ALASKA WORKERS' COMPENSATION BOARD

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

DEBORAH H. INGRAM, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 200420492
THE HOME DEPOT, INC., Employer,	)	AWCB Decision No. 15-0034
and	)	Filed with AWCB Anchorage, Alaska on March 20, 2015
NEW HAMPSHIRE INSURANCE CO., Insurer, Defendants.	)	

Deborah H. Ingram's (Employee) October 20, 2014 claim was heard on January 21, 2015, in Anchorage, Alaska, a date selected on October 29, 2014. Employee appeared, represented herself, and testified. Attorney Michael Budzinski appeared and represented The Home Depot, Inc. and New Hampshire Insurance Co. (collectively Employer). There were no other witnesses. The record was left open to allow the inclusion of a future deposition transcript and supplemental briefs. The record closed on February 25, 2015, when the panel met to deliberate.

ISSUES

Employee contends she is entitled to permanent partial impairment (PPI) and medical benefits because her disability and need for treatment arose from a work injury; furthermore, Employee contends Employer unfairly or frivolously denied her claim. Employer contends Employee's bilateral foot conditions are not work-related, no unfair or frivolous controversion took place, and no further benefits are owed.

1) ***Is Employee entitled to PPI and medical benefits for her bilateral foot conditions?***
2) ***Did Employer unfairly or frivolously controvert Employee's claim?***

FINDINGS OF FACT

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

1) On June 9, 2004, Employee was evaluated by osteopathic specialist Kim E. Thiele, M.D. Dr. Thiele's patient history notes stated: "PATIENT WORKS AT [EMPLOYER]. . . . STARTED HAVING PAIN IN THE R SHIN YESTERDAY WITH SWELLING. . . . 2 DAYS AGO SHE BUMPED THE R SHIN ON A DOOR SHE WAS DEMONSTRATING. . . . WORKS AT THE CONTRACTOR DESK, LIFTING CARRYING, WALKING A LOT!!" Dr. Thiele diagnosed acute right shin tendonitis and his recommendations included ice, rest, recommended nonsteroidal anti-inflammatory drugs (NSAIDs), and no walking at work for one week. This is the only traumatic injury to the legs or feet Employee suffered at work. (Thiele chart note, June 9, 2004; observation.)

2) On October 5, 2004, Employee returned to Dr. Thiele complaining of left hip and left foot pain for about one week. Dr. Thiele noted Employee was on her feet and walking ten miles a day at work. Dr. Thiele recorded a history of right foot pain since the June 9, 2004 office visit, and diagnosed bilateral swollen heels and acute Achilles tendonitis. He referred Employee to an "ortho," and recommended NSAIDs and ice. Dr. Thiele also wrote a letter releasing Employee to work with restrictions: "Her walking and standing duties must be kept to a strict limit for the next 2-4 weeks due to tendonitis of both legs." (Thiele chart note and letter, October 5, 2004.)

3) On November 2, 2004, Employee was evaluated by orthopedic surgeon Byron McCord, M.D., who noted Employee had just passed her first anniversary with Employer, where she was on her feet more than she had been in prior waitressing jobs, and walking on cement floors. She stated she had been plagued by some shin and hip pain but the worst symptoms were in her heels. Dr. McCord diagnosed Haglund's disease in both heels. (McCord chart note, November 2, 2004.)

4) On November 29, 2004, Employee presented to podiatrist Harry Cotler, D.P.M., with complaints of very painful heels. After what he described as an **"extremely"** long visit, Dr. Cotler noted: "No history of any trauma, incident, change in shoegear, etc. She started working

at [Employer] in November 2003 . . . About 4-5 months later she started having various pains in her heels, and by June, mentioned it to her employers." Dr. Cotler diagnosed Achilles tendonitis, peritendonitis, Achilles calcifications, and a posterior calcaneal tuberosity avulsion fracture. He further opined, "she did not sustain any direct trauma, but maybe because of her foot structure, type/style of work, etc., it worsened/aggravated foot structure/biomechanics enough to 'cause' presenting complaints." (Cotler chart note, November 29, 2004; emphasis in original.)

5) On December 2, 2004, Employee reported that repetitive walking on concrete floors at work caused tendonitis to both feet. Employer noted "it may have been the result of an aggrvation [sic] to a pre exiting [sic] injury." (Report of Injury (ROI), December 2, 2004.)

