ALASKA WORKERS' COMPENSATION BOARD

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

THEODORE MORRISON, Employee, Claimant, v. ALASKA INTERSTATE CONTRUCTION, Self-Insured Employer, and ASRC d/b/a SKW/ESIMOS, Self-Insured Employer, Defendants.	)))))))))))))))))	 FINAL DECISION AND ORDER AWCB Case Nos. 201414925, 200419949 AWCB Decision No. 17-0012 Filed with AWCB Fairbanks, Alaska on January 27, 2017

Theodore Morrison's (Employee) June 25, 2015 claim was heard in Fairbanks, Alaska on December 15, 2016, a date selected on July 7, 2016. Attorney Joseph Kalamarides appeared and represented Employee, who also appeared and testified on his own behalf. Attorney Michelle Meshke appeared and represented Alaska Interstate Construction. Attorney Colby Smith appeared and represented Arctic Sound Regional Corporation d/b/a/ SKW/Eskimos. Floyd Pohlman, M.D., testified telephonically on behalf of Alaska Interstate Construction. The record closed upon the receipt of Employee's supplemental affidavits of fees and costs on December 23, 2016.

ISSUES

Employee contends his right knee was trouble-free for nearly ten years following a 2004 injury with SKW/Eskimos until he injured it again in 2014 while working for Alaska Interstate

Construction. He contends the 2014 injury with Alaska Interstate Construction is "the substantial cause" of his current need for arthroscopic surgery, so it should be ordered to pay medical and other benefits following surgery.

Alaska Interstate Construction contends the 2014 injury Employee suffered while working in its employ resulted in a right knee strain, a temporary injury from which he recovered six weeks later, and Employee's present need for medical treatment is the result of his preexisting arthritis, the progression of which was accelerated by the surgical removal of 50 percent of his meniscus as a result of the 2004 injury with SKW/Eskimos. It contends Employee's 2004 injury with SKW/Eskimos is both "a substantial factor" and "the substantial cause" of Employee's current need for medical treatment, so SKW/Eskimos is liable to Employee for the benefits he seeks.

SKW/Eskimos concedes the 2004 injury Employee suffered while working in its employ caused the need for arthroscopic surgery to remove a portion of Employee's meniscus, and further concedes it paid Employee's benefits without dispute. However, SKW/Eskimos contends Employee fully recovered from that injury and did not require any additional right knee treatment until the 2014 injury with Alaska Interstate Construction. SKW/Eskimos contends Employee's 2014 injury is "the substantial cause" of Employee's current need for medical treatment, and the "last injurious exposure rule" is "alive and well" and places full liability upon Alaska Interstate Construction.

1) Is Employee entitled to medical benefits from either SKW/Eskimos or Alaska Interstate Construction?

Employee contends Alaska Interstate Construction controverted his claim and continued to deny benefits throughout litigation requiring the taking of numerous depositions and the scheduling of a formal hearing. He requests an order instructing Alaska Interstate Construction to pay his reasonable attorney's fees and costs under AS 23.30.145(b).

Alaska Interstate Construction contends SKW/Eskimos is liable for Employee's benefits because the 2004 injury is "the substantial cause" of his need for treatment. Therefore, it should be reimbursed attorney's fees and costs pursuant to AS 23.30.155(d).

SKW/Eskimos contends the last injurious exposure rule places full liability for Employee's benefits on Alaska Interstate Construction, so it should be reimbursed for its attorney's fees and costs pursuant to AS 23.30.155(d).

2) Is any party entitled to an award of attorney's fees and costs?

FINDINGS OF FACT

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

1) In March of 2004, Employee was working as a carpenter on Saint Paul Island for SKW/Eskimos, when he slipped and fell on ice, injuring his right knee. Following his slip and fall, Employee "had good and bad days," until he re-injured his right knee while pushing a wheelbarrow of cement. (Ambulatory Encounter Record, September 18, 2004; Physician's Report, September 23, 2004; Providence Hospital Billing, Admitting and Registration Form, October 19, 2004).

2) On October 18, 2004, Adrian Ryan, M.D., evaluated Employee's right knee. A magnetic resonance imaging (MRI) study showed a tear of the posterior horn of the medial meniscus, small joint effusion with early chondromalacia of the medial tibial femoral and patellofemoral joints, and a small tear of the posterior horn of the lateral meniscus. Dr. Ryan recommended a right knee arthroscopy and meniscectomy with possible joint debridement, which was performed the following day. (Ryan report, October 18, 2004; Operative Report, October 19, 2004).

3) On December 6, 2004, Employee followed-up with Dr. Ryan and reported overall improvement in his knee. He had returned to work, and still had pain when bending his knee, as well as some stiffness and pain when twisting his knee. Dr. Ryan determined Employee was doing "fairly well" overall and found Employee medically stable. Dr. Ryan gave Employee a four percent permanent partial impairment (PPI) rating and instructed Employee to continue with his normal occupation. (Ryan report, December 6, 2004).

4) On February 11, 2005, Employee saw Dr. Ryan for a follow-up evaluation and reported some aching discomfort when he bent his knee or twisted it quickly. Dr. Ryan discussed post-traumatic osteoarthritis risks with Employee and offered to re-check him in four to six months for a possible cortisone injection. Otherwise, Dr. Ryan's plan was to see Employee in October

or November to perform repeat bilateral knee x-rays for comparison. (Ryan report, February 11, 2005).

5) SKW/Eskimos voluntarily paid benefits arising from Employee's 2004 injury. (Record, AWCB Case No. 200419949).

6) There is a gap in Employee's medical record from February 11, 2005 until August 30, 2014. (Observations).

