ALASKA WORKERS' COMPENSATION BOARD

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

MARLA J. WORMAN, Employee, Claimant, v. WALMART ASSOCIATES, INC., Employer, and AMERICAN HOME ASSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 200515885 AWCB Decision No. 16-0032 Filed with AWCB Anchorage, Alaska on April 22, 2016

Marla Worman's (Employee) April 13, 2015 workers' compensation claim was heard on April 13, 2016, in Anchorage, Alaska, a date selected on November 12, 2015. Attorney Burt Mason appeared and represented Employee who appeared by telephone and testified. Attorney Vicki Paddock appeared and represented Walmart Associates, Inc., and its insurer (Employer). At hearing, Employee had no objection to Employer's over-length brief, and the brief was accepted as filed. Employer had no objection to Employee's lawyer filing his supplemental attorney's fee affidavit for consideration, though Employer objected to the amount sought. As a preliminary matter, Employee requested an order holding Employer's defense was barred by the *res judicata* doctrine. An oral order denied the request. This decision examines the oral order and decides Employee's claim on its merits. The record closed at the hearing's conclusion on April 13, 2016.

ISSUES

Employee contended Employer's defense based upon its most recent employer's medical evaluation (EME) is barred by *res judicata*; in other words, already decided pursuant to *Worman v. Walmart*, AWCB decision No. 08-2008 (January 2, 2008) (*Worman I*).

Employer contended *res judicata* does not bar its defense. It contended though the parties in *Worman I* and in the instant matter are identical the issues are not, thus making the *res judicata* doctrine inapplicable.

1) Was the oral order denying Employee's request for a *res judicata* holding correct?

Employee contends *Worman I* decided her June 13, 2005 work injury with Employer was compensable and awarded benefits including future medical care. She contends Employer's subsequent EME does not form a valid basis to overcome the presumption of compensability, and *Worman I* is not subject to modification under AS 23.30.130. Employee contends she should, therefore, prevail on the raised but unrebutted presumption or alternately, on the merits.

Employer acknowledges *Worman I* found Employee's injury compensable and awarded medical benefits in 2008. But, Employer contends the work injury is no longer a substantial factor in Employee's need for medical treatment and the treatment is neither necessary nor reasonable. Therefore, Employer contends Employee's claim should be denied.

2) Is Employee's claim for medical benefits, related transportation costs and medical reimbursements compensable?

Employee contends she is entitled to an attorney's fee and cost award should she prevail on her claim. She requests an order awarding attorney's fees and costs.

Employer contends Employee is entitled to no additional medical treatment for her work injury, other than spinal cord stimulator (SCS) related services. It contends Employee's attorney provided no beneficial services and her request for an attorney's fee and cost award should be denied. Alternately, should Employee prevail, Employer contends her attorney's fees and costs

should be reduced to reflect the issues upon which she did not prevail, including her request for a *res judicata* holding.

3) Is Employee entitled to an attorney's fee and cost award?

FINDINGS OF FACT

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

1) On June 13, 2005, Employee injured her back putting away fabric while at work for Employer. (Report of Occupational Injury or Illness, June 13, 2005).

2) On April 16, 2007, Larry Levine, M.D., performed a second independent medical examination (SIME) on Employee. Dr. Levine opined the June 13, 2005 work injury with Employer aggravated, accelerated or combined with a pre-existing condition, caused disability and need for medical treatment and produced a permanent change in Employee's symptoms and function. (Levine report, April 16, 2007).

3) At hearing on November 27, 2007, Employee presented documentary evidence of then-current out-of-pocket payments for which she sought reimbursement at hearing. (Alaska Worker's [sic] Compensation Board Hearing Notes and Attachments, November 27, 2007).

4) On January 2, 2008, *Worman I* found Employee was disabled by her work injury and in relevant part found, based on Employee's testimony and on medical reports from Gregory Polston, M.D., EME Ilmar Soot, M.D., and SIME Dr. Levine, that Employee would benefit from additional medical treatment for her work injury. *Worman I* found, given the timeframe during which the treatments were recommended, Employee's then-current claim came under *Hibdon v. Weidner & Associates*, 989 P.2d 727 (Alaska 1999). *Worman I* found no substantial evidence to rebut the presumption Employee was entitled to ongoing medical care as recommended by her physicians during the first two years after her work injury. *Worman I* specifically stated:

> We find the claimant is entitled to medical benefits for her back condition, as recommended by her treating physician. . . . Further, we find the employee is entitled to a pain management program, electrodiagnostic studies and upon completion of those, a physical capacities evaluation. We will award the medical benefits claimed by the employee, under AS 23.30.095(a). (*Worman I* at 28-29).

Worman I ordered, in relevant part:

> (1) The employer shall provide the employee ongoing medical benefits related to her work injury, under AS 23.30.095(a). . . . (*Id.* at 32).

5) Nothing in *Worman I* automatically required Employer to pay for every other medical benefit Employee requested thereafter. Similarly, nothing in *Worman I* prevented Employee from requesting additional medical care for her work injury with Employer. *Worman I* neither states nor implies an end to Employee's medical care for her work injury. (*Id.*; experience, judgment and inferences drawn from the above).

6) On August 5, 2008, neurosurgeon Timothy Cohen, M.D., saw Employee for her work injury. He recommended lumbar spine surgery. (Cohen report, August 5, 2008).

7) On October 31, 2008, Dr. Cohen performed spinal fusion surgery on Employee. (Operative report, October 31, 2008).

