ALASKA WORKERS' COMPENSATION BOARD

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

BARBARA J. UMIKER, Employee, Claimant, v. BRISTOL BAY AREA HEALTH CORPORATION, Employer, and SEABRIGHT INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201117972 AWCB Decision No. 15-0006 Filed with AWCB Anchorage, Alaska On January 21, 2015

Barbara Umiker's (Employee) September 4, 2012 and September 27, 2012 claims were heard on December 2, 2014, in Anchorage, Alaska. The hearing date was selected on September 30, 2014. Employee appeared and testified. Attorney Joseph Kalamarides appeared and represented Employee. Attorney Elise Rose appeared and represented Bristol Bay Area Health Corporation and its insurer Seabright Insurance Company (Employer). Other witnesses included Woody Waldroup, D.C., for Employee and Dennis Chong, M.D., for Employer. The record remained open to allow Employee to file a supplemental attorney's fee affidavit and Employer to respond, and closed on December 15, 2014.

ISSUES

Employee contends she was injured on the job while working for Employer as a registered nurse on November 15, 2011. Employee contends the work injury caused significant time loss from work, medical expenses, and required considerable treatment, including surgery, to address pain in her back, legs, buttocks, and foot. Employee concedes she has preexisting conditions, but contends these conditions were dormant or required only mild, conservative treatment until the November 15, 2011 work injury. Employee disagrees with the EME and SIME physicians' assessments, contending their reports were flawed.

Employer does not dispute Employee was injured on the job on November 15, 2011. However, Employer contends the November 15, 2011 work injury caused, at most, temporary aggravation of preexisting conditions which became medically stable by January 1, 2012, and resulted in no ratable impairment. Employer contends all benefits owed have been paid, along with a substantial overpayment. Employer seeks an order denying Employee's claims.

1) Is Employee's November 15, 2011 injury while working for Employer the substantial cause of her disability and need for medical treatment?

Employee contends she is entitled to temporary total disability (TTD) for the periods she was unable to work. Employee received 12 weeks of TTD benefits from May 26, 2012, until Employer controverted on August 21, 2012. Employee contends she is entitled to TTD from August 21, 2012, until she returned to work on June 27, 2013, a period of 44.2 weeks.

Employer contends it paid over $10,000 in TTD benefits. Employer contends based on the EME and SIME reports, it made a substantial overpayment. Therefore, Employer contends no additional TTD benefits are due or owing.

2) Is Employee entitled to additional TTD?

Employee has not been rated for permanent partial impairment (PPI), but contends she is entitled to a rating and PPI benefits after she reaches medical stability.

Employer contends the work injury was only a temporary aggravation of a preexisting condition which resolved by January 1, 2012, and did not result in any ratable impairment. Because it also contends the work injury was not the substantial cause of Employee's need for medical treatment, Employer denies Employee is entitled to a PPI rating or any PPI benefits.

3) Is Employee entitled to a PPI rating?

Employee contends she is entitled to a reemployment benefits eligibility evaluation because her work injury rendered her unable to work for more than 90 consecutive days.

Employer contends Employee is not entitled to an evaluation because she has returned to work with Employer and continues to work for it at this time.

4) Is Employee entitled to a reemployment benefits eligibility evaluation?

Employee contends Employer resisted paying benefits, and her claims were controverted or denied throughout litigation in this case. Employee contends her claims are complex and have involved significant litigation over causation. Therefore, Employee contends she is entitled to attorney's fees and costs and has provided statements and attorney's fees and cost affidavits.

Employer contends Employee is entitled to no additional benefits. Therefore, Employer contends Employee is not entitled to any attorney's fees or costs.

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

FINDINGS OF FACT

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

1) In January 2010, Employee began working as a registered nurse for Employer at a medical facility in Dillingham, Alaska. (Umiker).

2) On October 29, 2010, Employee began treating with Woody Waldroup, D.C., at Arctic Chiropractic in Dillingham. (Letter from Maria Burleson, M.D., July 29, 2014).

3) Dr. Waldroup treated Employee for "maintenance" and to address "muscle soreness, achiness, and structural instabilities" in Employee's lower back. Dr. Waldroup's treatment program was intended to address intermittent and mild aches and pains associated with Employee's occupation, rather than to correct any specific problem. (Waldroup).

4) Although the date is indecipherable, an intake form Employee completed for Dr. Waldroup's office states past relevant medical history includes a left hip replacement in 2006 and a fracture at the left acetabulum [pelvis] in 1993 related to a motor vehicle collision. (Arctic Chiropractic intake form, Employee's Hearing Exhibit 1).

5) Employee provided records from visits with Dr. Waldroup, with the following relevant notes:

Date	Complaints	Pain Level
October 29, 2010	Mod. soreness	4
January 15, 2011	Pain, constant	4
January 17, 2011	Lower back soreness	2
January 18, 2011	Right hip better	2
January 26, 2011	Right hip soreness, low back soreness	3
February 7, 2011	Right lower back soreness	3
February 18, 2011	Lower back soreness	3
February 22, 2011	Hip soreness, lower back soreness	1
March 7, 2011	Low back pain/soreness	2
March 10, 2011	Low back achiness, feeling better, slipped on ice	1
March 14, 2011	Hip area achiness	1
September 14, 2011	Hip/low back pain constant, moderate	5
September 19, 2011	Right hip soreness, mild	1
October 7, 2011	Low back pain mild, constant	3

(*Id*.).

