ALASKA WORKERS' COMPENSATION BOARD

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

MICHAEL CRUGER, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201609936
W.M.C. CONTRACTORS INC., Employer,	)	AWCB Decision No. 17-0056
and	)	Filed with AWCB Fairbanks, Alaska on May 16, 2017.
TWIN CITY FIRE INSURANCE COMPANY, Insurer, Defendants.	)	

Michael Cruger's December 21, 2016 claim was heard in Fairbanks, Alaska on March 23, 2017, a date selected on February 24, 2017. Attorney Robert Groseclose appeared and represented Michael Cruger (Employee), who appeared and testified on his own behalf. Attorney Constance Livsey appeared and represented W.M.C. Contractors (Employer). The record closed at the conclusion of deliberations on April 10, 2017.

ISSUES

Employee, who suffered numerous left foot fractures when he fell off a ladder, contends he is entitled to seek the opinions of his treating physician, as a compensable medical expense, on issues such as medical stability, permanent impairment and work restrictions. He also contends his fractures have not fully healed and he desires an evaluation for further medical treatment. Employee seeks a prospective award of medical costs so he can pursue his desired medical evaluation and consultation.

Employer contends Employee's medical treatment is complete, his treating physicians released him back to work last October, and "this claim was done." It contends it cannot be compelled to provide medical treatment beyond what the Act requires, and neither is Employee entitled to an expert medical opinion at Employer's expense since there are no disputed medical opinions. Employer seeks denial of Employee's claim.

1) **Is Employee entitled to an evaluation and consultation with Daniel Johnson, D.O., as a compensable medical benefit?**

Employee contends an award of additional medical benefits entitles him to attorney's fees and costs.

Employer denies any additional medical benefits are due, and therefore neither is Employee entitled to attorney's fees and costs.

2) **Is Employee entitled to attorney's fees and costs?**

FINDINGS OF FACT

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

1) On June 27, 2016, Employee was working for Employer as a carpenter at Fort Greely, Alaska, when he fell off a ladder and twisted his left ankle. (First Report of Injury, July 8, 2016; Craddick chart notes, June 28, 2016; Employee).

2) On June 28, 2016, Employee was seen by Steven Craddick, PA-C, at the U.S. Health Works Urgent Care in Fairbanks, Alaska. Left foot x-rays showed oblique fractures of the fourth and fifth metatarsals, a fractured calcaneus and soft tissue swelling about the ankle. PA-C Craddick prescribed crutches and "CAM Boot" immobilization, referred Employee to Daniel Johnson, D.O. at McKinley Orthopedics, took Employee off work until he could be seen by Dr. Johnson, and scheduled an appointment with Dr. Johnson the following day. (Cradock chart notes, June 28, 2016; x-ray report, June 28, 2016; Work Status Report, June 28, 2016; Request for Consultation or Referral Request, June 28, 2016).

3) On June 28, 2016, PA-C Craddick also completed a U.S. Health Works "Progress Note" form, which indicates he called a "Company Representative," discussed Employee's injury and his status, and faxed a "EWSR" to Employer's representative. (Progress Note, June 28, 2016).

4) On June 28, 2016, PA-C Craddick completed a U.S. Health Works "Medical Decision Making Treatment Plan Summary" form that states the date on which Employee can return to full duty without restrictions was "To Be Determined by Ortho." Under a section titled "Clinical Decision Making," PA-C Craddick wrote, "See Chart Notes[.] X-Rays revealed multiple fx's, L Foot/Ankle *Referred to Ortho[.]" The U.S. Health Works' Medical Decision Making Treatment Plan Summary also provided spaces titled "Treatment Plan," and "Plan of Care," which PA-C Craddick left blank. (Medical Decision Making Summary, June 28, 2016).