7) On August 30, 2014, Employee reported stepping off a ladder and onto a piece of angle iron three days earlier, which rotated his right knee outward. He was experiencing sharp pains just above his knee when climbing ladders and was unable to kneel. Colleen O'Sullivan, PA-C, evaluated Employee, prescribed ice, ibuprofen, gentle stretches and elevation. Employee was released to return to work as tolerated. (O'Sullivan report, August 30, 2014).

8) On September 7, 2014, Employee returned to see PA-C O'Sullivan and reported some improvement, but he still could kneel and reported having knee pain upon raising his knee. PA-C O'Sullivan recommended Employee have an orthopedic evaluation before returning to work. (O'Sullivan report, September 7, 2014).

9) On September 30, 2014, Employee sought a return-to-work authorization from Dale Trombley, M.D. and reported occasional aches and discomfort in his right knee. Employee was concerned because he had no problems with his right knee since his 2004 meniscus surgery. Dr. Trombley approved Employee returning to work on a trial basis and instructed Employee to report back to him after three weeks should he still have right knee discomfort. (Trombley report, September 30, 2014).

10) On November 4, 2014, Employee returned to Dr. Trombley and reported his knee was getting better. Employee could "do" stairs better, but still had some discomfort. Dr. Trombley thought Employee could return to work with no restrictions, but warned him, months or even years from now, his pain may return and his range of motion may be limited as a result of this injury. (Trombley report, November 4, 2014).

11) On March 31, 2015, Employee returned to Dr. Trombley and reported his right knee was not well. He had started to walk with a limp and was having discomfort in his hips and back. Employee stated his knee aches with normal activity and with rest. Dr. Trombley noted tenderness on the medial aspect, especially with outward twisting, as well as upon abduction of

the leg at the knee. A plain x-ray showed no bony abnormalities. (Trombley report, March 31, 2015).

12) On April 6, 2015, a right knee MRI was interpreted by John McCormick, M.D., as showing a tear of the posterior horn of the medial meniscus and a loss of overlying cartilage at the femoral condyle with associated subcortical degenerative cysts. The anterior horn of the medial meniscus was subluxed away from the joint and not interposed between articulating surfaces. (MRI report, April 6, 2015).

13) On April 8, 2015, based on the results of Employee's April 6, 2015 MRI, Dr. Trombley decided to refer Employee to an orthopedist of his choice. (Trombley report, April 8, 2015).

14) On April 13, 2015, Richard Garner, M.D., reviewed Employee's April 6, 2015 MRI and thought it showed images of "what appears to be a degenerative tear of the medial meniscus without bucket-handle components." Dr. Garner thought it was highly likely Employee would require debridement of the right medial meniscus. Employee desired to proceed with the surgery as soon as possible so he could undertake gainful employment through the summer work season. (Garner report, April 13, 2015).

15) On April, 23, 2015 and November 8, 2015, Charles Craven, M.D., performed an employer's medical evaluation (EME) on behalf of Alaska Interstate Construction. Employee's chief complaint was a stabbing pain in the anterior aspect of the right knee, as well as an aching pain in the lower back and right lateral hip. Employee reported having some discomfort on most days, and some days that were "really bad." Employee also reported discomfort when he walks for long distances, and at the end of the day after standing all day. Dr. Craven diagnosed, 1) right knee strain, which he thought was substantially caused by the August 27, 2014 injury, which he opined would have resolved within six weeks; and 2) right knee osteoarthritis, which he opined preexisted the August 27, 2014 injury and was not symptomatically aggravated by it. Dr. Craven also was unable to identify a symptomatic right knee medial meniscus tear. Instead, Dr. Craven opined the April 6, 2015 MRI showed postsurgical change of a surgically altered meniscus, and Employee's history, examination findings and imaging studies were "classic" right knee osteoarthritis. Dr. Craven thought Employee's right knee condition, medial chondromalacia, preexisted the 2004 work injury, but the meniscal tear in 2004, and the subsequent necessity for debridement of 40 to 50 percent of the meniscus, had hastened the degenerative decline of Employee's right medial knee. The 2004 injury and surgery, according

to Dr. Craven, was “a substantial factor” in Employee’s current need for surgery; however, Dr. Craven “strongly advised against” Dr. Garner’s proposed arthroscopic knee surgery, opining such a procedure might make Employee’s right knee condition worse because of his preexisting osteoarthritis. (Craven reports, April 23, 2015; November 8, 2015).

16) On May 8, 2015 and July 17, 2015, Employer controverted benefits based on Dr. Craven’s April 13, 2015 report. (Controversions, May 8, 2015; July 17, 2015).

17) On May 12, 2016, Floyd Pohlman, M.D., performed a second independent medical evaluation (SIME). Employee reported his knee had been asymptomatic since his 2004 meniscectomy, but he was now experiencing constant pain, which was made worse by walking and kneeling. Dr. Pohlman could not identify a posterior meniscal tear from the April 6, 2015 MRI, but rather thought the study showed a lesion. Dr. Pohlman diagnosed 1) right knee strain; and 2) moderate degenerative right knee arthritis. After evaluating the relative contributions of these two diagnoses, Dr. Pohlman opined the August 27, 2014 injury was “the substantial cause” of Employee’s ongoing disability.[1] He thought the August 27, 2014 injury had combined with Employee’s preexisting arthritis to produce a permanent change to Employee’s knee. Dr. Pohlman found Employee medically stable, but was unable to perform an impairment rating because weight-bearing x-rays are required to evaluate arthritis changes. Dr. Pohlman opined invasive treatment such as injections and visco-supplementation were “probably” indicated, but surgical intervention was not, although it could be in the future. (Pohlman report, May 12, 2016).

