ALASKA WORKERS' COMPENSATION BOARD

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

JAMIE A. WICKHAM,	)	
Employee,	)	
Claimant,	)	FINAL DECISION AND ORDER
	)	
v.	)	AWCB Case Nos. 201011311M; 201005009;
	)	200919539
STATE OF ALASKA, DEPARTMENT	)	
OF TRANSPORATION,	)	AWCB Decision No. 17-0038
	)	
Self-Insured	)	Filed with AWCB Juneau, Alaska
Employer,	)	On April 5, 2017
Defendant.	)	

Jamie Wickham's (Employee) September 8, 2010; December 19, 2011; and March 1, 2012 claims were heard on March 7, 2017, in Juneau, Alaska, a date selected on November 17, 2016. Attorney Jonathan Hegna appeared and represented Employee. Employee appeared and testified. Attorney Erin K. Egan appeared and represented the State of Alaska, Department of Transportation (Employer). The record closed at the hearing's conclusion on March 7, 2017.

ISSUES

Employee contends she was injured while working for Employer and her work injuries are the substantial cause of her disability and past need for medical treatment. Employee contends she is entitled to past medical treatment for three separate but interrelated work injuries. She seeks an order awarding past medical benefits for treatment necessitated by her work injuries.

Employer contends Employee's preexisting and non-work related fibromyalgia, not her work for Employer, is the substantial cause of her past need for medical treatment. Employer seeks an order denying Employee's claim for medical benefits.

1) Is Employee's work for Employer the substantial cause of Employee's need for past medical treatment?

Employee contends she is entitled to ongoing medical benefits for her work injuries, specifically the medical treatment recommended by second independent medical evaluation (SIME) physician David Brown, MD.

Employer contends Employee is not entitled to additional medical benefits because Employee's work for Employer is not the substantial cause of Employee's need for medical treatment. Alternatively, Employer contends if Employee's work for Employer are found to be the substantial cause of her need for ongoing medical treatment, any additional care recommend is palliative and Employee has not complied with the requirements to entitle her to palliative care.

2) Is Employee entitled to additional medical benefits?

Employee contends she is entitled to temporary total disability (TTD) benefits from July 9, 2013 forward because her work for Employer is the substantial cause of her current disability and she is not yet medically stable. She seeks an order awarding additional TTD.

Employer contends Employee is not entitled any additional TTD benefits as Employee is no longer disabled and has reached medical stability.

3) Is Employee entitled to TTD benefits from July 9, 2013 and ongoing?

Employee contends she is will be entitled to a permanent partial impairment rating (PPI) after she reaches medical stability. Employee requests an order she is entitled to a PPI rating at the time of medical stability.

Employer contends the work injuries are not the substantial cause of any permanent impairment. Employer further contends Employee is not entitled to PPI because Employee was paid PPI benefits based on ratings provided by two other SIME physicians; there are currently no PPI ratings outstanding for which Employee has not been paid benefits; and, in the event Employee is found to be not medically stable, any request for PPI benefits is speculative.

4) Is Employee entitled to a PPI rating?

Employee contends she is entitled to a reemployment eligibility evaluation. Employee contends she met all of the requirements to be found eligible for reemployment benefits for the April 2010 injury. Employee further contends if she is barred from pursuing reemployment benefits under the April 2010 work injury, she is entitled to a reemployment benefits evaluation under the July 2010 work injury, as well as potentially the June 2009 work injury. Employee contends she requested a reemployment benefits evaluation under the July 2010 injury but, at the request of Employer's adjuster, was found ineligible under the April 2010 injury. Employee requests an evaluation based on the July 2010 work injury.

Employer contends Employee's request for reemployment benefits must be dismissed because Employee was already found ineligible for reemployment benefits by the reemployment benefits administrator (RBA) and did not timely appeal or petition for modification of the RBA's decision. Employer further contends as Employee is able to work and/or is currently self-employed, she is ineligible for reemployment benefits.

5) **Should Employee's July 2010 work injury be referred to the RBA for an eligibility evaluation?**

Employee contends her attorney is entitled to attorney fees and costs as she is entitled to benefits resulting from her claim and her attorney obtained those benefits.

Employer contends Employee is not entitled to any additional benefit, and therefore, is not entitled to an award of attorney fees and costs.

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

FINDING OF FACTS

All findings in *Wickham v. State of Alaska*, AWCB Decision No. 13-0018 (March 6, 2013) (*Wickham I*), are incorporated herein. The following facts are reiterated from *Wickham I*, are undisputed or established by a preponderance of the evidence:

1. On January 16, 2009, Employee visited the Creekside Family Health Clinic and was assessed with depression, insomnia, fatigue and probable vitamin D deficiency. She was prescribed Ambien, Celexa and vitamin D2. (Creekside Family Health Clinic, January 16, 2009).
2. On July 8, 2009, Anh T. Lam, M.D., D.P.M., evaluated Employee's bilateral foot pain. Dr. Lam's notes from this exam are handwritten and largely illegible. He noted depression under the review of systems. The diagnosis includes bilateral metatarsalgia, bunion, HAV bilateral and Lister's fifth. (Dr. Lam, Chart Note, July 8, 2009). Dr. Lam stated Employee is not fit for duty due to painful feet and plantar fasciitis. (Dr. Lam, Fit/Unfit for Duty Form, July 8, 2009).
3. On July 9, 2009, Employee visited the Alliance Chiropractic Center for pain in her shoulders, back, neck and feet and headaches. The chart note for this visit is handwritten and illegible and contains a fax confirmation at the top of the page containing "10/28/2010 12:27 907790XXXX ALLIANCE CHIROPRATI PAGE03/04." (Alliance Chiropractic Center, Chart Note, July 9, 2009).
4. On July 23, 2009, Employee visited Dr. Lam. He stated Employee was not fit for duty due to metatarsalgia and arch pain. (Dr. Lam, Fit/Unfit for Duty Form, July 23, 2009).
5. On July 31, 2009, Employee visited Dr. Lam. Dr. Lam stated Employee is not fit for duty and listed painful right foot and "neuroma?" as the reason Employee was not fit for duty. (Dr. Lam, Fit/Unfit for Duty Form, July 31, 2009).
6. On August 10 and 19, 2009, Employee saw Dr. Lam; the notes for each visit are illegible. (Dr. Law, Chart Note, August 10, 2009; Dr. Lam, Chart Note, August 19, 2009).
7. On August 19, 2009, Dr. Lam stated Employee was fit for duty. (Dr. Lam, Fit/Unfit for Duty Form, August 19, 2009).
8. On March 6, 2010, Employee visited Dr. Lam. The note for this visit is mostly illegible. (Dr. Lam, Chart Notes, March 6, 2010).
9. On April 4, 2010, Employee reported she injured her lower back when she was carrying five-gallon buckets down stairs while working for Employer as a wiper on an Alaska Marine Highway System ferry, the M/V Matanuska. (*Wickham I*).
10. On April 7, 2010, Employee visited Lani Hill, A.N.P., for low back pain with onset when bending over to get a bucket. Nurse Practitioner Hill diagnosed acute lumbar strain, directed Employee to use Motrin 800 m.g., and declared Employee unfit for duty. (Hill, Chart Note, April 7, 2010; Hill, Fit/Unfit for Duty Form, April 7, 2010).

11. On April 12, 2010, Employee visited Nurse Practitioner Hill for back sprain follow up. She stated Employee was unfit for duty. (Hill, Chart Note, April 12, 2010; Hill, Fit/Unfit for Duty Form, April 12, 2010).

12. On April 14, 2010, Employee visited R. Clark Davis, D.C., D.A.C.R.B., for chiropractic treatment for lower back pain upon referral from Nurse Practitioner Hill. On the intake sheet under "Patient Information," Employee reported she had been to a chiropractor in July 2009 for low back pain, "resolved." (Dr. Davis, Patient Information Form, April 14, 2010; Dr. Davis, Chart Note, April 14, 2010).

13. On April 19, 2010, Employee visited Nurse Practitioner Hill. She declared Employee unfit for duty. (Hill, Chart Note, April 19, 2010; Hill, Fit/Unfit for Duty Form, April 19, 2010).

14. On May 3, 2010, Employee followed up with Nurse Practitioner Hill for her lower back pain. Hill diagnosed Employee with acute L-S sprain, right knee swelling, increased stress, headache, insomnia and right foot damage. (Hill, Chart Note, May 3, 2010).

15. On May 11, 2010, Employee visited with Nurse Practitioner Hill regarding headaches. She was diagnosed with headache and assessed with "likely allergy [with] contributing factor of increased stress; no neurological or migrainous features." (Hill, Chart Note, May 11, 2010).

16. On May 14, 2010, Employee saw Nurse Practitioner Hill for back pain, headache and improved right foot pain. Employee was diagnosed with lumbo-sacral sprain, right foot injury, headache- mixed migraine/tension and motion sickness. Employee was cleared to return to work on May 19, 2010 with advice to avoid extremely heavy or repetitive lifting. (Hill, Chart Note, May 14, 2010; Hill, Fit/Unfit for Duty Form, May 14, 2010).

17. On July 2, 2010, the Employer issued to Employee a letter of instruction outlining her duties and responsibilities as an oiler onboard M/V Malaspina. (Memorandum, July 2, 2010).

18. On July 5, 2010, Employee visited Dr. Lam. He declared Employee unfit for duty for right and left foot pain. (Dr. Lam, Chart Note, July 5, 2010; Dr. Lam, Fit/Unfit for Duty Form, July 5, 2010).

19. On July 8, 2010, Dr. Lam stated Employee would be fit for duty on July 9, 2010. (Dr. Lam, Fit/Unfit for Duty Form, July 8, 2010).

20. On July 20, 2010, Dr. Lam provided Employee a prescription for Naprosyn. (Dr. Lam, Prescription, July 20, 2010).

21. On July 26, 2010, Employee reported she injured her neck, upper back and right shoulder as a result of extraordinary stress while working for Employer as an oiler on the M/V Malaspina. (*Wickham I*).

