelope Barnes, M.D., of the OHSU Infectious Disease Clinic, noted Employee had suffered “persistent pain, dysfunction and immobility” in his shoulder since the June 25, 2013 operation with Dr. Powell. Dr. Barnes reiterated PA Felder’s description of bacteria hiding on infected bones, and opined:

[Employee] is healing nicely having had a very rough time with recurrence of infection[.] . . . We will see him back in 4 weeks the week of April 7th and pull his PICC line. He will then go onto 3 months of [oral] antibiotics. **I anticipate that he will not be [able] to have reconstruction until the fall – we will need him off the antibiotics for several months before reconstruction . . .** I have communicated my evaluation and treatment plan from today’s visit with the patient’s care team including the primary care provider and outpatient infusion provider. (Barnes chart notes, March 20, 2014.)

33) On March 25, 2014, Nina Bingham, Employer’s legal assistant, swore in an affidavit she identified five Anchorage orthopedic surgeons, other than Dr. Powell, whose offices stated they are experienced in treating complex shoulder conditions, including rotator cuff tear repair, chronic dislocations, infections, and shoulder replacements; and all five surgeons are accepting new patients. (Bingham affidavit, March 25, 2014.)

34) On April 8, 2014, Employer’s counsel filed an affidavit of attorney’s fees and costs totaling \$6,144.00. (Croft affidavit, April 8, 2014.)

35) At hearing on April 15, 2014, Mr. Silveus, Dr. Skala and Ms. Banahan were all found credible. (Observations; judgment.)

36) Employee testified he worked for Employer as a heavy equipment operator in Alaska since 2010, and spent part of the year at the home he shares in Oregon with his wife. He does not own property in Alaska and has not paid rent here since November 1, 2013, because he is totally disabled and does not know if or when he will be able to resume work for Employer. (Silveus.)

37) Employee testified he contracted a bone infection after his April 16, 2013 rotator cuff surgery with Dr. Powell. Employee stated since then he has undergone four surgeries for bone infection, one in Alaska and three in Oregon, all of which involved sawing off bone, debridement, and attempts to clear out the infection. Employee stated he previously had two MRSA skin infections, but they were resolved with oral medication. Employee testified his physicians in Alaska and Oregon told him bone infections are much harder to treat than tissue infections, and his therapy included two extended courses of intravenous antibiotics delivered via a PICC line. Employee testified after the June 25, 2013 surgery Dr. Powell told him, “there was nothing further that [Dr. Powell] could do to that arm” and he offered no further treatment. (*Id.*)

38) Employee testified he then returned to Dr. Skala, his attending physician since 2007, to discuss what could be done to “fix” the shoulder. Dr. Skala told Employee he would research medical facilities that deal with complicated cases like Employee’s. Employee testified Dr. Skala on September 18, 2013 said he planned to refer Employee to OHSU, a teaching hospital. Employee testified he did not ask specifically to go to Oregon; he would have gone anywhere Dr. Skala recommended, “to Fairbanks or Timbuktu.” Employee testified he went to Oregon “to deal with how to fix the shoulder.” He stated his goal was to receive the medical treatment he needed to return to the job he loved with Employer. Employee testified he remained in Oregon for medical reasons; “if they were fixing me here,” he would be living in Wasilla and working for Employer. (*Id.*)

39) Dr. Skala testified Dr. Powell, an orthopedic surgeon who did a fellowship in sports medicine, told him he was not comfortable treating Employee’s shoulder further. Dr. Skala testified when Employee came to him for a referral, Employee probably was expecting a referral to another Alaskan physician. However, while uncomplicated rotary cuff repairs are commonly done in Alaska, Dr. Skala testified it was highly unlikely any local surgeon would want to take over a colleague’s failed primary surgery followed by recurrent infections. Dr. Skala described the human, personal dynamics of a “pretty small club” of Alaska orthopedic surgeons, where everybody knows everybody. Dr. Skala testified he asked around, but “nobody up here is really that excited to deal with this.” Dr. Skala testified he consulted with two physicians on Employer’s list of five available Anchorage orthopedic surgeons, and neither was willing to take the case. Dr. Skala opined, “available is not the same thing as able and willing”; “just because somebody is there, doesn’t mean they really want to start getting into all of the internal politics

of a very small medical community”; and “just because they can do it, doesn’t mean they will.” (Skala.)