18) In his SIME report, Dr. Pohlman responded to the following question posed by Alaska Interstate Construction:

> Q For all *diagnosed* right knee complaints, please identify all causes contributing to any disability or need for medical treatment for any such *conditions*. Please include any relevant pre-existing or co-morbid *conditions*, any prior or subsequent employment activities or incidents, and any other contributing causes of medical significance.
>
> A The main cause of his disability is the pre-existing osteoarthritis in the right knee. This was aggravated by the twisting injury he sustained at work.

[1] At his deposition, Dr. Pohlman later acknowledged he was unaware Employee had not missed any work following the 2014 injury.

(*Id*. at 26) (emphasis added).

19) On June 12, 2015, Dr. Trombley authored a letter providing a summary of Employee's medical treatment for his right knee, and opining the August 27, 2014 injury was the substantial cause of Employee's need for treatment. (Trombley letter, June 12, 2015).

20) On June 26, 2015, Employee filed his instant claim. (Claim, June 26, 2015).

21) On October 8, 2015, and again on October 20, 2016, the parties deposed Employee. Employee described installing pilings at the Brooks Range Camp in 2014, which involved putting six inch pipe 35 feet into the ground and then pouring slurry solution so the pipes would freeze in place. Prior to freezing, the pipes would be lifted one to two feet from the bottom of the hole, and held in place by 2-by-2 angle iron welded to pipe, so it would "freeze back better." Later, the welder would go around and cut the pipe, and then Employee would grind the pipe. Because the pipes were five to six feet above the ground, Employee would lean a ladder against the pipes to grind them. He injured his right knee when he was coming back down the ladder and his foot hit what he thought was the ground, but it was the angle iron that had been welded to the pipe. Employee was wearing "big lug boots," and his foot did not turn with him as he spun off the ladder. He continued to work other jobs after injuring his knee, but had "good days" and "bad days" with his knee. His knee pain also caused him to suffer low back pain and left hip pain on bad days when he would limp. He also testified regarding his 2004 injury with SKW Eskimos and the meniscus surgery by Dr. Ryan following that injury. (Employee depositions, October 8, 2015; October 20, 2016).

22) Employee did not seek any treatment for his right knee between 2005 and 2014, because "there was nothing wrong with it as far as [he] was concerned." (Employee deposition, October 20, 2016, at 23). He repeatedly testified his right knee was symptom-free until the 2014 work injury. "It was fine. I don't recall any problems." (*Id*.). Employee did not experience any pain, locking or clicking leading up the 2014 work injury. (*Id*.). "I don't recall any problems with it at all." (*Id*. at 30, 38-39). "I was pain-free. Nothing was wrong with my knee until 2014, the way I remember it." (*Id*. at 35).

23) On October 28, 2016, the parties deposed Dr. Pohlman, where he reiterated opinions expressed in his May 12, 2016 report. Although Dr. Garner interpreted Employee's April 6, 2015 MRI as showing a medial meniscus tear, Dr. Pohlman thought that study might be show "pseudomeniscus" instead. Although Dr. Pohlman thought the 2004 work injury was a

substantial cause of Employee's arthritic changes, he also thought the 2014 work injury permanently aggravated his preexisting arthritis, causing it to become symptomatic, an opinion he based on Employee's lack of symptoms prior to the 2014 injury. Dr. Pohlman explained, not all people with osteoarthritic knees require treatment. The reasons an orthopedic physician would provide medical treatment to a person with osteoarthritic knees are pain and disability. In Dr. Pohlman's opinion, the symptoms that arose in Employee's arthritic right knee, requiring treatment, were caused by the 2014 work injury. (Pohlman deposition, October 28, 2016).

24) Dr. Pohlman also explained:

> I've seen people that have bone-on-bone contact come in to see me that twisted their knee, didn't have any symptoms of osteoarthritis at all, and were ready for a total knee replacement because . . . the knee is so damaged. But, they were not aware of it until something happened.

(Pohlman deposition at 25).

25) At another point in Dr. Pohlman's deposition, the attorney for one of the parties explored the causation issue with Dr. Pohlman by using the following analogy:

> Q Okay. Well, let me – I'm going to give an analogy. And nobody's going to like it, people are going to object, but let's talk about a wooden bridge, okay. Let's say there's a wooden bridge, and it's a hundred years old, and cars have been driving over it a bunch of times.
>
> A Uh-huh.
>
> Q If a car drives over it, you know, last week, and the bridge breaks and falls apart, what is the substantial cause of the bridge falling down? Is it the underlying structure of the bridge or is it the car that went -- the last car that went by?
>
> A I don't know if you can say. I mean, you got – I guess – I would say the car.
>
> Q The car? And it was because it was the last car that did it?
>
> A Yeah.
>
> Q Okay.
>
> A If no other cars went over it, it would probably still be standing.

> Q Well, but the next car would do it?
>
> A What?
>
> Q What about the next car that goes by?
>
> A Then that would be the cause.
>
> Q So it's whatever – whatever triggers it then is like the final straw for you, that's what the cause is; is that right?
>
> A In this – in this case, okay, okay, the bridge was asymptomatic, the bridge was fine.
>
> Q Well, was it? I mean it doesn't look like on –
>
> A Meaning you can walk across it and be fine, okay. . . . But, when the car went over it, the car went over it in a such a way that caused it to fail at that point in time.

(Pohlman deposition at 29-30).

26) Later, Dr. Pohlman summarized his opinion: "From a medical standpoint, I'd have to say yes, that he was asymptomatic, he didn't need any treatment until after he twisted his knee, which aggravated the condition." (Pohlman deposition at 44).