5) On June 28, 2016, PA-C Craddick completed a U.S. Health Works "Employee Work Status Report" form, which listed two Employer representatives, who were to be provided with reports following Employee's treatment. PA-C Craddick called one of the two Employer representatives listed, and provided a copy of his report to Employee so he could transmit the report to his supervisor. PA-C Craddick reiterated Employee's referral to Dr. Johnson, the scheduling of the appointment for Employee to see Dr. Johnson the following morning, and Employee's work restrictions of, "[o]ff work until seen by Ortho tomorrow," in the Employee Work Status Report. (Work Status Report, June 28, 2016).

6) On June 28, 2016, PA-C Craddick completed a U.S. Health Works "Request for Consultation or Referral" form for Employee to see Dr. Johnson. In the "Requesting Provider Comments" portion of the form, PA-C Craddick wrote, "Please see all attached: Chart Notes[,] Pt Demographics[,] Wrkrs Comp. & Employer Info[.] Actual X-Ray Report pending, but pt will bring X-Rays on CD to Appt[.]" (Request for Consultation of Referral, June 28, 2016).

7) On June 28, 2016, PA-C Craddick completed a workers' compensation Physician's Report form. (Physician's Report, June 28, 2016).

8) On June 29, 2016, Employee was seen at McKinley Orthopedics by Ambria Ptacek, PA-C, who noted marked diffuse swelling and ecchymosis of the Employee's foot and ankle. Employee was tender over the medial and lateral ankle, and had a decreased range of motion secondary to pain and swelling. PA-C Ptacek ordered a computed tomography (CT) study of Employee's left foot to evaluate the extent of the calcaneus fracture. (Ptacek report, June 29, 2016).

9) On June 30, 2016, Matt Raymond, D.O., saw Employee at U.S. Health Works. Dr. Raymond's chart notes state, "Saw Dr. Johnson yesterday. CT ordered. Concern is calcaneus fx." Dr. Johnson diagnosed multiple left foot fractures, and concluded his notes by writing, "Managed by Dr. Johnson in Ortho." Dr. Raymond completed U.S. Health Medical Decision Making, and Work Status Report forms, as well as a workers' compensation Physician's Report form. Employee completed a U.S. Health Works "Established Patient Statement," which asked him whether he had improved since his last visit, to estimate his percentage of improvement, and whether any new complaints had developed since his last visit. (Raymond chart notes, June 30, 2016; Medical Decision Making Treatment Summary, June 30, 2016; Works Status Report, June 30, 2016; Physician's Report, June 30, 2016; Established Patient Statement, June 30, 2016).

10) On July 1, 2016, Employee underwent a left, lower extremity computed tomography (CT) study, which found, "The most significant fracture is extensive comminuted fracturing of the calcaneus which shows intraosseous hemorrhage and malalignment. Maximum fragment diastasis in 6mm. "In addition to the known comminuted calcaneal and proximal 4^{th} and 5^{th} metatarsal fractures, there are tiny fractures of the anteromedial talus and small avulsions involving the medial and lateral malleoli." (CT report, July 1, 2016).

11) On July 5, 2016, PA-C Ptacek saw Employee and reviewed the July 1, 2016 CT study results. She planned to see Employee in one week for a "re-check" with x-rays. (Ptacek report, July 5, 2016).

12) On July 7, 2016, Dr. Raymond ordered Employee to continue with "Ortho." Management, Cam Boot and crutches. He also completed U.S. Health Works Medical Decision Making and Work Status Report forms, as well as a workers' compensation Physician's Report form. Employee completed a U.S. Health Works Patient Statement form. (Raymond chart notes, July 7, 2016; Medical Decision Making form, July 7, 2016; Work Status form, July 7, 2016; Patient Statement, July 7, 2016; Physician's Report form, July 7, 2016).

13) On July 15, 2016, Employee followed-up with PA-C Ptacek. X-rays taken that day showed Employee's fourth and fifth metatarsal fractures were "unchanged from previous films," and "not much healing at this time." PA Ptacek released Employee back to non-weight-bearing work, and planned to follow-up with Employee in three weeks. (Ptacek report, July 15, 2016; x-ray report, July 15, 2016).

