ALASKA WORKERS' COMPENSATION BOARD

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

JAYNELL JONES, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201604460
NICOLE MASSON D/B/A ROCKING YEARS ONE & TWO, Employer,	)	AWCB Decision No. 16-0105 Filed with AWCB Fairbanks, Alaska on November 7, 2016
and	)	
BENEFIT GUARANTEE FUND, Insurer, Defendants.	)	

Jaynell Jones's (Employee) March 30, 2016 workers' compensation claim was heard on August 25, 2016 in Fairbanks, Alaska. This hearing date was selected on July 28, 2016. Attorney Robert Beconovich appeared and represented Employee. Nicole Masson, d/b/a Rocking Years One and Two (Employer) appeared, representing herself. Joanne Pride appeared and represented Wilton Adjustment Service, Inc. and the Alaska Benefit Guaranty Fund (the Fund). Velma Thomas appeared and represented the Fund. There were two witnesses. Employer testified telephonically, and Employee testified in person. The record closed at the hearing's conclusion on August 25, 2016.

ISSUES

Employee contends she was injured during the course and scope of her employment and is entitled to workers' compensation benefits as a result of the injury. Employee contends she reported the injury to her supervisor within the time required and that she was not provided with

work accommodations for medical provider's recommended limit to light duty work. Employee contends that Employer's failure to answer Employee's claims should be treated as admission to the claims.

Employer contends that Employee was not injured at work but was using a preexisting injury to seek transfer to a different work location. Employer contends that Employee did not timely report the injury or any work restrictions, but stopped coming to work.

The Fund contends that it did not dispute Employee's status as an employee, and that the Board should make a determination on Employee's benefits. The Fund contends that Employee has not provided documentation of transportation costs, and Temporary Total Disability (TTD) benefits, if awarded, should begin on the date Employee was given a full work restriction.

1. **Is Employee entitled to workers' compensation benefits?**

Employee contends the Board should issue a prospective order for coverage of surgery recommended by Employee's medical provider.

Employer and the Fund did not take a position on an order for coverage of prospective medical benefits, but are presumed to oppose it.

2. **Should payment for Employee's future surgery be ordered?**

Employee contends that she should be awarded attorney's fees and costs if Employee's claims are granted.

Employer and the Fund did not take a position on the award of attorney's fees and costs.

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 March 8, 2016, Employee was injured while working for Employer at the "Rocking Years One" business location. (Employee).

2. On March 9, 2016, Employee was treated at Fairbanks Memorial Hospital. Employee was given a "Work/School Excuse" limiting her to light-duty work, signed by Lisa Thoene, PA-C. (Medical Record, March 9, 2016).

3. On March 29, 2016, Employee was treated by Michael Pomeroy, PA-C, at Steese Orthopaedic Associates LLC. PA-C Pomeroy, after examining Employee and discussing treatment options, recommended "an expeditious MRI of her right knee" and conservative treatment. PA-C Pomeroy issued a note indicating Employee was totally incapacitated for work and would be reevaluated once an MRI was completed. PA-C Pomeroy diagnosed Employee with a complex tear of the medial meniscus, current injury, right knee (S83.231) and chondromalacia patella, right knee (M22.41). (Medical Report, March 29, 2016).

4. On March 30, 2016, Employee filed a claim for workers' compensation benefits including TTD, Permanent Partial Impairment (PPI), medical costs, and transportation costs. Employee amended this claim on June 20, 2016 to claim TTD from March 8, 2016 through the present, PPI when rated, medical and transportation costs, penalties, interest, and attorney's fees and costs. (Claim, March 30, 2016; Claim, June 20, 2016).

5. On April 8, 2016, Employee underwent an MRI evaluation at Northstar Radiology with Jedidiah Malan, M.D. Dr. Malan indicated that the MRI showed the following:

1. Small oblique tear involving the posterior horn of the medial meniscus with additional low-grade partial thickness tearing at the anterior and posterior meniscal attachments.
2. Mild to moderate tricompartmental chondromalacia is more pronounced involving the medial femoral condyle and the trochlear groove.
3. Mild patellar tendinopathy with overlying prepatellar bursitis.
4. Low-grade medial collateral ligament sprain.
5. Mild distal semimembranosus tendinopathy.
6. Prominent knee joint effusion.

(Medical Record, April 8, 2016).

6. On April 11, 2016, the Fund answered Employee's March 30, 2016 claim, stating that it was unclear whether an employee/employer relationship existed in this case, and there had been no finding that Employer was in default of a Board decision at the time. The Fund stated Employee did not qualify for workers' compensation benefits from the Fund at that time. (Answer, April 11, 2016).