27) On December 9, 2016, the parties deposed Dr. Craven, who repeated the diagnosis set forth in his EME report: right knee strain, which was substantially caused by the 2014 work injury and would have resolved in six to 12 weeks; and pre-existing, symptomatic, right knee osteoarthritis, which was not symptomatically aggravated by that same injury. He thought Employee had nearly recovered from his knee strain by the time of his November 4, 2014 appointment with Dr. Trombley, and thought Employee's return to Dr. Trombley seven months later was on account of his arthritic symptoms. Dr. Craven testified the April 6, 2015 MRI shows Employee had severe arthritis, which would have taken years to develop, and repeatedly attributed Employee's lack of reported symptoms between 2005 and 2014 to Employee being a "stoic" individual living with the aches and pains of daily life, but who did not "perceive" these aches and pains as being associated with arthritic progression. In Dr. Craven's experience, very stoic patients do not perceive minor aches and pains as "symptoms" until they mentally ascribe them to some injurious event. The "more medically astute" question in Employee's case, according to Dr. Craven, was not what caused Employee's symptoms, but rather what caused the

underlying pathologic process of Employee's arthritis, which Dr. Craven opined was the 2004 surgical removal of one-half Employee's meniscus. Dr. Craven acknowledged not everyone with osteoarthritis of the knee needs treatment. (Craven deposition, December 9, 2016).

28) On December 8, 2016, Employee filed affidavits of attorney's fees and costs claiming $18,020 in attorney's fees, $4,817.50 in paralegal costs and $2,035.52 in other costs, for a grand total of $24,873.02. (Employee's affidavits of attorney's fees and costs, December 8, 2016).

29) On December 9, 2016, SKW/Eskimos filed an affidavit of attorney's fees and costs, claiming $8,857.50 in attorney's fees, $754.60 in paralegal costs and $2,617.75 in other costs, for a grand total of $12,229.85. (SKW/Eskimos' affidavit of attorney's fees and costs, December 9, 2016).

30) On December 9, 2016, Alaska Interstate Construction filed an affidavit of attorney's fees and costs, claiming $17,181 in attorney's fees, $7,050 in paralegal costs and $2,590.15 in other costs for a grand total of $26,821.15. (Alaska Interstate Construction's affidavit, December 9, 2016).

31) At the December 15, 2016 hearing, Dr. Pohlman testified consistent with his October 28, 2016 deposition. He opined the 2004 meniscus removal was "a substantial cause" of Employee's underlying arthritis, and the 2014 injury was "the substantial cause" of aggravating the underlying arthritis, causing it to become symptomatic. Employee was still symptomatic at the time of his SIME evaluation and Dr. Pohlman thought his symptoms would be permanent. Based on a "pathological approach," Dr. Pohlman apportioned the relative contributions of the two injuries as 10 to 20 percent for the 2014 injury, and 80-90 percent for the 2014 injury. When asked to evaluate and weigh the contributions of Employee's knee pathology versus his knee symptoms, Dr. Pohlman agreed with Dr. Craven to an extent Employee would have recovered from the 2014 injury, if he had a "normal" knee, but given his preexisting arthritis, the 2014 injury hastened Employee's need for treatment. He also explained, not all patients with arthritis require treatment because symptoms dictate the need for treatment, and he has seen some patients with worn out knees that did not need treatment. Dr. Pohlman was not aware of Employee having any right knee symptoms or seeking any right knee treatment between 2005 and 2014, nor was he aware of any medical records in this timeframe. (Pohlman).

32) Dr. Pohlman was credible. (Experience, judgment, observations, and inferences drawn therefrom).

33) At the December 15, 2016 hearing, Employee testified concerning details of the 2004 injury, the 2004 meniscus surgery with Dr. Ryan, as well as details of the 2014 injury. After having surgery for a meniscus tear with Dr. Ryan in 2004, he returned to work approximately eight or nine days after surgery. Between 2005 and 2014, Employee did not have any pain or other problems with his right knee. He was prescribed no medications for his right knee, and he continued to work as a carpenter and welder. The 2014 injury was not as "bad" as the 2004 injury, but his knee was swollen. Employee explained, Dr. Trombley diagnosed knee sprain, and Employee returned to work, but his knee was still painful. He continued to seek treatment in January and February of 2015, and returned again to seek treatment again on March 15, 2015 because he had a "bad limp" and his knee was very painful. After an MRI showed a meniscus tear, Dr. Ryan was not available, so he saw Dr. Garner. Employee clarified he is seeking an order for him to receive medical treatment for his knee. He has not turned down any work since the 2014 injury, and he has still been able to engage in recreational activities. Employee is aware some doctors have opined an additional surgery may make his knee worse. Employee last worked in September of 2016, and he sometimes voluntarily takes time off work. He explained he was "very happy" with the way his 2004 surgery went, and he does not recall any problems with his right knee until the 2014 injury. (Employee).

34) Employee was credible. (Experience, judgment, observations, and inferences drawn therefrom).

35) Employee's accounts of his 2014 work injury and the onset of his symptoms are consistent throughout the medical records, his depositions and at hearing. (Record).

36) On December 19, 2016, SKW/Eskimos filed a supplemental affidavit of attorney's fees and costs, claiming an additional $2,871.80 in attorney's fees, for a revised grand total of $15,101.65 in fees and costs. (SKW/Eskimos' supplemental affidavit, December 19, 2016).

37) On December 22, 2016, Alaska Interstate Construction filed a supplemental affidavit of attorney's fees and costs, claiming an additional $10,235 in attorney's fees, $1,400 in paralegal costs and $1,030.98 in other costs for a revised grand total of $39,487.13. (Alaska Interstate Construction supplemental affidavit, December 9, 2016).

38) On December 23, 2016, Employee filed supplemental affidavits of attorney's fees and costs, claiming $23,400 in attorney's fees, $4,817.50 in paralegal costs and $3,015.93 in other costs for a grand total of $31,233.43. (Employee's supplemental affidavits, December 20, 2016).