14) On July 22, 2016, Dr. Raymond released Employee back to non-weight-bearing work. He also completed U.S. Health Works Medical Decision Making and Work Status Report forms, as well as a workers' compensation Physician's Report form. Employee completed a U.S. Health Works Patient Statement form. (Raymond chart notes, July 22, 2016; Medical Decision Making form, July 22, 2016, Work Status form, July 22, 2016; Physician's Report form, July 22, 2016).

15) Employee's medical records from July 22, 2016 also contain "Employer's Medical Case Instructions," which sets forth "Parent Carrier's Special Instructions." The instructions state:

> THRESHOLDS FOR THERAPY AND MODALITY SERVICES ARE INITIALLY SET AT 4 PER VISIT. THERAPISTS CAN CALL FIRST HEALTH TO CONFIRM A SEVERITY RATING SET FORTH IN THE CONTRACT. THIS CAN BE DONE OVER THE PHONE AFTER THE THERAPIS [SIC] ANSWERES A FEW CASE-SPECIFIC QUESTIONS. THE THERAPIST CAN CONTACT FIRST HEALTH'S ADJUSTER SERVICES DEPARTMENT FOR CONSIDERATION [TOLL FREE TELEPHONE NUMBER OMITTED] AFTER COMPLETING THE INITIAL EVALUATION TO CONFIRM A SEVERITY LEVEL RATING.

(Employer's Medical Case Instructions, July 22, 2016).

16) On August 5, 2016, Employee followed-up with PA-C Ptacek. X-rays taken that day showed Employee's fourth and fifth metatarsal fractures were "unchanged from previous films," and "not much healing at this time." PA-C Ptacek ordered a physical therapy referral to improve Employee's ankle range of motion, and planned to re-check Employee in four weeks with an x-ray. (Ptacek report, August 5, 2016).

17) On August 5, 2016, Dr. Raymond thought Employee's foot was "Healing well," though the fifth metatarsal was a "non-union." His chart notes indicate he had discussed a physical therapy referral with PA-C Ptacek, and he referred Employee to physical therapy for 30 days "in hopes gap will close." Dr. Raymond completed a U.S. Health Works Work Status Report form, which reads "off work per Dr. Johnson," a U.S. Health Works Medical Decision Making form, and a workers' compensation Physician's Report form. Employee's completed Patient Statement form states, "seen [sic] ortho today and he said the bone isn't healing right." (Raymond chart notes, August 5, 2016, physical therapy referral form, August 5, 2016, Medical Decision Making form, August 5, 2016, Work Status Report form, August 5, 2016; Patient Statement form, August 5, 2016; Physician's Report form, August 5, 2016).

18) On August 8, 2016, Employee began four weeks' physical therapy and reported he had not been wearing the CAM Boot at home. The physical therapist "educated" Employee on the importance of compliance with using the CAM Boot. (Physical Therapy chart notes, August 8, 2016).

19) On August 19, 2016, PA-C Craddick thought Employee was "[d]oing very well with: Time (good healing), immob. & PT." PA-C Craddick completed U.S. Health Works Medical Decision Making and Work Status Report forms, as well as a workers' compensation Physician's Report form. Employee completed a U.S. Health Works Patient Statement form. (Craddick chart notes, August 19, 2016; Medical Decision Making form, August 19, 2016; Work Status Report form, August 19, 2016; Patient Statement, August 19, 2016).

20) Employee's August 19, 2016 medical records contain "Parent Carrier's Special Instructions," reminding Employee's providers of the thresholds for therapy and modality services and the requirements for reporting a "severity rating" to Employer's adjuster services department and answering "a few" case-specific questions. (Employer's Medical Case Instructions, August 19, 2016).