7. On April 12, 2016, Employee was again examined by PA-C Pomeroy, who reviewed her MRI results. PA-C Pomeroy recommended surgery to address Employee's meniscal tear, and discussed the risks and benefits of conservative and surgical treatment with Employee, but did not schedule surgery at that time. (Medical Report, April 12, 2016).

8. On July 5, 2016, the Fund answered Employee's June 30, 2016 amendment to her claim, reiterating its argument that there was not a clear employee/employer relationship in this case, and no order of compensability or finding of default had been issued by the Board at the time. The content of this answer is identical to the Fund's April 11, 2016 answer. (Answer, July 5, 2016; Answer, April 11, 2016).

9. On July 18, 2016, Employee was examined by Richard Cobden, M.D. Dr. Cobden stated that Employee's condition "appears to be clearly work related injury to the meniscal cartilages of the right knee and will require an arthroscopic meniscectomy and debridement." Dr. Cobden stated he would arrange for that procedure as soon as the workers' compensation approval was given, and Employee would be off work for about 6 weeks following the procedure. (Medical Report, July 18, 2016).

10. At the August 18, 2016 hearing, Employer testified to the following: Ms. Masson is the sole owner of Employer, and Employee was an employee. Employer did not have worker's compensation insurance on the date Employee stated she was injured, though she has since obtained insurance. Employee did not act as if she was injured, since she requested permission to return to work at a different work site several days after the injury date, didn't show up for the shift after the injury date or a start date for the at the new location, walked in to pick up a paycheck, and had been recently seen driving a vehicle and entering a grocery store. Employee did not inform Employer she couldn't lift patients, did not provide any doctor's note, and never mentioned light-duty work. Employer may not have been able to provide light-duty work. As a general practice, if an employee took more than "a couple days" off from work, Employer required a doctor's note. Employer told Employee she could file a workers' compensation claim, but Employer did not have insurance. Employer did not file a report of injury or speak with any doctors about payment of Employee's medical bills. (Employer).

11. At the August 18, 2016 hearing, Employee testified to the following: She started working for Employer on December 29, 2015, working from 7 a.m. to 3 p.m., Monday through Friday (40 hours per week), at a rate of $11 per hour, paid every two weeks. Employee worked under two

supervisors and notices of any special tasks for the workday were posted on a bulletin board. Employee reported her injury to her supervisor by telephone the day after her injury. Employee was told by her supervisor that Employer did not have workers' compensation insurance and she should not file a workers' compensation claim. She initially thought Medicare would pay for her medical care, but coverage was later denied. She did not perform any light duty work in the time after her light-duty recommendation and before her no-work recommendation, though she did not present her light-duty recommendation to her supervisor or Employer. (Employee).

12. At the August 18, 2016 hearing, the Fund stated it was not disputing compensability of Employee's claim. (Thomas).

13. On August 22, 2016, Employee filed an affidavit containing an invoice of attorney fees showing time spent and tasks completed by the attorney through August 18, 2016 on the issue of medical authorization.

14. Employee agreed that her claims for PPI and reemployment benefits are not yet ripe for decision. (Employee)

PRINCIPLES OF LAW

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

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

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and

> may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute . . . .

AS 23.30.005(h) has long been interpreted as empowering the board to order a party to release and produce records "that relate to questions in dispute." *See, e.g., Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 (December 11, 1987). Additional authority to order a party to release information is set forth not only in specific statutes, but in broad powers given to best ascertain and protect the rights of the parties under AS 23.30.135(a) and AS 23.30.155(h). *See, e.g., McDonald v. Municipality of Anchorage*, AWCB Decision No. 94-0090 (April 15, 1994).

> **AS 23.30.010. Coverage**. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

For an injury occurring on or after November 7, 2005, the board must evaluate the relative contribution of all causes of disability, death or need for medical treatment and award benefits if employment is, in relation to all other causes, "the substantial cause" of the disability, death or need for medical treatment. *City of Seward v. Hansen*, AWCAC Decision No. 146 at 11-14 (January 21, 2011). When all causes are compared, only one cause can be "the substantial cause." *Id.*

> **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 and the process of recovery requires . . .
> . . . .

> (c) A claim for medical or surgical treatment, or treatment requiring continuing and multiple treatments of a similar nature, is not valid and enforceable against the employer unless, within 14 days following treatment, the physician or health care provider giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so.
>
> **AS 23.30.120. Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
> (1) the claim comes within the provisions of this chapter; . . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Id*. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 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 first establish a "preliminary link" between his or her injury and the employment. *Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). Medical evidence may be needed to attach the presumption of compensability in a complex medical case. *Burgess Constr. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). 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 employee need only adduce "some relevant evidence establishing a preliminary link" between the claim and the employment. C*heeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413,417 (Alaska 2004).