39) No party objected to any other party's attorney's fees. (Record).

PRINCIPLES OF LAW

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).

At the time of Employee's August 30, 2004 injury, the Act provided:

> **AS 23.30.010. Coverage**. Compensation is payable under this chapter in respect of disability or death of an employee.

Decisional law interpreted former AS 23.30.010 to require payment of benefits when employment was "a substantial factor" in disability or need for medical treatment. *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590 (Alaska 1979). Employment is "a substantial factor" in bringing about the disability or need for medical care where "but for" the work injury, a claimant would not have suffered disability at the time he did, in the way he did, or to the degree he did, and reasonable people would regard it as the cause and attach responsibility to it. *Fairbanks North Star Borough v. Rogers and Babler*, 747 P.2d 528 (Alaska 1987). A preexisting disease or infirmity does not disqualify a claim if employment aggravated, accelerated, or combined with disease or infirmity to produce death or disability. *Thornton v. Alaska Workers' Compensation Board*, 411 P.2d 209 (Alaska 1966).

During a 2005 legislative re-write, the Act was amended to require work be "the substantial cause" of the disability or need for medical treatment in order for compensation to be payable to an employee. AS 23.30.010(a).

> **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. . . .

For injuries occurring on or after November 7, 2005, the board must evaluate the relative contribution of all causes of disability and need for medical treatment, and will award benefits if employment is, in relation to all other causes, "the substantial cause" of the disability or need for medical treatment. *City of Seward v. Hanson*, AWCAC Decision No. 146 at 10 (January 21, 2011). A preexisting disease or infirmity does not disqualify a claim if employment aggravated, accelerated, or combined with disease or infirmity to produce death or disability. *Thornton* (applied under the current AS 23.30.010 in *City and Borough of Juneau v. Olsen*, AWCAC Decision No. 185 (August 21, 2013) at 15-16). An aggravation of a preexisting condition occurs when a job worsens an employee's symptoms such that she can no longer perform her job functions, even when the job does not worsen the underlying condition. *Hester v. State, Public Employee's Retirement Board*, 817 P.2d 472; 476 (Alaska 1991) (observing increased pain or other symptoms can be "as disabling as deterioration of the underlying disease itself." *Id.* at 476 n. 7).

In *DeYonge v. NANA/Marriott*, 1 P.3d 90 (Alaska 2000), the Alaska Supreme Court reiterated that preexisting conditions do not disqualify a claim under the work-connection requirement if the employment injury aggravated, accelerated or combined with the preexisting infirmity to produce the disability for which compensation is sought. The court stated so long as the work injury worsened the injured person's symptoms, the increased symptoms constitute an aggravation, "even when the job does not actually worsen the underlying condition." *Id.* at 96. For an employee to establish an aggravation claim, the employment need only have been the substantial factor in bringing about the disability. *Olsen* at 17-18 (*citing DeYonge*). Whether employment is the substantial cause of the need for medical treatment requires an evaluation of the relative contributions of the employment and

the preexisting condition. *Id.*

A decision by an Anchorage panel addressed the causation standard in a case involving an employee with preexisting radiculopathy, which would "flare up" as a result of her work activity. In his report, the SIME physician addressed the relative contributions of the different causes of the employee's "complaints and symptoms," and attributed 90 percent of her complaints and symptoms to her preexisting radiculopathy. The decision then observed:

> A preexisting condition may indeed cause 90 percent of a person's . . . symptoms yet not cause the . . . need for medical treatment. Where the . . . need for medical treatment [is] due to the remaining 10 percent . . . , the cause of the ten percent would be the substantial cause.

Sarmiento-Mendoza v. State of Alaska, AWCB Decision No. 14-0122 (September 2, 2014). Though the panel noted the employee "may have some preexisting condition," it nevertheless found the work injury was the substantial cause of her disability and need for medical treatment, and found the employer liable for benefits.

In *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590 (Alaska 1979), the Alaska Supreme Court adopted the last injurious exposure rule," which "imposes full liability on the employer at the time of the most recent injury that bears a causal relation to the disability." *Id*. at 595 (citing 4 A. Larson, The Law of Workmen's Compensation § 95.12 (1979)). After reviewing the way other states handled situations where employment with successive employers contributed to an injured worker's disability or need for medical care, the Court found the last injurious exposure rule was simpler, easier to administer, and avoided the difficulties associated with apportionment. *Id*. at 507.

However, the last injurious exposure rule is not designed to inequitably impose liability on employers having no causal connection with an employee's disability. Liability may only be imposed on a subsequent employer only after a preponderance of the evidence demonstrates that the employment aggravated, accelerated or combined with a preexisting condition, and that this aggravation, acceleration or combination was the legal cause, *i.e.*, "a substantial factor," of the employee's disability. *United Asphalt Paving v. Smith*, 660 P.2d 445; 447 (1983); *Flour Alaska,*

Inc. v. Peter Kiewit Sons' Co., 614 P.2d 310; 313 (1980); *Peek v. SKW/Clinton*, 855 P.2d 415, 416 (Alaska 1993); *Saling* at 598.