22. On July 28, 2010, Employee visited Dr. Lam; the handwritten notes are illegible. (Dr. Lam, Chart Note, July 28, 2010). Dr. Lam diagnosed neuroma, foot pain and plantar fasciitis and stated Employee was unfit for duty due to right ankle second and third interspaces pain. He referred her for reflexology/massage. (Dr. Lam Fit/Unfit for Duty Form, July 28, 2010; Dr. Lam Prescription, July 28, 2010).

23. On August 2, 2010, Employee visited Nurse Practitioner Hill, for ongoing back pain due to work injury and a referral for chiropractic care. Several symptoms are listed, including fatigue, difficulty sleeping, chest tightness, shortness of breath, palpitations, sweaty palms, nausea, decreased appetite, joint stiffness, muscle or joint pain in the neck, upper back, shoulders, low back, back pain, and limited movement of the neck, upper back, shoulders and lower back. The notes from this visit state Employee was "being TREATED? [sic] unfairly at work by superior workers in high positions" and it "has become so bad that [Employee] finally left boat." Hill noted, "After several very upsetting [and] intimidating meetings [and] unfair treatment – [Employee] had neck pain/spasm which is persisting despite a chiropractor visit. Also, prior work-related low back pain/spasms re-flared since all the emotional upheaval at work." Hill released Employee from work pending further evaluation and treatment. (Hill, Chart Notes, August 2, 2010; Hill, Physician's Report, August 2, 2010).

24. On August 18, 2010, Employee visited Kevin Fischer, D.C., for pain over Employee's "entire body." His handwritten notes included fibromyalgia and chronic fatigue. He noted Employee had a cortisone shot, massage, physical therapy and counseling, which helped. (Fischer, Chart Note, August 18, 2010).

25. On August 31, 2010, Employee saw Scott Saunders, M.D., for a chief complaint of pain all over for a year. Under "HPI", Dr. Sanders noted, aching pain all over increasing with stress; anxiety, panic attacks – skin feels hypersensitive; sleep problems for 3 years; memory problem, depression, right foot pain. Dr. Saunders noted panic attacks, fatigue/malaise, and fibromyalgia under "PMH." He assessed anxiety state, unspecified; panic disorder without agoraphobia; myalgia and myositis, unspecified; mixed disorders as reaction to stress; depressive disorder not

elsewhere classified; insomnia, unspecified; foot sprain; and backache, unspecified. Employee was provided a Myers' cocktail. (Dr. Saunders, August 31, 2010).

26. On September 8, 2010, Employee filed a claim for TTD related to her July 2010 work injury. Employee's claim described the cause and nature of her injury as "extraordinary stress" and the body part injured as "neck and upper back." (*Wickham I*).

27. On September 8, 2010, Employee visited Nurse Practitioner Hill for several health concerns. Employee was assessed with panic disorder without agoraphobia, other anxiety states, chronic fatigue syndrome, and generalized pain. Hill noted a concerned that there may be some other generalized chronic medical condition rather than stress-induced symptoms and ordered lab tests for autoimmune and rheumatoid conditions, anemia and vitamin deficiency. (Hill, A.N.P., September 8, 2010).

28. On September 8, 2010, Employee saw Dr. Davis for low back, upper back and neck pain. Dr. Davis declared Employee unfit for duty due to her spine condition. (Dr. Davis, Chart Note, September 8, 2010; Dr. Davis, Fit/Unfit for Duty Form, September 8, 2010).

29. On September 21, 2010, Employee reported she injured her feet on June 30, 2009, when she was carrying five-gallon buckets up a ladder while working for Employer on the M/V Fairweather. (*Wickham I*).

30. On September 27, 2010, Dr. Lam stated Employee was unfit for duty due to foot pain because of neuroma. He also referred Employee to a rheumatologist for "non-specific general body pain and fatigue (neck and back problem)." (Dr. Lam Fit/Unfit for Duty Form, September 27, 2010; Dr. Lam, Prescription, September 27, 2010).

31. On September 30, 2010, Employer filed an answer to Employee's September 8, 2010 claim, denying TTD benefits from July 28, 2010 forward because Employee had not provided any medical evidence to support her claim she was unable to work as a result of her neck and upper back condition prior to August 2, 2010 and Employee was receiving TTD benefits for her low back condition. (Answer, September 30, 2010).

32. On October 4, 2010, Nurse Practitioner Hill referred Employee to Integrative Medical Center for a possible anxiety disorder. (Hill, Referral, October 4, 2010).

33. On October 5, 2010, Employee saw Dr. Saunders for complaints of anxiety disorder and changes in back pain. Under "HPI," he noted Employee has a history of fibromyalgia with chronic fatigue; works on a ship in Alaska; had sexual discrimination injustice against her; is

"under extreme stress at work"; "had a panic attack after a disciplinary meeting"; insomnia due to stress; and chronic pain in her feet and neck, low and upper back pain. Under "PMH," Dr. Saunders noted Employee has panic attacks, fatigue/malaise, and fibromyalgia. He assessed anxiety state, unspecified and directed Employee to complete an adrenal stress index, a neuroscience neurotransmitter test, monitor her blood pressure, and take cyanocobalamin. (Dr. Saunders, Chart Notes, October 5, 2010).

34. On October 12, 2010, Employee visited Dr. Saunders. He assessed myalgia and myositis, unspecified, and gave Employee a Myers' drip. (Dr. Saunders, Chart Note, October 12, 2014).

35. October 15, 2010, Employee saw Nurse Practitioner Hill to review a lab report and for a B12 injection. Hill noted increased intensity and frequency of headaches, decreased concentration and memory, anxiety, depressed mood, insomnia, fatigue and multiple sites of muscle spasm and tenderness, especially at neck, shoulders, and upper and lower back, and foot pain after the July 2010 work injury. (Hill, Chart Note, October 15, 2010).

36. On November 24, 2010, Mirza M. Monsef, D.C., declared Employee unfit for duty as of September 27, 2010 due to lumbar strain. (Dr. Monsef, Fit/Unfit for Duty Form, November 24, 2010).

37. On December 13, 2010, Employer's adjuster mailed a letter to Dr. Lam requesting he provide the dates Employee was unfit for duty and answer questions about whether Employee's bilateral foot conditions were work-related. (Employer's Adjuster, Letter, December 13, 2010).

38. On December 20, 2010, Employee visited Nurse Practitioner Hill to reevaluate fitness for duty. Hill opined Employee was unfit for duty due to anxiety with panic episodes secondary to work events and triggered by work environment." She recommended counseling. (Hill, Chart Note, December 20, 2010).

39. On January 11, 2011, the reemployment benefits section received Employee's request for a reemployment eligibility evaluation under the July 2010 work injury case number; under the date of injury, Employee listed all three work injury dates. (Employee, Request for an Eligibility Evaluation, January 11, 2011).

40. On January 20, 2011, in response to the December 13, 2011 letter from Employer's Adjuster, Dr. Lam diagnosed Employee with "right foot pain (bursitis and neuroma 3rd interspace and 2nd interspace)" and failed conservative care. He stated it was "possible Employee acquired forefoot injury leading to neuroma and metatarsalgia and the June 2009 work injury could be start or

point of injury with continued work to increase problems to conditions." (Dr. Lam Response, January 20, 2011).

41. On January 20, 2010, Employee visited Nurse Practitioner Hill for anxiety, pain, insomnia, and "other conditions due to work injury and resulting hostile environment." Hill noted Employee continued to experience anxiety when dealing with work issues. Employee's neck and back pain/spams were helped by physical therapy. She stated Employee was unfit for duty due to multiple physical conditions aggravated by her work environment. (Hill, Chart Notes, January 20, 2010; Hill, Fit/Unfit for Duty Form, January 20, 2010).

42. On January 21, 2011, the RBA designee mailed a letter to Employer's adjuster with a 90 consecutive day verification form, requesting the adjuster confirm whether Employee had been off work for 90 consecutive days due to the July 2010 work injury. (RBA Designee, Letter to Adjuster, January 21, 2011).

43. On January 26, 2011, Employer's Adjuster returned the completed 90 consecutive day verification form and indicated Employee had been off work due to the July 2010 work injury since August 2, 2010, more than 90 consecutive days. (Employer's Adjuster, Workers' Compensation Reemployment Verification for 90 Consecutive Days of Timeloss, January 26, 2011).

44. On February 15, 2011, the RBA designee mailed a letter to Employee stating the division had received documentation she missed 90 consecutive days from work as a result of the July 2010 injury and compensability of her claim did not appear to be in dispute. The letter informed Employee a rehabilitation specialist, Denise Van Der Pol, was assigned to complete an eligibility evaluation. (RBA Designee, Letter, February 15, 2011).

45. On February 28, 2011, Employee visited Nurse Practitioner Hill. Employee reported continued neck, back and foot pain; anxiety from dealing with her old job; insomnia; fatigue; and burning and tingling in her feet. Hill noted Employee "acquired chronic anxiety with panic episodes, insomnia, chronic fatigue, fibromyalgia, and feet/ankle neuropathy [status post] work related injuries [and] hostile environment." Hill documented the pain that began initially in the right foot was occurring on the left foot possibly due to having to favor the left foot for so long. (Hill, Chart Note, February 28, 2011).

46. On March 23, 2011, Ms. Van Der Pol requested an extension to complete the eligibility evaluation, as Nurse Practitioner Hill had not yet predicted whether Employee would have a PPI

rating above zero and whether Employee would have the permanent physical capabilities to perform any of the jobs she had held in the 10 years prior to her work injury. (Ms. Van Der Pol, Eligibility Evaluation Request for Extension, March 23, 2011).

47. On March 31, 2011, Nurse Practitioner Hill requested Physical Therapist, Leah Pagenkopf, review the job descriptions for jobs Employee had held in the past 10 years and predict whether Employee would have the permanent physical capabilities to perform them. (Hill, Referral Form, March 31, 2011).

48. On April 1, 2011, Physical Therapist Pagenkopf predicted Employee would not have the permanent physical capabilities to perform the jobs Employee had held in the past 10 years. (Pagenkopf, Response, April 1, 2011).

49. On April 6, 2011, Nurse Practitioner Hill requested a consultation with Dr. John Bursell to "provide a prediction of permanent impairment as a result of the injury of 7/26/10." (Patient Referral Request, April 6, 2011).

