ALASKA WORKERS' COMPENSATION BOARD

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

DANA R. SORENSEN, Employee, Claimant, v. TYLER RENTAL, INC., Employer, and ALASKA NATIONAL INSURANCE CO., Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 200917353 AWCB Decision No. 14-0134 Filed with AWCB Juneau, Alaska on October 7, 2014

Dana Sorensen's (Employee) August 26, 2013 claim was heard on August 12, 2014, in Juneau, Alaska, a date selected on March 25, 2014. Attorney Joseph Kalamarides appeared and represented Employee. Attorney Merrilee Harrell appeared and represented Tyler Rental, Inc. and its insurer Alaska National Insurance Co. (Employer). Employee was the only witness. The record was left open until August 29, 2014, to receive Employee's supplemental affidavit of attorney's fees and costs and Employer's objection to the supplemental affidavit. The record closed on October 6, 2014, after further deliberation.

ISSUES

Employee contends his November 23, 2009 work injury is the substantial cause of his need for low back medical treatment and related transportation costs.

Employer concedes Employee was injured at work, but contends the November 23, 2009 work injury is not the substantial cause of Employee's need for low back medical treatment and related transportation costs.

1) Is Employee's November 23, 2009 work injury the substantial cause of Employee's need for low back medical treatment and related transportation costs?

Employee contends his attorney provided valuable legal services in a complex case. Employee contends he is entitled to actual attorney's fees under AS 23.30.145(b).

Employer contends Employee is not entitled to any benefit, and is thus not entitled to attorney's fees. Employer did not otherwise object to Employee's attorney's hourly rate, hours or costs.

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

FINDINGS OF FACT

The record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

1) On November 23, 2009, Employee injured his low back while working for Employer when the forklift he was operating and loading onto a truck, fell from the truck and rolled. (Claim, August 26, 2013; Bartlett Regional Hospital Emergency Department Note, November 23, 2009).

2) On January 21, 2010, a lumbar spine magnetic resonance imaging (MRI) scan showed a transverse mid-body nondisplaced fracture at L3 and a mild L4-5 central and L5-S1 left paracentral disc bulging. (Radiologist Report, Steven Strickler, D.O., January 21, 2010).

3) On February 16, 2010, John Bursell, M.D., at Juneau Bone & Joint Center, treated Employee for low back pain and assessed L3 fracture and sciatica. Dr. Bursell opined Employee's L3 fracture was stable and should heal over time. He also opined Employee's sciatica was most likely from his L4-5 or L5-S1 disc protrusions. (Chart Note, Dr. Bursell, February 16, 2010).

4) On March 2, 2010, Dr. Bursell treated Employee for continued low back pain and bilateral lower extremity radicular pain. Employee reported his lumbar pain from his L3 fracture was decreasing but he continued to have pain radiating down both legs. (Chart Note, Dr. Bursell, March 2, 2010).

5) On May 4, 2010, physical therapist Chris Chiles treated Employee for low back pain. Employee reported he was no longer having leg pain and his low back pain was localized to just above his sacrum. (Chart Note, Physical Therapist Chris Chiles, May 4, 2010).

6) On May 10, 2010, Dr. Bursell treated Employee for continued low back pain. Employee reported his low back pain was gradually improving although there was still a point of discomfort on the right and left lower back. Employee also reported no leg symptoms as of that day, but stated he felt them intermittently. (Chart Note, Dr. Bursell, May 10, 2010).

7) On June 16, 2010, Dr. Bursell released Employee to work without restrictions as of May 10, 2010. (Return to Work Recommendations, Dr. Bursell, June 16, 2010).

8) On July 12, 2010, PT Chiles treated Employee for low back pain. Employee reported continued low level but frequent pain in the L5 region but was able to run up to two miles. Employee also reported posterior right thigh soreness with increased time spent driving a truck, which he was doing for a living. (Chart Note, Physical Therapist Chris Chiles, July 12, 2010).

9) On July 20, 2010, a lumbar spine MRI showed a slight, old anterior wedging of the L3 vertebral body and a minimal central protrusion without neural impingement at L5-S1. The MRI report's L4-5 impressions stated, "There is a relatively small central canal at the L4-5 level on a developmental basis. There is a small central protrusion without neural impingement." However, its L4-5 findings said, "There is a small broad-based central protrusion. There is a relatively small central canal on a developmental basis in the protrusion causes minimal effacement of the thecal sac and the origin of the L5 nerve roots." (Radiologist Report, Jay Kaiser, M.D., July 20, 2010).