In *State of Alaska v. Dennis*, AWCAC Decision No. 036 at 11-13 (March 27, 2007), the commission explained the 2005 amendments to the Act only modified the definition of "legal cause" from "a substantial factor" to "the substantial cause." The 2005 amendments did not abrogate the "last injurious exposure" rule, which still operates to prevent apportionment of liability of injury among employers. *Id.* Neither did the 2005 amendments change the operation of the presumption analysis, just the "elements of a prima facie case." *Dennis* at 16. Although the Alaska Supreme Court has not directly addressed the issue of whether the 2005 amendments alter the presumption analysis in cases involving situations where employment with successive employers contribute to an injured worker's disability or need for medical care, it nevertheless noted the following in a case involving successive injuries with the same employer:

> At oral argument before us, [the employer] contended that *DeYonge* only permitted attaching the presumption of compensability because of increased symptoms and that any analysis based on *DeYonge* would be different because of the 2005 workers' compensation amendments. In *DeYonge,* we held that an increase in symptoms could be the basis of an award of disability benefits, not just a means to attach the presumption of compensability. 1 P.3d at 98. [The employer] did not ask either the Commission or this court to consider whether [the employee's] second injury should be analyzed differently from her first injury, so we accept the Board's use of its three-step analysis in this case. We observe nonetheless that the 2005 amendments did not prohibit an award of benefits based on increased symptoms. *See* ch. 10, § 9, FSSLA 2005.

Rivera v. Wal-Mart Stores, Inc., 247 P.3d 957; 963 n 18 (Alaska 2011); *see also Huit v. Ashwater Burns, Inc.*, 372 P.3d 904; 918-19 (Alaska 2016) (concluding, although the legislature intended to create a "higher standard" for compensability under AS 23.30.010(a) in 2005, it did not intend to change the operation of the presumption analysis by eliminating the "negative evidence test").

> **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 . . . .

"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.*

> **AS 23.30.155. Payment of compensation.**
> . . . .
>
> (d) . . . . When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

Bouse v. Fireman's Fund Ins. Co., 932 P.2d 222, 240-41 (Alaska 1997) under AS 23.30.155(d) made an unsuccessful insurer pay the attorney's fees and costs of a successful insurer in a case where two employers contested their respective liability for the claimant's benefits. *Bouse* said:

> Providence Washington argues that the statute means that the prevailing insurer is entitled to attorney's fees and costs only where no other grounds are raised for controversion of the claim. Fireman's Fund argues that the sentence containing the word 'solely' is intended to ensure the worker receives benefits to which he/she is clearly entitled regardless of which

> insurer ultimately pays and to limit such automatic payment to situations where it is clear that at least one employer or insurer will be liable. Fireman's Fund argues that the attorney's fees clause is included to discourage insurers from trying to join other insurers with little evidence against them in hopes of a 'nuisance action' settlement.
>
> The court agrees with the interpretation urged by Fireman's Fund. The last sentence of AS 23.30.155(d) stands independently of all other sentences. Although both of the relevant sentences deal with the last injurious exposure rule, they address different issues. The 'solely' sentence is there to guarantee benefits to injured employe[e]s. The last sentence is there to provide reimbursement, including attorney's fees, to the insurer who prevails. Accordingly, the court concludes that the Board properly ordered Providence Washington to reimburse Fireman's Fund['s] attorney's fees.

8 AAC 45.120. Evidence

. . . .

(k) The board favors the production of medical evidence in the form of written reports, but will, in its discretion, give less weight to written reports that do not include

(1) the patient's complaints;
(2) the history of the injury;
(3) the source of all facts set out in the history and complaints;
(4) the findings on examination;
(5) the medical treatment indicated;
(6) the relationship of the impairment or injury to the employment;
(7) the medical provider's opinion concerning the employee's working ability and reasons for that opinion;
(8) the likelihood of permanent impairment; and
(9) the medical provider's opinion as to whether the impairment, if permanent, is ready for rating, the extent of impairment, and detailed factors upon which the rating is based.

ANALYSIS

1) Is Employee entitled to medical benefits from either SKW/Eskimos or Alaska Interstate Construction?

The principle issues to be decided is, which, if either, of the two Employers are liable to Employee for medical treatment of his right knee. The parties do not dispute Employee sustained two right knee injuries - one in 2004 while working for SKW/Eskimos, and another in 2014 while working for Alaska Interstate Construction. SKW/Eskimos concedes the 2004 injury

Employee suffered while working in its employ caused the need for arthroscopic surgery to remove a portion of Employee's meniscus, and further concedes it paid Employee's benefits without dispute. However, SKW/Eskimos contends Employee fully recovered from that injury and did not require any additional right knee treatment until the 2014 injury with Alaska Interstate Construction. Alaska Interstate Construction contends the 2014 injury Employee suffered while working in its employ resulted in a right knee strain, a temporary injury from which he recovered six weeks later, and Employee's present need for medical treatment is the result of his preexisting arthritis, the progression of which was accelerated by the surgical removal of 50 percent of his meniscus as a result of the 2004 injury with SKW/Eskimos.

SKW/Eskimos contends Employee's 2014 injury is "the substantial cause" of Employee's current need for medical treatment and the "last injurious exposure rule" places full liability upon Alaska Interstate Construction. Alaska Interstate Construction contends Employee's 2004 injury is both "a substantial factor" and "the substantial cause" of Employee's current need for medical treatment, so SKW/Eskimos is liable to Employee for his benefits. Employee contends his right knee was trouble-free and did not require any additional treatment between 2005 and 2014, when he has injured while working for Alaska Interstate Construction, and he shares SKW/Eskimos' view that Alaska Interstate Construction should be held liable for his benefits.

The issue of causation between two potentially liable employer's raises a factual dispute to which the statutory presumption of compensability applies. AS 23.30.120; *Cheeks*. Employee attaches the presumption against Alaska Interstate Construction through his own testimony his right knee was trouble-free and did not require any medical treatment for nearly ten years until he twisted it while working for Alaska Interstate Construction. *Cheeks*. The presumption also attaches against SKW/Eskimos with Dr. Craven's April 23, 2015 and November 8, 2015 EME reports, which identify the 2004 injury with SKW/Eskimos, and the resulting meniscus debridement, as the cause of Employee's present need for treatment. *Id*. Alaska Interstate Construction also rebuts the presumption with Dr. Craven's April 23, 2015 and November 8, 2015 SIME reports, which point to Employee's preexisting osteoarthritis and the 2004 injury with SKW/Eskimos as the cause of Employee's present need for treatment. *Runstrom*. SKW/Eskimos rebuts the presumption with Dr. Pohlman's May 12, 2016 SIME report, and Dr.