40) Dr. Skala testified he was concerned Employee could not get the specialty medical care he needs here, because his complicated and uncommon condition is not one Alaskan physicians see on a regular basis. Dr. Skala opined Employee needed to go to a major medical center, also known as a tertiary medical facility, where physicians work as an integrated team, providing expertise and advanced care for a large volume of unusual and difficult cases; the high volume is necessary for physicians to remain fully proficient in the treatment of uncommon conditions, and reach the goal of functional repair. Dr. Skala testified he wanted to get Employee to “a place where they see these kinds of cases routinely,” and there are no tertiary care facilities in Alaska. (*Id.*)

41) Dr. Skala testified the closest tertiary facilities to Alaska are in Seattle and Portland. Dr. Skala chose to refer Employee to OHSU because he knows a staff physician, working in sports medicine there, who after hearing about “this kind of problem,” recommended a couple of physicians, including Dr. Mirarchi. Dr. Skala also testified he chose OHSU for logistical reasons: Employee could stay in his own home, and has family there who would be able to assist him in his treatment and recovery, providing 24-hour care if necessary. Employee’s wife would be available to drive him to appointments, help him get dressed, and assist with shopping, bathing, and feeding. (*Id.*)

42) Dr. Skala testified Employee presented with a shoulder abscess that was lanced and drained on October 14, 2013. Ten days later, when Dr. Skala wrote the referral to OHSU, it was unknown whether Employee’s infection was under control. In any case, Dr. Skala testified the referral was necessary to find “some sort of surgical correction” so Employee could have a functional recovery. Dr. Skala described Employee’s injury as the most complex shoulder case he has seen; currently “his shoulder is a medical train wreck.” (*Id.*)

PRINCIPLES OF LAW

AS 01.10.055. Residency.

- (a) A person establishes residency in the state by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state.
- (b) A person demonstrates the intent required under (a) of this section
 - (1) by maintaining a principal place of abode in the state for at least 30 days or for a longer period if a longer period is required by law or regulation; and

(2) by providing other proof of intent as may be required by law or regulation, which may include proof that the person is not claiming residency outside the state or obtaining benefits under a claim of residency outside the state.

(c) A person who establishes residency in the state remains a resident during an absence from the state unless during the absence the person establishes or claims residency in another state, territory, or country, or performs other acts or is absent under circumstances that are inconsistent with the intent required under (a) of this section to remain a resident of this state.

Heller v. State of Alaska, Department of Revenue, 314 P.3d 69, 78-79 (Alaska 2013) examined AS 01.10.055 and concluded “there is no consistent code-wide definition of what it means to be a ‘resident.’ . . . The legislature clearly contemplated allowing for varying residency requirements depending on the context – requiring longer periods of physical presence for some purposes than for others.” The Alaska Workers’ Compensation Act (Act) does not define residency.

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 . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . .
...

The board may base its decision not only on direct testimony 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 23.30.005. Alaska Workers’ Compensation Board.

...
(h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

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 workers' compensation statute. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996); *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665 (Alaska 1991). 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 must demonstrate a preliminary link between his employment and the injury. *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). The presumption of compensability applies to continuing medical care during the course of the claimant's recovery from the injury and disability. *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991); *Carter* at 665. Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

For injuries occurring on or after November 7, 2005, an employer may overcome the presumption by producing substantial evidence demonstrating a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 7 (March 25, 2011). "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, 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. 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).

AS 23.30.122. Credibility of witnesses. (a) 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. . . .

AS 23.30.145. Attorney fees.

...
(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.

Attorney's fees may be awarded under AS 23.30.145(b) when an employer resists payment of compensation, and an attorney successfully prosecutes employee's claims. *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 152-53 (Alaska 2007). In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 973 (Alaska 1986), the Supreme Court held attorney fee awards under AS 23.30.145(b) should be "both fully compensatory and reasonable so that competent counsel will be available to furnish legal services to injured workers." The factors to be considered in

determining a reasonable fee include the contingency nature of representing injured workers; the nature, length, and complexity of the services performed; the benefits resulting from the services obtained; the fee customarily charged in the locale for similar services; and the experience, reputation and ability of the lawyer performing the services. *Id.* at 973-75, n. 7.

AS 23.30.155. Payment of compensation.

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .

...

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.

...

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

...

It has long been recognized §155(e) provides penalties when employers fail to timely pay compensation. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). Likewise, the Supreme Court has consistently instructed the board to award interest in recognition of the time value of money. *See Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1191 (Alaska 1993); *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984).

AS 23.30.175. Rates of compensation.

...