6) After October 7, 2011, there are no chart notes from Dr. Waldroup or records from Arctic Chiropractic until November 15, 2011, when Dr. Waldroup examined Employee following the work injury. (Record).

7) On November 15, 2011, Employee was injured when she slipped and fell on a wet floor while working for Employer. (Report of Injury, November 21, 2011).

8) The day of the injury, Employee was seen by Richard Asher, M.D., who worked at the medical facility where Employee worked and was injured. Dr. Asher's report states:

> Barbara was taking care of a patient this morning, when she slipped in the room on a wet floor landing on her knees. She has pain in her neck, both knees, and L forearm. She had no loss of consciousness nor trauma to her head.
> . . .
>
> Assessment: 1. Neck strain with no radicular symptoms - RX ice, ibuprofen, referral to chiropractor for treatments. 2. Bilat knee contusion - Ice, ibuprofen, f/u in 1 week. 3. Back strain in the thoracic area - RX with ice, and hot baths, and referral to chiropractor. (Asher, Post-injury Report, November 15, 2011).

9) Employer initially accepted Employee's claim. Based on her $1,502.93 gross weekly earnings, Employer paid Employee $915.77 per week TTD while she remained in Dillingham, beginning May 26, 2012. When Employee relocated to Rapid City, South Dakota, Employer paid Employee $740.86 per week TTD until August 21, 2012, when Employer controverted. (ICERS Database, accessed January 13, 2015; Compensation Report, June 4, 2012).

10) On May 30, 2012, Dr. Waldroup reviewed x-rays of Employee's spine. Dr. Waldroup noted possible degenerative joint disease, with "possible grade II spondylo [sic] at L5-S1." (Arctic Chiropractic chart note, May 30, 2012).

11) Dr. Waldroup testified: before the November 15, 2011 work injury, Employee's complaints were related mostly to soft tissue, with no radiating or referral nerve pain to the feet or legs. After the injury, Dr. Waldroup treated Employee for "moderate to severe pain." Dr. Waldroup stated the November 15, 2011 work injury caused a "significant trauma" to nerve roots in the lower back. Dr. Waldroup opined the work injury was an aggravation of Employee's preexisting condition. (Waldroup).

12) Employee testified: prior to the November 15, 2011 injury, she usually worked a seven-day week, with the following seven days spent "on call" as a medevac nurse. Because Dillingham is a remote location and access to qualified staff is more limited, Employee was required to assist in various departments at the medical facility where she worked, and her duties often included lifting and moving incapacitated patients. After the injury, she began experiencing pain down her legs and buttocks and a burning sensation in her foot, which got worse in the following

months. Employee did not experience these particular symptoms prior to the November 15, 2011 injury. She initially resisted Dr. Waldroup's recommendations to take time off work or to work only light-duty. Employee tried to work as close as possible to her hours and duties before the work injury, but pain eventually made this difficult. In time, the pain caused her to change her work duties and hours. She stopped medevac duties because she could no longer meet the physical demands of transporting and moving patients, and reduced her work week to no more than three or four successive days. (Employee).

13) On May 18, 2012, Dr. Waldroup recommended Employee take time off work so she could begin to recover. Dr. Waldroup's note states:

> …this weekend her pain became severe enough that she went to the E.R. where she was given two types of pain killers. . . . I voiced my concern of using drugs to mask the pain. . . . We both discussed the ongoing idea of taking time off [work] which has been my recommendation from the beginning of treatment and to which she has been against taking time off. She continues to work which we both know keeps her injury aggravated. (Waldroup Report, May 18, 2012).

14) On May 26, 2012, Employee left her position with Employer. Employee testified this was because worsening pain in her back, legs, and foot had made it impossible for her to perform her regular duties as a nurse. (*Id.*).

15) On June 15, 2012, Dr. Waldroup treated Employee for the last time. (Waldroup; Arctic Chiropractic chart note, June 15, 2012).

16) Sometime in late June of 2012, Employee relocated to South Dakota to live with her parents because she had no income and was therefore no longer able to live alone in Dillingham. (Employee).

17) On June 25, 2012, Employee began treating with Nathan Ritterbush, D.C., at Southern Hills Chiropractic in Hot Springs, South Dakota. Dr. Ritterbush's report states:

> Patient Barbara Umiker presented to my office on June 25, 2012 requesting treatment for a low back injury on November 15, 2011. . . . Ultimately, the chiropractor took Ms. Umiker off work for 90 days because he felt work was preventing her condition to improve [sic]. Ms. Umiker was forced to move back to South Dakota with her parents due to high cost of living in Alaska. With referral from her step-mother, she requested treatment in my office. . . .
>
> After evaluation of her x-rays, (grade II spondylolisthesis L5 on S1, severe degenerative disc disease L5-S1), case history, examinations and evaluation, I

> determined an MRI was necessary and assumed the findings would warrant a referral. . . . Both appointments were quickly made to reduce Ms. Umiker's wait time due to her pain and level of discomfort.
>
> Ms. Umiker initially presented with bilateral low back pain primarily on the right, right side sciatic nerve pain radiating to the right foot. She constantly, subconsciously has to change positions while seated or she sits with her leg crossed and her body weight primarily on her left glute [sic] and arm to reduce pressure on her side. She will stand less than a minute due to pain, she has been off work for over 30 days and has no improvement. Daily activities like shopping or housework is limited due to pain levels increasing with activity. . . . (Ritterbush Report, June 25, 2012).

18) On June 28, 2012, Malcolm Shupeck, M.D., performed an MRI. Dr. Shupeck's report noted "severe degenerative disc disease L5-S1 with grade 2 spondylolisthesis of L5 on S1." (Shupeck Report, June 28, 2012).