Trombley's June 12, 2015 letter, both of which identify the 2014 injury with Alaska Interstate Construction as the cause of Employee's present need for treatment. *Id*. Employee must prove, by a preponderance of the evidence, that either his injury with SKW/Eskimos is a substantial factor, or his injury with Alaska Interstate Construction, is the substantial cause, of his need for medical treatment. *Saxton*.

Of the three physician opinions in the record on the issue of causation, two of them - Dr. Craven's and Dr. Pohlman's, were rendered by doctors who had performed comprehensive medical records reviews. Their detailed reports stand in stark contrast to Dr. Trombley's cursory opinion letter. Additionally, unlike Dr. Trombley, the parties were afforded opportunities to thoroughly explore the opinions of Drs. Craven and Pohlman during their depositions. Therefore, although Dr. Trombley's opinion is afforded some weight as Employee's treating physician, his opinion is afforded lesser weight than the opinions of Drs. Craven and Pohlman. 8 AAC 45.120(k).

Turning to Drs. Craven and Pohlman, both agree – orthopedic treatment is driven by symptoms. Not everyone with arthritis requires orthopedic treatment, rather only those who present with symptoms. However, Dr. Craven testified the more "medically astute" question in Employee's case was not what caused his symptoms, but rather what caused the underlying pathologic process of his arthritis. While such an inquiry may be more medically astute in Dr. Craven's opinion, it is not the inquiry the law requires.

Under both the plain language of the current statute, as well as decisional authority interpreting the former statute, the focus of causation inquiries in workers' compensation cases has always been on the need for medical treatment, and not on the cause of an underlying medical condition. AS 23.30.010(a); *accord Saling; DeYonge* (former statute). Thus, even when Dr. Pohlman used Dr. Craven's "pathological approach" at hearing, and apportioned the relative contributions of Employee's two injuries as 10 to 20 percent for the 2004 injury, and 80 to 90 percent for the 2014 injury, such an apportionment provides little probative value on the issue of legal causation in Alaska because it is an apportionment of the contributing causes of Employee's arthritis, not

his present need for medical treatment. *Contra Saling* (rejecting the apportionment schemes of other jurisdictions). Accordingly, as an Anchorage panel observed in another decision,

> A preexisting condition may indeed cause 90 percent of a person's . . . symptoms yet not cause the . . . need for medical treatment. Where the . . . need for medical treatment [is] due to the remaining 10 percent . . . , the cause of the ten percent would be the substantial cause.

Sarmiento-Mendoza. Here, Alaska Interstate Construction proposes a different approach.

Alaska Interstate Construction contends, following the 2005 amendments, a weighing must occur to evaluate the relative contribution of different causes of the need for medical treatment. Indeed, the current statute prescribes as much. AS 23.30.010(a). However, the weighing Alaska Interstate Construction proposes is set forth in its hearing brief, where it contends:

> In finding that the relatively minor work injury in 2014 "triggered" symptoms, there is no weighing or comparing of the causes of the symptoms. When Dr. Pohlman does "weigh" the (1) right knee strain caused by the 2014 injury with (2) the pre-existing osteoarthritis caused by the 2004 injury, his conclusion is "the main cause of the disability is the pre-existing osteoarthritis in the right knee." SIME Report at p. 26. If the 2004 injury is *"the substantial cause" of the osteoarthritis condition* that developed, it must play the greatest role in the onset of symptoms. Without the osteoarthritis, there would be no symptoms.

Alaska Interstate Construction Hearing Brief at 10 (emphasis added). The substantial cause of Employee's arthritis is not at issue, but rather the cause of his current need for medical treatment. AS 23.30.110; *Saling*; *DeYonge*.

The Alaska Supreme Court has adopted the last injurious exposure rule, which "imposes full liability on the employer at the time of the most recent injury that bears a causal relation to the disability." *Saling*. The Workers' Compensation Appeals Commission has explained the 2005 amendments only modified the definition of "legal cause" from "a substantial factor" to "the substantial cause." *Dennis*. The 2005 amendments did not abrogate the "last injurious exposure" rule, which still operates to prevent apportionment of liability of injury among employers. *Id*. Neither did the 2005 amendments change the operation of the presumption analysis, just the "elements of a prima facie case." *Id*. *See also Rivera*; *Huit*.

Employee's preexisting arthritis, even if substantially caused by the 2004 injury with SKW/Eskimos, is not a bar to benefits if the 2014 injury with Alaska Interstate Commerce aggravated his arthritis to produce his need for treatment. *Thornton*; *Olson*. Such an aggravation could have occurred even if the 2014 injury with Alaska Interstate Construction worsened Employee's symptoms and not the underlying condition of his knee. *Hester*. Whether or not the 2014 work injury with Alaska Interstate Construction worsened the condition of Employee's knee is not clear. Drs. McCormick and Garner both interpret Employee's April 6, 2015 MRI as showing a medial meniscus tear, while Dr. Craven sees no tear at all. Meanwhile, Dr. Pohlman thinks the MRI shows either a lesion or "pseudomeniscus." However, the question of whether or not the 2014 work injury with Alaska Interstate Construction aggravated Employee's symptoms is clear.