50. On April 8, 2011, Ms. Van Der Pol supplemented her eligibility evaluation stating:

> The designated treating provider, Lani Hill, FNP, referred the SCODRDOT job descriptions to [Employee]'s physical therapist, Leah Pagenkopf, who she sees two times a week since December 2010. [Employee] and her physical therapist reviewed the job descriptions and the therapist predicted that [Employee] would not have permanent physical capacities to perform any jobs she has held in the past 10 years. In their review of the 8 job descriptions, they missed the one for oiler, her job at the time of injury. That job description has been sent back to the physical therapist to complete.
>
> The State of Alaska was not successful in securing employment for her in Ketchikan in which she can be accommodated under the ADA. They cited the limited labor market in Ketchikan and limited work skills [Employee] has for a new job. The employer has no alternative employment for her.
> . . . . .
>
> The question of permanent partial impairment as a result of the injury remains. Lani Hill, FNP, referred [Employee] to Dr. John Bursell to make a prediction of permanent impairment.

(Ms. Van Der Pol, Eligibility Evaluation Addendum, April 8, 2011).

51. On April 11, 2011, Ms. Van Der Pol sent a letter to Dr. Bursell requesting he predict whether or not a permanent impairment would result from Employee's July 2010 work injury. (Ms. Van Der Pol, Letter, April 11, 2011).

52. On April 15, 2011, Dr. Bursell predicted Employee would have a permanent partial impairment rating above zero as a result of the July 2010 work injury. (Dr. Bursell, Response, April 15, 2011).

53. On April 18, 2011, Employer's adjuster sent a letter to the RBA designee stating:

> [Employee] currently has three open claims. On 01/04/11 she requested an eligibility evaluation for retraining under all there [sic] of her workers' compensation claims. Subsequently, your office forwarded your Workers' Compensation Reemployment Verification Form to us requesting we advise if [Employee] has been off work for 90 consecutive days. [Employee] has been off work over 90 consecutive days but not for the above referenced claim. She has been off work over 90 consecutive days but not for the [July 2010 work injury]. She has been off work and is receiving temporary total disability benefits for one of her other claims with date of injury of [April 2010]. [Employee] has not received any indemnity benefits for the [July 2010] claim. We apologize for this oversight.
>
> Per our telephonic conversation with you and [the RBA], we are respectfully requesting [Employee]'s eligibility evaluation for retraining be transferred to the claim with date of injury [April 2010].

(Employer's Adjuster, Letter, April 18, 2011).

54. On April 19, 2011, the RBA designee crossed off the case number for the July 2010 work injury and wrote in the April 2010 case number on the following documents in the reemployment benefits file:

- Employee's Request for an Eligibility Evaluation, January 11, 2011
- Letter to Adjuster, January 21, 2011
- Workers Compensation Reemployment Verification for 90 Consecutive Days of Timeloss, January 26, 2011
- Eligibility Evaluation Addendum, April 8, 2011
- Employer Adjuster Letter, April 18, 2011

(Reemployment Benefits Record).

55. On April 19, 2011, Employer filed a controversion notice denying all benefits for the July 2010 injury because an "[i]njury caused by stress is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination or similar action taken in good faith by the employer." (Controversion Notice, April 11, 2011)

56. On April 22, 2011, Dr. Bursell evaluated Employee. He assessed low back pain, upper back pain and neck pain, and stated:

> [Employee] has bilateral foot pain, right worse than left, which consists from interdigital neuroma which may require surgical resection for control of her foot pain symptoms. She has also developed an element of plantar fasciitis which should resolve over time without permanent impairment. Her spine pain is complicated by the stress reaction, and this will need to continue to be addressed with the psychological counseling and medication. I do expect that she will have a permanent impairment from the interdigital neuroma as it likely will require surgical intervention. It is unclear to me whether a permanent impairment will result from the back injury.

(Dr. Bursell, Chart Note, April 22, 2011).

57. On June 9, 2011, Physical Therapist Pagenkopf predicted Employee would not have the permanent physical capabilities to perform her job at the time of the July 2010 injury. (Pagenkopf, Response to Oiler Job Description, June 9, 2011).

58. On June 10, 2011, Ms. Van Der Pol sent a letter to Dr. Bursell requesting he predict whether a ratable permanent impairment would result from Employee's April 2010 work injury. (Ms. Van Der Pol, Letter, June 10, 2011).

59. On June 10, 2011, Ms. Van Der Pol supplemented her eligibility evaluation recommendation stating she is waiting on Dr. Bursell's prediction on whether Employee would have a ratable permanent impairment as a result of the April 2010 work injury. (Ms. Van Der Pol, Eligibility Evaluation Addendum, June 10, 2011).

60. On July 25, 2011, Employee saw Marilyn Yodlowski, M.D., an orthopedic surgeon, for an employer's medical evaluation (EME). Dr. Yodlowski noted there was no purely objective basis to identify any current pathological condition of Employee's musculoskeletal system, either in her back or her feet. She stated, "The primary pathogenic process may actually be that of a psychiatric/ psychosocial/psychological condition, or a non-work related system condition such as fibromyalgia, a diagnosis which she has had." Dr. Yodlowski found "no mechanism of injury that would be considered the 'substantial cause' in the formation of a Morton's neuroma" and "Employee's presentation does not indicate any objective evidence of an abnormal finding, or even a subjective reporting of symptoms to support the diagnosis of a Morton's neuroma." Dr. Yodlowski opined Employee had reached medical stability and had no PPI and recommended no further medical treatment for Employee's bilateral foot pain. She found no "objective evidence of any condition related to her thoracolumbar spine that requires any further diagnosis or treatment." Dr. Yodlowski further opined Employee had reached medical stability and had no

PPI as a result of the thoracolumbar sprain/strain sustained on April 4, 2010 and recommended no further medical treatment for that condition. (Dr. Yodlowski, EME Report, July 25, 2011).

61. On July 30, 2011, Dr. Lam ordered an MRI of Employee's bilateral feet for non-specific foot pain." (Dr. Lam, Prescription, July 20, 2011).

62. On August 2, 2011, Dr. Bursell responded to Ms. Van Der Pol's June 10, 2011 letter: "I don't know whether or not [the April 2010] injury will result in a permanent impairment." (Dr. Bursell Response, August 2, 2011; Dr. Bursell Log Note, August 2, 2011).

63. On August 10, 2011, Employee underwent an MRI of her bilateral feet. The MRI of Employee's right foot found mild degenerative changes and a small joint effusion at the first metatarsal phalangeal joint and no other significant abnormalities. The MRI of Employee's left foot found an edema within the medial sesamoid without significant surrounding soft tissue abnormalities which was nonspecific and may be seen with bone bruising; a small effusion at the first metatarsal phalangeal joint; and fluid surround the proximal flexor digitorum tendon which was nonspecific but may be seen with synovitis. (Peter C. Buetow, M.D., MRI Reports, August 10, 2011).

64. On August 19, 2011, Employer filed a controversion notice denying all benefits for the June 2009 injury based on Dr. Yodlowski's July 25, 2011 EME report. (Controversion Notice, August 19, 2011).

65. On August 19, 2011, Employer filed a controversion notice denying all benefits for the April 2010 work injury, based on Dr. Yodlowski's July 25, 2011 EME report. (Controversion Notice, August 19, 2011).

66. On August 24, 2011, Ms. Van Der Pool recommended Employee not be found eligible for reemployment benefits under the April 2010 work injury, based on Dr. Yodlowski's EME report. She noted Dr. Bursell was unable to confirm Employee would have a permanent impairment as a result of the April 2010 work injury and Employee was not eligible for the state injured worker rehire program. (Ms. Van Der Pol, Eligibility Evaluation Recommendation, August 24, 2011).

67. On September 12, 2011, Employee filed a petition for a SIME under the case number for the April 2010 work injury. (Petition, September 12, 2011).

68. On September 22, 2011, Dr. Bursell evaluated Employee's chronic pain in her neck, mid back, low back and bilateral feet. He assessed low back pain without radiculopathy or myelopathy complicated by "the development of fibromyalgia with diffuse soft tissue pain and

tenderness and associated sleep dysfunction." He noted no evidence of interdigital neuroma on physical exam. He recommended considering a referral to a rheumatologist and counseling for psychological stresses. He stated if Employee's spine symptoms persisted despite the interventions he recommended, an MRI of Employee's spine would be indicated. (Dr. Bursell, Chart Note, September 22, 2011).

69. On September 22, 2011, Dr. Lam wrote a "To Whom it May Concern" letter stating:

> This is a letter to note that [Employee] is a patient with chronic forefoot pain that over the years has been progressive and not resolved with conservative care. She was first seen in my office for metatarsalgia and neuroma pain from working on the hard, vibrating decks of the Alaska ferry. I have exhausted conservative care without resolutions. Recent exams noted she is having lots of pain to both her feet now and compensational pain throughout her body. She is unable to work and depressed and exam with acute pain to her forefeet. Her MRI is not consistent with clinical findings of pain. I have requested she consult with rheumatoid and neurological to rule out regional pain issue and pain management.

(Dr. Lam, Letter, September 22, 2011).

70. On October 4, 2011, the RBA determined Employee was not eligible for reemployment benefits under the April 2010 work injury because no permanent partial impairment was identified as a result of the April 2010 work injury. The letter informed Employee she must request a review of the decision within 10 days, otherwise the decision would be final. (RBA, Letter, October 4, 2011).

71. On October 13, 2011, Employer and Employee attended a prehearing conference and agreed to administratively join Employee's three cases. (Prehearing Conference, October 13, 2011).

72. On October 28, 2011, Jeffrey Boggs, D.P.M., evaluated Employee and diagnosed arthralgia, plantar atrophy, and plantar fasciitis. He noted Employee's symptoms were consistent with plantar fasciitis, but because Employee had generalized foot pain as well as other generalized joint pain, he was concerned Employee may have systemic arthritis. He released Employee from work due to bilateral foot pain. (Dr. Boggs, Chart Note, October 28, 2011; Dr. Boggs, Activity Exemption Authorization, October 28, 2011).