8) On October 24, 2009, Employer sent Employee to orthopedic surgeon Douglas Bald, M.D., for another EME. Employee was taking Hydrocodone, 7.5 mg three or four times a day, Piroxicam, 20 mg once a day and Cymbalta, 60 mg to control her pain. She was not working and was receiving time loss benefits. Dr. Bald concluded Employee had pre-existing degenerative disc disease and facet arthropathy in her lumbar spine before her work injury, but the work injury symptomatically aggravated her pre-existing condition. In Dr. Bald's opinion, the June 13, 2005 work injury "continues to be a significant factor in her ongoing complaints of chronic low back pain, including her need for surgical treatment performed by Dr. Cohen on October 30, 2008." Dr. Bald further opined surgical fixation hardware removal was a reasonable treatment option and stated, "At this point in time, Ms. Worman will continue to require medications, including anti-inflammatory medications, as well as pain medication to control her chronic pain complaints. . . ." (Bald report, October 24, 2009).

9) On January 28, 2010, Employee told Dr. Cohen her back and buttock pain returned after she cut "her pain medication in half last week" and noticed increasing pain. (Cohen report**,** January 28, 2010).

10) On February 16, 2010, Grant Roderer, M.D., implanted a SCS, which resulted in Employee's symptoms improving. (Operative report, February 16, 2010).

11) On May 25, 2010, Kenneth Hahn, M.D., assumed Employee's pain management. (Hahn report, May 25, 2010).

12) On August 18, 2010, Employee returned to Dr. Roderer to get her SCS reprogrammed. She was on a stable medication regimen including OxyContin, Lyrica, Zanaflex, Cymbalta and Valium. Dr. Roderer expected to wean Employee off Valium and Zanaflex. (Roderer report, August 18, 2010).

13) On August 23, 2010, Employee also saw Dr. Hahn who refilled her OxyContin prescription. (Hahn report, August 23, 2010).

14) On October 28, 2010, Employee returned to Dr. Bald for another EME. Dr. Bald concluded Employee's medical care had been reasonable, necessary and work related, including her SCS implant. He further stated, "Narcotic medication, in my opinion, is also reasonable and necessary." Treatment included occasional follow-ups for SCS monitoring and "continued use of her current regimen of medications is a reasonable treatment option on a chronic or more permanent basis." Dr. Bald found Employee "severely physically restricted." In his opinion, the June 13, 2005 work injury "continues to be a substantial factor in her current low back condition including what is likely a chronic low back pain syndrome." (Bald report, October 28, 2010).

15) Throughout 2011, and until Employee left Alaska in 2012, Dr. Hahn continued to provide pain management including prescription medications to Employee for her work injury. (Hahn chart notes, 2011-2012).

16) On October 31, 2011, the parties filed a compromise and release settlement agreement (C&R). The settlement resolved Employee's right to indemnity benefits but did not resolve medical benefits. The C&R expressly stated:

> It is agreed the employer and carrier/adjuster will be responsible under the terms of the Alaska Workers' Compensation Act for reasonable and necessary low back medical benefits and related travel expenses, which although incurred in the future, are attributable to the condition described herein. It is also agreed that the right of the employer and carrier/adjuster to contest liability for future medical benefits is not waived under the terms of this settlement agreement. (C&R at 9).

17) On July 12, 2013, after moving to Nevada, Employee saw Bo Chung, M.D., for her work injury. He noted Employee suffered from back pain from a work injury in Alaska, and Flexeril, Lyrica and Tramadol controlled her pain well, while Lunesta and Cymbalta addressed her insomnia and depression, respectively. Dr. Chung refilled these medications. (Chung report, July 12, 2013).

18) On February 4, 2014, Dr. Chung diagnosed fibromyalgia along with back pain. (Chung report, February 4, 2014).

19) On December 15, 2014, Employee saw Dr. Schwartz for another EME. Dr. Schwartz reviewed Employee's medical records beginning with an emergency room report from January 5, 2002, through approximately June 6, 2014, and examined her. Dr. Schwartz concluded Employee's medical treatment had been neither medically reasonable nor necessary. In his view, Employee had been inappropriately and excessively treated with medication and surgery, which were not indicated or required. Dr. Schwartz opined some invasive testing performed on Employee was outdated and no longer in medical vogue. On examination, Dr. Schwartz found an objectively unremarkable exam except for Employee's symptom magnification and pain behavior. He diagnosed a work-related "mild soft tissue strain of the lumbar spine, self-limiting, which would be considered to have long since subsided." In Dr. Swartz's opinion, Employee's work-injury treatment would have been completed by July 14, 2005, at which time she could have returned to work without any restrictions. Ongoing prescription narcotics after July 14, 2005, would not be considered palliative as they were never indicated in the first place, in his view. Dr. Schwartz opined no further evaluations were required and Employee's excessive treatment for several years had made her feel worse. (Schwartz report, December 15, 2014).

20) On January 16, 2015, Employer controverted Employee's right to "All Medical Benefits." (Controversion Notice, January 15, 2015).

21) On January 23, 2015, Dr. Chung continued to prescribe Cyclobenzaprine, Cymbalta, Gabapentin and Lunesta, among other things, for Employee. (Chung report, January 23, 2015).

22) On April 14, 2015, Employee filed a claim for continuing medical care and related mileage and attorney's fees and costs in this case. (Workers' Compensation Claim, April 13, 2015).

23) On April 22, 2015, Employer controverted Employee's claim for "All Medical Benefits." (Controversion Notice, April 21, 2015).

24) On July 20, 2015, for one-hour, Dr. Swartz gave testimony in his deposition. Attorney Mason attended the deposition in person. Dr. Schwartz reiterated the opinions set forth in his written report. Specifically, Dr. Schwartz opined "there is no further treatment required" to address Employee's work injury with Employer. Dr. Schwartz also stated Cyclobenzaprine, Cymbalta, Lunesta, Tramadol, and Valium are "the types of medications that are prescribed for

people with fibromyalgia." Fibromyalgia was "certainly not work-related." (Schwartz deposition, July 20, 2015).