21) On September 6, 2016, Employee reported he does not use his CAM Boot at home. (Physical therapy chart notes, September 6, 2016).

22) On September 7, 2016, Employee saw Dr. Johnson. X-rays taken that day showed Employee's fourth and fifth metatarsal fractures "unchanged from previous films," and "not much healing noted of the fifth metatarsal fracture." Dr. Johnson told Employee "the fifth metatarsal fracture may not heal and may have to have an ORIF [open reduction internal fixation] with screw; however, it was agreed to wait and see what does [sic]." Dr. Johnson authorized Employee working "at a sit down job while in a boot," and planned for Employee to return in four weeks. (Johnson report, September 7, 2015; x-ray report, September 7, 2016).

23) On September 7, 2016, PA-C Craddick thought Employee's fractures were "Healing well," and referred Employee for additional weeks of physical therapy. PA-C Craddick completed U.S. Health Works Medical Decision Making and Work Status Report forms, as well as a workers' compensation Physician's Report form. Employee completed a U.S. Health Works Patient Statement form. (Craddick chart notes, September 7, 2016; physical therapy referral, September 7, 2016; Medical Decision Making form, September 7, 2016; Work Status Report form,

September 7, 2016; Physician's Report form, September 7, 2016; Patient Statement form, September 7, 2016).

24) On September 20, 2016, a physical therapy chart note states Employee reported he was not wearing his CAM Boot at home.

25) On October 4, 2016, Employee's physical therapist noted the girth of Employee's ankle had significantly decreased in recent weeks, but the therapist thought Employee would benefit from continued physical therapy to increase his range of motion and functional ability. (Physical therapy chart notes, October 4, 2016).

26) On October 5, 2016, Employee was evaluated at McKinley Orthopedics by Timothy Carey, D.O., who found Employee to have "fairly good" range of motion in his left ankle. X-rays taken that day showed minimal callus formation at Employee's fourth and fifth metatarsal fractures and the reports states, "There is no [sic] much healing." Dr. Carey opined, "the fifth metatarsal fracture may be healed with delayed radiographic signs." Dr. Carey authorized transition to normal shoe wear, continued Employee's work restrictions for an additional four weeks, and anticipated seeing Employee on an as-needed basis from that date. (Carey report, October 5, 2016).

27) On October 5, 2016, Dr. Johnson completed a work release form releasing Employee from his care. (Work Release Form, October 5, 2016).

28) On October 5, 2016, Employee saw PA-C Craddick, who wrote, "Fractures (well-healed)," "Left foot/heel fx's – Well Healed," "Doing well. Done with all Ortho F/U Appts & Tx/Care," "Final advise from Ortho today, is: 1) Done with PT, 2) Done with CAM BOOT Immobilizer; 3) No Ladders x 4 wks (ground work only)." Employee was instructed to return on November 4, 2016, when PA-C Craddick "Anticipate[d] final Appt & Case Closure at that time." PA Craddick released Employee back to work with one restriction – "No Ladders . . . . (Ground work only)" and completed U.S. Health Works Medical Decision Making and Work Status Report forms, as well as a workers' compensation Physician's Report form. Employee completed a U.S. Health Works Patient Statement form. (Craddick chart notes, October 5, 2016, Medical Decision Making form, October 5, 2016; Work Status Report form, October 5, 2016; Physician's Report form, October 5, 2015; Patient Statement, October 5, 2016).

29) On his October 5, 2016, PA-C Craddick thought Employee was not yet medically stable and would require an additional four weeks' treatment. He also opined Employee's injury would

not preclude him from returning to his job at the time of injury, and Employee's injury would not result in a permanent impairment. (Physician's Report form, October 5, 2016).

30) Employee's October 5, 2016 medical records contain "Parent Carrier's Special Instructions," reminding Employee's providers of the thresholds for therapy and modality services and the requirements for reporting a "severity rating" to Employer's adjuster services department and answering "a few" case-specific questions. (Employer's Medical Case Instructions, October 5, 2016).