6) From 2005-2011 Employee underwent an extensive course of evaluations and treatments, with multiple physicians. She received foot surgery on January 25, 2005 from Dr. Cotler, and on December 20, 2006 with orthopedic surgeon Sigvard Hansen, M.D. (Post-operative reports, January 25, 2005, and December 20, 2006; Hansen chart note, July 24, 2006.)

7) On May 17, 2007, Employee was examined by an Employer's Medical Evaluation (EME) panel consisting of internal medicine and endocrinology specialist Mary Higley-Carbone, M.D., and podiatrist John Hoy, D.P.M.. In response to the question, "Was [Employee's] work for [Employer] the [sic] substantial factor in causing [her] current medical treatment?," Dr. Hoy opined, "[Employee] has pes cavus which can cause Achilles tendon pathology with walking as she does at her job." Where Employer asked, "Did the October 5, 2004, injury aggravate, accelerate, or combine with a preexisting condition to produce the need for medical treatment or the disability?," Dr. Higley-Carbone opined, "The Achilles tendonitis was on a more-probable-than-not basis due to a combination of congenital abnormalities of her feet and work activities." The EME physicians agreed she was not medically stable. Dr. Higley-Carbone dictated, "[Employee] is not medically stable in relation to her work injury because she needs to continue with her ongoing physical therapy" and Dr. Hoy opined, "[Employee] is not medically stable in relationship to her work injury. She is still having right shin pain." Both physicians consequently declined to assess a PPI rating. (EME report, May 17, 2007.)

8) On February 11, 2008, Employee was evaluated by Dr. Hansen, who stated "this was an industrial injury to begin with." (Hansen chart note, February 11, 2008.)

9) Employee underwent foot surgeries on October 29, 2008 and January 5, 2010 with Dr. Hansen. (Post-operative reports, October 29, 2008, and January 5, 2010.)

10) In February, 2010, Employee completed workers' compensation vocational rehabilitation training as a Chief Clerk/Office Manager. (Alaska Vocational Counseling Closing Reemployment Plan Status Report, February 22, 2010.)

11) On June 7, 2011, Employee was examined by EME orthopedic surgeon Marilyn Yodlowski, M.D., a foot and ankle specialist. Where Employer asked, "In your opinion, was [Employee's] work for [Employer] beginning 11/01/03 a substantial factor causing" her foot conditions, Dr. Yodlowski responded:

> The only condition for which employment at [Employer] can be considered the substantial cause [sic] is the contusion that she sustained to the right shin in June of 2004. However, this condition is fully resolved with no sequelae and did not require any additional treatment other than simply the passage of time.
>
> With respect to the remaining conditions in both feet, these are congenital/developmental conditions due to her particular foot structure and anatomy, and likely symptomatically somewhat worsened due to a combination of her obesity and general body habitus. . . .

Dr. Yodlowski further opined Employee had no permanent impairment attributable to any work injury, and became medically stable from her June 2004 work injury by August 2004, and from surgeries unrelated to work by July 2009. (Yodlowski EME report, June 7, 2011, pp. 31-32.)

12) On August 15, 2011, Employer controverted Employee's benefits, including PPI and further orthopedic medical treatment, based on Dr. Yodlowski's EME report. (Controversion, August 15, 2011; filed August 17, 2011.)

13) On September 15, 2011, in response to a letter from Employer, Dr. Yodlowski reiterated her EME report opinion Employee had "significant pathology unrelated to her work, including bilateral congenital/developmental abnormal foot structure of a cavovarus foot with a tight gastrocsoleus and associated Achilles tendinopathy, as well as peripheral neuropathy likely secondary to diabetes." (Yodlowski letter, September 15, 2011.)

14) On October 26, 2012, Employee filed a claim for PTD from 8/15/2011 through 10/23/2012; PPI from 8/15/2011 through indefinite; and unfair or frivolous controvert. She stated, "Job discription [sic] was to walk up to 8 miles a day on concrete floors thus causing foot problems that hindered my walking." Employee reported the nature of the injury was "[r]epetitive walking on the concrete floors up to eight miles a day caused tendonitis to both feet." She also noted she suffered from bilateral spurs. (Claim, October 23, 2012.)

15) On November 9, 2012, Employer controverted PPI and PTD benefits based on Dr. Yodlowski's EME opinion all Employee's permanent impairment is attributable to congenital conditions. (Controversion, November 9, 2012; filed November 13, 2012.)