10) On July 21, 2010, Dr. Bursell treated Employee for continued low back pain and sciatica. He reviewed the July 20, 2010 MRI and opined, "The L4-5 disc protrusion contacts the L5 nerve roots. The MRI films were compared with the January 2010 study done at BRH, and there is no significant change in the disc protrusions. The L3 fracture looks much better on the studies done yesterday." (Chart Note, Dr. Bursell, July 21, 2010).

11) On October 8, 2010, Dr. Bursell evaluated Employee for a permanent partial impairment (PPI) rating and assessed six percent whole person impairment. Dr. Bursell noted Employee continued to experience low back pain but exercise helped reduce Employee's low back pain. (Chart Note, Dr. Bursell, October 8, 2010).

12) Thereafter, Employee did not seek low back or lower extremity medical treatment for approximately two years. However, he continued to have residual pain, which he conservatively

treated on his own with exercises, including those he learned in physical therapy, and aspirin. (Deposition of Dana Sorensen, November 14, 2013; Employee Hearing Testimony, August 12, 2014).

13) On July 18, 2012, while out camping, Employee bent over to pick up a very small and light cooking pot and immediately felt stabbing pain in his back and shooting pain down his right leg. (Chart Note, William Walker, PAC, July 22, 2012; Employee).

14) On July 25, 2012, family practice physician Stephanie Sworski, M.D., at Mayo Clinic Health System, treated Employee for low back pain and opined, "It is not clear to me whether this injury is an extension of his previous back injury three years ago." (Chart Note, Dr. Sworski, July 25, 2012).

15) On August 3, 2012, occupational medicine specialist Donald Bodeau, M.D., at Mayo Clinic Health System, evaluated Employee at Dr. Sworski's request and assessed low back pain with an old L3 compression fracture and evidence of osteopathic dysfunction at multiple levels. Employee described to Dr. Bodeau his November 2009 work injury and reported having some element of back pain since that time, although he had tried to stay in excellent physical condition to minimize the pain. Employee reported doing reasonably well until he bent over to pick up a pot while camping, when he experienced immediate onset of pain. Employee stated the episode in 2009, and the most recent one both caused intermittent pain radiating down Employee's posterior right thigh greater than left thigh, although the radiating pain was essentially absent for about one and a half years until the present time. Dr. Bodeau requested Employee's records from Juneau Bone & Joint Center, including the MRIs, and recommended physical therapy. (Chart Note, Dr. Bodeau, August 3, 2012).

16) On August 28, 2012, Dr. Bodeau treated Employee for low back pain follow-up, reviewed Employee's Juneau Bone & Joint Records, and diagnosed back pain, L3 compression fracture, and L4-5 and L5-S1 disk herniations. (Chart Note, Dr. Bodeau, August 28, 2012).

17) On May 3, 2013, orthopedic surgeon Charles Peterson, M.D., examined Employee for an employer's medical evaluation (EME). Dr. Peterson diagnosed: (1) lumbar strain, due to camping bending injury, (2) preexisting L3 vertebral fracture, minimal and nondisplaced, and (3) preexisting herniated lumbar discs at L4-L5 and L5-S1. He opined Employee's camping bending injury in July 2012 was a new injury, and which was unrelated to his November 2009 work injury. He stated Employee's July 2012 injury is the substantial cause of Employee's need

for medical treatment. He also opined Employee was not medically stable from his July 2012 non-work related injury. In relating his history of present complaints, Employee reported after his November 2009 work injury he got better but never got completely free of his symptoms. He continued to have pain in his low back and occasionally would get a sharp pain in his left and right buttock. (EME Report, Dr. Peterson, May 3, 2013).

18) On August 1, 2013, Dr. Bodeau opined Employee's November 2009 work injury caused his need for low back medical treatment. Specifically, he opined Employee's, "current back problems do represent continued and worsening symptoms directly related back to the work injury that occurred on or about November 21, 2009, while he was employed at Tyler Rental of Juneau, Alaska." (Letter from Dr. Bodeau to Joseph Kalamarides, August 1, 2013).

