ALASKA WORKERS' COMPENSATION BOARD

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

SHARON K. DOTY, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 200918284
CH2M HILL COMPANIES, LTD., Employer,	)	AWCB Decision No. 18-0021
and	)	Filed with AWCB Fairbanks, Alaska on February 27, 2018
CH2M HILL COMPANIES, LTD., Insurer, Defendants.	)	

Sharon Doty's November 25, 2015 claim was heard in Fairbanks, Alaska on October 12, 2017, a date selected on May 11, 2017. Attorney Andrew Lambert appeared and represented Sharon Doty (Employee), who also appeared and testified on her own behalf. Attorney Rebecca Holdiman Miller appeared and represented CH2M HILL (Employer). Donald Schroeder, M.D., testified on Employer's behalf. The record closed upon receipt of Employee's supplemental affidavits of attorney fees and costs on October 26, 2017.

ISSUES

Employer contends medical records show Employee related her left knee pain to her work activities in March 2009, but she did not report her injury until December 2009, so her injury report was untimely and her claim for left knee benefits is barred.

Employee contends she began having left knee pain around February or March 2009, but did not understand why until December 2009, when her doctor related the pain to her repetitive work duties, at which time she filed her report. Employee contends her report was timely and left knee benefits are not barred.

1) Are left knee benefits barred for untimely injury reporting?

Employer contends 2011 medical records shows Employee's right knee symptoms were work-related, but a right knee injury was not reported until Employee filed her instant claim in 2015, so right knee benefits are also barred because of her extremely late reporting.

Employee contends she began experiencing right-sided symptoms that did not involve her knee in 2011, but her physician did not relate her right knee medical treatment to work until 2015, so her report was timely. She further contends the injury reporting statute requires prejudice to Employer, and since Employer has not suffered any prejudice in this case, Employee should not penalized by having her benefits barred.

2) Are right knee benefits barred for untimely injury reporting?

Employee contends she sustained a cumulative injury to her left knee by repetitive climbing in and out of trucks and walking, kneeling and standing on concrete floors for up to 12 hours per day during her employment with Employer. She contends her work for Employer is the substantial cause of her need for left knee medical treatment, and since she has "a few" outstanding medical bills, she seeks an order finding left knee benefits compensable.

Employer primarily relies on its notice defense, but also contends Employee's left knee is medically stable and all benefits have been paid.

3) Is Employee's left knee medical treatment compensable?

Employee contends her left knee injury altered her gait and shifted weight to her right knee, which has now created a need for total right knee replacement. She seeks an order finding right knee benefits compensable.

Employer primarily relies on its notice defense for right knee benefits, but it also relies on the opinion of its medical expert, who opines Employee's need for right knee medical treatment was caused by the natural progression of pre-existing arthritis and not work.

4) Is Employee's right knee medical treatment compensable?

Employee contends her work for employer is the substantial cause of her disability and she seeks an award of temporary total disability (TTD) from September 17, 2015 and continuing. She contends the second independent medical evaluator (SIME) and other physicians have opined Employee could perform work as a general clerk, but her own physician has not released her back to work.

Employer contends Employee was released back to work in 2009 and the SIME physician recently opined Employee has the physical capacities to work as clerk, a job she previously held. Therefore, it contends Employee is entitled to limited, if any, additional TTD.

5) Is Employee entitled to TTD?

Employee contends she is entitled to an additional permanent partial impairment (PPI) benefit for her left knee, and further contends she is entitled to a PPI rating for her right knee, once that knee is medically stable.

Employer contends it has paid all PPI due on Employee's left knee, and no PPI benefit is due on Employee's right knee either because her claim is barred, or because the 2009 work injury is not the substantial cause of any permanent impairment.

6) Is Employee entitled to PPI?

Employer contends that if Employee is entitled to any additional TTD, it is entitled to offsets based on Employee's receipt of Social Security retirement and State of Alaska pension benefits.

Employee does not oppose Employer's petitions for offsets.

7) Is Employer entitled to offsets based on Employee's receipt of Social Security retirement and State of Alaska pension benefits?

Employee contends she retained an attorney is the successful prosecution of her claim and she seeks an award of attorney fees and costs.

Employer contends, since no benefits are due Employee, neither are attorney fees and costs.

8) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) In January 1968, Employee injured her right knee while skiing. X-rays showed a fractured patella, "which seemed to be in very good position." A cast was placed on Employee's right leg and removed two weeks later. (Itaska Clinic chart notes, January 11, 1966 to September 6, 1973).