16) On November 13, 2013, Employee filed a Notice of Intent to Rely (NOI) identifying and refuted numerous statements in the EME report that Employee considered false and inaccurate. Employee emphasized: "MY FOOT STRUCTURE HAS NEVER BEEN A PROBLEM IN ALL MY YEARS OF WORKING ON MY FEET UNTIL [EMPLOYER] DEMANDED WE WALK 8,000 TO 10,000 STEPS A DAY WITH AN ODEMETER [sic] GIVEN AT MEETING BY THE MANAGER." (NOI History of Illness Statement Response, p. 3.)

17) On April 22, 2014, Employee was examined by Second Independent Medical Evaluation (SIME) orthopedic foot and ankle specialist Carol Frey, M.D., who diagnosed congenital, preexisting, bilateral foot conditions: cavovarus feet, tight Achilles tendons, insertional Achilles tendinosis, Haglund's deformity, and peripheral neuropathy. Dr. Frey opined Employee was medically stable six months after her last surgery with Dr. Hansen in 2010. Dr. Frey made numerous treatment recommendations, but also opined repetitive walking on concrete floors at work was not a substantial factor in bringing about Employee's disability and need for treatment, nor did Employee's work activities aggravate, accelerate, or combine with her preexisting conditions to cause her disability or need for treatment. Employer explained the operative legal standard in an SIME question:

> A factor is a substantial factor if it meets each of the two following tests:
> a. 'But for' the conditions of employment, the injury, illness or impairment would not have occurred when it did, to the extent it did.
> The next test must also be met:
> b. Aspects of employment must have been so important in bringing about the patient's condition that reasonable persons would consider those aspects to be a cause of the condition, and would assign responsibility for the condition to the employment.

Dr. Frey opined neither test had been passed. (SIME report, April 22, 2014, pp. 49-52, 54-58.)

18) The most recent medical record reviewed by Dr. Frey was Dr. Yodlowski's September 15, 2011 letter. On November 14, 2013, Employee swore the SIME records were complete to the best of her knowledge. The division's database includes no medical records from treating physicians dated after the August 15, 2011 controversion. (SIME report; Employee affidavit, November 14, 2013; observation.)

19) On April 25, 2014, Employer controverted medical benefits related to Employee's feet, based on Dr. Yodlowski's June 7, 2011 EME report opining Employee's work for Employer was not a substantial factor in the bilateral foot problems she developed or the treatment she received. (Controversion, April 25, 2014; filed April 28, 2014.)

20) On June 13, 2014, Employer wrote Dr. Frey a letter asking the following question:

> In your opinion, were [Employee's] overall work duties for [Employer], which included walking and standing on concrete floors, a substantial factor causing her bilateral foot conditions that were subsequently surgically treated? That is, would it be medically reasonable to assign responsibility to the overall demands of her employment at [Employer] for her bilateral foot conditions and the subsequent treatment? Please state the reasons for your opinion. (Budzinski letter, June 13, 2014.)

21) On September 1, 2014, Dr. Frey responded to Employer's June 13, 2014 letter:

> No, her diagnoses are not a result to walking on cement floors. That would not cause
>
> - Cavovarus feet
> - Achilles Tendonosis
> - Haglunds Deformity
> - Tight Achilles Tendon
> - Peripheral Neuropathy
>
> These problems are caused by:
>
> - Shoe Pressure
> - Shape of the Heel bone
> - Tight Achilles tendon
> - Degeneration in tendon insertion
> - Gout/Familial hyperlipidemia
> - Idiopathic hy[p]erostosis
>
> No science to show from walking (Frey letter, September 1, 2014.)

22) On September 26, 2014, Employee wrote Employer's counsel to express her agreement with Dr. Frey's treatment recommendations: "Dr. Frey stated that the treatment that I have had was necessary to recovery. I have had no medical treatment, footwear, insoles or therapy approved since 11/11." Employee then listed 11 recommended treatment/medical equipment expenses she believed Employer's insurance company should pay for. (Employee letter, September 26, 2014.)