73. On October 28, 2011, Employee's lab report indicated high ANA and Anti-RNP levels. (Lab Report, October 28, 2011).

74. On November 11, 2011, Andrew S. Sohn, M.D., a rheumatologist, evaluated Employee. He stated:

> This patient describes chronic widespread musculoskeletal pains, especially of bilateral feet, but also elsewhere throughout extremities, neck and back, cause of which is unclear at this time. Part of her feet pains appear to be due to plantar fasciitis but tenderness is very generalized along the undersurface of the feet. As far as pains elsewhere, the main notable finding is tenderness including the back as well as multiple trigger points of fibromyalgia. I feel part of her widespread pains are due to fibromyalgia syndrome although I do not feel fibromyalgia can explain all of her pains including the distal extremities. Labwork showed abnormal ANA reflexive panel with positive RNP antibody that raises some possibility of systemic connective-tissue disease. On the other hand, there is no evidence of synovitis on exam and ESR, CRP are within normal.

(Dr. Sohn, Chart Notes, November 11, 2011).

75. On November 18, 2011, Employee saw Dr. Sohn for follow up. He assessed multiple site joint pain and stated:

> This patient's complaints of severe chronic pain especially of bilateral feet but also throughout extremities and back. Lab shows consistently elevated RNP antibodies and it raises possibility of connective-tissue disease. While she does have tenderness including some joint tenderness there is no clear synovitis on exam and outside of the abnormal ANA reflexive panel remainder extensive lab including ESR, CRP all negative. It is not at all clear that she has any systemic connective-tissue disease and I'm suspecting that her pains are largely noninflammatory although this is not entirely clear. She is noted to have several tender points of fibromyalgia and given this along with chronic fatigue and some sleep problems, I am suspecting at least part of her pains are due to fibromyalgia syndrome and this was discussed.

(Dr. Sohn, Chart Note, November 18, 2011).

76. On December 19, 2011, Employee filed a claim for medical benefits under the April 2010 work injury. Employee's claim described her injury as "Lifting 2 full 5 gallon buckets," its nature as "injured/strained/pain chronic" and the injured body part as "left back." (*Wickham I*).

77. On January 6, 2012, Employer filed an answer to Employee's December 19, 2011 claim stating Employer had paid all medical bills submitted up to August 19, 2011, the date of the controversion notice and denying additional medical benefits were owed. (Answer, January 6, 2012).

78. On January 11, 2012, Employee visited Nurse Practitioner Hill. Hill noted musculoskeletal tenderness and increased muscle tension in posterior neck/shoulders and thoracolumbar paraspinous muscles. She diagnosed myofascial pain syndrome secondary to work injuries. She stated Employee was unlikely to ever be able to return to work as an oiler or wiper and

Employee was unfit for clerical or other prolonged sitting work. Hill stated prior to the work injuries, employee was quite active and strong physically and emotionally and was taking no medication other than occasional Motrin. Hill noted Employee's acute pain did not improve and progressed to chronic pain; Employee's hostile work environment related to her work injures had resulted in acute anxiety that continued to be triggered when Employee returned to the site of the hostile treatment; and Employee's pain and anxiety produced insomnia, fatigue, depression, and appetite disturbance with weight loss. (Hill, Chart Note, January 11, 2012).

79. On February 21, 2012, Employee followed up with Dr. Sohn. He noted Employee saw a chiropractor for her generalized pain, including neck and back; and after a chiropractic manipulation, she experienced significant pain in her left shoulder. He noted an x-ray of the shoulder showed a possible Hill-Sachs lesion in the humeral head and ordered an MRI of Employee's left shoulder. He noted Employee has tenderness of the upper, mid, low back very generally and of the metatarsal joints, the arch and heels of her feet. He noted, based on the laboratory test and Employee's responsiveness to prednisone and plaquenil, it is possible Employee has undifferentiated connective tissue but "the presentation has been rather odd." He noted Employee "had multiple tender points of fibromyalgia that could be contributing to some of her pains." (Dr. Sohn, Chart Note, February 21, 2012). Employee's laboratory tests indicated elevated antinuclear antibodies, anti-RNP and anti-SCL70. (Lab Report, February 21, 2012).

80. On February 24, 2012, Employee visited orthopedist Robin Madsen, M.D., for her left shoulder pain. She was diagnosed with frozen shoulder adhesive capsulitis and cervical pain. (Dr. Madsen, Chart Note, February 24, 2012).

81. On February 27, 2012, Dr. Sohn wrote a "Whom it may concern" letter stating Employee was not "able to do the 12 hour shift at work at this time, given her medical condition." (Dr. Sohn Letter, February 27, 2012).

82. On February 28, 2012, an MRI of Employee's cervical spine showed mild cervical spondylosis and no neural impingement. (Stephen Buetow, M.D., Cervical Spine MRI Report, February 28, 2012). An MRI of Employee's left shoulder showed a probably intra-articular long head biceps tendon tear; a large amount of edema around the rotator cuff interval indicating adhesive capsulitis; subacromal-subdeltoid bursitis; and subcentimeter small partial-thickness tear at the supraspinatus footprint. (Stephen Buetow, M.D., Left Shoulder MRI Report, February 28, 2012).

83. On March 1, 2012, Employee filed a claim under the June 2009 work injury, noting bilateral foot pain and seeking TTD from August 19, 2011 to October 1, 2011 and November 20, 2011 forward; medical costs; and review of the reemployment eligibility decision. (Claim, March 1, 2012).

84. On March 12, 2012, Employee visited Dr. David Brown for left shoulder pain. He found Employee's symptoms are "stemming from a profound left shoulder adhesive capsulitis." Employee received an injection in her left shoulder and was referred to physical therapy. (Dr. David Brown, Chart Note, March 12, 2012).

85. On March 15, 2012, Employer filed a controversion notice related to the June 2009 work injury, denying all benefits based on Dr. Yodlowski's July 25, 2011 EME report. (Controversion Notice, March 15, 2012).

86. On March 20, 2012, Employer filed an answer to Employee's March 1, 2012 claim, denying any additional benefits were owed. (Answer, March 20, 2012).

87. On March, 27, 2012, Employee orally amended her claim for the July 2010 work injury. Employee clarified her July 2010 injury to her neck and back was caused by work-related stress and aggravated her April 2010 injury. Employee withdrew her mental injury claim, specifically her allegation that the July 2010 injury caused "stress." (*Wickham I*).

88. On March 21, 2012, Employee filed an affidavit of readiness for hearing (ARH) on her March 1, 2012 claim for the June 2009 work injury. (ARH, March 21, 2012).

89. On March 30, 2012, Employer filed a petition to dismiss Employee's claim under the case number for the July 2010 work injury. (Petition, March 30, 2012).

90. On April 4, 2012, Employee followed-up with Nurse Practitioner Hill. Hill recommended the following physical limitations: no lifting greater than 10 pounds more than four times per hour; lifting more than 25 pounds twice per day; no repetitive twisting, bending, or other repetitive motions; no prolonged sitting greater than one hour without five to ten minute breaks; and no prolonged walking beyond three to four blocks without 10 or more minute breaks. (Hill, Chart Note, April 4, 2012).

91. On April 19, 2012, Dr. David Brown assessed Employee's left shoulder and neck pain. He found degenerative changes in her cervical spine centered at the C5-6 level and adhesive capsulitis with biceps tendinitis in her left shoulder. He noted Employee worked with a physical therapist and has noted some improvement in motion in her left shoulder. He recommended

continuing physical therapy and monthly injections in her left shoulder. (Dr. David Brown, April 19, 2012).

92. On May 1, 2012, Employee orally amended her December 19, 2011 claim clarifying the body parts injured were her back, neck and shoulder blade. Employee also stated her ARH was to request a hearing on all her claims and her SIME petition. (Prehearing Conference Summary May 1, 2012).

93. On June 12, 2012, Alexis Fallcov, M.D., an orthopedic surgeon, evaluated Employee's foot, back and left shoulder pain. He stated there was no Hill-Sachs lesion in her left shoulder and he believed Employee had a frozen shoulder. He opined Employee was medically stable from an orthopedic basis. He stated he suspected Employee had a rheumatologic condition and stated all of Employee's injuries were mild and "do not make a lot of sense in terms of her work." He recommended a more complete work up with her rheumatologist. (Dr. Fallcov, Chart Note, June 12, 2012).

94. On March 6, 2013, *Wickham I* issued, finding Employee's claim for the July 2010 work injury was for a mental-physical injury, denying Employer's petition to dismiss and partially granting Employee's petition for an SIME. *Wickham I* ordered the examination be conducted with an SIME physician with adequate expertise in orthopedics and podiatry. (*Wickham I*).

95. On January 8, 2014, Barry E. Weiner, D.P.M, conducted an SIME. He opined Employee had no preexisting foot condition. He noted Employee "does have other issues including fibromyalgia which can cause foot pain in and of itself." Dr. Weiner stated the substantial cause of Employee's disability and need for medical treatment was the overuse syndrome that developed on June 30, 2009. He also stated "essentially absent that injury, whatever disability in Employee's feet would have had from the fibromyalgia would be minor in comparison to what she has gone through over the last few years." Dr. Weiner opined the June 30, 2009 work injury contributed 75% of the cause of disability and need for medical treatment and 25% was due to the fibromyalgia. He further opined Employee's continuing symptoms were due to her chronic fibromyalgia. He opined Employee became medically stable as of July 8, 2013 and had no ratable PPI. Dr. Weiner opined Employee's "particular foot problems are more of a systemic nature that have really nothing to do with the injury that occurred on 6/30/09." He recommended biomechanically correct orthotic devices every two to three years and the use of the TENS unit since it had provided Employee some relief. He recommended the following physical limitations

based solely on Employee's foot and ankle disability: no climbing on ladders or stairs, no prolonged weight-bearing, and adlib access to non-weight-bearing. (Dr. Weiner, SIME Report, January 8, 2014).

96. On January 9, 2014, orthopedist Marjorie Oda, M.D., conducted an SIME. Dr. Oda opined Employee had a 1% whole person impairment related to her spine condition. She opined Employee was medically stable from an orthopedic perspective by July 25, 2011 and no further medical treatment was necessary. In the "Discussion" section of her report Dr. Oda stated:

> While, from an orthopaedic perspective, I recognize that she has physical symptoms in the musculoskeletal system, it is important to place these in the appropriate context, given the mechanism of injury.
>
> I am hopeful that consultants from the field of rheumatology to assess the effect of fibromyalgia, and psychiatry, to assess the effect of the work-related anxiety and stress on the musculoskeletal system, will help to further elucidate these issues. From a purely orthopaedic perspective, her subjective complaints [out] weigh both the mechanism of injury and the diagnosis.
>
> In fact, she was continuing in her usual and customary occupation despite her lumbar complaints until the nonorthopaedic component was manifested in cervicotrapezial strain as well as the anxiety issues and panic disorder which took her off work.