19) On July 13, 2012, Employee was examined by rehabilitation medicine specialist Peter Vonderau, M.D. Dr. Vonderau assessed:

> 1. Low back pain localized to the lumbosacral junction area, worse with standing.
> 2. Intermittent pain radiation along the posterior aspect of the right thigh.
> 3. Numbness and tingling of the right foot.
> 4. Lumbar MRI evidence of grade 2 anterolisthesis at L5/S1 with moderate to severe biforaminal narrowing.
> 5. Work related injury in November of 2011 (Alaska). (Vonderau Report, July 13, 2012).

20) On August 8, 2012, Employee was examined by Dennis Chong, M.D., for an Employer's Medical Evaluation (EME). Dr. Chong's EME report states, in relevant part:

> Diagnosis: By historical record in proximate physician and chiropractic examination, bilateral knee contusion, related to the industrial event on November 15, 2011.
>
> Neck strain and thoracic area back strain, related to the industrial event of November 15, 2011.
>
> Development of right buttock pain at the end of January 2012 as reported to her chiropractor after chiropractic adjustments at greater than two months subsequent to the industrial event of November 15, 2011. This is most likely not related to the industrial event of November 15, 2011.

> Pre-existing severe degenerative disk disease, L5-S1, with grade 2 spondylolisthesis of L5 on S1. This is not related to the industrial event of November 15, 2011. . .

Regarding causation, Dr. Chong opined:

> The work injury of November 15, 2011 is the substantial cause of bilateral knee contusion and neck strain and thoracic back strain.

Regarding further medical treatment:

> With regard to Ms. Umiker's spondylolisthesis, I would recommend that further diagnostic imaging of the lumbar spine . . . be obtained to assess for stability. . . . However, this would not be related to the claim under study. There is no further medical treatment recommended for conditions related to the November 15, 2011 injury.
>
> Ms. Umiker's work related conditions are medically stable at this time. She is currently not stable with regard to her pre-existing condition.
> . . .
>
> There is no impairment to rate with respect to her work-related condition. . . . (Chong EME Report, August 8, 2012).

21) On August 23, 2012, Employer filed a controversion, which denied all benefits after August 21, 2012 based on Dr. Chong's EME. The notice stated, "[Employee] is medically stable with no PPI in regards to the injuries whose the work event [sic] was the substantial cause." (Controversion Notice, August 23, 2012).

22) On August 24, 2012, Employee was seen by Dr. Vonderau for a follow-up. Dr. Vonderau's report stated:

> Ms. Umiker has not noticed much improvement with physical therapy. I feel that steroid injections would likely provide only temporary relief. She inquired about referral to a surgeon and has heard very good things about Dr. Rice. I think he is an excellent choice. I will make that referral for her today. (Vonderau Report, August 24, 2012).

23) On September 4, 2012, Employee filed a claim related to the November 15, 2011 injury. Employee's claim sought unspecified TTD, medical costs, transportation costs, a finding of an unfair or frivolous controversion, and requested a second independent medical evaluation (SIME). Employee wrote the reason for filing the claim was, "Controversion of claim. My

physician & I disagree with controversion. Injury remains unresolved." (Workers' Compensation Claim, September 4, 2012).

24) On September 27, 2012, attorney Joseph Kalamarides filed his appearance on Employee's behalf. Employee also filed an amended workers' compensation claim, which sought TTD from August 22, 2012 ongoing; PPI for neck, back, hip, and knee injuries; medical costs; transportation costs; a reemployment benefits eligibility evaluation; interest on TTD withheld; and attorney's fees and costs. (Notice of Appearance, September 27, 2012; Workers' Compensation Claim, September 27, 2012).

25) On September 20, 2012, and again on October 3, 2012, Employer filed controversions, which denied all benefits based on Dr. Chong's August 8, 2012 EME. (Controversion Notice, September 20, 2012; Controversion Notice, October 3, 2012).

26) On October 15, 2012, at Dr. Vonderau's referral, Employee was examined by neurosurgeon Stuart Rice, M.D. Dr. Rice assessed, "[s]evere lower back pain secondary to work accident as a nurse in Alaska in November 2011." Dr. Rice's report further stated:

> At this point, I do not believe that conservative measures would be helpful. The patient has a congenital spondylosis with development of spondylolisthesis. **While this is a preexisting condition, it clearly is a situation where she was asymptomatic before the injury and has been grossly symptomatic since the time of the injury. In other words, stated simply, the patient's injury is the cause of her pain. . . . At this point, I would recommend surgical intervention. . . .** (Rice report, October 17, 2012) (emphasis added).

27) On December 26, 2012, Dr. Rice performed a posterior fusion surgery at the L5-S1 level. (Rice Postoperative Report, December 26, 2012).

28) On March 4, 2013, Dr. Rice performed a follow-up examination and noted Employee "appeared much more comfortable" and was "doing well." Dr. Rice released Employee to work, stating, "[t]he patient can return to work. She does work as an RN. She may not lift more than 25 pounds until 5/1/2013. We will see her in the future as needed." (Rice Report, March 5, 2013).

29) Employee was not medically stable between the time she left her employment with Employer and the time Dr. Rice released her to work. (Experience, judgment, observations, and inferences from all of the above).