23) On October 20, 2014, Employee filed a claim, marked amended from October 23, 2012, for PTD benefits from August 15, 2011 through present; PPI benefits from August 15, 2011 through

indefinitely; medical costs for treatment and equipment recommended by Dr. Frey; and unfair or frivolous controvert. Employee described how the injury happened: "Job discription [sic] added after all employee meeting was to walk up to 8 miles a day or 10,000 steps with pedometer on concrete floors causing foot problems that hindered my walking. Was sent by HR to doctors." She repeated her contention that repetitive walking for long distances on concrete floors caused tendonitis to both feet. (Claim, October 20, 2014.)

24) At hearing on January 21, 2015, Employee withdrew her claim for PTD benefits. She credibly testified she had been employed for thirty years as a waitress, but never had problems with or medical treatment for her feet prior to her work for Employer. Employee stated her job involved considerable physical labor beyond walking. She testified that if she had told a physician she walked 10 miles a day, she was mistaken, but she avowed she had met Employer's fitness challenge to walk 10,000 steps daily. Employee further testified she believed Dr. Frey had performed a "wonderful examination" and Employee agreed with Dr. Frey's treatment recommendations. (Record.)

25) At deposition on February 5, 2015, Dr. Frey reiterated her opinion that neither the June 2004 shin injury nor walking, even at 10,000 steps a day over a period of time, caused Employee's current bilateral foot conditions:

> Walking, just walking does not cause cavovarus feet, Haglund's deformity, Achilles tendinosis, tight Achilles tendons and peripheral neuropathy. It doesn't cause those things. Just walking does not. There is no science to back that up. That just does not happen. There are causes that are probable, and causes that are possible, and causes that are – don't happen. Walking does not cause those problems.

Regarding Employee's congenital cavovarus feet, Dr. Frey testified, "By far and away, that is the most common cause of Haglund's, Achilles tendons, and Achilles tendinosis." She concluded it would not be medically reasonable to hold Employer responsible for those conditions. (Frey deposition, February 5, 2015, pp. 12-14, 21.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
> 1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . .

> . . .
> 4) hearings in workers' compensation cases shall be impartial and fair to all parties .
> . .

The board may base its decision not only on direct testimony 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**. **[prior to November 7, 2005]** Compensation is payable under this chapter in respect of disability or death of an employee.

The law in effect at the time of an injury generally determines the parties' rights and remedies, despite later changes to the law. *See, e.g., Weed v. State,* AWCAC Decision No. 204 (November 13, 2014). Decisional law interpreted former AS 23.30.010 to require payment of benefits when employment was "a substantial factor" in causing the disability or need for medical treatment. *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 598 (Alaska 1979). Employment is "a substantial factor" in bringing about the disability or need for medical care where "but for" the work injury, a claimant would not have suffered disability at the time he did, in the way he did, or to the degree he did, and reasonable people would regard the work injury as a cause and attach responsibility to it. *Rogers and Babler* at 532, *citing Division of Corrections v. Neakok,* 721 P.2d 1121, 1135 (Alaska 1986); *State v. Abbott*, 498 P.2d 712, 726–27 (Alaska 1972).

A finding disability would not have occurred "but for" employment may be supported not only by a doctor's testimony, but inferentially from the fact an injured worker had been able to continue working despite pain prior to the subject employment but required surgery after that employment. A reasonable finding employment was a cause of an employee's disability or need for medical care, for which reasonable people would impose liability is, "as are all subjective determinations, the most difficult to support." There is 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." *Rogers & Babler* at 534.

A preexisting disease or infirmity does not disqualify a claim if employment aggravated, accelerated, or combined with disease or infirmity to produce death or disability. *See, e.g., DeYonge v. NANA/Marriott,* 1 P.3d 90, 96 (Alaska 2000); *Peek v. SKW/Clinton, 855 P.2d 415, 416* (Alaska 1993); *Wilson v. Erickson,* 477 P.2d 1988 (Alaska 1970). Aggravation of a preexisting condition may be found absent any specific traumatic event. *Providence Washington Insurance v. Banner*, 680 P.2d 96 (Alaska 1984). "[F]or an employee to establish an aggravation claim under workers' compensation law, the employment need only have been 'a substantial factor in bringing about the disability.' [*Hester v. State, Public Employees' Retirement Board,* 817 P.2d 472 (Alaska 1991)] suggests that when a job worsens an employee's symptoms such that she can no longer perform her job functions, that constitutes an 'aggravation' -- even when the job does not actually worsen the underlying condition." *DeYonge* at 96.