Dr. Oda opined the April 2010 injury was the substantial cause for need for treatment for the lumbar spine. However, she noted "There are questions of preexisting condition of fibromyalgia but this apparently had been quiescent for many years, and any contribution of this should be addressed by a rheumatologist." She stated the treatment Employee received, including chiropractic care, physical therapy, and anti-inflammatory medications, was "appropriate in the acute and subacute period but at this stage have limited value." Dr. Oda opined additional treatment should focus on Employee's chronic fatigue syndrome and fibromyalgia, "the specific treatment of which is outside my field of expertise." She stated, from an orthopedic perspective, "purely based on the diagnosis and physical requirements" of the job descriptions of oiler and wiper, Employee can perform the jobs of wiper or oiler. Finally, Dr. Oda requested lumbar x-rays "to make sure there are no underlying conditions which may have contributed to the lack of improvement with respect to the lumbar spine." (Dr. Oda, SIME Report, January 9, 2014).

97. On April 15, 2014, Dr. Weiner opined in a supplemental report the limitations and restrictions working as a wiper or oiler were caused by the work-related injury. (Dr. Weiner, Supplemental Report, April 15, 2014).

98. On March 6, 2014, Employee underwent an x-ray of her lumbar spine which showed mild loss of disc space at L2-3 and the degenerative changes in the facet joints were not prominent. (Kevin Ketchum M.D., X-Ray Report, March 6, 2014).

99. On March 31, 2014, Dr. Oda stated a rheumatologist's opinion was required regarding the diagnosis of fibromyalgia and soft tissue complaints. She clarified her February 21, 2014 report stating, "From a purely orthopedic perspective, [Employee's] subjective complaints outweigh both the mechanism of injury and the diagnosis." (Dr. Oda, Letter, March 31, 2014).

100. On December 18, 2014, Dr. Oda reaffirmed her prior opinion after reviewing x-rays of Employee's lumbar spine. (Dr. Oda, Letter, December 18, 2014).

101. On February 16, 2015, Edward J. Barrington, D.C. /D.A.B.C.N., evaluated Employee for a PPI rating. He opined Employee had a 3% whole person impairment, attributing 1% for cervical spine, 1% for thoracic spine, 1% lumbar spine and 0% for bilateral feet after reviewing Dr. Weiner's EME report and Dr. Oda's SIME report. (Dr. Barrington, Letter, February 16, 2015).

102. On May 19, 2016, Paul B. Brown, M.D., Ph. D., a rheumatologist, conducted an SIME. Dr. Paul Brown listed the July 9, 2009 Alliance Chiropractic medical report under the date of "10/28/2010." Under the Physical Examination section of his report, he noted under musculoskeletal:

> Pertinent findings only. Cervical spine: reduced extension and rotation. Thoracic spine: markedly reduced right side bending and right rotation. LS-spine: full range of motion. She has 14 out of 18 American College of Rheumatology tender points. Feet: she has bilateral tenderness to palpitation over the MTP joints 2-4; she has tenderness in the right posterior and medial arch.

Dr. Paul Brown diagnosed Employee with fibromyalgia and cervicothoracic strain caused by the July 26, 2010 work injury, lumbar strain caused by the April 4, 2010 injury, and foot pain caused by the June 30, 2009 work injury, and stated, "Please review the physical exam section in my report for objective evidence." He identified the following complaints or symptoms as related to the work injuries based on his review of the medical records: widespread pain, fatigue, depression, neck and mid-back pain as related to the July 2010 work injury; bilateral foot pain as related to the June 2009 work injury; and low back pain as related to the April 2010 work injury. He opined the work injuries are the substantial cause of Employee's disability and need for medical treatment with respect to the complaints or symptoms identified. Dr. Paul Brown further opined the medical treatment provided from June 30, 2009 to the present for Employee's fibromyalgia and orthopedic conditions had been medically reasonable, necessitated by the work injury, and within the realm of medically accepted options; but that "he cannot speak to the therapy for the foot injury." He stated, "Dr. Oda in her [EME] makes reference to a history of fibromyalgia preceding the [July 2010] employment injury, but I was not able to locate that in the records with any degree of certainty." He stated further he doubted Employee had preexisting fibromyalgia; but if she did, it was quiescent and Employee's July 2010 work injury produced a permanent change in the preexisting condition. Dr. Paul Brown opined Employee was not medically stable because Employee would respond to further treatment and predicted Employee would have permanent physician capabilities less than the physical demands of her job at the time of injury. Dr. Paul Brown opined future palliative care was medically reasonable and necessary to relieve Employee's chronic debilitating pain. He recommended further evaluation of Employee's foot pain to determine if Employee had chronic regional pain syndrome Type I: reflex sympathetic dystrophy, and included the possibility of a three-phase joint scan of the foot; a lumbar sympathetic block; treatment with alpha agonists; and a SPECT scan of the spine to identify a facet syndrome and facet injections if found. He also recommended a trial of Lyrica or gabapentin, tizanidine or cyclobenzaprine, tramadol, trigger point injections, biofeedback and relaxation techniques, acupuncture, and a physical activity program guided by a knowledgeable physical therapist. He stated:

> If there is evidence for chronic regional pain syndrome Type I: reflex sympathetic dystrophy in the feet, then physical therapy and medications would be appropriate. Physical therapy would initially be once per week, and as she improved, gradually reducing it so that it might be on a quarterly basis. If acupuncture is successful, then I would recommend starting with once or twice a week, and then again weaning as possible and tolerated. The same is true for trigger point injections. Biofeedback and relaxation techniques should be administered by a course which may take several weeks.

Dr. Paul Brown recommended the following physical limitations on Employee's work activities: no repetitive tasks; no prolonged sitting, standing or walking; no lifting or carrying greater than 10 pounds; no reaching below the knees; pushing and pulling limited to 10 pounds; no kneeling, twisting, crawling or climbing; and no repetitive bending. (Dr. Paul Brown, SIME Report, May 19, 2016).

103. On August 30, 2016, Employee filed an amended claim seeking attorney fees and costs. (Claim, August 30, 2016). Employee also filed an ARH on her claims dated September 8, 2010 and March 27, 2012. (ARH, August 30, 2016).

104. On September 20, 2016, Employer filed an answer to the claim dated denying Employee's claim for attorney fees and costs as there is no nexus between benefits paid to Employee and work performed. (Answer, September 20, 2016).

105. On November 17, 2016, Employer and Employee attended a prehearing conference. The board designee scheduled a hearing on March 7, 2017 on Employee's three claims and the parties agreed to the following issues: medical benefits; TTD from July 9, 2013 and ongoing; additional PPI; attorney fees and costs; and reemployment benefits. (Prehearing Conference Summary, November 17, 2016).

106. Employee credibly testified about her employment history and her work injuries. She testified she began work for the Alaska Marine Highway System (AMHS) in 2007 as a Steward for approximately six months. She changed positions to Wiper in the engineering room in 2008 and became an Oiler in 2010. Employee was working as a Wiper when she injured her feet in June 2009. She testified she was instructed to clean water out from underneath an engine so she used a shop vacuum to remove the water and then put the water in five gallon buckets and carried them up a ladder to dump the water into a temporary storage tank for polluted water. She testified she did this approximately 50 times and afterwards her feet were ruined and have never been the same since. She stated she finished her rotation and saw a podiatrist who told her to stay off of her feet for a couple weeks and that was the beginning of her unfit for duty. She stated she did what the podiatrist told her to do but her feet never recovered. Employee stated in April 2010 she was cleaning water out of a space on the ship and picked up two five gallon buckets full of water and twisted and felt a pain in her back that made her buckle over; since that time she has had chronic pain in her back. She testified she continued working until she got to a port where she could seek treatment; she took ibuprofen at a rate that was so high Nurse Practitioner Hill told her she could not take that much and to come in as fast as she can. Employee stated the July 2010 injury was the culmination of all her time in the engineering room where she had been discriminated against because of her gender; she testified the men in the engineering department

really did not want women in there. She stated she was also dealing with the fact she came from a disadvantaged background as her education had basically stopped when she was in the sixth grade and she had self-studied for three years to get the credentials needed to be an Oiler; and the male employees received assistance to learn but not female employees. She testified she was accused of doing things that she did not do and she was disciplined for those things and that caused a domino effect and such stress in her life it compounded her work injuries. Employee stated her work injuries prevented her from returning to work after the July 2010 work injury and the July 2010 work injury magnified her previous work injuries. Employee never received any documentation or signed any documents regarding her separation from employment. She testified she feels like she is being put under a microscope and given a hard time for trying to go back to work. Employee testified she became a licensed esthetician after completing six months of training at Paul Mitchell "The School" in Portland, Oregon when she traveled with her husband for his job in 2013. Employee obtained her esthetician-manicurist license because it seemed like a job she could perform taking into consideration her physical limitations but she was unsuccessful in getting any work in the small town she lives in and she let her license lapse. Employee stated she bought a lodge and lives in it; she opened the lodge in 2014 and operates May through September. She stated the worst year she had running the lodge she made $400 and the best year she had running the lodge was last year when a couple stayed at her lodge for about a week and a half and she made $5,000. Employee stated she made at least $50,000 per year working for AMHS. Employee stated the work injuries affect her current ability to work; Employee testified she experiences foot and back pain every day and because she runs her own business, she can rest as needed. Employee stated she never missed a day of work before the first work injury and she worked 12 hours per day graveyard shift for 14 days in a row. (Employee; Experience, judgment, and observations).