31) On November 3, 2016, Charles Craven, M.D., performed an Employer's Medical Evaluation (EME). Employee reported to Dr. Craven that his left foot feels "fine," but he did not feel it was 100 percent. Employee indicated he was experiencing pain in his great toe and over the fifth metatarsal when walking, but his pain was worse while descending stairs. Employee thought he had the physical capacity to work as a carpenter, but was not working at that time because of the seasonal nature of his occupation and Employer's business. Dr. Craven undertook a palpatory examination of Employee's left foot and ankle, and found no tenderness. He also reviewed x-rays from June 28, 2016, and the July 1, 2016, CT study, and agreed with the findings in those reports. Dr. Craven concluded, given that there was no palpatory tenderness over Employee's calcaneus or fourth or fifth metatarsals, Employee's fractures, particularly the fifth metatarsal, which had demonstrated a "paucity of callus formation" on the last x-rays taken, were clinically healed with "delayed radiographic healing." Dr. Craven did not think Employee required any additional physical therapy, medication, bracing or other stabilization. He opined Employee could return to work as a carpenter without restrictions, and further opined Employee had not incurred a permanent impairment. (Craven report, November 3, 2016).

32) On November 7, 2016, Dr. Raymond noted, "Released by Dr. Johnson, transferred to Dr. Carey. No work limits. Finished with Ortho." Dr. Raymond check a box indicating Employee was "Discharged from care. No further treatment is anticipated at this time." He also released Employee to full duty with no restrictions and completed U.S. Health Works Medical Decision Making and Work Status Report forms, as well as a workers' compensation Physician's Report form. Employee completed a U.S. Health Works Patient Statement form. (Raymond chart notes, November 7, 2016; Medical Decision Making form, November 7, 2016; Work Status Report form, November 7, 2016; Physician's Report, November 7, 2016; Patient Statement form, November 7, 2016).

33) On December 7, 2016, Employee wrote Employer's adjuster expressing his dissatisfaction with Dr. Craven's "medical assessment and rating," and requested a "second opinion" from Dr. Johnson. (Employee's letter, December 7, 2016).

34) On December 9, 2016, Employer's adjuster informed Employee its insurer would not pay for a second opinion from Dr. Johnson. (Adjuster's email, December 9, 2016).

35) On December 21, 2016, Employee filed a claim seeking medical costs, permanent partial impairment (PPI) and attorney's fees and costs. (Claim, December 21, 2016).

36) On February 8, 2017, Employer controverted time-loss benefits after November 3, 2016, PPI, medical costs, reemployment benefits and attorney's fees and costs. (Controversion, February 8, 2017).

37) On March 20, 2017, Employee filed an initial affidavit claiming $12,796.50 in attorney's fees and costs. (Employee affidavit, March 20, 2017).

38) At hearing, Employee testified as follows: He had been working for Employer at Fort Greely for two weeks, when he fell off a ladder and landed on a rebar pad. Employee initially thought he had a sprained ankle and reported his injury to the "safety guy" at Fort Greely. By the next morning, his ankle was worse, and he called the "safety guy," who instructed him to report to U.S. Health Works in Fairbanks. Once at U.S. Health, he was provided with a list of doctors to choose from, and he chose Dr. Johnson from the list. Every time Employee went to Dr. Johnson's office, Employer required him to see either PA-C Craddick or Dr. Raymond at U.S. Health, who were not his chosen physicians. Employee does not think he has fully recovered and believes the fractures have not healed, but he has not returned to see Dr. Johnson because Employer will not pay for the visit. Although Dr. Johnson has released him back to work, Dr. Johnson has not opined on the issue of a permanent impairment, so Employee seeks a permanent impairment assessment from Dr. Johnson rather than just accepting the opinion of the EME. On cross-examination, Employee acknowledged receiving physical therapy from U.S. Health Works, and acknowledged physical therapy is medical treatment. He also acknowledged he had been released back to work by Dr. Johnson's office on November 5, 2016, with restrictions, and had been discharged from Dr. Johnson's care. Employee is not aware of any disagreements between McKinley Orthopedics and U.S. Health Works, but added he would hand-deliver reports from McKinley Orthopedic to U.S. Health. (Cruger).