25) On July 30, 2015, Dr. Chung responded to a letter from Employer's attorney in which he agreed with Dr. Swartz's December 15, 2014 opinions. (Chung response, July 30, 2015).

26) On August 13, 2015, Dr. Chung responded to another letter from Employer's attorney in which he said the June 13, 2005 work injury with Employer is a substantial factor "in the future treatment for Ms. Worman's low back pain." He recommended continued treatment with Cymbalta and Lyrica. (Chung response, August 13, 2015).

27) On November 12, 2015, the parties attended a prehearing conference at which "medical costs" and "attorney's fees and costs" were noticed as issues for hearing. Prehearing Conference Summary, April 13, 2016 [sic]).

28) On July 19, 2016, Dr. Chung wrote a letter to "Exam Works" stating:

> Ms. Worman is under my care for the treatment of her Fibromyalgia. She is currently taking Cyclobenzaprine, 10 mg to manage her pain. She is also taking Cymbalta for depression or anxiety, Lunesta for sleep, as well as Pepcid and Nexium for GERD. We have no record of her being prescribed or using a spinal cord stimulator. If she has one or is using one, please contact the prescribing physician. (Chung letter, January 19, 2016).

29) On February 3, 2016, Bruce Mullen, M.D., wrote a letter to "Exam Works" stating he was treating Employee on referral from Dr. Chung. Her history included a workers' compensation injury while moving bolts of cloth "in 2009." Employee underwent disc decompression and fusion in 2008, but had complications and had her fusion hardware removed about a year later. According to Dr. Mullen, Employee continued to have low back and leg pain thereafter. In 2009, Employee obtained a dorsal column stimulator, which still provided her with some pain relief. Employee was then-currently taking Cymbalta, Lyrica, Tramadol and Lunesta. Dr. Mullen recommended Employee continue to use her SCS daily. He continued Employee on Cymbalta but discontinued Tramadol and changed it to Norco. Dr. Mullen also discontinued Lyrica and changed it to Neurontin. (Mullen letter, February 3, 2016).

30) At hearing on April 13, 2016, Employee testified prior to her work injury with Employer, she had no low back pain or injury. Since her work injury with Employer, Employee's pain and other symptoms have never fully remitted and her foot is still numb. Employee's SCS has worked well and she uses it 24 hours per day, seven days per week. Following the C&R,

Employee moved to Nevada where she began treating with Dr. Chung. Dr. Chung performed examinations and wrote prescriptions to help Employee control her pain and other symptoms. However, Dr. Chung left the area and referred Employee to Dr. Mullen. An SCS technician went to Dr. Mullen's office in Carson City, Nevada and adjusted her SCS about one year ago. Employee is unaware of any bills for this or earlier SCS adjustments. Dr. Mullen switched Employee's Lyrica prescription to Gabapentin and her Tramadol to Hydrocodone. With exception of Dr. Mullen's more recent cost-saving changes to her medications, since at least 2005, Employee has been taking the following medications for her work injury with Employer: Cymbalta for depression caused by chronic pain; Gabapentin for nerve pain; Hydrocodone for pain; and Lunesta for insomnia due to pain. Employee's work-related back symptoms have not changed in at least five years. Her medication and SCS adequately control her injury symptoms. In Employee's view, she could not function without her medications. She tried for up to a day, but the resultant pain was "awful." (Employee).

31) Though Employee had out-of-pocket expenses for her work-injury-related medications, she admitted she did not send receipts to her attorney. Employee believes Medicare may have paid for some medications Employee had taken for her work injury with Employer. (*Id.*).

32) At hearing, Employee contended Dr. Schwartz offered the only opinion different from all physicians who had treated her work injury. Employee likened Dr. Schwartz's opinion to "a feather floating down on a scale" when compared to opinions from other physicians, including EME and SIME doctors. In her view, Dr. Swartz's opinion is not adequate to even rebut the raised presumption of compensability. Employee does not claim fibromyalgia is the result of her work injury with Employer. Employee through counsel conceded she did not file an itemization for travel expenses or for out-of-pocket costs. Employee contended Employer's defenses are barred by *res judicata* and the time for Employer to request *Worman I* modification has passed. Employee seeks an order awarding continuing medical care, an order resolving a "Medicare lien," and attorney's fees and costs. (Employee's hearing arguments).

33) Employee filed no evidence of a "Medicare lien," or the amount thereof. (Agency record).

34) Employer has not sought modification of *Worman I.* (*Id*.).

35) At hearing, Employer said the SCS was no longer controverted. Employer contended it has a right to dispute the work injury still being a substantial factor in Employee's need for medical care. Employer also contended it could dispute the reasonableness and necessity of

Employee's continuing medical care. Employer pointed to Dr. Chung's records, which purportedly do not mention or address low back pain, and show he was unaware Employee was using an SCS as evidence showing Employee's claim should be denied. Employer further contended there was no record since 2010 showing the SCS had been adjusted. Most notably, Employer contended Dr. Chung diagnosed Employee with fibromyalgia, and no physician has linked fibromyalgia to Employee's work injury with Employer. Employer contends only Dr. Schwartz had a complete medical history, so his opinions should be given greater weight. In Employer's view, *Worman I* "contemplated" Employee's medical care would eventually be completed. Therefore, her claim for ongoing medical benefits should be denied. Further, Employer contends if Employee prevails, her attorney's fees should be reduced by the unsuccessful *res judicata* argument, upon which Employee's arguments focused. (Employer's hearing arguments).