107. At hearing, Employee submitted Exhibits 4, 8 and 9. Exhibit 4 consisted of Dr. Paul Brown's curriculum vitae. Exhibit 8 contains an explanation of TTD benefits paid to Employee: from July 23, 2009 through August 18, 2009 at the 2009 compensation rate; from April 6, 2010 through May 20, 2010 at the 2010 compensation rate; from July 05, 2010 through July 8, 2010 at the 2009 compensation rate; from July 28, 2010 through August 01, 2010 at the 2009 compensation rate; from August 2, 2010 through August 7, 2011 at the 2010 compensation; and from November 20, 2011 through July 9, 2013 at the 2009 compensation rate. Exhibit 8 also

includes Employee's request for TTD benefits which includes TTD from July 1, 2009 to July 22, 2009 at the 2009 compensation rate; on July 27, 2010 at the 2010 compensation rate; from August 8, 2011 to November 19, 2011 at the 2010 compensation rate; from November 20, 2011 to July 8, 2013 at the 2010 compensation rate, as Employee was paid at the 2009 compensation rate; and from July 9, 2013 to the present at the 2010 compensation rate. Exhibit 10 contained outstanding medical bills from Jennings Chiropractic, Creekside Family Health Clinic, Ketchikan Chiropractic Center, Peacehealth Medical Group, Western Washington Medical Group, and Miller Family Chiropractic. (Record; Employee's Exhibits, March 7, 2017).

108. At hearing, Employer contended the record demonstrates the reemployment evaluation took into consideration all of Employee's injuries, not just the April 2010 work injury, and Employee failed to timely appeal or request modification. (Record).

109. Employee requested total attorney fees of $44,212.50 and costs of $975.63. (Employee Affidavit of Attorney's Fees and Costs, March 1, 2017; Employee Supplemental Affidavit of Attorney's Fees and Costs, March 9, 2017).

110. Employer did not file an objection to Employee's affidavits and did not object to any particular entries in Employee's attorney fee affidavit or to Employee's counsel's claimed hourly rate. (Record; Observation).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . . .
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.010. 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.
>
> (b) Compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer.

> **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. However, if the condition requiring treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. 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. . . .

> (o) Notwithstanding (a) of this section, an employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection. A claim for palliative care is subject to the requirements of (c) - (n) of this section. If a claim for palliative care is controverted by the employer, the board may require an evaluation under (k) of this section regarding the disputed palliative care. A claim for palliative care may be heard by the board under AS 23.30.110.
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> **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), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a worker’s claim. At the first step, the claimant need only adduce “some” “minimal” relevant evidence establishing a “preliminary link” between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.,* 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks,* 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.,* 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Kramer* at 473-74, quoting *Smallwood* at 316. To rebut the presumption, an employer must present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment or (2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc*., 973 P.2d 603, 611-12 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381. At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

Lack of objective signs of injury does not, in and of itself, preclude the existence of such an injury, since there are many types of injuries which are not readily disclosed by objective tests. *Kessick v. Alyeska Pipeline Services*, 617 P.2d 755, 757 (Alaska 1980) *citing Rogers Electric Co. v. Kouba*, 603 P.2d 909, 911 (Alaska 1979).

> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

> **AS 23.30.395 Definitions.** In this chapter,
> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury. . . .
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;
>
> (29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition;

Lowe's v. Anderson, AWCAC Decision No. 130 (March 17, 2010), explained to obtain TTD benefits, assuming the presumption has been rebutted, an injured worker must establish: (1) she is disabled as defined by the Act; (2) her disability is total; (3) her disability is temporary; and (4) she has not reached the date of medical stability as defined in the Act. (*Id*. at 13-14).

"The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment." *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974). An award of compensation must be supported by a finding the claimant suffered a decrease in earning capacity due to a work-connected injury or illness. *Id.*

The Alaska Supreme Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012) said: "'Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary.' We therefore examine whether the employer rebutted the presumption" (*Id*. at 573).

An employer may rebut the continuing presumption of compensability and disability, and gain a "counter-presumption," by producing substantial evidence that the date of medical stability has been reached. *Lowe's* at 8. Once an employer produces substantial evidence to overcome the presumption in favor of TTD, the employee must prove all elements of the TTD claim by a preponderance of the evidence. However, if the employer raised the medical stability counter-presumption, "the claimant must first produce clear and convincing evidence" that he has not reached medical stability. *Id*. at 9. One way an Employee rebuts the counter-presumption with clear and convincing evidence is by asking his treating physician to offer an opinion on "whether or not further objectively measurable improvement is expected." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1246 (Alaska 1992). The 45 day provision in AS 23.30.395(27) merely signals "when that proof is necessary." *Id*.

In *Vetter*, the Alaska Supreme Court stated:

> The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability, or more precisely, a decrease in earning capacity due to a work-connected injury or illness. (At 266.)

Vetter further held where a claimant, through voluntary conduct unconnected with his or her injury, leaves the labor market, there is no compensable disability. Expanding on its ruling in *Vetter*, however, the Court, in *Cortay v. Silver Bay Logging*, noted the definition of "disability" in AS 23.30.395 says nothing about an employee's reasons for leaving work. The issue is whether the claimant is able to work despite his injury, not why he is no longer working. 787 P.2d 103, 106 (Alaska 1990).

Interpreting both *Vetter* and *Cortay*, the Alaska Workers' Compensation Appeals Commission, in *Strong v. Chugach Electric Assoc. Inc.*, AWCAC Decision No. 128 (February 12, 2010), held where an employee's unemployment is because of his work injury, and his earning capacity is impaired, he is entitled to compensation. *Strong* set the legal standard as "unemployed but willing to work and making reasonable efforts to return to work" when deciding if an unemployed injured worker's loss of earnings is due to a compensable disability or an otherwise non-compensable voluntary withdrawal from the work force. (*Id.* at 20).

When both work related and non-work related medical conditions prevent a disabled employee from returning to work, the non-work related condition does not necessarily destroy the causal link between the work injury and the loss of earning capacity and a worker may still be entitled to disability benefits. *Estate of Ensley v. Anglo Alaska Constr.*, 773 P.2d 955; 958 (Alaska 1989). Similarly, a disabled worker may be entitled to compensation even though he is unavailable for work for some other, personal reason. *Cortay* at 108 (Alaska 1990).

In *Olson v. AIC/Martin, J.V.*, 818 P.2d 669 (Alaska 1991), the board held the employee was not entitled to TTD because he was capable of performing work without regard to the work's availability. The Alaska Supreme Court held the board must consider the employee's earning potential and the availability of employee and applied the "odd lot" doctrine to TTD claims:

> Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. Larson, *supra*, §57.51 at 10-53 (emphasis added). Therefore, the Board's termination of TTD because Olson was capable of performing any work, regardless of availability of employment, was error (*id*. at 674).

In *Phillips Petroleum Co. v. Alaska Industrial Bd.*, 17 Alaska 658, 667 (D. Alaska 1958), the district court held there is a recognized rule "in practically all jurisdictions that the ability of an employee to engage in 'light or occasional' work does not negative a finding that the employee is entitled to total compensation. *Id*. at 667.

Even though an employee may have limited capabilities, she is not entitled to TTD when work is regularly and continuously available to her within her capabilities. *Summerville v. Denali Center*, 811 P.2d 1047; 1051 (Alaska 1991).

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 credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **8 AAC 45.065. Prehearings**
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> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.
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> **8 AAC 45.070. Hearings**
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> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.
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> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.**
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> (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.
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> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five

> percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.
>
> (c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. If the combination of a prior impairment rating and a rating under (a) of this section would result in the employee being considered permanently totally disabled, the prior rating does not negate a finding of permanent total disability.
>
> (d) When a new edition of the American Medical Association Guides described in (b) of this section is published, the board shall, not later than 90 days after the last day of the month in which the new edition is published, hold an open meeting under AS 44.62.310 to select the date on which the new edition will be used to make all determinations required under (b) of this section. The date selected by the board for using the new edition may not be later than 90 days after the last day of the month in which the new edition is published. After the meeting, the board shall issue a public notice announcing the date selected. The requirements of AS 44.62.010 - 44.62.300 do not apply to the selection or announcement of the date under this subsection.

An employee is entitled to a PPI rating paid for by the employer and is due PPI benefits based upon that rating, if the board accepts it. *Redgrave v. Mayflower*, AWCB Decision No. 09-0188 (December 7, 2009). *See also Taylor v. Unisea, Inc.*, AWCB Decision No. 02-0110 (June 19, 2002). “We find the cost of the PPI rating . . . is a medical cost, and should be paid by the employer.” *Nunn v. Lowe’s Co.*, AWCB Decision No. 08-0241 (December 8, 2008).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
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> (c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation

specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.

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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 they become 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.

8 AAC 45.180. Costs and attorney fees.

(a) This section does not apply to fees incurred in appellate proceedings.

(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. Board approval of an attorney fee is not required if the fee

(1) is to be paid directly to an attorney under the applicant's union-prepaid legal trust or applicant's insurance plan; or

(2) is a one-time-only charge to that particular applicant by the attorney, the attorney performed legal services without entering an appearance, and the fee does not exceed $300.

(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, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. 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. (e) Fee contracts are not enforceable unless approved by the board. The board will not approve attorney's fees in advance in excess of the statutory minimum under AS 23.30.145. (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. The following costs will, in the board's discretion, be awarded to an applicant:

(1) costs incurred in making a witness available for cross-examination;
(2) court reporter fees and costs of obtaining deposition transcripts;
(3) costs of obtaining medical reports;
(4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;
(5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;
(6) costs for telephonic participation in a hearing;
(7) costs incurred in securing the services and testimony, if necessary, of vocational rehabilitation experts;
(8) costs incurred in obtaining the in-person testimony of physicians at a scheduled hearing;
(9) expert witness fees, if the board finds the expert's testimony to be relevant to the claim;
(10) long-distance telephone calls, if the board finds the call to be relevant to the claim;
(11) the costs of a licensed investigator, if the board finds the investigator's services to be relevant and necessary;
(12) reasonable costs incurred in serving subpoenas issued by the board, if the board finds the subpoenas to be necessary;
(13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;
(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk
(A) is employed by an attorney licensed in this or another state;
(B) performed the work under the supervision of a licensed attorney;
(C) performed work that is not clerical in nature;
(D) files an affidavit itemizing the services performed and the time spent in performing each service; and
(E) does not duplicate work for which an attorney's fee was awarded;
(15) duplication fees at 10 cents per page, unless justification warranting awarding a higher fee is presented;
(16) government sales taxes on legal services;
(17) other costs as determined by the board.