19) On October 31, 2013, a lumbar spine MRI showed a small broad-based posterior bulge and mild disc desiccation at L4-L5, a moderate broad-based posterior bulge with small amount of disc desiccation and mild disc space height loss at L5-S1, and a minimal broad-based posterior bulge at L1-L2. (Radiologist Report, Scott Cole, M.D., October 31, 2013).

20) On December 5, 2013, Dr. Bodeau opined Employee's October 2013 MRI showed progression of disk bulges at the L1-2, L4-5 and L5-S1 levels. (Letter from Dr. Bodeau to Joseph Kalamarides, December 5, 2013).

21) On December 20, 2013, Dr. Peterson, in response to Employer's request for an EME report addendum following his receipt of additional medical records and Employee's deposition, opined there is no significant difference between Employee's 2010 and 2013 lumbar spine MRIs. He stated, "There is certainly nothing on the MRI scan to suggest the condition has worsened between 2010 and 2013. The fracture is healed. The only 'worsening' is [Employee's] subjective report of back pain." He again opined Employee's camping bending injury was the substantial cause of his low back pain. (EME Addendum, Dr. Peterson, December 20, 2013).

22) On January 29, 2014, Employee saw physical medicine and rehabilitation specialist Neil Pitzer, M.D., for a second independent medical evaluation (SIME). Dr. Pitzer diagnosed chronic lumbar spine muscular pain, myofascial in origin and related to his camping injury. He opined Employee's camping injury in July 2012 was unrelated to his November 2009 work injury. He stated Employee's July 2012 injury is the substantial cause of Employee's need for medical treatment. Dr. Pitzer also stated at the time Employee was, "released in Alaska in 2010 he was doing well with no residual symptoms period he relates prior to his injury in 2012, he did not

seek any medical care, did not take any medications for back pain nor did he have any back pain." (SIME Report, Dr. Pitzer, January 29, 2014).

23) On March 21, 2014, Dr. Bodeau reviewed Dr. Pitzer's SIME report and disagreed with Dr. Pitzer's opinions, stating, "It is clear that Mr. Sorensen went through extensive treatment and in fact did have permanent disability from the 2009 injury. He was not free of residual symptoms as indicated by Dr. Pitzer but was managing as best he could. As noted above, this is not persuasive to me given the relative disparity and magnitude between the 2 injuries and the time course of problems indicated by Mr. Sorensen." (Chart Note, Dr. Bodeau, March 21, 2014).

24) At a March 25, 2014 prehearing conference, the parties agreed to schedule an August 12, 2014, hearing on causation of Employee's work injury. (Prehearing Conference Summary, March 25, 2014).

25) On July 22, 2014, Dr. Bodeau was deposed and opined Employee's 2009 work injury is the substantial cause of Employee's need for low back medical treatment, based on the magnitude of the trauma Employee's experienced with the 2009 work injury compared to the 2012 camping incident of lifting a small light camping pot, his review of the MRIs, and also his examination of Employee. Dr. Bodeau opined Employee's disc bulging had progressed since 2009, when compared to Employee's 2009 MRI studies. He also opined Employee's pain generator is either the physical contact of the disc with the nerve root, or the inflammatory contact of the disc with the nerve root. He explained medical literature supports a very substantial increase in the risk of a recurrent disk herniation or a recurrent disk problem with exact reproduction of symptoms following a significant industrial injury as Employee experienced. (Deposition of Dr. Bodeau, July 22, 2014).

26) At a July 22, 2014 prehearing conference, the August 12, 2014 hearing issues were narrowed to causation relating to Employee's claim for low back medical treatment and related transportation costs, along with attorney's fees and costs. (Prehearing Conference Summary, July 22, 2014).