39) At hearing, Employee clarified he is seeking both additional medical treatment and an opinion on PPI. (Record).

40) On March 29, 2017, Employee filed a supplemental affidavit, claiming a total of $15,599 in attorney's fees and costs. (Employee's fee affidavit, March 29, 2017).

41) On April 3, 2017, Employer filed its opposition to an award of attorney's fees and Employee's fee affidavits. In addition to denying there is a basis for a fee award, Employer contends Employee's fees should be reduced because the overall time spent on this matter is excessive, the rate charged for an inexperienced attorney in Employee's law firm is excessive, and certain time entries are duplicative and reflect simple clerical tasks. (Employer's objections, April 3, 2017).

42) On April 7, 2017, Employee filed his reply to Employer's opposition of his attorney's fees and costs, offering to accept Employer's proposed adjustments to his attorney's fees and costs. (Employee's Reply, April 7, 2017).

43) Employee considers Dr. Johnson to be his designated physician. Employer considers both the providers at U.S. Health and McKinley Orthopedic to be Employee's designated physicians. (Employees' Hearing Brief, March 16, 2017; Employer's Hearing Brief, March 17, 2017).

44) Division's publication, *Workers' Comp and You*, which explains to injured workers "What to do if you are injured?"

1. Get . . . medical care immediately. . . .

5. Get treatment from [a] licensed doctor. . . .

9. Take good care of yourself. Get needed treatment. . . .

(*Workers' Comp and You*, undated).

PRINCIPLES OF LAW

The board may base its decision on not only 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 23.30.001. 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 . . . .

AS 23.30.010. Coverage. Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an Employee if the disability . . . 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 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 the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . 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 . . . 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 the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . The board may authorize continued treatment or care or both as the process of recovery may require.
. . . .

(k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

AS 23.30.110. Procedure on Claims. (a) . . . the board may hear and determine all questions in respect to the claim.
. . . .

> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . .
>
> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination. . . .

The regulation at 8 AAC 45.090(b) provides for orders requiring an employer to pay for an employee's examination pursuant to AS 23.30.095(k) or §110(g). Section 095(k) and §110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997), at 3; *see also Harvey v. Cook Inlet Pipe Line Co.*, AWCB Decision No. 98-0076 (March 26, 1998). Considering §135(a) and §155(h), wide discretion exists under AS 23.30.110(g) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties."

The Alaska Workers' Compensation Appeals Commission (Commission) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under §095(k) and §110(g). With regard to §095(k), the Commission referred to its decision in *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007), at 8, in which it confirmed:

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

The Commission further stated in *dicta*, before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME will assist the board in resolving the dispute. *Bah* at 4.

The Commission outlined the board's authority to order an SIME under §110(g), as follows:

> [T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. . . . Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties.

Id. at 5.

Under either §095(k) or §110(g), the Commission noted the purpose of ordering an SIME is to assist the board, and the SIME is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician's opinion. *Id.* When deciding whether to order an SIME, the board typically considers the following criteria, though the statute does not require it:

1) Is there a medical dispute between Employee's physician and an EME?

2) Is the dispute significant? and

3) Will an SIME physician's opinion assist the board in resolving the disputes?

Deal at 3. *See also, Schmidt v. Beeson Plumbing and Heating*, AWCB Decision No. 91-0128 (May 2, 1991). Accordingly, an SIME pursuant to §095(k) may be ordered when there is a medical dispute, or under §110(g) when there is a significant gap in the medical or scientific evidence. Further, the Commission held an SIME may be ordered when, because of a lack of understanding of the medical evidence, the parties' rights cannot be ascertained. It stated:

> Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties in the dispute before the board.