> **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 the 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….
> …

AS 23.30.095(a) requires employers to pay for treatment necessitated by the nature of injury or the process of recovery up to two years after the injury date. After two years the board may authorize "indicated" medical treatment "as the process of recovery may require." *Philip Weidner & Associates v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999), *citing Municipality of Anchorage v. Carter*, 818 P.2d 661, 664 (Alaska 1991). The board also has discretion to order treatment necessary to prevent further disability: "If the treatment is necessary to prevent the deterioration of the patient's condition and allow his continuing employment, it is compensable within the meaning of the statute." *Leen v. R.J. Reynolds Co.*, AWCB Dec. No. 98-0243 (September 23, (1998); *Wild v. Cook Inlet Pipeline*, 3AN-80-8083 (Alaska Super. Ct. Jan. 17, 1983); *see accord Dorman v. State*, 3AN-83-551 at 9 (Alaska Super. Ct., February 22, 1984).

> **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. The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical and continuing benefits. *See, e.g., Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. "Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary." *Grove v. Alaska Constructors & Erectors*, 948 P.2d 454, 458 (Alaska 1997), *citing Bailey v. Litwin Corp.*, 713 P.2d 249, 254 (Alaska 1986). An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991).

Application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must establish "some preliminary link" between the disability and employment, or between a work-related injury and the existence of the disability; the claimant need only present "some evidence that the claim arose out of, or in the course of, employment before the presumption arises." *Burgess Constr. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981); *see also, e.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to raise the presumption of compensability varies. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Smallwood* at 316. In less complex cases, lay evidence may be sufficiently probative to establish the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). The presumption of compensability continues during the course of the claimant's recovery from the injury and disability. *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991). Witness credibility is not weighed at this stage of the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

For injuries arising before November 7, 2005, once the preliminary link is established, the employer has the burden to overcome the raised presumption by producing substantial evidence the injury is

not work-related. *See, e.g., DeYonge* at 95; *Tolbert* at 611; *Smallwood* at 316. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert* at 611-612. To rebut the presumption, the employer's evidence must either:

(1) Provide an alternative explanation that, if accepted, would exclude work-related factors as a substantial cause of the disability; or

(2) Directly eliminate any reasonable possibility that employment was a factor in causing the disability. *DeYonge* at 96; *Grainger v. Alaska Workers' Comp. Bd.*, 805 P.2d 976, 977 (Alaska 1991).

For injuries occurring prior to November 7, 2005, "[i]t has always been possible to rebut the presumption of compensability by presenting a qualified expert who testifies that, in his or her opinion, the claimant's work was probably not a substantial cause of the disability." *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994), *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992). At this second step of the analysis, the employer's evidence is viewed in isolation, without regard to any evidence presented by the claimant. 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* at 1054; *Wolfer* at 871.

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).

> **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. *See, e.g.*, *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005). 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 (August 25, 2008) at 11.

> **AS 23.30.155. Payment of compensation.**
> (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
> . . .
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . .
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
> . . .

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Harp* at 358; *citing Kerley v. Workmen's*

Comp. App. Bd., 481 P.2d 200, 205 (Cal. 1971). The evidence which the employer possessed "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Harp* at 358. If none of the reasons given for a controversion is supported by sufficient evidence to warrant a Board decision the employee is not entitled to benefits, the controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155. *Id.* at 359.

> **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.
> . . .

> **8 AAC 45.182. Controversion.**
> (a) To controvert a claim the employer shall file form 07-6105 in accordance with AS 23.30.155(a) and shall serve a copy of the notice of controversion upon all parties in accordance with 8 AAC 45.060.
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> (b) if a claim is controverted . . . on other grounds, the board will, upon request under AS 23.30.110 and 8 AAC 45.070, determine if the other grounds for controversion are supported by the law or the evidence in the controverting party's possession at the time the controversion was filed. If the law does not support the controversion or if evidence to support the controversion was not in the party's possession, the board will invalidate the controversion, and will award additional compensation under AS 23.30.155(e).
> . . .
> (d) After hearing a party's claim alleging an insurer or self-insured employer frivolously or unfairly controverted compensation due, the board will file a decision and order determining whether an insurer or self-insured employer frivolously or unfairly controverted compensation due. Under this subsection,
>
> > (1) if the board determines an insurer frivolously or unfairly controverted compensation due, the board will provide a copy of the decision and order at the time of filing to the division of insurance for action under AS 23.30.155(o); . . .