If the employee establishes the preliminary link, then the employer can rebut the presumption by presenting substantial evidence demonstrating that a cause other than employment played a greater role in causing the disability or need for medical treatment, or by substantial evidence

that employment was not the substantial cause. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). Because the employer's evidence is considered by itself and not weighed at this step, credibility is not examined at this point. *Veco* at 869-70.

If the presumption is raised and not rebutted, the Employee need produce no further evidence and the Employee prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Runstrom* at 8. This means the employee must "induce a belief" in the minds of the factfinders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). At the third step, evidence is weighed, inferences are drawn from the evidence, and credibility is considered.

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

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

The Alaska Supreme Court held it is not necessary that doctors use particular phrasing or terminology in workers' compensation cases:

> The compensation process is not a game of "say the magic word," in which the rights of injured workers should depend on whether a witness happens to choose a form of words prescribed by a court or legislature. What counts is the real substance of what the witness intended to convey, and for this purpose there are more realistic approaches than a mere appeal to the dictionary....

Smith v. Univ. of Alaska, Fairbanks, 172 P.3d 782 at 791 (Alaska 2007), citing 8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 130.06[2][e] (2006). The Supreme Court held "we have previously refused to adopt a general rule in workers' compensation cases that a treating physician's opinion is entitled to greater weight than the opinion of an employer's expert. The board alone is charged with determining the weight it will give to medical reports." *Id*. at 793, citing *Safeway, Inc. v. Mackey*, 965 P. 2d 22, 29 (Alaska 1998).

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

The scope of evidence admissible in administrative hearings is generally broader than is allowed in civil courts because AS 23.30.135 makes most civil rules of procedure and evidence inapplicable. Information that would be inadmissible at a civil trial may nonetheless be discoverable in a worker's compensation claim if it is reasonably calculated to lead to admissible evidence. See, e.g., *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999); *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Under relaxed evidence rules, discovery should be at least as liberal as in a civil action and relevancy standards should be at least as broad. *Schwab*.

> **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 . . . When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion (actual or in fact) is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed. *Id*. at 152. Reasonable fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. at 152-153. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained are also considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, at 973, 975 (Alaska 1986).

> **AS 23.30.150. Commencement of compensation.**
> Compensation may not be allowed for the first three days of the disability, except the benefits provided for in AS 23.30.095; if, however, the injury results in disability of more than 28 days, compensation shall be allowed from the date of the disability.

> **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 . . .
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . . .
> (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.
> . . . .
> (h) The board may upon its own initiative at any time in a case ... where right to compensation is controverted ... make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.
> . . . .
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.
>
> **8 AAC 45.050. Pleadings.**
> . . . .
> (c) **Answers.**
> (1) An answer to a claim for benefits must be filed within 20 days after the date of service of the claim and must be served upon all parties. A default will not be entered for failure to answer, but, unless an answer is timely filed, statements made in the claim will be deemed admitted. The failure of a party to deny a fact alleged in a claim does not preclude the board from requiring proof of the fact.
> . . . .
> (3) An answer must be simple in form and language. An answer must state briefly and clearly the admitted claims and the disputed claims so that a lay person knows what proof will be required at the hearing . . .
>
> **8 AAC 45.082. Medical Treatment.**
> . . . .
> (d) medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill, . . . and a completed report in accordance with 8 AAC 45.086(a). . . .
> . . . .

In *Harris v. M-K Rivers*, 325 P.3d 510 (Alaska 2014), the Alaska Supreme Court addressed penalties on medical benefits prescribed but not actually provided, and said:

> The Alaska Workers' Compensation Act sets up a system in which payments are made without need of Board intervention unless a dispute arises (footnote omitted). If the employer disputes payment, it is required to file a timely controversion notice. The purpose of the act is 'to ensure the quick, efficient, fair, and predictable delivery of indemnity and *medical benefits* to injured workers at a reasonable cost to the employers . . . subject to [it]." The workers' compensation

> system also recognizes that it is appropriate to require an employer, who gets the benefit of protection from tort liability by participating in the system, to bear the cost of a worker's injury, rather than impose that cost on the general public. Under this compensation system, payments 'due' under the act are more appropriately characterized as '[p]ayable immediately or on demand,' not '[o]wed as a debt.'