27) On July 30, 2014, Dr. Peterson was deposed and again opined Employee's July 2012 injury was a new injury and unrelated to his 2009 work injury, stating, "It's been my impression that his preexisting condition had healed and resolved, and he had a new injury occur." With regard to Employee's reports of pain since 2010, Dr. Peterson opined, "I don't consider pain to be an objective finding, and therefore I can't put pain into this whole picture . . . pain is a subjective

complaint that patients or claimants give me, and it's not what we can use to rate things with. So I don't pay a whole lot of attention to pain anymore." Dr. Peterson stated on examination he did however find some hypesthesia or slight numbness beyond the outer aspects of Employee's left leg. Dr. Peterson noted Employee had Lyme disease in the past and possibly a recurrence in 2012, but did not relate it to any need for low back medical treatment. (Deposition of Dr. Peterson, July 30, 2014).

28) Employee's November 2009 work injury is the substantial cause of his ongoing need for low back medical treatment and related transportation costs. (Experience, judgment, observations).

29) Employee filed two attorney's fee affidavits. The first itemized 27.06 hours of attorney time at a rate of $350 per hour and 20.76 hours of paralegal time at a rate of $150 per hour, for a total of $11,325.00 in fees. He filed an itemization of costs totaling $283.13. A supplemental fee and cost affidavit itemized an additional 12.42 hours of attorney time at $350 per hour, and .2 hours of paralegal time at a rate of $150 per hour, for a total of $4,377 in additional fees. Employee filed an itemization of additional costs totaling $5,465.54. Total attorney's fees and costs equal $21,450.67. Employer did not object to Employee's attorney's hourly rate, hours or costs. The requested hourly rates and itemized hours for Employee's attorney's fees and costs are reasonable. The primary issue in this case was whether Employee's November 2009 work injury was the substantial cause of low back medical treatment and related transportation costs. Employee was successful on this main issue. (Affidavit of Attorney's Fees, August 1, 2014; Supplemental Affidavit of Attorney's Fees, August 22, 2014; experience, judgment, observations).

30) Dr. Bursell, Dr. Bodeau, and Employee are credible. (Experience, judgment, observations).

PRINCIPLES OF LAW

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

> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at . . . reasonable cost to . . . employers . . . subject to . . . this chapter; . . . .

AS 23.30.005. Alaska Workers' Compensation Board.

. . .

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

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

A finding reasonable persons would find employment was or was not a cause of the Employee's disability and impose or deny liability is, "as are all subjective determinations, the most difficult to support." *Rogers & Babler*, 747 P.2d at 534.

> **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. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

> **AS 23.30.120 Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute. *Id*.; (emphasis omitted). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). The evidence necessary to raise 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.

For injuries occurring after the 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence, which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, Alaska Workers' Comp. App. Comm'n Dec. No. 150 at 7 (March 25, 2011). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility of the parties and witnesses is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the board finds the employer's evidence is sufficient, in the third step the presumption of compensability drops out, the employee must prove her case by a preponderance of the evidence, and must prove in relation to other causes, employment was the substantial cause of the disability or need for medical treatment. *Runstrom* at 8. This means the employee 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). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered.

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

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007). The board has the sole discretion to determine the weight of the medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 087 at 11 (Aug. 25, 2008).

> **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. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

AS 23.30.145(b) requires an employer to pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. *Harnish Group, Inc.*, 160 P.3d at 150-51. AS 23.30.145(b) also requires an award of attorney's fees to be reasonable. In workers' compensation cases, "the objective is to make attorney fee awards both fully compensatory and reasonable so that competent counsel will be available to furnish legal services to injured workers." *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 973 (Alaska 1986). In *Judith Lewis-Walunga and William J. Soule v. Municipality of Anchorage*, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (December 28, 2009), the Alaska Workers' Compensation Appeals Commission stated:

> The commission recognizes that promoting the availability of counsel for injured workers is a legitimate legislative goal of the attorney fee statute. This goal is served in the current statute by provision of a statutory minimum fee that may result in disproportionate fees in some cases, a mandate to examine the complexity of services provided, and a barring of most fee awards against injured workers when the employer prevails. Thus, a small value claim that involves a novel application of the law or an injured worker's claim that succeeds against heavy opposition, may result in fee awards that recognize the particular complexity or difficulty of the case.
>
> . . .
>
> The legislature's choice represents a balance between assuring the injured worker access to representation and freedom to file claims without fear of financial consequences on one hand and avoiding unnecessary litigation of doubtful claims and unreasonable costs to the public and employers on the other. The commission will not disturb the balance struck by the legislature.

Id. at 13-15.