30) Employee testified: after she recovered from the December 26, 2012 surgery, she experienced much improvement to her pain and her range of motion. Subsequent physical therapy provided more relief. After being released by Dr. Rice, Employee began looking to resume full-time employment as a nurse and began sending out resumes. Employee eventually spoke to a former supervisor at Employer, who offered her a position. (Employee).

31) On June 27, 2013, Employee returned to work for Employer in Dillingham, where she currently works a sedentary job in the information technology department. Employee's duties consist of training rotating staff in using medical records software. Employee did not state what her wages are, but stated she earns less now than in the position held prior to the injury. (*Id*.).

32) Employee testified she still has pain in her back, but her condition is better than before the December 26, 2012 surgery. On some days, she experiences burning or pain in her foot or legs, although the sensation of numbness has gone away. She is currently taking pain medications and is in physical therapy. (*Id*.).

33) On July 3, 2013, Employee was examined by Neil Pitzer, M.D. for an SIME. Dr. Pitzer's SIME report states, in relevant part:

> I would agree with Dr. Chong that the injury may have caused a temporary aggravation of her condition, but did not cause the need for lumbar spine surgery as the patient clearly had a pre-existing spondylolisthesis and some chronic low back pain prior to the work injury.
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> **Obviously, having Dr. Waldroup's preinjury records in their entirety would be helpful**, but this one brief entry just one day prior to her work injury where she had diffuse spinal pain complaints would lead me to believe that she had significant ongoing chronic spinal pain problems prior to her work injury and the need for lumbar spine surgery with fusion is related to her long-standing spondylolisthesis and not to her work injury of 11-15-11.
> . . .
>
> I do not feel that the 11-15-11 employment injury was a substantial cause the [sic] for medical treatment other than the initial evaluation by Dr. Asher as the patient was already receiving chronic chiropractic care for spinal pain complaints.
> . . .
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> I do feel the patient has recovered from her work injury. I believe the patient reached a point of medical stability at approximately 1-1-12 and the patient should undergo normal healing from minor bruising and contusions. . . I do not feel the patient has a permanent partial impairment rating related to her injury. . . . (Pitzer SIME Report, July 10, 2013) (emphasis added).

34) On July 12, 2013, Employer filed a controversion, which denied all benefits based on Dr. Pitzer's July 10, 2013 SIME. (Controversion Notice, July 12, 2013).

35) Employee is credible. (Experience, judgment, observations, and inferences from all the above).

36) On December 4, 2014, Employee filed affidavits of attorney's fees and costs executed and signed by attorney Joseph Kalamarides and legal assistant Douglas Johnston, respectively. Employee's billing timesheets itemize 59.92 hours of attorney and paralegal time at hourly rates of $350 and $400 per hour for attorney time and $150 and $175 for paralegal time, totaling $15,788.25 in fees. Employee lists $29.95 in costs, for a total of $15,818.20 in attorney's fees and costs. (Affidavit of Joseph Kalamarides, December 4, 2014; Affidavit of Douglas Johnston, December 4, 2014; Statement of Attorneys' Fees and Costs, December 4, 2014).

37) The requested hourly rates and itemized hours for Employee's attorney's fees and costs are reasonable based on the amount of work done, the geographic location and relevant legal market, and complexity of the issues. (Experience, judgment).

38) Employer did not file an objection or opposition to the foregoing attorney's fees or costs. (Record).

PRINCIPLES OF LAW

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

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). A finding reasonable persons would find employment was a cause of the employee's disability and impose liability is, "as are all subjective determinations, the most difficult to support." However, there is also no reason to suppose board members who so find are either irrational or arbitrary. That "some

reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." *Id*. at 534.

The board has the sole discretion to determine the weight of the medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision No. 087 at 11 (Aug. 25, 2008).

> **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.
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> **AS 23.30.041. Rehabilitation 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 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
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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
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> (1) the claim comes within the provisions of this chapter. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Carter*, 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between her injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). In making its preliminary link determination, the board need not concern itself with the witnesses' credibility. The evidence necessary to raise the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316

(Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *Id*.

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).

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

If the board finds the employer's evidence is sufficient, in the third step the presumption of compensability drops out, the employee must prove her case by a preponderance of the evidence, and must prove in relation to other causes, employment was the substantial cause of the disability or need for medical treatment. *Runstrom* at 8. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Id.*

"It is well-established in workers' compensation law 'that a preexisting disease or infirmity does not disqualify a claim under the work-connection requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought.'" *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 315 (Alaska 1981) *quoting Thornton v. Alaska Workmen's Compensation Board*, 411 P.2d 209, 210 (Alaska 1966).

In *Sarmiento-Mendoza v. State of Alaska*, AWCB Decision No. 14-0122 (September 22, 2014), the board concluded an aggravation of a preexisting condition need not be permanent to be the substantial cause of an employee's disability or need for treatment. Moreover, a preexisting condition may indeed cause 90 percent of a person's complaints and symptoms yet not cause the inability to work or need for medical treatment. Where the disability and need for medical treatment are due to the remaining 10 percent of "complaints and symptoms," the cause of the 10 percent would be the substantial cause. *Id.* at 18.

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

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

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

> **AS 23.30.145. Attorney Fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services

> have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

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

> The commission recognizes that promoting the availability of counsel for injured workers is a legitimate legislative goal of the attorney fee statute. This goal is served in the current statute by provision of a statutory minimum fee that may result in disproportionate fees in some cases, a mandate to examine the complexity of services provided, and a barring of most fee awards against injured workers when the employer prevails. Thus, a small value claim that involves a novel application of the law or an injured worker's claim that succeeds against heavy opposition, may result in fee awards that recognize the particular complexity or difficulty of the case.
> . . . .
>
> The legislature's choice represents a balance between assuring the injured worker access to representation and freedom to file claims without fear of financial consequences on one hand and avoiding unnecessary litigation of doubtful claims and unreasonable costs to the public and employers on the other. The commission will not disturb the balance struck by the legislature. *Id.* at 13-15.