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ANALYSIS

1) Is Employee's work for Employer the substantial cause of Employee's need for past medical treatment?

Employee contends the work injuries are separate but interrelated and are the substantial cause of her past need for medical treatment. Employee's testimony combined with Dr. Paul Brown's May 19, 2016 SIME opinion the July 2010 work injury caused fibromyalgia and cervicothoracic strain, the April 2010 work injury caused lumbar strain, and the June 2009 work injury foot pain and all three work injures are the substantial cause of Employee's need for medical treatment are sufficient to raise the presumption of compensability. *Smallwood*; *Wolfer*.

To rebut the presumption, Employer was required to present substantial evidence demonstrating employment was not the substantial cause or that a cause other than employment played a greater role in causing Employee's need for medical treatment, without considering credibility or weighing the evidence. *Huit; Wolfer*. Employer relies on Dr. Oda's SIME report to prove Employee's fibromyalgia preexisted her work injuries because it included questions of preexisting, quiescent fibromyalgia. Employer relies on the January 16, 2009 Creekside Family Health Clinic chart note assessing depression, insomnia, fatigue and the July 9, 2009 chart note from Alliance Chiropractic noting Employee reported pain in her shoulders, back, neck and feet and headaches as evidence of Employee having similar pain complaints attributable to fibromyalgia prior to the July 2010 work injury. Employer also relies on Dr. Saunders' August 31, 2010 and October 5, 2010 reports listing fibromyalgia in the past medical history section as evidence Employee's fibromyalgia is a preexisting, non-work related medical condition. Finally, Employer relies on Dr. Dr. Paul Brown's SIME report to demonstrate Dr. Dr. Paul Brown ignored medical evidence and contradicted his own opinion when he opined Employee's July 2010 work injury caused fibromyalgia while also acknowledging Dr. Oda's contrary opinion regarding the cause of the fibromyalgia. Employer contends these medical reports are substantial evidence to rebut the presumption because the evidence raises questions as to whether any work incident was the cause of Employee's fibromyalgia.

Employer failed to rebut the presumption of compensability because Employer did not present substantial evidence Employee's fibromyalgia preexisted the July 2010 work injury. *Tolbert*. Dr. Saunders' August 31, 2010 and October 5, 2010 medical reports are not substantial evidence Employee's fibromyalgia was preexisting because the reports are dated after Employee's July

2010 work injury and after the first diagnosis of fibromyalgia in the medical record, referenced in Dr. Fischer's August 18, 2010 report. The two medical reports months apart, from January 2009 and July 2009, do not provide substantial evidence Employee's fibromyalgia was preexisting simply because they listed similar pain complaints, as there was no diagnosis of fibromyalgia or a chronic or systemic issue. Dr. Oda's SIME report does not constitute substantial evidence Employee's fibromyalgia was preexisting because she did not diagnose Employee with preexisting fibromyalgia, her report only discussed possible quiescent preexisting fibromyalgia and she instead referred Employee to a rheumatologist for diagnosis of fibromyalgia. Lastly, Dr. Paul Brown did not contradict his own opinion when he acknowledged Dr. Oda's reference to a possible quiescent preexisting fibromyalgia; he reviewed the entire medical record, which included Dr. Oda's SIME report, to reach his determination the July 2010 work injury is the substantial cause of Employee's fibromyalgia and consequent need for medical treatment.

Assuming for the sake of argument Employer rebutted the presumption of compensability, Employee has proven by a preponderance of the evidence her work for Employer is the substantial cause of her need for medical treatment. *Koons.* Dr. Paul Brown's opined in his SIME report the work injuries are the substantial cause of Employee's need for medical treatment. Employer argued Dr. Dr. Paul Brown's SIME report is insufficient evidence because the report is based in large part, upon Employee's subjective complaints of pain, rather than objective testing and because Dr. Dr. Paul Brown ignored the July 9, 2009 medical report from Alliance Chiropractic that contradicted his opinion. However, lack of objective signs of injury does not, in and of itself, preclude the existence of such an injury. *Kessick.* Furthermore, Employee's subjective pain complaints were not questioned as being unreliable or insincere by Nurse Practitioner Hill and Dr. Lam, who both treated her extensively; by Dr. Weiner; by Dr. Oda; by Dr. Sohn, the first rheumatologist to treat Employee; or by Dr. Paul Brown. Employee credibly testified about her work injuries, and the onset and continuation of her symptoms are consistent throughout the entire medical record and with her testimony at hearing. *Rogers & Babler*; AS 23.30.122; *CSK Auto, Inc.* Dr. Paul Brown explained Employee's subjective pain complaints and provided an objective basis for Employee's diagnosis of fibromyalgia.

Dr. Paul Brown's opinion is the only opinion in the record from a rheumatologist regarding the substantial cause of Employee's fibromyalgia and need for medical treatment. Dr. Paul Brown's SIME report is credible and is given more weight than Dr. Oda's SIME report. *Rogers & Babler*; AS 23.30.122; *CSK Auto, Inc.* Dr. Paul Brown reviewed Employee's entire medical record and thoroughly examined Employee. Dr. Paul Brown did not ignore the July 9, 2009 medical report; he included the mostly illegible July 9, 2009 medical report in his review of past medical records under the date of October 28, 2010, the date of the fax confirmation at the top of the page. Moreover, Dr. Paul Brown reviewed Dr. Oda's SIME report, which referenced the July 9, 2009 medical report and raised the possibility of preexisting fibromyalgia, when he concluded the July 2010 work injury is the substantial cause of Employee's fibromyalgia. Dr. Oda's opinion regarding the possible onset and cause of Employee's fibromyalgia and Employee's disability is given less weight than Dr. Paul Brown's because fibromyalgia is outside Dr. Oda's area of expertise, as she herself conceded, and fibromyalgia is within Dr. Paul Brown's expertise as he is a rheumatologist. *Id.*

Employee has proven by a preponderance of the evidence the June 2009, April 2010 and July 2010 work injuries are separate but interrelated and are the substantial cause of her past need for medical treatment. Employer will be ordered to pay for past outstanding medical benefits for Employee's work injuries.

2) Is Employee entitled to additional medical benefits?

Employee contends she is entitled to additional medical benefits, specifically the medical care recommended by Dr. Paul Brown. Employer contends Employee is not entitled to continuing medical benefits because the June 2009, April 2010 and July 2010 work injuries are not the substantial cause of Employee's need for additional medical care. This creates a factual dispute to which the presumption of compensability must be applied. AS 23.30.120(a)(1); *Meek*.

The board may authorize continued treatment or care or both as the process of recovery may require if continued treatment or care or both is indicated beyond two years from the date of injury. AS 23.30.095(a). Without regard to credibility, Employee raises the presumption with Dr. Paul Brown's opinion Employee requires further treatment for the June 2009, April 2010 and

July 2010 work injuries. *Tolbert*; *Wolfer*. Without regard to credibility, Employer rebuts the presumption with Dr. Oda's and Dr. Weiner's opinions Employee needs no further treatment for her work injuries, only treatment for her fibromyalgia. *Id*. Employee must prove her medical benefit claim by a preponderance of the evidence. *Saxton*.

Employee has proven by a preponderance of the evidence the work injuries are the substantial cause of her continuing need for medical treatment with Dr. Paul Brown's SIME report. *Koons.* As discussed above, Dr. Paul Brown's SIME report is credible and provided more weight than Dr. Oda's SIME report. *Rogers & Babler*; AS 23.30.122; *CSK Auto, Inc.* Similarly, Dr. Paul Brown's opinion regarding the cause and onset of Employee's fibromyalgia and need for additional medical treatment is given more weight than Dr. Weiner's opinions, as Dr. Weiner is a podiatrist and fibromyalgia is outside Dr. Weiner's area of expertise. *Id*.

Employer contends if the June 2009, April 2010 and July 2010 work injuries are found to be the substantial cause of Employee's need for ongoing medical treatment, the medical care recommended by Dr. Paul Brown is palliative in nature and Employee is medically stable and has not met the requirements for palliative care. This creates a factual dispute to which the presumption of compensability must be applied. AS 23.30.120(a)(1); *Meek*.

An employer is not liable for palliative medical care after the date of medical stability unless it is reasonable and necessary to enable the employee to continue in the employee's employment at the time of treatment, to enable the employee to continue to participate in an approved reemployment plan, or to relieve chronic debilitating pain. AS 23.30.095(1). Employee raises the presumption with Dr. Paul Brown's opinion Employee is not medically stable from the June 2009, April 2010 and July 2010 work injuries and her physical limitations will improve with more treatment. *Tolbert*; *Wolfer*. Employer rebuts the presumption with Dr. Oda's opinion Employee reached medical stability for her spine on July 25, 2011 and Dr. Weiner's opinion Employee reached medical stability for her bilateral feet on July 9, 2013. Therefore, the presumption drops out and Employee must prove all elements of her claim for further palliative treatment by a preponderance of the evidence. *Runstrom*. However, Employee must first rebut the counter-presumption of medical stability with clear and convincing evidence that she was not medically stable because Dr. Oda's and Weiner's reports rebutted the presumption of medical instability by raising the counter-presumption of medical stability. If successful, Employee must then prove she is not medically stable by a preponderance of the evidence. *Anderson*; *Leigh*.

Employee rebutted the counter-presumption with Dr. Dr. Paul Brown's report opining Employee was not medically stable from the June 2009, April 2010 and July 2010 work injuries and recommending additional medical care to improve her physical capabilities. Dr. Paul Brown's report constitutes clear and convincing evidence that objectively measureable improvement from the effects Employee's work injuries as reasonably expected to result from additional medical care and treatment. *Leigh*.

Employer relies on Drs. Oda and Weiner's opinions Employee is medically stable. As discussed above, Dr. Paul Brown's opinion is given more weight than Dr. Oda's and Dr. Weiner's opinions regarding the onset and cause of Employee's fibromyalgia and Employee's medical stability because fibromyalgia is outside Dr. Oda's and Dr. Weiner's area of expertise and fibromyalgia is within Dr. Paul Brown's expertise as a rheumatologist. *Rogers & Babler*; AS 23.30.122; *CSK Auto, Inc.* Employee has not yet reached medical stability related to her work injuries. AS 23.30.395(28). Employer will be ordered to pay for ongoing medical treatment as recommended by Dr. Brown.