Id. at 8 (footnotes omitted). *Harris* reiterated the Alaska Supreme Court's previously recognized importance of medical care in workers' compensation cases, citing *Summers v. Korobkin Construction*, 814 P.2d 1369, 1372 (Alaska 1991). *Summers* held an injured worker who had been receiving medical treatment has the right to a prospective determination of compensability. *Summers* noted injured workers must weigh many variables before deciding whether to pursue a course of medical treatment. An important factor in many cases is whether the indicated treatment is compensable under the law. This factor, in turn, illuminates who must pay for the treatment.

Harris also cited *Childs v. Copper Valley Electric Association*, 860 P.2d 1184, 1192 (Alaska 1993), which applied the Act's penalty provisions to medical care as an incentive for employers to pay medical bills promptly. *Harris* noted: "Without the possibility of a penalty, an insurer would be able to controvert expensive medical care for no reason and escape without sanction, even when the care is critical to the employee's health" (*Harris* at 8).

Harris next cited *Hammer v. City of Fairbanks*, 953 P.2d 500, 506 (Alaska 1998), which held PPI became "due" when the employer received a rating from the employee's doctor. Because the employer wrote a letter to the doctor seeking clarification of the rating, but did not file a controversion notice or pay within the time required, *Hammer* held the employer had to pay a penalty on the PPI amount. *Harris* found the situation analogous held "medical benefits become due for purposes of controversion and penalties when the employer has notice they have been prescribed by a doctor." Additionally, *Harris* held "a controversion of medical benefits that is not made in good faith delays receipt of the benefit" (*Harris* at 8).

Harris also cited a Pennsylvania case, *McLaughlin v. Workers' Compensation Appeal Board*, 808 A.2d 285, 289 (Pa. Commw. 2002), which followed a lower court's application of a penalty

for refusal to pre-certify or challenge the prescribed back surgery. The court held that the insurer's arguments that it could only be penalized for failure to pay once provided with a medical bill were "disingenuous" because the insurer's "own action effectively prevented [the employee] from receiving the recommended treatment in the first place."

Kamitchis v. Swan Employer Services, AWCB Decision No. 14-1139, cited *Harris* in finding that once a physician prescribed medical treatment, the employer had a duty to either authorize the treatment or controvert within the required time. This decision also held that the statute requiring employers to "furnish" medical treatment and the regulations requiring them to pay medical bills under particular procedures are not in conflict. The regulation "does not give Employer the right to refuse to preauthorize prescribed surgery in a non-controverted case." *Kamitchis* at 29 (citations omitted). In essence, the procedure for billing was found to be irrelevant to the question of preauthorization or controversion of prescribed medical procedures. *Id*.

> **8 AAC 45.120. Evidence.**
> . . . .
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds. . . . .

The "relevant" and "reliable" admission standard gives the board discretion to exclude untrustworthy evidence. *Granus* at 10, n.34, citing *Whaley v. Alaska Workers Compensation Board*, 648 P.2d 955, 958 (Alaska 1982). However, the trustworthiness of relevant evidence is an issue properly addressed at the time of its admission at hearing, and does not impose an additional requirement for discovering information. *Granus* at 11, n.34.

ANALYSIS

1. Is Employee entitled to workers' compensation benefits?

As a preliminary matter, Employee seeks an order accepting her claims as a result of Employer's failure to file a timely answer, in accordance with 8 AAC 45.050. While the Fund answered both of Employee's claims, Employer did not. The Fund's answers offer denials regarding only whether Employee was truly an employee of Employer (though the Fund has since reversed this denial) and whether Employee had a duly authorized claim and was entitled to benefits under the Act. The Fund also stated Employee was not entitled to receive benefits from the Fund since there had not been an order of compensability or a finding of Employer's default. The Fund does not appear to have maintained any arguments that Employee is not entitled to benefits, except to argue that Employee's TTD coverage should not start until she was given a no-work note by her physician. Accordingly, the statements in Employee's claim may be deemed admitted. 8 AAC 45.050(c)(1). However, this is a complicated case involving overlapping rights and duties of Employee, Employer, and the Fund, and there is sufficient reason to fully analyze compensability.

At the first step in the presumption analysis, Employee must show a preliminary link between her disability and need for treatment and the work injury. *Tolbert*. Employee satisfies this step by testifying that her knee was injured at work and providing Dr. Cobden's medical report linking stating that the injury was caused by the work.

At the second step, Employer must rebut this presumption with substantial evidence. *Runstrom*. Employer adequately satisfies this burden with her testimony that Employee never reported her injury and that Employee's actions after the date of injury were inconsistent with the injury claimed.