> **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.

Lowe's v. Anderson, AWCAC Decision No. 130 (March 17, 2010), explained to obtain TTD benefits, assuming no presumptions apply, 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.

Estate of Ensley v. Anglo Alaska Construction, Inc., 773 P.2d 955 (Alaska 1989), addressed the question of successive, independently and temporarily disabling conditions, one work-related and one not. In *Estate of Ensley*, the board terminated Ensley's TTD benefits finding he could no longer work as a result of medical treatments for non-work-related cancer. The court reversed the board's decision and remanded the case for determination as to the date Ensley's back condition no longer constituted a disability. *Estate of Ensley* held: "We believe the Board erred by failing to consider whether Ensley's back condition constituted a disability regardless of his treatment for cancer. Liability for workers' compensation benefits will be imposed when employment is established as a causal factor in the disability." *Id*. at 958. (citation omitted).

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (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.
>
> (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. . . .

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 23.30.395. 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 in the same or any other employment;
> . . . .
>
> (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. . . .

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 v. Anderson*, AWCAC Decision No. 130 (March 17, 2010), 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 *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249 (Alaska 2007), the Alaska Supreme Court further explained this concept. Thoeni had a knee injury and her insurer discontinued TTD benefits based on its claim she was medically stable. The TTD period in dispute was from November 2, 2002 January 25, 2001. At hearing in September 2002, the board found she was medically stable based upon one physician who predicted no expected "major changes in the next 45 days" and on another who predicted the employee's knee was "capable of improvement with a diligent exercise program." *Id*. at 1255-56. By the time the board heard Thoeni's claim in 2002, it knew the first two physicians' predictions "proved incorrect," because the employee's knee got worse and did not improve with exercise. The board also knew a third physician had recommended additional knee surgery, which Thoeni had in April 2001. *Id*. at 1256. *Thoeni* held the first two physicians' predictions, which proved to be incorrect, "were not substantial evidence upon which the board could reasonably conclude that Thoeni had achieved medical stability." Accordingly, *Thoeni* reversed the board's medical stability determination. *Id*.

> **8 AAC 45.180. Costs and attorney's fees.**
> . . . .
> (b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.
>
> (c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed. . . .

> (d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.
>
> > (1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed. . . . Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
> >
> > (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.
> > . . . .
>
> (f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs were incurred in connection with the claim. . . .

ANALYSIS

1) Is Employee's November 15, 2011 injury while working for Employer the substantial cause of her disability and need for medical treatment?

Employee contends the November 15, 2011 work injury was the substantial cause of her disability and need for medical treatment. This is a factual question to which the presumption of compensability applies. AS 23.30.120(a); *Meek*. A claimant's disability is presumed to be compensable when she demonstrates a "preliminary link" between the disability and her employment. *Burgess.* In determining whether the presumption is met, credibility is not considered nor is the evidence weighed against competing evidence at this step. *Tolbert*.

Employee testified she was unable to continue her employment as before the November 15, 2011 work injury due to worsening pain. Employee left her position with Employer altogether and moved back in with her parents because she was unable to work and support herself. This,

coupled with the testimony of Dr. Waldroup and Dr. Rice's report stating the work injury was an aggravation of Employee's preexisting condition, is sufficient to raise the presumption. To rebut the presumption, Employer was required to present substantial evidence demonstrating the employment was not the substantial cause or that a cause other than employment played a greater role in causing Employee's disability and need for medical treatment. *Burgess*. Again, credibility is not considered nor is the evidence weighed against competing evidence at this step.

Employer rebutted the presumption through Dr. Chong's August 8, 2012 EME report and Dr. Pitzer's July 10, 2013 SIME report, both of which opined the November 15, 2011 work injury was not the substantial cause of Employee's ongoing disability or need for medical treatment and was, at most, a temporary aggravation of a preexisting condition which became medically stable. Because Employer rebutted the presumption, Employee must prove, by a preponderance of the evidence, the work injury was the substantial cause of her disability and need for medical treatment. *Id*.

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*. Prior to the November 15, 2011 work injury, Dr. Waldroup's testimony and records are clear only "maintenance" and conservative management of occasional discomfort was needed. Dr. Waldroup's treatment for Employee focused on "achiness and soreness," rather than constant, significant pain. After the November 15, 2011 incident, Employee dramatically changed her work schedule. She reduced her hours and changed her duties. She no longer assisted in medevac operations, finding them too physically demanding. She continued to seek treatment for her pain, which culminated in back surgery. While Employee eventually returned to work for Employer, she now works a sedentary job in the information technology department, rather than as a nurse providing direct care for patients.