36) Employee itemized the following costs for travel to downtown Reno, Nevada to participate in Dr. Swartz's deposition on July 20, 2015:

Date	Cost	Amount
On or about July 20, 2015	Airfare	$797.25
On or about July 20, 2015	Rental car	$334.50
On or about July 20, 2015	Gas	$30.59
On or about July 20, 2015	"Per diem"	$300.00
July 20, 2015	Schwartz transcript	$132.10
Total		**$1,594.54**

37) Reno, Nevada is a relatively small city. The airport is only a few miles from the downtown business district where Dr. Swartz's deposition occurred, according to the deposition transcript. The deposition began at 5:00 PM and lasted only one hour. Employee's attorney spent 2.5 days in the Reno area. Attorney Mason did not explain why he needed to spend over two days in Reno or rent a car for over two days and incur more than $30 in gasoline charges to travel to and from the airport to attend a one-hour deposition in downtown Reno. He did not explain his $300 "per diem" expense. (Experience, judgment and inferences drawn from the above; Dr. Schwartz deposition transcript; record).

38) Reasonable costs for Employee's attorney to attend Dr. Swartz's deposition are as follows:

Date	Cost	Amount
On or about July 20, 2015	Airfare	$797.25
July 20, 2015	Rental car	$111.50
On or about July 20, 2015	Gas	$10.00
July 20, 2015	Schwartz transcript	$132.10
Total		**$1,050.85**

39) Attorney Mason's attorney's fee affidavits contain block billing, which makes it difficult to determine exactly how much time he spent on the *res judicata* argument. Given his billing methods and the total services attorney Mason provided on each day in question, the following reduced hours account for Employee's unsuccessful *res judicata* argument:

Service Date	All Time Charged	Description of Reduced Services	Time Reduced	Remaining Hours
February 9, 2016	4.4	*Res judicata* research	3.3	1.1
February 23, 2016	3.0	Briefing *res judicata*	.3	2.7
March 15, 2016	3.5	Briefing *res judicata*	1.8	1.7
April 5, 2016	2.2	Briefing *res judicata*	.5	1.7
April 7, 2016	2.5	*Res judicata* related	.5	2.0
April 8, 2016	3.0	*Res judicata* related	1.5	1.5
April 10, 2016	2.2	*Res judicata* related	2.2	0
April 11, 2016	1.4	*Res judicata* related	.4	1.0
April 12, 2016	3.5	*Res judicata* related	.3	3.2
April 13, 2016	2.0	*res judicata* argument	.2	1.8
Totals	**27.7**		**11.0**	**16.7**

Employee's attorney incurred approximately two hours traveling to and from and attending the April 13, 2016 hearing. Including two additional hours for the hearing, Employee's attorney itemized 90.3 hours (74.7 + 13.6 + 2 = 90.3) at $425 per hour and $1,594.54 in costs representing Employee. (Statement of Legal Services Rendered on Behalf of: Marla Worman regarding Past and Future Medical Bills, April 5, 2016; Supplemental Statement of Legal Services Rendered on Behalf of: Marla Worman, April 12, 2016; experience, judgment, observations and inferences drawn from the above).

40) Attorney Mason's hearing brief was not particularly helpful to the panel and his *res judicata* argument had no merit. His "modification" written argument was irrelevant because

Employer never requested *Worman I* be modified. Attorney Mason's effort spent on "modification" was *de minimis*. (Experience, judgment and inferences from the above; record).

41) Taking into account the factual finding 39 reductions from his itemized billing hours to take into account his unsuccessful *res judicata* argument, attorney Mason itemized 79.3 hours (90.3 - 11 = 79.3) representing Employee. (Experience, judgment).

42) Attorney Mason did not specify which AS 23.30.145 subsection supported his attorney's fee request. Attorney Mason's previously awarded $375 per hour fee is a reasonable hourly fee for an attorney with his extensive experience litigating workers' compensation cases on a contingency basis representing injured workers. (Employee's Hearing Brief, April 5, 2016; experience, judgment and inferences drawn from the above).

PRINCIPLES OF LAW

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). 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 factfinders who so find "are either irrational or arbitrary." The fact "some reasonable persons may disagree with a subjective conclusion" does not "make that conclusion unreasonable." *Id.*

DeYonge v. NANA/Marriott, 1 P.3d 90 (Alaska 2000) concluded, "Thus, for 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.*" *Id.*; emphasis in original.

In *McKean v. Municipality of Anchorage*, 783 P.2d 1169 (Alaska 1989), the Alaska Supreme Court held *res judicata* applies in workers' compensation cases. The employee had a hearing in which the board determined her temporary total disability rate. The parties subsequently agreed to convert the employee's temporary total disability to permanent total disability. The employee applied for a higher permanent total disability rate. The board applied *res judicata* as a bar to her claim and she appealed, contending the two disabilities were different and required separate

compensation rate determinations. *Id*. at 1169. *McKean* also set forth the test to determine whether *res judicata* or its subset collateral estoppel may be applied in a particular workers' compensation case, and listed three prerequisites:

> (1) The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action;
> (2) The issue to be precluded from relitigation by operation of the doctrine must be identical to that decided in the first action;
> (3) The issue in the first action must have been resolved by a final judgment on the merits. *Id*. at 1171.

McKean determined the employee's claim for a permanent total disability rate different from her temporary total disability rate was not precluded by *res judicata* or collateral estoppel. *McKean* noted the difference between the two disability types and determined they were not "identical," thus eliminating prerequisite (2) in the test. *McKean* reversed the board's decision.

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

> **AS 23.30.110. Procedure on claims**. (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability . . . and the board may hear and determine all questions in respect to the claim. . . .

The language "all questions" is limited to questions raised by the parties or the agency upon proper notice to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981).

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

The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute including continuing medical benefits. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996); *Municipality v. Carter*, 818 P.2d 661 (Alaska 1991).