> **8 AAC 45.180. Costs and attorney's fees**.
> . . .

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

(c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed. . . .

(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. . . . Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
>
> (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.

. . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim…

ANALYSIS

1) Is Employee's November 23, 2009 work injury the substantial cause of Employee's need for low back medical treatment and related transportation costs?

There is no dispute Employee suffered a work-related injury and this injury caused a need for low back medical treatment. On November 23, 2009, a forklift Employee was operating and loading onto a truck, fell from the truck and rolled. This work injury resulted in a transverse mid-body nondisplaced fracture at L3 and a mild L4-5 central and L5-S1 left paracentral disc bulging, causing Employee low back pain and bilateral lower extremity radicular pain. Employee treated conservatively and his symptoms improved. On October 8, 2010, Dr. Bursell evaluated Employee for a PPI rating and assessed six percent whole person impairment. At that time, Employee still was experiencing low back pain, although exercise helped him manage it. On July 18, 2012, while out camping, Employee bent over to pick up a very small and light cooking pot and immediately felt stabbing pain in his back and shooting pain down his right leg. The parties' dispute relates to whether Employee's November 23, 2009 work injury is the substantial cause of his current need for low back medical treatment and related transportation costs.

This issue raises factual disputes to which the statutory presumption of compensability applies. AS 23.30.120; *Meek*. Employee satisfied the presumption analysis' first step with Dr. Bodeau's records and deposition testimony. Without regard to credibility, Dr. Bodeau opined Employee's November 2009 work injury is the substantial cause of Employee's need for low back medical treatment. This is adequate evidence to raise the presumption and cause it to attach to his claim. Viewing the evidence in isolation, and without regard to credibility, Drs. Peterson and Pitzer stated Employee's July 2012 camping bending injury, and not his November 2009 work injury, is the substantial cause of his need for low back medical treatment. Their opinions provide substantial evidence to rebut the presumption, cause it to drop out, and require Employee to prove causation, by a preponderance of the evidence. To prevail on his claim for low back medical treatment, Employee must show his November 2009 work injury is the substantial cause, in relation to all other causes, for his need for continued low back medical treatment.

Here, Dr. Bodeau opined Employee's November 2009 work injury is the substantial cause of his need for low back medical treatment, while Drs. Peterson and Pitzer opine Employee's July 2012

non-work related injury is the substantial cause. Dr. Bodeau's opinion is based on his examination of Employee, review and comparison of Employee's lumbar spine MRIs, and the magnitude of the trauma Employee's experienced with the November 2009 work injury compared to the July 2012 camping incident of lifting a small light camping pot. Employee credibly testified although he did not seek low back or lower extremity medical treatment for approximately two years prior to his July 2012 injury, he continued to have residual pain. He treated this pain conservatively on his own with aspirin and exercises, including those he learned in physical therapy. Dr. Bodeau persuasively explained Employee's pain generator is either the physical contact of the discs with the nerve root, or the inflammatory contact of the disc with the nerve root. AS 23.30.122.

Dr. Pitzer's opinion is based in part on his misunderstanding of Employee's symptoms following his October 2010 PPI rating. Dr. Pitzer incorrectly believed Employee was pain free by October 2010, and had no residual symptoms until July 2012. Dr. Pitzer's statement that when Employee was, "released in Alaska in 2010 he was doing well with no residual symptoms period he relates prior to his injury in 2012, . . . did not take any medications for back pain nor did he have any back pain" is incorrect. Employee's credible testimony shows Employee continued to have low back and occasionally lower extremity pain prior to his July 2012 injury, although he was able to manage it fairly well with self-directed exercise and aspirin. Dr. Pitzer's opinion is consequently given less weight on this issue. AS 23.30.122.