Employee is credible. AS 23.30.122; *Smith*. The work injury coincided with a sudden, dramatic change in Employee's work and life conditions immediately following. Two qualified physicians also attributed the work injury to the need for medical care and disability. These facts, combined with her credible testimony concerning her worsening symptoms following the

injury show, by a preponderance of the evidence, the industrial injury is the substantial cause of her disability and need for treatment. AS 23.30.120(a); *Meek*; *Burgess*. A contrary result would require either rejection of Employee's otherwise credible testimony concerning her worsening symptoms and subsequent life changes, or attribution of the sudden aggravation of her preexisting conditions to a stark coincidence with the November 11, 2011 work injury. Neither result is reasonable in this context or is consistent with the purposes of the Act. AS 23.30.001; AS 23.30.010; *Kessick.*

The EME and SIME reports of Drs. Chong and Pitzer, respectively, both opined the November 15, 2011 work injury was, at most, a temporary aggravation of preexisting congenital disc disease with spondylolisthesis, which in any event became medically stable by January 1, 2012 and resulted in no ratable impairment. However, Dr. Pitzer, in his July 10, 2013 SIME report, acknowledges he did not have Dr. Waldroup's full pre-injury records and that this would have been "helpful" in his evaluation. Furthermore, Dr. Pitzer did not have the benefit of hearing Dr. Waldroup's testimony, which carefully delineated the differences between Employee's symptoms and treatments pre- and post-injury. Dr. Waldroup also testified consistently as to worsening of Employee's symptoms after the November 15, 2011 injury, pointing to abundant pre-injury records where chiropractic treatment was only on a "maintenance" or conservative basis. Employee testified credibly and extensively as to worsening of her symptoms after the November 15, 2011 injury, culminating in her leaving her job with Employer and seeking surgery. While doctors may look at medical records, x-rays and MRI scans and see little objective differences in a medical "condition" either "before" or "after" a work injury, only Employee knows what her physical symptoms were like both before and after the injury. In the context of a back injury, a common industrial injury often difficult to objectively diagnose or describe, Employee's credible testimony concerning her suddenly deteriorating physical abilities after November 15, 2011, is given significant weight. Employee's testimony is strongly corroborated by changes in her life following the work injury. Further, Dr. Chong's report opined the medical condition, spondylolisthesis combined with pre-existing degenerative disc disease, is not related to the work injury. However, that is not the legal issue. The question is whether the work injury is the substantial cause for the need for medical treatment or disability.

Therefore, the EME and SIME reports of Drs. Chong and Pitzer are given less weight. AS 23.30.122; *Rogers & Babler*; *Moore*; *Harnish*; *Smith*.

The record does not contain, nor has Employer alleged, some other explanation for the sudden turn of events in Employee's life after the November 15, 2011 work injury. There is no evidence Employee filed her claim for secondary gain, or to obtain benefits fraudulently. Employer advanced no argument why Employee would be motivated to suddenly leave her job in Dillingham and relocate to South Dakota, such as divorce, conflict with co-workers or management, personal family issues, a change of scenery, or financial gain. Employee's argument is bolstered by the fact that after she recovered from back surgery, and a job with Employer was offered to her, albeit in a sedentary position, she left South Dakota to return to Dillingham, where she remains.

It is well-established a preexisting disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Burgess*; *Estate of Ensley*. This legal premise is not at odds with the post-November 2005 changes to the workers' compensation law. An aggravation need not be permanent to be "the substantial cause" of an employee's disability or need for treatment. *Sarmiento-Mendoza.* Therefore, the weight of the lay and medical evidence shows the November 15, 2011 work injury, combined with Employee's preexisting condition, is the substantial cause of her disability and need for medical treatment. *Id*.; *Burgess*; *Estate of Ensley*.

2) Is Employee entitled to additional TTD?

To succeed on her TTD claim, Employee must demonstrate she was both "disabled" by her work injury with Employer and not "medically stable" during the periods for which she seeks TTD. AS 23.30.185; AS 23.30.395(16), (28). Employee contends she is entitled to TTD from August 21, 2012, the date TTD benefits were last paid, through the date she returned to work for Employer on June 27, 2013. The presumption of compensability also applies to whether an employee is entitled to TTD. This decision already determined Employee's November 15, 2011

work injury was the substantial cause of her disability. Therefore, all that remains to be determined is whether Employee is entitled to additional TTD.

Employee raises the presumption with her testimony and with Dr. Rice's report stating Employee was disabled by her work injury until May 1, 2013. Employer rebuts the presumption with Dr. Pitzer's report, which states Employee was medically stable from her work injury no later than January 1, 2012. Therefore, the presumption drops out and Employee must prove all elements of her TTD claim by a preponderance of the evidence. *Runstrom*. However, because Dr. Pitzer's report rebutted the presumption of continuing TTD by raising the counter-presumption of medical stability, Employee must first rebut the counter-presumption of medical stability with "clear and convincing evidence" that she was not medically stable. If successful, Employee must then prove her TTD claim by a preponderance of the evidence. *Anderson*; *Leigh*.

Rebutting the counter-presumption is simple. *Id*. On October 15, 2012, Dr. Rice recommended Employee get back surgery to correct her condition which he believed arose from the November 15, 2011 work injury. This medical opinion, combined with Employee's testimony she was unable to return to the position she held at the time of the injury, is adequate to rebut the counter-presumption of medical stability and is clear and convincing evidence that objectively measurable improvement from the effects of Employee's compensable injury was reasonably expected to result from additional medical care and treatment. *Leigh*.

A) Whether Employee was disabled.

Disability is defined as "incapacity because of injury to earn the wages" which Employee was receiving at the time of injury in the same or any other employment. AS 23.30.395(16). Employee credibly testified she was not able to work at full capacity after her injury. Dr. Waldroup confirmed this when he recommended Employee take time off of the position she held at the time of her injury in order to begin the process of recovery. AS 23.30.122. Therefore, Employee was disabled after her work injury of November 15, 2011 as defined in the Act. AS 23.30.395(16).