Applying the presumption involves a three-step analysis. First, to attach the presumption an employee must adduce "some," "minimal," "relevant evidence" establishing a "preliminary link" between his disability or need for medical care and the employment. *Cheeks v. Widmer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to raise the presumption varies depending on the claim. In less complex cases, lay evidence may be sufficiently probative to establish the connection. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). In making the preliminary link determination, the board does not assess witness credibility. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413 (Alaska 2004).

Second, if the employee establishes the preliminary link, the burden shifts to the employer, which must rebut the raised presumption with "substantial evidence" to the contrary. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). "It 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). The employer's evidence is considered in isolation without regard to credibility. *Ugale*, 92 P.3d 413 at 417 (Alaska 2004).

Third, if the employer rebuts the presumption the employee must prove his claim by a preponderance of the evidence, meaning the employee must "induce a belief" in the fact-finders' minds that the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

In *Black v. Universal Services, Inc.*, 627 P.2d 1073 (Alaska 1981), the Alaska Supreme Court addressed an injured worker's claim that the employer's EME evidence was inadequate to rebut the raised presumption. *Id.* at 1074-75. The EME physician stated the employee's continued disability

arose from a "hysterical personality disorder of long-standing." *Black* noted the same "substantial evidence" standard is used to determine whether an employer rebutted the presumption and said:

> In April 1977, ALPAC arranged to have her examined by two San Francisco doctors. One of them, psychiatrist-neurologist Willard Pennell, concluded that Black had fully recovered from her back injury and for psychological reasons was simply 'manipulating' those treating her. The other orthopedic surgeon Elton Welke found that Black had not fully recovered but that her condition was stationary and permanent. He concluded that 'she is probably reasonably to be considered to show disability precluding heavy lifting.' Dr. Welke was unable to explain whether or not the pipeline accident caused her condition. Based on these reports, ALPAC terminated Black's temporary total disability benefits in June 1977. Black nevertheless continued to see a Fairbanks doctor on a frequent basis.
> . . . .
>
> Here the Board . . . relied primarily on the report of Dr. Pennell, the San Francisco psychiatrist-neurologist (footnote omitted). The Board's conclusions are very brief:
>
> > We believe, as stated in Dr. Pennell's report that it is probable that some secondary gain or need for attention is motivating her to perpetuate her symptoms and that she will continue to seek treatment and take medication as long as it is provided.
> >
> > In summary, we believe that whatever disability she may have at the present time is unrelated to the February 14, 1976, incident. We further believe she has been adequately compensated for the minor back strain she incurred in the course of her employment for the defendant.
>
> Black challenges the propriety of the Board's reliance on that report and claims that Dr. Pennell's knowledge of the case is so slight as to make his report virtually worthless. After reviewing the record, we are unable to accept Dr. Pennell's report as 'substantial evidence' in support of the Board's conclusion that Black's then-present disability was unrelated to the February 14, 1976, incident.
>
> Because Dr. Pennell had no opportunity to examine Black in any depth (footnote omitted), and because his conclusions are contrary to those of the numerous physicians who treated her, we have concluded that a 'reasonable mind' would not accept his diagnosis (footnote omitted). While the judiciary may not reweigh the evidence before the Board (citation omitted) neither may it abdicate its reviewing function and affirm a Board decision that has only extremely slight supporting evidence.
> . . . .
>
> Dr. Pennell's report is neither doubtful nor ambiguous, and as such, it overcomes the statutory presumption of compensability under AS 23.30.120(1). *Id.* at 1074-75.

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

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

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

> **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. . . . 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.

Attorney's fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990). Fees for time spent on *de minimis* issues will not be reduced if the

employee prevails on the primary issues at hearing. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 at 14-16 (May 11, 2011).

In *Humphrey v. Lowes HIW, Inc*., AWCAC Decision No. 179 (March 28, 2013), the employee claimed temporary total disability benefits from his injury date and continuing, permanent partial impairment benefits, medical costs, penalty, interest and attorney's fees and costs. The employer controverted all benefits on grounds the employee had quit his job and returned to medically stable, pre-injury status. After a hearing, the board awarded some temporary total disability but denied the disability claim between February 2010 and May 2011. The board determined the employee's PPI claim was not ripe. He lost on the penalty claim, but the employee prevailed on his medical cost claim and interest. The claimant's attorney requested attorney's fees exceeding $35,000. The board reduced the requested fees by 30 percent finding the employee did not prevail on all issues in his claim. On appeal, the commission did not find the attorney fee reduction an abuse of the board's discretion. Rather, the commission cited the lack of an explanation by the board for not awarding attorney fees under AS 23.30.145(a) in a controverted case. The commission also found the board's "relatively terse explanation" for reducing the requested attorney's fees under AS 23.30.145(b) prevented meaningful review. Accordingly, the commission vacated and remanded the attorney's fee issue for a "revisit." *Id*. at 20-21.

In *Ragan v. Bearskin Creek Guides*, AWCB Decision No. 13-0041 (April 23, 2013), attorney Mason requested and was awarded attorney's fees at a $350 per hour rate for services rendered from approximately November 2011 through April 2013. (*Id*. at 7, 14). *Ragan* found $350 per hour was "a reasonable hourly fee for an attorney with his extensive experience litigating workers' compensation cases on a contingency basis representing injured workers." (*Id*. at 14).

In *Fruichantie v. Brian Butler*, AWCB Decision No. 14-0077 (June 6, 2014), attorney Mason requested and was awarded attorney's fees at a $375 per hour rate, for services rendered from approximately January 17, 2012 through March 22, 2014. (*Id*. at 8, 15).