Dr. Peterson's causation opinion was based on his belief Employee's November 2009 work injury "had healed and resolved" prior to his July 2012 injury. He stated no objective findings supported any worsening of Employee's condition from 2009, other than Employee's "subjective report of back pain." With regard to Employee's pain complaints, he opined, "I don't consider pain to be an objective finding, and therefore I can't put pain into this whole picture . . . pain is a subjective complaint that patients or claimants give me, and it's not what we can use to rate things with. So I don't pay a whole lot of attention to pain anymore." However, Dr. Peterson stated on examination he found some hypesthesia or slight numbness beyond the outer aspects of Employee's left leg. This represents a permanent injury. The medical evidence and Employee's credible testimony shows Employee's November 2009 work injury had not "healed and resolved" prior to his July 2012 injury. This is also supported by Drs. Bodeau and Peterson's

physical examination of Employee, and Employee's numerous MRIs, which Dr. Bodeau credibly opined evidenced Employee's disc bulging had progressed since 2009, and that this progression was causing Employee's current pain symptoms. Consequently, Dr. Peterson's opinion is given less weight on this issue. AS 23.30.122.

There is clearly disagreement among the physicians regarding the substantial cause of Employee's need for low back medical treatment. A finding reasonable persons would find employment was a cause of Employee's need for medical treatment and impose liability is a subjective determination. *See, e.g.*, *Rogers & Babler*, 747 P.2d at 534. The preponderance of the evidence shows Employee's November 2009 work injury is the substantial cause of his need for low back medical treatment and related transportation costs. Other causes of Employee's need for low back medical treatment, such as his July 2012 injury, may be a substantial factor in his need for low back medical treatment but are not the substantial cause. Dr. Bodeau's, credible and clear testimony, in conjunction with Employee's credible testimony, is the most persuasive and probative evidence on the issue of whether Employee's November 2009 work injury was the substantial cause of his need for low back medical treatment. AS 23.30.122. Comparing the relative contribution of the November 2009 work injury with the 2012 camping incident, Employee's November 2009 work injury is the substantial cause of his need for low medical treatment and related transportation costs. Accordingly, his claim for low back medical benefits and related transportation costs will be granted.

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

Employer vigorously resisted this case, so fees and costs under AS 23.30.145(b) may be awarded. *Harnish.* Employee retained an attorney who was successful in prosecuting the most significant and complex issue in this case. This decision finding Employee's November 2009 work injury is the substantial cause of his current need for low back medical treatment and related transportation costs is a significant benefit to Employee because medical treatment is expensive.

Employee filed two attorney's fee affidavits. The first itemized 27.06 hours of attorney time at a rate of $350 per hour and 20.76 hours of paralegal time at a rate of $150 per hour, for a total of $11,325.00 in fees. He filed an itemization of costs totaling $283.13. A supplemental fee and cost

affidavit itemized an additional 12.42 hours of attorney time at $350 per hour, and .2 hours of paralegal time at a rate of $150 per hour, for a total of $4,377 in additional fees. Employee filed an itemization of additional costs totaling $5,465.54. Total attorney's fees and costs equal $21,450.67. (Affidavit of Attorney's Fees, August 1, 2014; Supplemental Affidavit of Attorney's Fees, August 22, 2014).

Employer did not object to Employee's attorney's hourly rate, hours or costs. The requested hourly rates and itemized hours for Employee's attorney's fees and costs are reasonable. The primary issue in this case was whether Employee's November 2009 work injury was the substantial cause of low back medical treatment and related transportation costs. Employee was successful on this main issue. Considering the nature, length, and complexity of the case and services performed, the resistance of Employer, and the benefits resulting to Employee from the services obtained, Employee is awarded $21,450.67 in reasonable attorney's fees and costs.

CONCLUSIONS OF LAW

1) Employee's November 2009 work injury is the substantial cause of his need for low back medical treatment and related transportation costs.
2) Employee is entitled to an award of attorney's fees and costs.

ORDER

1) Employee's claim is granted.
2) Employee's claim for an award of attorney's fees and costs award is granted. Employee is awarded $21,450.67 in attorney's fees and costs.

Dated in Juneau, Alaska on October 7, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Marie Marx, Designated Chair

Charles M. Collins, 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

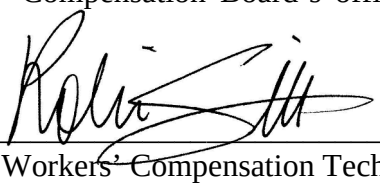
A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

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 DANA R. SORENSEN, employee / claimant v. TYLER RENTAL, INC., employer; ALASKA NATIONAL INSURANCE CO., insurer / defendants; Case No. 200917353; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties on October 7, 2014.



Robin Silk, Workers' Compensation Technician