B) Whether and when Employee reached medical stability.

On March 5, 2013, Dr. Rice released Employee to work with a 25 pound lifting restriction until May 1, 2013. It would have been helpful if Dr. Rice had noted whether any restrictions would apply after this date. However, once an employee is disabled, the disability is presumed to continue until the employer produces substantial evidence to the contrary. *Sarmiento-Mendoza*. Such evidence could include a medical opinion releasing Employee to full duty work without restrictions, or a medical opinion stating Employee was medically stable from her injury's effects. Two physicians have opined the November 15, 2011 work injury did not result in lasting disability or impairment. However, less weight is again given to Dr. Chong's and Dr. Pitzer's opinions, for the reasons set forth above. Additionally, Dr. Chong's EME report was made prior to Employee's December 26, 2012 back surgery, which may have affected Employee's progress towards medical stability. Thus, they are not substantial evidence as to when Employee's "work-related" disability ended. *Thoeni*. Given Dr. Rice's opinion and recommendation for surgery, Employee was disabled by her work injury with Employer through May 1, 2013. A reasonable inference from Dr. Rice's medical report is that there were no restrictions on Employee's ability to work after May 1, 2013. *Rogers & Babler*. Therefore, Employee is entitled to TTD benefits from Employer from August 21, 2012, through May 1, 2013, or a period of 36 weeks.

3) Is Employee entitled to a PPI rating?

An injured worker with a compensable work injury is entitled to a PPI rating from her physician, and the expense is a "medical cost" borne by the employer. *Redgrave*. This is true notwithstanding EME or SIME opinions indicating no PPI for any work related condition. An employer also has the right to obtain a PPI rating of its own from an EME physician in the event it wishes to dispute any PPI rating Employee may attain by her physician or referral. Here, Drs. Chong and Pitzer both opined Employee's need for medical treatment, including surgery, was not work-related. But their opinions of no lasting impairment were given without the benefit of this decision, which contradicts their views on causation. Therefore, a PPI rating on the now accepted medical treatment and residuals is necessary. Employee never had a PPI rating or referral for a PPI rating from her own physician. Therefore, she is entitled to a PPI rating from her physician, or from someone to whom her physician refers her for rating, for each work-related condition, as identified in this decision, assuming her condition is medically stable and

ready for rating. AS 23.30.190. If Employee obtains a referral or rating, Employer will be ordered to pay the related expenses. *Id*.

4) Is Employee entitled to a reemployment benefits eligibility evaluation?

Under AS 23.30.041(c), an employee is entitled to a reemployment benefits eligibility evaluation when, because of the injury, she is unable to return to her job at the time of injury for 90 consecutive days. Here, Employee left her position with Employer on May 26, 2012, on Dr. Waldroup's recommendation. Employee returned to work with Employer on June 27, 2013, albeit in a sedentary position in a different department, where she earns less money. Therefore, Employee is entitled to a reemployment benefits eligibility determination. AS 23.30.041(c). Whether or not she is ultimately entitled to reemployment benefits is a decision left to the Rehabilitation Benefits Administrator's designee following the eligibility evaluation.

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

Employer resisted paying benefits in this case, so fees and costs under AS 23.30.145(b) may be awarded. *Harnish*. Employee retained an attorney who was successful in prosecuting the most significant and complex issues in this case. This decision finding Employee's November 15, 2011 work injury is the substantial cause of her current need for treatment and related expenses is a significant benefit to Employee because medical treatment is expensive and her disability from the injury was fairly lengthy.

Employee filed two attorney's fee affidavits. They itemized 59.92 hours of attorney and paralegal time, for a total of $15,818.20 in attorney's fees and costs. Employer did not object to Employee's attorney's hourly rate, hours or costs. The requested hourly rates and itemized hours for Employee's attorney's fees and costs are reasonable. The primary issue in this case was whether Employee's November 15, 2011 work injury was the substantial cause of her need for medical treatment. Employee succeeded on this issue. Considering the claim's nature, length, and complexity and the services performed, Employer's resistance, and the benefits resulting to Employee from the services obtained, Employee is awarded $15,818.20 in reasonable attorney's fees and costs. AS 23.30.145(b). Interest is mandatory. AS 23.30.155(p). Therefore,

Employee's interest request will be granted, and Employer will be ordered to pay interest on all benefits awarded to the appropriate party.

Finally, Employee's claims for penalties and a finding of an unfair or frivolous controversion were not briefed or discussed at hearing. Therefore, they are not addressed.

CONCLUSIONS OF LAW

1) Employee's November 15, 2011 injury while working for Employer is the substantial cause of her disability and need for medical treatment.

2) Employee is entitled to additional TTD.

3) Employee is entitled to a PPI rating.

4) Employee is entitled to a reemployment benefits eligibility determination.

5) Employee is entitled to an award of attorney's fees and costs.

ORDER

1) Employee's September 4, 2012 and September 27, 2012 claims are granted in part and denied in part.

2) Employer is ordered to pay Employee TTD benefits from August 21, 2012, through May 1, 2013, or a period of 36 weeks.

3) Employer is ordered to pay for a PPI rating from employee's attending or referral physician.

4) Employee is entitled to a reemployment benefits eligibility evaluation.

5) Employee's claim for an award of attorney's fees and costs is granted. Employee is awarded $15,818.20 in reasonable attorney's fees and costs.

Dated in Anchorage, Alaska on January 21, 2015.