ANALYSIS

1) Is Employee entitled to PPI and medical benefits for her bilateral foot conditions?

Employee contends walking long distances on concrete floors at work was a substantial factor in bringing about her disability and need for medical treatment. This is a factual question to which the presumption of compensability applies. Because Employee was paid benefits for her bilateral foot conditions prior to Employer's August 15, 2011 controversion, only benefits after that date are at issue. Employee needed only "some" relevant evidence to raise the presumption. In determining whether the presumption is met, credibility is not considered nor is evidence weighed against competing evidence. Employee's consistent statements to medical providers that her foot pain began a few months after she began working for Employer, a job that required extensive walking on hard floors, combined with the fact that Employer paid medical, indemnity and reemployment benefits for her foot conditions for seven years, even after a panel EME, are sufficient to raise the presumption of continued compensability. *Grove.*

To rebut the compensability presumption, Employer needed to produce substantial evidence that Employee's injury was not work-related. At the second step of the presumption analysis, issues of evidentiary weight and credibility are again deferred. Here Employer controverted benefits based on Dr. Yodlowski's EME opinion that, other than the long-resolved June 2004 traumatic shin injury, Employee's foot conditions were congenital and developmental, unrelated to work. Viewed in isolation, this evidence is sufficient to support a finding Employee is not entitled to further benefits; the controversion was therefore valid and filed in good faith, and the presumption was rebutted. *Norcon; Harp.*

Once Employer rebutted the presumption of compensability, Employee needed to prove her claim by a preponderance of the evidence. Employee failed to meet this burden. That Employee has suffered from foot pain for over a decade and needs further treatment is undisputed. However, Employee produced only limited medical evidence to support her contention work was a substantial factor in causing her bilateral foot conditions: (1) treating podiatrist Dr. Cotler's November 2004 speculation that "maybe" Employee's "type/style of work, etc." worsened or aggravated her underlying structural foot problems; (2) EME podiatrist Dr. Hoy's May 2007 opinion that Employee's Achilles tendon pathology could have been caused by her pes cavus combined with

walking at work; (3) EME internist Dr. Higley-Carbone's May 2007 opinion that "on a more-probable-than-not" basis, Employee's Achilles tendonitis was due to a combination of congenital abnormalities and work activities; and (4) three-time treating surgeon Dr. Hansen's February 2008 opinion "this was an industrial injury to begin with." The record includes no medical evidence post-dating the August 15, 2011 controversion to indicate Employee's continued foot conditions were in any way related to her employment.

On the other hand, Employer produced concurring EME and SIME opinions that Employee's post-controversion foot conditions were not attributable to any work-related injury. Dr. Yodlowski and Dr. Frey, who both are orthopedic foot and ankle specialists, agreed Employee's disability and need for medical treatment instead resulted from preexisting, congenital deformities. Writing as the board's independent medical expert, Dr. Frey specifically opined that Employee's overall work duties, including walking and standing on concrete floors, were not a substantial factor causing her bilateral foot conditions. Dr. Frey further opined that neither prong of the *Rogers and Babler* substantial factor test had been met. While recognizing Employee's continuing pain and need for treatment, Dr. Frey did not believe that "but for" a work injury, Employee would not have suffered disability at the time, in the way, or to the degree she did. Dr. Frey also did not believe Employer should be held responsible for further benefits, because a reasonable person would not regard a work injury to be a cause of Employee's medical conditions. The weight of the medical evidence clearly shows it is more likely than not work was not a substantial factor in Employee's disability and need for further medical treatment for her foot conditions. Employee's claim for PPI and additional medical benefits will be denied.

2) Did Employer unfairly or frivolously controvert Employee's claim?

As analyzed above, Employer did not unfairly or frivolously controvert Employee's claim.

CONCLUSIONS OF LAW

1) Employee is not entitled to PPI or medical benefits for her bilateral foot conditions.
2) Employer did not unfairly or frivolously controvert Employee's claim.

ORDER

1) Employee's October 20, 2014 claim is denied.

Dated in Anchorage, Alaska on March 20, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____

Margaret Scott, Designated Chair

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Ron Nalikak, Member

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Mark Talbert, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of DEBORAH H. INGRAM, employee / claimant; v. THE HOME DEPOT INC., employer; NEW HAMPSHIRE INSURANCE CO., insurer / defendants; Case No. 200420492; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 20, 2015.

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Pamela Murray, Office Assistant