In *Garwood v. Black Gold Express*, AWCB Decision No. 15-0064 (June 1, 2015), the claimant's two Fairbanks area lawyers, neither involved in this case, sought attorney's fees at a rate higher

than they had been awarded in previous cases. Though the employer did not object to the rates charged, the board reduced the fees from $420 and $400 per hour for the claimant's co-counsel to $350 per hour for both attorneys. The claimant's lawyers offered additional evidence to support the higher rate on petition for reconsideration, which also addressed modification. The *Garwood* board did its own attorney's fee research and found:

> A review of workers' compensation cases revealed the following hourly rates awarded to attorneys representing injured workers before the board in 2015: Joe Kalamarides-$400; Elliot Dennis-$330; Michael Jensen-$385; Chancy Croft-$400; Michael Stepovich-$300; Burt Mason-$375; John Franich-$350. (*Id*. at 4).

> **8 AAC 45.084. Medical travel expenses.** (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.
>
> (b) Transportation expenses include
>
> > (1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;
> >
> > (2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and
> >
> > (3) ambulance service or other special means of transportation if substantiated by competent medical evidence or by agreement of the parties.
>
> (c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.
>
> (d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or more have accumulated, or upon completion of medical care, whichever occurs first.
>
> (e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.

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. . . .

. . . .

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

(1) costs incurred in making a witness available for cross-examination;

(2) court reporter fees and costs of obtaining deposition transcripts;

(3) costs of obtaining medical reports;

(4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;

(5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;

(6) costs for telephonic participation in a hearing;

(7) costs incurred in securing the services and testimony, if necessary, of vocational rehabilitation experts;

(8) costs incurred in obtaining the in-person testimony of physicians at a scheduled hearing;

(9) expert witness fees, if the board finds the expert's testimony to be relevant to the claim;

(10) long-distance telephone calls, if the board finds the call to be relevant to the claim;

(11) the costs of a licensed investigator, if the board finds the investigator's services to be relevant and necessary;

> (12) reasonable costs incurred in serving subpoenas issued by the board, if the board finds the subpoenas to be necessary;
>
> (13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;
>
> (14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk
>
> (A) is employed by an attorney licensed in this or another state;
> (B) performed the work under the supervision of a licensed attorney;
> (C) performed work that is not clerical in nature;
> (D) files an affidavit itemizing the services performed and the time spent in performing each service; and
> (E) does not duplicate work for which an attorney's fee was awarded;
>
> (15) duplication fees at 10 cents per page, unless justification warranting awarding a higher fee is presented;
>
> (16) government sales taxes on legal services;
>
> (17) other costs as determined by the board.
>
> (g) Costs incurred in attending depositions not necessitated by a Smallwood objection may be awarded only where the board finds that attendance at the deposition was reasonable.

Pursuant to 42 U.S.C. §1395y(b), Medicare is required to seek reimbursement for conditional payments related to workers' compensation claims.

ANALYSIS

1) Was the oral order denying Employee's request for a *res judicata* holding correct?

As a preliminary matter at hearing, Employee contended Employer's defenses had already been resolved in *Worman I*. She contended the parties and issues previously decided in *Worman I* were all identical and *Worman I* resulted in a final decision. Accordingly, Employee contended *res judicata* and collateral estoppel prevented Employer from re-litigating the "same issues." In short, Employee sought a preliminary order declaring she prevailed based solely upon *res judicata*. *McKean*. Employer conceded the parties were identical and *Worman I* was a final decision, but contended the issues decided in *Worman I* and at issue here were not identical.

Employee correctly notes *res judicata* and related collateral estoppel doctrines may apply in workers' compensation cases. *McKean*. However, *Worman I* simply found Employee's claim compensable and awarded benefits requested and awardable. Unlike a final judgment in a civil action, *Worman I* did not foreclose Employee's right to claim additional benefits. Similarly, *Worman 1* did not prevent Employer from asserting defenses should Employee seek more benefits. Employee is concerned Employer relies on Dr. Swartz's opinion, which states Employee's injury was never work-related. However, at hearing Employer stated it only relies upon Dr. Swartz's opinion to deny benefits from January 15, 2016 and continuing, and is not attempting to change the result in *Worman I*. Employer was not seeking *Worman I*'s modification under AS 23.30.130, and never did. Employer contended it has a right to rely on Dr. Swartz's opinion stating the work injury is no longer a substantial factor in Employee's need for continuing medical care and her medical care has been unnecessary and unreasonable. Nothing in Employee's argument precludes Employer's right to rely on Dr. Swartz's opinion. Further, the parties expressly agreed in their C&R that Employee reserved her right to make further claims for medical care and Employer reserved its right to dispute those claims. Applying *res judicata* or collateral estoppel under these circumstances would effectively and inappropriately prevent Employer from asserting any defenses to Employee's ongoing medical benefit claims. Therefore, the oral order denying Employee's request for a *res judicata* order was correct.

2) Is Employee's claim for medical benefits, related transportation costs and medical reimbursements compensable?

Employee seeks an order awarding medication to address her symptoms resulting from her work injury with Employer, and SCS maintenance and possible replacement. AS 23.30.095(a). Though it controverted all requested benefits, at hearing Employer said the SCS was no longer subject to controversion. Thus, this claim is about past and ongoing doctors' appointments to obtain examinations and prescription medications**,** past and ongoing medical mileage and past and ongoing prescription costs, all after January 15, 2016.