Bah at 8.

The decision to order an SIME rests in the discretion of the board, even if jointly requested by the parties. *Olafson v. State Department of Transportation*, AWCAC Decision No. 06-0301

(October 25, 2007), at 6. Although a party has a right to request an SIME, a party does not have a right to an SIME if the board decides an SIME is not necessary for the board's purposes. *Id*. at 8. A party does not have "veto" rights over the board's choice of physician. *Id*. at 10. An SIME is not a discovery tool exercised by the parties; it is an investigative tool exercised by the board to assist it by providing disinterested information. *Id*. at 15.

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

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id.* An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once an employee attached the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services,* 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds by *Huit*). If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons,* 816 P.2d 1381 (*citing Miller v. ITT Services,* 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **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 legislative history of AS 23.30.122 states the intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation

Act." *DeRosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013). The Alaska Workers' Compensation Appeals Commission is required to accept the board's credibility determinations. *Id.* The Alaska Supreme Court defers to board's credibility determinations. *Id.* If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, it may rely on one opinion and not the other. *Id.* at 147. The board may also choose not to rely on its own expert. *Id.*

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

> **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. . . .
>
> (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 a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in-fact, is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id.* at 152. 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 152-53.

> Although the supreme court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (citation omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (citation omitted). Subsection (b) may apply to fee awards in controverted claims (citation omitted), in cases which the employer does not controvert but otherwise resists (citation omitted), and in other circumstances (citation omitted).

Uresco Construction Materials, Inc. v. Porteleki, AWCAC Decision No. 09-0179 (May 11, 2011).

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are also considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975.

The statute at AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009) at 5. A fee award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the board to consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." *Id.*

> **8 AAC 45.082. Medical treatment.**
> . . . .
>
> (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service

> (A) at a hospital or an emergency care facility;
>
> (B) from a physician
>
> (i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;
>
> (ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or
>
> (iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician;
> . . . .

In *Richard v. Fireman's Fund*, 384 P.2d 445 (Alaska 1963), the Alaska Supreme Court "held to the view that a workmen's compensation board or commission owes a durty to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may known them, and of instructing him on how to pursue that right under law.

ANALYSIS

1) Is Employee entitled to a medical evaluation and consultation with Daniel Johnson, D.O., as a compensable medical benefit?

Employee seeks a return visit to Dr. Johnson at McKinley Orthopedics for further evaluation and consultation as a compensable medical expense. For medical benefits to be due Employee, his employment must be "the substantial cause" of his need for additional medical treatment. AS 23.30.110(a). The issue of compensability raises a factual dispute to which the statutory presumption of compensability applies. *Meek.* Employee attaches the presumption with his own hearing testimony, where he shared his opinion he has not fully recovered and his belief his fractures have not completely healed. *Cheeks*. Employer rebuts the presumption with Dr. Raymond's November 7, 2016 documents "discharging" Employee from U.S. Health Works' care, with "[n]o further treatment . . . anticipated at this time." Dr. Raymond also released Employee to full duty with no restrictions on that same date. *Miller*. Employee must now prove,

by a preponderance of the evidence, that his injury with Employer is the substantial cause of his need for further medical evaluation or treatment. *Koons.*