Since the presumption of compensability is rebutted, the presumption drops out and Employee must prove all elements of her case by a preponderance of the evidence. *Id*. At this step the evidence may be weighed and credibility determined. At hearing, Employee appeared to be calm and collected, answering questions in a forthright manner, and her testimony is considered

credible. AS 23.30.122. Employer's testimony appeared defensive, colored by feelings toward the business and Employee, and sometimes inconsistent. Employer's testimony is considered not credible. *Id*. Employee presented convincing evidence that she was injured while working for Employer on March 8, 2016, reported her injury to her supervisor, was unable to work as a result of her injury, and required the subsequent medical treatment she obtained for her injury. Dr. Cobden stated "this appears to be clearly work related injury to the meniscal cartilages of the right knee. . ." There is no sufficiently probative medical or testimonial evidence to overcome the evidence that the injury is work-related. Thus, Employee's disability and need for medical treatment is found to arise out of and in the course of employment, the injury is determined to be the substantial cause of the disability and need for medical treatment, and Employee is entitled to workers' compensation benefits. AS 23.30.010. Employee's claim for medical benefits, associated transportation benefits and TTD benefits will be granted.

The Fund challenged Employee's right to receive TTD benefits for the period between March 9 and March 29, 2016, during which she was on a light-duty work restriction but did not inform Employer or request light-duty work. Testimony at hearing proved by a preponderance of the evidence that while Employer did not receive notice of Employee's light-duty restriction, there likely would not have been light-duty work available. As a result, Employee's light-duty work restriction should be treated as TTD as of March 9, 2016. Employee is therefore entitled TTD from that date, as well as interest on all delayed payments. AS 23.30.150.

2. Should Employee's prescribed surgery be pre-authorized?

Since medical treatment for Employee's work injury is covered, it is necessary to address the specific request for pre-authorization of the prescribed surgery. Employee relies on Dr. Cobden's medical report indicating that the arthroscopic meniscectomy and debridement surgery is medically necessary, and requests preauthorization of coverage for the surgery and the subsequent recovery period, expected to last approximately 6 weeks.

Once a physician prescribes medical treatment for an employee, the employer is required to either furnish (i.e. authorize) or controvert benefits within the required time. *Harris*; *Kamitchis*. Employee discussed surgical intervention on April 12, 2016, but did not at that point decide

whether to pursue it. Dr. Cobden's July 18, 2016 medical report gives a more definite statement, and is reasonably interpreted as the prescription for the surgery in question. Neither Employer nor the Fund has filed a notice of controversion in this case, so payment or pre-authorization was warranted at that time. Since there has been no controversion filed, or valid reason for the failure to controvert or authorize medical benefits, it is appropriate to order pre-authorization of the requested surgery. *Summers*. Employee is entitled to coverage of the arthroscopic meniscectomy and debridement surgery and sufficient disability payment for recovery, expected to last approximately 6 weeks.

3. Is Employee entitled to attorney fees?

Attorney fees may be awarded under AS 23.30.145(b) when an employer resists payment of compensation and an attorney is successful in prosecuting the employee's claim. Neither Employer, nor the Fund, objected to the hourly rate billed, or time expended, by Employee's attorney. Here, Employer has resisted payment of all workers' compensation benefits, and Employee is entitled to attorney fees. Employee's attorney has successfully obtained benefits for Employee, and will be awarded attorney fees in accordance with the affidavit he has filed on that issue. Employer will be required to pay $7,760.00 in attorney fees and costs.

CONCLUSIONS OF LAW

1. Employee is entitled to workers' compensation benefits.
2. Employee's prescribed surgery should be pre-authorized.
3. Employee is entitled to attorney fees.

ORDER

1. Employee's amended claim is granted in part:
    a. Employee is entitled to continuing TTD, beginning on March 9, 2016.
    b. Employee is entitled to medical benefits.
    c. Employee is entitled to transportation benefits.
    d. Employee is entitled to interest on all accrued benefits, at the statutory rate.
2. Employer is ordered to authorize and pay for Employee's knee surgery as prescribed by Dr. Cobden on July 18, 2016.

3. Employer is required to pay Employee $7,760.00 as a reasonable attorney fee.

Dated in Fairbanks, Alaska on November 7, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

unavailable for signature
Sarah LeFebvre, Member

/s/
Jacob Howdeshell, 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 JAYNELL JONES, employee / claimant; v. NICOLE MASSON D/B/A ROCKING YEARS ONE & TWO, employer; BENEFIT GUARANTEE FUND, insurer / defendants; Case No. 201604460; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on November 7, 2016.

/s/
Jennifer Desrosiers, Office Assistant II