Employee's claims raise factual disputes to which the presumption of compensability must be applied. AS 23.30.120(a); *Meek*; *Carter*. It is presumed Employee is entitled to continuing

medical benefits. *Carter*. Without regard to credibility, Employee raises the presumption with her testimony and with Drs. Bald's, Chung's and Mullen's opinions stating Employee's medication use including narcotics was reasonable, necessary, long-term and causally connected to her work injury with Employer. *Cheeks*; *Wolfer*; *Ugale*. Again without regard to credibility, Employer rebuts the raised presumption with Dr. Swartz's clear, unambiguous opinion stating Employee's need for medication to address her work injury with Employer ended by July 14, 2005, and has been and continues to be unreasonable and unnecessary. *Ugale*; *Miller*; *Norcon*; *Black*. Employee's argument that Dr. Swartz's opinion is inadequate to even rebut the presumption of compensability is without merit, because it meets the "substantial evidence" requirement to rebut the presumption and is "clear and unambiguous." *Black*. Therefore, Employee must prove her claim by a preponderance of the evidence. *Saxton.*

a) Past and ongoing doctors' appointments and prescriptions.

An employer must furnish medical, surgical and other attendance or treatment to an injured worker which the nature of the injury or the recovery process requires. AS 23.30.095(a). According to Employee and her medical records, her medication regimen has not appreciably changed in over five years. There is no evidence Employee suffered an intervening superseding injury. Dr. Mullen changed some medications to a less expensive version, apparently in response to Employer's controversion. But her effective treatment has remained the same for years. Employee on her own tried to wean herself from medications, with painful results. EME Dr. Bald said years ago that Employee's medication regimen was reasonable, appropriate, necessitated by her work injury with Employer, and probably would be a long-term requirement. Employee's physician Dr. Mullen agrees. These opinions are given the greatest weight. AS 23.30.122; *Smith*.

Employer criticizes Dr. Chung's records and opinions because he admitted he was unaware Employee even had an implanted SCS. But at hearing, Employer said the SCS was no longer controverted, and there is no suggestion by Employee or her records that the SCS has to this point resulted in a contested medical bill. The fact Dr. Chung said he was treating Employee for fibromyalgia and Dr. Schwartz opined her medications are used to treat this condition is immaterial. Dr. Chung's initial report also said she had back pain from a work injury and

renewed prescriptions Employee had been taking for years. The fact Employee's medications may be used to treat fibromyalgia does not preclude their use to also treat symptoms arising from her work injury. *Rogers & Babler*. The records show Employee used the same or equivalent medications for years before Dr. Chung even diagnosed fibromyalgia. Further, the fibromyalgia diagnosis is irrelevant since Employee does not claim it is work related. Dr. Chung at one time agreed with Dr. Swartz's unspecified opinions and then contradicted himself in a subsequent response to Employer's attorney's letter. For this reason, Dr. Chung's opinions are given slightly less weight. AS 23.30.122; *Smith*.

But Employer relies solely on Dr. Swartz's report and testimony. Given the totality of the medical evidence, including Employee's credible testimony and two EME reports from Dr. Bald supporting Employee's position and consistent prescription refills by Employee's serial attending physicians, the least weight is given to Dr. Swartz's report because it stands alone. AS 23.30.122; *Smith*; *Black.* Even if Dr. Swartz was correct in his assertion Employee never should have had any surgical procedures, it is undisputed these procedures were performed at her doctors' recommendation for her work injury. Dr. Swartz's opinion implies Employee's subsequent medical care addressed symptoms resulting from these surgical procedures. Therefore, even if the surgical fusion with instrumentation and subsequent surgery to remove it were ill-advised when they occurred, they nonetheless occurred as a result of this injury. Thus, to the extent Employee's ongoing medication regimen addresses symptoms arising from allegedly ill-advised surgery, these medications are still compensable. AS 23.30.095(a).

Given this analysis, Employee's work injury with Employer remains a substantial factor in her treatment regime since Employer's controversion, and continuing. *DeYonge*. Her request for ongoing medical care and prescription medications with related transportation expenses will be granted. Specifically, Employer will be ordered to pay for Employee's *future* doctor's visits for her work injury and for *future* prescriptions for Cymbalta, Gabapentin, Hydrocodone and Lunesta. To be clear, these benefits are awarded because these are the medications Employee's physician currently prescribes to treat her work injury with Employer. This list is not intended to be the only medication or treatment for the work injury to which Employee may forever be entitled. She retains her right to follow her physician's instructions should they change and

Employer retains its right to object to any additional or different medical care for the work injury. AS 23.30.095(a); *Carter*.

However, Employee also requested an order reimbursing her for her *past* out-of-pocket medical expenses for her work injury. Medical expenses, which include out-of-pocket medical expenditures, were fairly noticed for hearing. AS 23.30.110(a); *Simon*. However, Employee conceded she has not filed or served any evidence demonstrating she paid out-of-pocket expenses for work-injury-related medical treatment. Therefore, Employee failed to meet her burden and these claims will be denied. *Saxton*. However, Employee has a right to submit receipts for any out-of-pocket payments she may make for injury-related medical care in the *future* after this decision's date.

b) Past and ongoing medical mileage.

Medical mileage is part of medical benefits, which this decision found compensable. But Employee has not filed mileage evidence as required to support her claim. 8 AAC 45.084. Medical transportation costs were fairly noticed and argued as an issue for hearing. AS 23.30.110(a); *Simon*. Therefore, Employee failed to meet her evidentiary burden and this claim will be denied. *Saxton*. Employee retains her right to submit mileage logs and other evidence for transportation for medical reasons, incurred in the *future* after this decision's date.

c) Medicare lien reimbursement.

Employee has filed no evidence concerning an alleged Medicare lien. As Employee raised and argued this issue as part of her claim for medical benefits, it was properly noticed for hearing. AS 23.30.110(a); *Simon*. Based on Employee's testimony, this decision assumes Medicare made conditional payments for treatment and medications for her work injury with Employer. Medicare is required to seek reimbursement for these services. 42 U.S.C. §1395y(b). Without any evidence, Employee failed to meet her burden and her unspecified Medicare reimbursement claim will also be denied. *Saxton*. This decision does not affect Medicare's right to seek reimbursement from any party under federal law.