ALASKA WORKERS' COMPENSATION BOARD

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Matthew Slodowy, Designated Chair

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Patricia Vollendorf, Member

DISSENT OF BOARD MEMBER DAVE KESTER

The dissent concurs in part and dissents in part with the majority's conclusion that the November 15, 2011 work injury is the substantial cause of Employee's ongoing disability and need for medical treatment. Applying the presumption of compensability analysis, the dissent concurs with the majority that Employee's testimony, coupled Dr. Waldroup's testimony and Dr. Rice's report stating the work injury was an aggravation of Employee's preexisting condition, is sufficient to raise the presumption. The dissent further concurs Employer successfully rebutted the presumption by presenting substantial evidence from EME and SIME reports demonstrating employment was not the substantial cause of Employee's disability or need for treatment.

However, Employee has not met the burden of proving her case by a preponderance of the evidence, or proving in relation to other causes, employment was the substantial cause of her disability or need for medical treatment. There is evidence Employee treated with Dr. Waldroup for low back pain, constant, both mild and moderate, and glut spasms prior to the work injury. Similar treatment and diagnoses are also recorded after the work injury. Dr. Waldroup's records indicate Employee reported pain levels in the 2-5 level ranges both before the work injury and after the work injury. In fact, the low back pain level recorded on November 18, 2011, three days after the work injury, was one. The dissent agrees with Drs. Chong's and Pitzer's EME and SIME reports. Both unequivocally conclude the November 15, 2011 work injury caused, at most, a temporary aggravation of Employee's preexisting degenerative disc disease and spondylolisthesis. Dr. Chong's August 8, 2012 EME report concluded no further medical treatment was warranted concerning the November 15, 2011 work injury. While Dr. Pitzer noted some of Dr. Waldroup's records were not available for his review, he stated with Employee's

significant grade 2 spondylolisthesis supported his conclusion Employee's spondylolisthesis was symptomatic prior to the work injury. Dr. Pitzer made a valid assessment and opined Employee experienced a temporary aggravation of her pre-existing condition due to the work injury, but the work injury did not cause the need for lumbar spine surgery. Dr. Pitzer concluded Employee had significant ongoing chronic spinal pain problems prior to her work injury and the need for lumbar spine surgery with fusion is related to Employee's long-standing spondylolisthesis and not to her work injury. Employee's pre-existing spondylolisthesis and chronic low back pain were the substantial cause of her need for lumbar surgery.

The dissent respectfully disagrees with the majority's finding that Dr. Chong and Pitzer's reports do not address the legal issue, whether the work injury is the substantial cause for the need for medical treatment or disability. Dr. Pitzer specifically addresses the substantial cause of Employee's need for lumbar fusion spinal surgery, and attributes it to Employee's pre-existing spondylolisthesis, and longstanding chronic pain caused by Employee's spondylolisthesis. The dissent gives more weight to Dr. Pitzer's opinion and report. In reliance upon Dr. Pitzer's opinion, Employee failed to prove her work injury is the substantial cause of her need for medical treatment. The dissent's conclusion is additionally supported by the medical opinions of Drs. Vonderau, Rice, and even Waldroup, which provide ample evidence Employee had very serious preexisting degenerative disc disease and long-standing back problems prior to the November 15, 2011 work injury.

To succeed on her TTD claim, Employee must demonstrate she was both "disabled" by her work injury with Employer and not "medically stable" during the periods for which she seeks TTD. AS 23.30.185; AS 23.30.395(16), (28). Employee contends she is entitled to TTD from August 21, 2012, the date TTD benefits were last paid, through the date she returned to work for Employer on June 27, 2013. The majority determined Employee's November 15, 2011 work injury was the substantial cause of her need for medical treatment, and hence her disability. Finding work was not the substantial cause of Employee's need for medical treatment, the dissent relies upon Dr. Pitzer to determine the date Employee was medically stable. Employee had a temporary aggravation of a pre-existing condition that Dr. Pitzer concluded reached medical stability as of January 1, 2012. The dissent finds Employee is not entitled to TTD

benefits after January 1, 2012, and any TTD paid after that date is an overpayment Employer should be permitted to recoup.

As a final note, the dissent fervently disagrees with the majority's finding that back injuries are often difficult to objectively diagnose or describe, and that Employee's testimony concerning her suddenly deteriorating physical abilities after November 15, 2011, is entitled to significant weight leading to the conclusion work is the substantial cause of Employee's disability and need for medical treatment. The dissent gives greater weight to Dr. Chong's testimony that because pain is a subjective complaint, it must be corroborated by objective findings through diagnostic testing, such as MRI's and x-rays, and record examinations. Employee's low back pain was chronic and consistently identified in Dr. Waldroup's reports. After the work injury, those complaints did not change. In this case, there are sufficient objective findings derived from diagnostic studies that do not corroborate employee's subjective complaints after the work incident were exacerbated or aggravated. The objective findings support the dissent's conclusion that work was not the substantial cause of Employee's disability or need for medical treatment.

Therefore, the dissent concludes the November 15, 2011 work injury was not the substantial cause of Employee's disability or need for treatment. Accordingly, Employee should not be entitled to medical benefits, TTD benefits, a PPI rating, a reemployment benefits eligibility determination, or attorney's fees and costs. Further, Employer should be permitted to recoup any TTD it overpaid.

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Dave Kester, 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 BARBARA J. UMIKER, employee / claimant; v. BRISTOL BAY AREA HEALTH CORPORATION, employer; SEABRIGHT INSURANCE CO., insurer / defendants; Case No. 201117972; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on January 21, 2015.

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Sertram Harris, Office Assistant