3) Is Employee entitled to additional TTD benefits?

To prove her claim for TTD, Employee must demonstrate she is not medically stable and is was disabled by her work injuries with Employer during the time periods she seeks TTD. AS 23.30.185; AS 23.30.395(16), (28); *Lowe's*. Employee contends she is entitled to TTD benefits from July 1, 2009 to July 22, 2009 at the 2009 compensation rate; from August 8, 2011 to November 19, 2011 at the 2010 compensation rate, as she was paid at the 2009 compensation rate; from November 20, 2011 to July 8, 2013 at the 2010 compensation rate; and July 9, 2013 and continuing. However, the only issue that can be considered is Employee's claim of TTD from July 9, 2013 forward because the other dates were not included among issues for hearing in the November 17, 2016 prehearing conference summary. 8 AAC 45.065(c); 8 AAC 45.070(g).

Employer contends Employee is not entitled to TTD because Employee is medically stable and because she is able to work and is currently self-employed. As previously addressed, Employee has not yet reached medical stability. The remaining issue of total and temporary disability is a factual dispute regarding disability to which the presumption of compensability must be applied. AS 23.30.120(a)(1); *Meek.*

Disability is defined as the incapacity because of the injury to earn wages which the employee was receiving at the time of injury. AS 23.30.395(16). Employer contends Employee is not entitled to TTD because Employee became a licensed esthetician-manicurist and she is self-employed as the owner and operator of a lodge. Employee provided evidence to raise the presumption she sustained work injuries which made her incapable of earning the wages she earned at the time of the work injury. *Runstrom; Tolbert*; *Wolfer*. Employee credibly testified she earned some wages operating the lodge, but she has been unable to earn the wages she was receiving at the time of the July 2010 work injury working as an esthetician-manicurist and operating the lodge due to her work injuries limiting her physical capabilities and because she was unable to find steady work. *Vetter*; *Strong*; AS 23.30.122; *CSK Auto Inc*. Dr. Paul Brown opined Employee is disabled and has significant physical restrictions.

Employer provided substantial evidence to rebut the presumption of compensability with Dr. Oda's report, which stated Employee was able to return to her occupation at the time of the work injuries, and with Employee's testimony she returned to work as an owner/operator of the lodge. *Runstrom; Tolbert*; *Wolfer*.

Employee has proven by a preponderance of the evidence she is disabled because she sustained work injuries which made her incapable of earning the wages she earned at the time of the work injury. *Koons.* Nurse Practitioner Hill released Employee from work on August 2, 2010 after the July 2010 work injury. Dr. Oda is the only physician that predicted Employee could return to work after Nurse Practitioner Hill released her from work, after the July 2010 work injury, and Dr. Oda acknowledged her opinions were based upon a purely orthopedic perspective and did not take into consideration Employee's fibromyalgia, which was found to be work related and compensable. Physical Therapist Pagenkopf predicted Employee would not have the permanent physical capabilities to perform the jobs Employee had held in the past 10 years and Dr. Bursell opined Employee would have a permanent partial impairment rating above zero as a result of the July 2010 work injury. Even Dr. Weiner opined Employee could not return to work at the time she was injured and Employee was physically restricted, no climbing on ladders or stairs, no prolonged weight bearing and adlib access to non-weight-bearing, based upon a solely podiatric perspective. Therefore, Dr. Oda's opinion regarding Employee's ability to return to work is given little weight. AS 23.30.122; *CSK Auto Inc*. Employee has proven she has significant physical restrictions due to her work injuries which limits the work she is capable of performing. *Id*.

Employee never returned to her employment at the time of the July 2010 injury and she has been unsuccessful in her attempts to return to work. Employee credibly testified she has not been able to earn the wages she earned at the time of the July 2010 work injury when she credibly testified she was unable to find any work as an esthetician-manicurist and she was able to earn $400 one year operating the lodge and $5,000 another year operating the lodge and she earned around $50,000 per year at the time of the July 2010 work injury. Employer argues Employee retraining as an esthetician-manicurist and her return to work an owner/operator of a lodge establishes Employee is not disabled. However, total disability does not require a total inability to return to work and when determining whether an employee is totally disabled, the availability of employment for persons with the physical limitations and education of the employee and the earning potential for such employment must be taken into consideration. *Phillips Petroleum Co. v. Alaska Industrial Bd.*,; *Olson*. Employer provided evidence Employee worked some time periods operating her lodge; but provided no evidence Employee was able to earn any income as an esthetician-manicurist; no evidence Employee could earn more than she earned as an owner/operator of the lodge; no evidence a steady and readily available labor market existed for Employee, either as an esthetician-manicurist or as an owner/operator of a lodge; and no evidence regular and continuous employment was available in the area for persons with Employee's physical limitations and education. *Summerville.* As stated before, Employee credibly testified she attempted to find work within her physical limitations and education and earn the wages she earned at the time of her July 2010 work injury and was unable to do. Based upon the medical record and Employee's testimony, the preponderance of the evidence indicates Employee has been disabled from her work since July 9, 2013 due to her work injuries.

However, Employee earned $5,000 in a week and a half in the summer of 2016; therefore, Employee was not totally disabled during that time period and is not entitled to TTD for that time period. Therefore, Employee is entitled to TTD benefits, except for the week and a half she earned $5,000 in the summer of 2016, until she is medically stable or is no longer disabled. Employee's request for additional TTD will be granted.

4) Is Employee entitled to a PPI rating?

An injured worker with a compensable work injury is entitled to a PPI rating from her physician. *Redgrave*. As determined previously, Employee's June 2009, April 2010, and July 2010 work injuries are not medically stable. Therefore, Employee is entitled to a PPI rating from her physician, or on referral from her physician, for each work-related condition, including fibromyalgia, when her condition is medically stable. AS 23.30.190. If Employee obtains a referral or rating, Employer will be ordered to pay the related expenses. *Id*.

5) Should Employee's July 2010 work injury be referred to the RBA for an eligibility evaluation?

Employee contends she is entitled to a reemployment eligibility evaluation for her July 2010 work injury because the RBA determined she was ineligible under the April 2010 injury. Employer contends Employee's request for reemployment benefits must be dismissed because Employee was already found ineligible for reemployment benefits by the RBA, the evaluation took into consideration all of Employee's injuries, and Employee failed to timely appeal or request modification of the RBA's decision.

Employee is entitled to an eligibility evaluation if she suffers a compensable injury and, as a result of the injury, she is totally unable to return to her employment at the time of injury for 90 days. AS 23.30.041(c). Employee suffered three separate work injuries and filed a separate claim for each; Employee is entitled to request an eligibility evaluation for each injury. Employee's request for a reemployment eligibility evaluation under the July 2010 case number, listing all three injury dates, was changed to an evaluation under only the April 2010 work injury by the reemployment benefits section upon request by Employer's adjuster. Employee was found ineligible for reemployment benefits for the April 2010 work injury only because the RBA's letter informing Employee she was not eligible referenced the April 2010 work injury case number and stated no PPI was identified as a result of April 2010 work injury. No reference was made to the other two work injuries or Dr. Bursell's April 15, 2011 prediction Employee would have a ratable PPI as a result of the July 2010 work injury. Therefore, the evaluation did not take into consideration all of Employee's injuries.

Employer contends Employee is not eligible for reemployment benefits because she has been retrained and she owns and operates a lodge. The board does not have the authority to make an initial determination on eligibility for reemployment benefits. Employee's request for an order directing the RBA designee to review the July 2010 case and determine if she is entitled to an eligibility evaluation will be granted.

6) Is Employee entitled to an award of attorney fees and costs? If so, in what amount?

On April 19, 2011; August 19, 2011; and March 15, 2012, Employer controverted Employee's claims for medical costs, PPI, TTD and a reemployment eligibility evaluation. Employee has prevailed on her request for medical benefits, TTD, PPI, and a reemployment eligibility evaluation. Therefore, as a controverted claim on which she was to some extent successful, Employee is entitled to fully compensatory and reasonable, though not necessarily actual, attorney fees under AS 23.30.145(a) and 8 AAC 45.180 and costs under 8 AAC 45.180. *Cortay*.

Employer did not object to any particular entries in Employee's attorney fee affidavit or to Employee's counsel's claimed hourly rate. After taking into account the nature, length, complexity of the services performed and benefits received, Employee's attorney fees will not be reduced.

A fully compensable, reasonable attorney fees and costs award for Employee is this case will be $44,212.50 and $975.63 respectively.

CONCLUSIONS OF LAW

1. Employee's work for Employer is the substantial cause of her need for past medical treatment.
2. Employee is entitled to additional medical benefits.
3. Employee is entitled to additional TTD.
4. Employee is entitled to a PPI rating.
5. Employee is entitled to a reemployment eligibility evaluation.
6. Employee is entitled to an award of attorney fees and costs.

ORDER

1. Employee's September 8, 2010; December 19, 2011; and March 1, 2012 claims are granted.
2. Employer is ordered to pay for all past outstanding medical bills related to Employee's treatment for the June 2009, April 2010 and July 2010 work injuries.
3. Employer is ordered to provide Employee ongoing medical and related benefits for her the June 2009, April 2010 and July 2010 work injuries.
4. Employer is ordered to pay Employee TTD benefits from July 9, 2013, except for the week and a half Employee earned $5,000 in the summer of 2016, until she is medically stable or is no longer disabled.
5. Employer is ordered to pay for a PPI rating from Employee's attending or referral physician.
6. This matter is referred to the RBA for her consideration of a reemployment eligibility evaluation for the July 2010 work injury.
7. Employer's claim for an award of attorney's fees and costs is granted. Employer is ordered to pay $44,212.50 in reasonable attorney's fees and $975.63 in reasonable costs.

Dated in Juneau, Alaska on April 5, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Charles Collins, Member

/s/
Bradley Austin, 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 JAMIE A. WICKHAM, employee / claimant; v. ALASKA MARINE HIGHWAY, employer; STATE OF ALASKA, insurer / defendants; Case No(s). 201011311; 201005009; 200919539, dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties on April 5, 2017.

/s/

Dani Byers, Workers' Compensation Technician