3) Is Employee entitled to an attorney's fee and cost award?

Employer controverted Employee's right to all medical benefits in this case. Employee filed a claim for medical benefits. Employer controverted her claim. Employee prevailed on some issues in this hearing. She prevailed on her request for continued medical care related to her SCS, as Employer withdrew its controversion on this device at hearing. Employee also prevailed on her primary claim for continuing medical care for her work injury. This decision will order Employer to continue to pay for Employee's *future* physician's visits to obtain follow-up care and medication prescriptions. Employer must pay for *future* appointments and prescriptions.

On the other hand, Employee spent considerable time researching, briefing, refining its briefing and arguing about *res judicata* as a complete bar to Employer's defenses. Had Employee succeeded on her *res judicata* argument, the hearing would have ended quickly and she would have prevailed. But she lost on this issue. Employee also spent time briefing a modification issue under AS 23.30.130, which was irrelevant because Employer never requested modification. Further, Employee requested an order reimbursing her for *past* out-of-pocket medical costs, *past* prescription costs and requiring Employer to reimburse Medicare. She did not prevail on these claims for lack of proof. Only the "modification" issue was *de minimis*. *Porteleki*.

Since Employer controverted this claim, attorney's fees under AS 23.30.145(a) may be awarded to Employee's counsel. *Cortay*. Under this subsection, fees may be granted in addition to compensation awarded. In determining the awardable fee, the nature, length, complexity of the services performed, transportation charges and benefits resulting from the attorney's services to the claimant must be taken into consideration. This was not a particularly difficult, lengthy or complex case, especially considering the overwhelming medical evidence favoring Employee's position. *Rogers & Babler*. Employee's attorney only worked on the case for about one year. Missing evidence makes it difficult to determine "the benefits" to Employee resulting from attorney Mason's services. Employee presented no evidence stating how much either her past controverted or ongoing doctor's visits or prescription medications or related travel expenses cost. This decision can take official notice that medical care and most prescription medications are not "inexpensive." Continued medical care for a work injury is usually an important benefit. *Rogers & Babler.*

Attorney's fees and costs were issues properly noticed for hearing. *Simon*. Employer did not specifically object to attorney Mason's hours or hourly rate, but did request an adjustment to reflect Employee's unsuccessful *res judicata* argument. *Humphrey*. Attorney Mason requests 90.3 hours at $425 per hour. He failed to explain why his previously awarded $375 hourly rate should be increased to $425 per hour. Recent decisions have awarded attorney Mason fees at $375 per hour, or have noted this as his rate, a rate which compares favorably to rates for other attorneys with similar experience litigating workers' compensation cases. *Ragan*; *Fruichantie*; *Garwood*. In *Fruichantie*, attorney Mason claimed fees at $375 per hour for services rendered through March 22, 2014. His services in Employee's case began on April 13, 2014. Another panel's independent research found attorney Mason was typically awarded attorney's fees at $375 per hour as of June 1, 2015. *Garwood*. Attorney Mason's decision to give himself a $50 per hour raise is troubling. Employee's brief was not particularly helpful, nor was relevant evidence presented to support claims on which attorney time was expended. His requested hourly rate would exceed the hourly rate typically awarded to two of the most experienced workers' compensation claimant attorneys in Alaska, attorneys Kalamarides and Croft.

Given this analysis and reasoning, Employee's requested attorney's fees will be reduced by 11 hours to reflect his unsuccessful efforts in obtaining a *res judicata* decision, in accordance with factual finding 39, above. His requested $425 per hour rate will be reduced to $375 per hour, which comports with the rate he has been previously awarded and takes into account issue on which Employee did not prevail. Therefore, Employee's attorney will be awarded $29,737.50 (79.3 X $375 = $29,375.50) in attorney's fees under AS 23.30.145(a).

Employee's litigation costs are also somewhat troubling. Dr. Swartz's deposition on July 20, 2015, took only one hour. Attorney Mason's airfare to travel to Reno, Nevada and back is reasonable as is the cost to obtain Dr. Swartz's deposition transcript. These costs will be awarded. 8 AAC 45.180(f)(1)-(17). However, Employee's attorney failed to explain why he had to rent a car for over two days, spend over $30 in gas and how he incurred $300 in 2.5 days' "per diem" for a one-hour deposition in a small city. *Rogers & Babler*. Therefore, these litigation costs will be reduced in accordance with factual finding 38, above. Employee will be awarded $1,050.85 in litigation costs. 8 AAC 45.180(f)(1)-(17).

CONCLUSIONS OF LAW

1) The oral order denying Employee's request for a *res judicata* holding was correct.

2) Employee's claim for future medical benefits, related transportation costs and medical reimbursements is compensable.

3) Employee is entitled to an attorney's fee and cost award.

ORDER

1) Employee's claim for *future* medical benefits, related transportation costs and medical reimbursement for out-of-pocket expenses, all incurred after this decision's date, is granted in accordance with this decision.

2) Employee's claim for *past* medically related transportation costs and reimbursement for *past* out-of-pocket medical expenses is denied.

3) Employee's request for an order requiring Employer to reimburse Medicare is denied.

4) Employer is ordered to pay Employee's attorney $29,737.50 in attorney's fees and $1,050.85 in litigation costs, in accordance with this decision.

Dated in Anchorage, Alaska on April 22, 2016.

ALASKA WORKERS' COMPENSATION BOARD

_____

William Soule, Designated Chair

_____

Amy Steele, Member

_____

Stacy Allen, 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 Marla J. Worman, employee / claimant v. Walmart Associates, Inc., employer; American Home Assurance Company, insurer / defendants; Case No. 200515885; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on April 22, 2016.

_____

Charlotte Corriveau, Office Assistant