Employee does not point to any medical opinions supporting his claim for additional medical treatment, and none are apparent from the record. Drs. Raymond, Craven and Johnson have all opined Employee does *not* require any further treatment. Neither are there differences of medical opinions that might warrant an SIME. *Bah*. This is not to say, however, that Employee might not have any cause for concern. Each time he visited McKinley Orthopedic, the providers took x-rays of his foot, which were repeatedly interpreted as "unchanged from previous films," and showing "not much healing." By September 7, 2016, Dr. Johnson was even considering performing open reduction surgery on Employee's foot because of the lack of healing at his fifth metatarsal. It is also curious that the providers at U.S. Health Works were repeatedly finding Employee to be "healing well," and "doing very well" with "good healing," contemporaneous with these very same x-ray studies, which were seemingly showing otherwise. Nevertheless, by October 5, 2016, Dr. Carey thought Employee's fifth metatarsal fracture "may be healed with delayed radiographic findings," an opinion with which the EME physician, Dr. Craven, ultimately agreed, and Employee was released back to work. For these reasons, Employee has failed to carry his burden and his claim will be denied. AS 23.30.010(a); *Koons*.

However, this panel is concerned Employee is still experiencing problems with his foot, which may not be completely healed, as he suspects. Thus, even though his immediate claim will be denied, Employee is reminded that Employer must provide medical treatment "for the period which the nature of the injury or the process of recovery requires." AS 23.30.095(a). He is additionally reminded of the advice set forth in the Division's publication, *Workers' Comp and You*, which explains, "What to do if you are injured?"

2. Get . . . medical care immediately. . . .

6. Get treatment from [a] licensed doctor. . . .

10. Take good care of yourself. Get needed treatment. . . .

An ancillary issue, the question of who, if anyone, was Employee's "designated physician," also arose at hearing. *Richard*. Employer contends Employee designated the providers at U.S. Health Works as his treating physician since he got "treatment, advice, an opinion or any type of service from a physician for the injury" at that facility, and Dr. Johnson at McKinley Orthopedics was "in the chain of referral" from U.S. Health Works. Employee, meanwhile, is under the impression that Dr. Johnson is his designated treating physician, apparently because he "chose" Dr. Johnson's name off the list provided to him at U.S. Health Works. However, given Employee's credible hearing testimony concerning Employer's instructions for him to report to U.S. Health Works for treatment of his injury, as well as the medical record, which clearly shows PA-C Craddick scheduled Employee's initial appointment with Dr. Johnson, it might appear that each of the several exceptions to an employee designating a physician could apply under the facts of this case. 8 AAC 45.082(b)(2)(B)(i), (ii), (iii). Therefore, it is possible Employee has yet to designate a treating physician.

The question of who is Employee's designated treating physician was not an issue noticed for this hearing, and resolution of that issue is not necessary to deciding Employee's instant claim. Its relevance here is, even if Employee designated U.S. Health Works, or McKinley Orthopedics, as his treating physician, he is free to return to Dr. Johnson at McKinley Orthopedics for the evaluation and consultation he desires. *Richard*. Furthermore, Employee may even seek the opinion of at least one, if not two, other physicians, in addition to Dr. Johnson. AS 23.30.095(a). Should Employee choose to see Dr. Johnson again, he would be free to solicit Dr. Johnson's opinions on the issues he desires - medical stability, permanent impairment and work restrictions. *Id*. In the event Dr. Johnson should conclude Employee is not medically stable and requires additional treatment, such as the open reduction surgery previously discussed, Employee may file another claim seeking additional medical benefits. *Id*.; AS 23.30.095(a).

2) Is Employee entitled to attorney's fees and costs?

As this decision awards no additional benefits to Employee, his claim for attorneys' fees and costs will be denied. *Bignell*.

CONCLUSIONS OF LAW

1) Employee is not entitled to an evaluation and consultation with Daniel Johnson, D.O., as a compensable medical benefit.
2) Employee is not entitled to attorney's fees and costs.

ORDER

Employee's December 21, 2016 claim is denied.

Dated in Fairbanks, Alaska on May 16, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Sarah Lefebvre, Member

/s/
Lake Williams, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the

board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of MICHAEL CRUGER, employee / claimant; v. W.M.C. CONTRACTORS INC., employer; TWIN CITY FIRE INSURANCE COMPANY, insurer / defendants; Case No. 201609936; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on May 16, 2017.

/s/_____
Ronald C. Heselton, OA II