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

(1) the weekly rate of compensation shall be calculated by multiplying the recipient's weekly compensation rate calculated under AS 23.30.180, 23.30.185,

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23.30.190, 23.30.200, or 23.30.215 by the ratio of the cost of living of the area in which the recipient resides to the cost of living in this state;

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

...

A workers' compensation claimant is entitled to out-of-state medical treatment when equally beneficial treatment is not available in Alaska. *Alcan Elec. v. Bringmann*, 829 P.2d 1187, 1189 (Alaska 1992); see 2 A. Larson, *The Law of Workmen's Compensation* § 61.13(b)(2) (1989). In *Bringmann*, the Supreme Court found the employer did not rebut the presumption of compensability because it produced no evidence any doctor in Alaska considered or recommended the combination of procedures the employee was receiving out-of-state:

If a doctor does not provide an option to the patient, regardless of the doctor's skill level, the option is unavailable to that patient. Alcan has failed to demonstrate that 'adequate medical facilities' were available within the state. Bringmann's evidence, together with the un rebutted presumption, satisfied his burden of proof that adequate medical treatment was unavailable in Alaska. Therefore, we affirm the superior court's decision requiring reimbursement by Alcan of Bringmann's transportation expenses incurred in obtaining medical treatment in Huntington Beach, California. *Bringmann* at 1190.

In *Merritt v. State of Alaska, Department of Transportation*, AWCAC Decision No. 196 at 28-30 (May 16, 2014), an injured worker contended he relocated to Wisconsin to obtain medical treatment not reasonably available in Alaska. The employer contended the employee had received approximately six years of satisfactory care in Alaska before his move, appropriate medical care was still available here, and the employee actually relocated to be closer to family. The Commission affirmed the board's finding the presumption of compensability had not attached, because the employee failed to adduce minimal evidence the medical services he needed were not reasonably available to him in Alaska at the time of his move. The evidence therefore supported imposition of a COLA. *Id.*

In *Alaska Pacific Assurance v. Brown*, 687 P.2d 264 (Alaska 1984), the Supreme Court affirmed the superior court's invalidation of a prior version of AS 23.30.175 as an unconstitutional violation of the equal protection clause of Alaska's Constitution. The Supreme Court noted the statute's

purpose was to adjust benefit levels to the economic environment where recipients lived, and one reason for this was to avoid paying benefits so high when compared to a worker's actual living costs that they amounted to a disincentive to return to work. *Id.* at 272. *Brown* found the former statute not "well designed to achieve" the objective of adjusting benefits to the cost of living of workers living outside Alaska. *Id.* at 273-74. This was because the statute did not use cost-of-living statistics from other states; rather it used wage levels, which tended to yield "an average benefit reduction of approximately 142% of the reduction in the cost of living." *Id.* at 274.

Based on *Brown's* guidance, in 1988 the legislature developed COLA statistics upon which to adjust benefit amounts for injured employees not residing in Alaska during periods of disability. The legislative intent of amended AS 23.30.175 is recorded in § 1(c), ch. 79, SLA 1988:

*** Section 1. LEGISLATIVE INTENT. . . .**

(c) It is the intent of the legislature in amending AS 23.30.175 regarding benefits payable to recipients not residing in the state to

- (1) recognize the levels of workers' compensation benefits brought about by the high cost of living that exists in the state as compared to other localities;
- (2) increase the incentives to return to work; and
- (3) remove obstacles to the utilization of vocational rehabilitation that may be brought about by the payment of workers' compensation benefits at the high levels provided by the Alaska workers' compensation law to individuals residing in localities with living costs lower than those in Alaska.

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. . . .

8 AAC 45.138. Cost-of-living adjustment. . . .

(e) If the recipient does not reside in this state but resides in the United States, the cost-of-living ratio must be determined by using the ratio of the published cost of living for the area nearest where the recipient resides and the cost of living for this state. If the recipient resides an equal distance between two areas for which cost-of-living surveys have been published, the ratio that results in the highest compensation rate must be used.

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest

must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

(b) The Employer shall pay the interest

(1) on late-paid time-loss compensation to the Employee. . . .

8 AAC 45.180. Costs and attorney’s fees. . . .

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed . . .

(2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney’s affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

ANALYSIS

1) Is Employee entitled to disability benefits at the Alaska resident rate?