Employee's accounts of his 2014 work injury, and the onset of his symptoms, are consistent throughout the entire medical record, his deposition testimony and his testimony at hearing. At his second deposition, he repeatedly testified his right knee had been trouble-free for nearly ten years leading up to the 2014 injury with Alaska Interstate Construction, testimony he credibly presented again at hearing. Additionally, Employee's lack of medical treatment for his right knee between 2005 and 2014 is undisputed among the parties. For these reasons, significant weight is placed on Employee's testimony regarding the onset of his symptoms following the 2014 work injury, and his lack of symptoms prior to it. AS 23.30.122.

Dr. Craven was dismissive of Employee's reports of being symptom-free for nearly ten years, as well as his lack of a medical record for right knee treatment over the same time period of time. He attributed Employee's lack of medical treatment to him being a "stoic" individual, who lived with arthritis pain, which he mistook for the "aches and pains of daily life" for years while his arthritis progressed, and who only "perceived" his aches and pains as "symptoms" following an injurious event. To an extent, Dr. Pohlman agrees, but he comes to a different conclusion:

> I've seen people that have bone-on-bone contact come in to see me that *twisted their knee*, didn't have any symptoms of osteoarthritis at all, and were ready for a

> total knee replacement because . . . the knee is so damaged. But, they were not aware of it until [they twisted their knee].

Pohlman deposition at 25 (emphasis added). At another point in Dr. Pohlman's deposition, one attorney explored causation issue with Dr. Pohlman by using an analogy of an old wooden bridge that collapsed when a car drove over it. Dr. Pohlman identification of the car as the cause of the bridge failure is akin to an event that constitutes the substantial cause of an employee's need for medical treatment where that employee had a preexisting condition. Pohlman deposition at 29-30. Summarizing his opinion, Dr. Pohlman stated, "From a medical standpoint, I'd have to say yes, that he was asymptomatic, he didn't need any treatment until after he twisted his knee, which aggravated the condition." Pohlman deposition at 44.

Not only is Dr. Pohlman's explanation of the onset of Employee's symptoms more consistent with the medical record, Employee's credible testimony, and Dr. Trombley's prescient November 4, 2014 admonition to Employee his work related injury symptoms may return, *Rogers & Babler*, his opinion on causation is also based on the correct legal standard – that employment be the cause of Employee's current need for medical treatment, and not the cause of his preexisting medical condition. AS 23.30.010(a); *Saling*; *DeYonge*. For these reasons, Dr. Pohlman's opinion is afforded greater weight than that of Dr. Craven's, and Employee has demonstrated by a preponderance of the evidence the substantial cause of his need for right knee treatment was the 2014 injury with Alaska Interstate Construction. *Saxton*.

2) Is any party entitled to an award of attorney's fees and costs?

Employee seeks an award of attorney's fees and costs. Here, Alaska Interstate Construction resisted paying compensation by controverting and litigating benefits. Employee retained counsel, who has successfully litigated the compensability of Employee's claim and made valuable medical benefits, and potentially other benefits, such as disability compensation and PPI, available to him. Thus, Employee is entitled to reasonable attorney's fee and costs under AS 23.30.145(b).

In making attorney's fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on the employee's behalf, and the benefits

resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings, and fully but reasonably compensate attorneys, commensurate with their experience, for services performed on issues for which the employee prevails. *Bignell*.

Employee's counsel is an experienced litigator and has represented injured employees in workers' compensation cases for many years. Alaska Interstate Construction controverted benefits and continued to deny them throughout litigation, which necessitated a hearing on the merits of Employee's case. Litigation in this case has involved complex causation issues, which necessitated the taking of numerous depositions and conducting an SIME. Additionally, given the conflicting medical opinions in this case, the final outcome of litigation was not certain.

Employee has provided an affidavit of fees and costs setting forth $23,400 in attorney's fees, $4,817.50 in paralegal costs and $3,015.93 in other costs. Alaska Interstate Construction has not objected to these fees. Employee will therefore be awarded fees and costs in an amount of $31,233.43 against Alaska Interstate Construction.

SKW/Eskimos also seeks attorney's fees and costs from Alaska Interstate Construction as a prevailing employer. AS 23.30.155(d). SKW/Eskimos successfully defended Alaska Interstate Construction's defense that SKW/Eskimos rather than Alaska Interstate Construction is liable for Employee's benefits. In last injurious exposure cases, the prevailing employer is entitled to reimbursement, including attorney's fees and costs, from the losing employer. *Bouse*. SKW/Eskimos has provided affidavits setting forth $15,101.65 in attorney's fees and costs. Alaska Interstate Construction has not objected to these fees. Therefore, Alaska Interstate Construction will be ordered to reimburse SKW/Eskimos for its attorney's fees and costs in defending against this action.

CONCLUSIONS OF LAW

1) Employee is entitled to medical benefits from Alaska Interstate Construction.
2) Employee and SKW/Eskimos are entitled to an award of attorney's fees and costs from Alaska Interstate Construction.

ORDER

1) Employee's June 25, 2015 claim against Alaska Interstate Construction is granted.

2) Alaska Interstate Construction is ordered to pay Employee's medical and related transportation costs in accordance with this decision.

3) Alaska Interstate Construction shall pay Employee's attorney's fees and costs in an amount of $31,233.43.

4) Alaska Interstate Construction shall reimburse SWK/Eskimos' attorney's fees in an amount of $15,101.65.

Dated in Fairbanks, Alaska on January 27, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Jacob Howdeshell, Member

unavailable for signature
Julie Duquette, 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 THEODORE MORRISON, employee / claimant; v. ALASKA INTERSTATE CONSTRUCTION, self-insured employer; Case No. 201414925; and SKW/ESKIMOS INC., self-insured employer; Case No. 200419949; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on January 27, 2017.

/s/____

Jennifer Desrosiers, Workers' Compensation Technician