Answering this question involves first determining whether Employee’s living in Oregon since November, 2013 constitutes “not residing in the state” under AS 23.30.175(b). If Employee is found to be currently residing in Alaska, he would be entitled to continue receiving TTD benefits at the \$1,070.70 weekly rate. If Employee is found not to be currently residing in Alaska, then it must be determined (1) if Employer is entitled, under AS 23.30.175(b)(1), to reduce the weekly compensation to \$838.36 to align with lower living costs in Oregon; or (2) if Employee’s absence is for medical services not reasonably available in Alaska, in which case his compensation would be exempt from COLA under AS 23.30.175(b)(2).

Alaska law provides no single code-wide definition of what it means to be a resident; rather, residency indicia and requirements vary according to context. AS 01.10.055; *Heller*. The Act does not define residency. However the legislative intent of AS 23.30.175(b) is to adjust benefits to

correspond with an out-of-state injured worker's lower living costs. *Brown*; § 1(c), ch. 79, SLA 1988. Employee is encountering lower living costs while in Oregon, therefore for the purposes of AS 23.30.175(b) he is found to be "not residing in [Alaska] at the time compensation benefits are payable."

Whether Employee is entitled to TTD at the Alaska resident rate is a factual question subject to the presumption analysis. *Sokolowski*. Dr. Skala's testimony he referred Employee to OHSU because he needed to go to a tertiary care facility, and none exists in Alaska, is sufficient to attach the presumption of compensability. *Merritt*.

At the second step of the presumption analysis, Employer produced evidence, in the form of a legal assistant's telephone survey of doctor's offices, that five orthopedic surgeons in Anchorage, in addition to Dr. Powell, treat complex shoulder conditions (including rotator cuff tear repair, chronic dislocations, infections, and shoulder replacements) and are accepting new patients. Employer also noted the availability of local infectious disease specialists including Dr. Bundtzen. The instant case is distinguishable from *Bringmann*, where the employee left the state to obtain a combination of procedures no Alaskan physician considered or recommended. Here Employer's evidence, viewed in isolation, adequately supports the conclusion Employee could reasonably find physicians in Alaska who would provide the same services he is in the process of receiving at OHSU: treatment for recurrent infections, followed by reconstructive shoulder surgery. *Tolbert; Norcon; Wolfer*. The presumption is rebutted.

However at the third step of the analysis Employee proved, by a preponderance of evidence, the medical services he needs were and are not reasonably available in Alaska. At hearing Dr. Skala explained numerous reasons for his plan, documented on September 18, 2013, to refer Employee to OHSU. First, Dr. Skala testified Employee's shoulder condition had steadily become more difficult and complicated since Dr. Powell's April 16, 2013 rotator cuff surgery. The initial symptoms of infection appeared less than three weeks later, and on June 25, 2013, Dr. Powell re-operated on the failed repair and infected bone. Dr. Powell subsequently told both Employee and Dr. Skala he had no further treatment to offer Employee. By October 14, 2013, ten days before Dr. Skala wrote the consult request to Dr. Mirarchi (and coincidentally also the day

Employee told Ms. Banahan he would be returning to Oregon at the end of the month), Employee had suffered at least four more flare-ups of post-operative infection.

Second, Dr. Skala convincingly described a small Alaskan medical community in which it was highly unlikely an orthopedic surgeon would be willing to take over a colleague's failed primary surgery followed by repeated infections. Dr. Skala testified he consulted with two physicians on Employer's list of five available Anchorage orthopedic surgeons, and neither was willing to take the case. Dr. Skala credibly opined, "available is not the same thing as able and willing" and "just because they can do it, doesn't mean they will."

Third, by September, 2013, Employee's condition had worsened to the point Dr. Skala believed Employee could not get the advanced, specialty medical care he needed in-state. Rather, Dr. Skala opined Employee needed to be treated by an integrated team of physicians at a major medical center that does a high volume of the most difficult and complex cases. There are no such tertiary care facilities in Alaska; the closest are in Seattle and Portland.

Finally, Dr. Skala's decision to refer to OHSU was driven by logistics. Employee testified he did not ask specifically to go to Oregon; he was willing to go anywhere Dr. Skala recommended, "to Fairbanks or Timbuktu." However Dr. Skala realized Employee's wife resides within driving distance of OHSU, and would be able to assist him during treatment and recovery. While this practical consideration is irrelevant to the determination of whether Employee's compensation should be reduced under AS 23.30.175(b), it is noteworthy that Employer benefits significantly from Employee's living in Oregon. Health care, which Employer has accepted as compensable, is verifiably less expensive than in Alaska, and Employer does not need to pay for lodging, per diem or a personal care assistant.

Since Employee's first appointment at OHSU on December 17, 2013, his shoulder condition has continued to deteriorate, rendering it all the more important he continues to be treated and monitored by an integrated care team at a tertiary care facility. He has been diagnosed with osteomyelitis, suffered yet more drug-resistant recurring bone infections, and undergone three additional shoulder surgeries, including debridement. The last medical record on file, dating less

than a month before hearing, indicated Employee's PICC line would be pulled the week of April 7th. Dr. Skala agreed with OHSU Dr. Barnes' opinion Employee needed to be off antibiotics for several months prior to reconstructive surgery. At hearing it was unknown whether the latest round of intravenous antibiotics had successfully eliminated Employee's pernicious, recurring bone infection; OHSU's outpatient antibiotic infusion team told Employee he might need additional antibiotics for months, or even for life. What was known at hearing was that Employee remained totally disabled, unable to lift more than a coffee cup in his right hand. He also remained far from medical stability, much less his goal of functional repair, and was frustrated by his inability to get his shoulder condition "fixed" so he could return to Alaska to work for Employer. In the words of Dr. Skala, Employee's shoulder was the most complex shoulder case he had ever seen, "a medical train wreck."

The preponderance of the evidence therefore places Employee squarely into the AS 23.30.175(b)(2) COLA exemption category, because he left Alaska to obtain treatment not reasonably available in the state. If at some future point tertiary medical care is no longer indicated, and Employee receives medical or rehabilitation services in Oregon that are reasonably available in Alaska, Employer would be entitled to apply COLA under AS 23.30.175(b)(1). However currently Employee is entitled to TTD at the Alaska resident rate. Employer will be ordered to pay Employee an additional \$232.34 weekly (\$1,070.70 owed minus \$838.36 received) for TTD from November 10, 2013 through the date the Alaska rate is reinstated.

2) Is Employee entitled to penalty and interest?

Effective November 10, 2013, Employee did not receive the full compensation he is entitled to under the Act. Under the express language of AS 23.30.155(e) and (p), he is entitled to a 25 percent penalty plus interest on the unpaid portion of all installments not paid within seven days after they were due.

3. Is Employee entitled to attorney's fees and costs, and, if so, in what amount?

Where an employer delays or otherwise resists payment of compensation and the employee hires an attorney who successfully prosecutes his claim, the employee is entitled to an award of reasonable attorney fees. AS 23.30.145(b); *Harnish*. Here Employer did not pay Employee the full amount of TTD owed, and Employee's counsel successfully prosecuted the claim to reinstate benefits at the Alaska rate. Employee is therefore entitled to reasonable attorney fees and costs.

The factors to be considered in determining a reasonable fee include the contingency nature of representing injured workers; the nature, length, and complexity of the services performed; the benefits resulting from the services obtained; the fee customarily charged in the locale for similar services; and the experience, reputation and ability of the lawyer performing the services. *Bignell*; 8 AAC 45.180(d)(2). Employee's attorney's hourly rate is reasonable when compared with those charged by other attorneys with similar experience. Likewise, the work performed was reasonable given the length of time, the complexity of the case, Employer's resistance, and the benefits obtained for Employee. Employer did not object to Employee's affidavit for fees and costs. Employee will be awarded the full \$6,144.00 billed.

CONCLUSIONS OF LAW

- 1) Employee is entitled to disability benefits at the Alaska resident rate.
- 2) Employee is entitled to penalty and interest.
- 3) Employee is entitled to \$6,144.00 in attorney's fees and costs.

ORDER

- 1) Employer is ordered to reinstate Employee's TTD benefit at the \$1070.70 Alaska rate.
- 2) Employer is ordered to pay Employee \$232.34 weekly (\$1,070.70 owed minus \$838.36 received) for TTD from November 10, 2013 through the date the Alaska rate is reinstated.
- 3) Employer is ordered to pay a 25 percent penalty and interest on the unpaid portion of all installments not paid within seven days after they were due.
- 4) Employer is ordered to pay \$6,144.00 in attorney's fees and costs.

Dated in Anchorage, Alaska on May 23, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Margaret Scott, Designated Chair

Amy Steele, Member

Mark Talbert, 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 KIRBY L. SILVEUS, employee / claimant; v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, employer; ALASKA NATIONAL INSURANCE CO., insurer / defendants; Case No. 201304926; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on May 23, 2014.

Sid Harris, Office Assistant