2) On July 7, 1969, Employee was playing softball and ran into another player, injuring both knees. X-rays were normal and no treatment was administered. (*Id*.).

3) Employee worked for Employer as an Equipment Shop Laborer from November 8, 2008 through March 19, 2009. She also worked, on-and-off, as a respite caregiver for REACH, Incorporated. (Labor Detail Report, undated; REACH Employment Application, May 28, 2009).

4) On January 27, 2009, while seeking treatment for neck and shoulder stiffness, Employee also mentioned increasing stiffness in her left knee over the past year. (Chiropractic chart notes, January 27, 2009).

5) On March 23, 2009, Employee presented to Michael Fischer, M.D., for left knee pain and explained she began having occasional left knee pain after returning from work on the North Slope, where she does shop maintenance on cement floors and works 12-hour shifts. Dr. Fischer thought "[Employee's] exam is a bit confusing since she has such very significant pain without a clear cause . . . ." Before proceeding with a magnetic resonance imaging (MRI) study, Dr. Fischer decided to refer Employee to Peter Schaab, M.D., for an evaluation. He released

Employee from work, pending diagnosis and formulation of a treatment plan. (Northern Orthopedics chart notes, March 23, 2009; Fischer report, March 23, 2009).

6) On March 25, 2009, Dr. Schaab evaluated Employee for left knee pain. Employee reported being on her feet for long work shifts, but she could not relate her knee pain to a specific activity that caused her symptoms. Dr. Schaab thought there was a high probability of a meniscus tear and recommended arthroscopic surgery. (Schaab report, March 25, 2009).

7) On April 1, 2009, Dr. Schaab performed a left knee arthroscopy with chondroplasty. Employee's lateral and medial meniscus were intact. (Operative Report, April 1, 2009).

8) On April 13, 2009, Employee completed an application for short-term disability benefits, indicating her disability was not work related. (Aetna form, April 13, 2009).

9) On May 20, 2009, Dr. Schaab released Employee back to work without restrictions and suggested she start her "usual work cycle" on June 11, 2009. (Return to Work Recommendations, May 20, 2009).

10) On May 27, 2009, Employee returned to work for REACH and continued to work "irregularly" until January 28, 2011. (Termination of Employment Summary, January 28, 2011).

11) On December 8, 2009, Employee was laid off work for Employer. (Employer's May 9, 2017 Interrogatories; Employee's deposition, February 3, 2012).

12) On December 10, 2009, Employee returned to Dr. Schaab complaining of left knee pain and swelling. She explained her knee was doing well, and on her first tour of duty back at work, her knee ached. On Employee's second tour of duty back at work, her knee "really hurt" and it swelled. Dr. Schaab thought Employee had done well following surgery, but since her symptoms re-occurred upon returning to work, work was the likely etiology of Employee's knee problem. He released Employee from work. (Schaab chart notes, December 9 [sic], 2009; Schaab report, December 10, 2009).

13) On December 14, 2009, Employee completed an injury report for her left knee. (Report of Occupational Injury or Illness, December 14, 2009).

14) On March 8, 2010, Ted Schwarting, M.D., evaluated Employee for left knee pain. He assessed "[p]ersistent left knee pain after work injury and arthroscopy," and ordered an MRI. (Schwarting report, March 8, 2010).

15) A March 10, 2010 MRI showed a left knee medial meniscus tear. (MRI report, March 10, 2010).

16) On March 25, 2010, Dr. Schwarting performed a left knee arthroscopic meniscectomy and chondroplasty. (Operative Report, March 25, 2010).

17) On October 28, 2010, Employee saw Patrick Hall, M.D., for another opinion on left knee treatment. Employee's history of her present illness mentioned her work injury and described her two previous surgeries. Dr. Hall administered a Synvisc injection and thought he would treat Employee's symptoms non-operatively. (Hall report, October 28, 2010).

18) On November 1, 2010, Stewart Kerr, M.D., performed an employer's medical evaluation (EME) of Employee's left knee condition and opined Employee's work was the substantial cause of her need for the March 25, 2010 left knee surgery. He also thought Employee's "wear-and-tear" work injury precluded her returning to work as an equipment shop laborer. Dr. Kerr opined Employee was medically stable and had incurred a one percent whole person permanent impairment. (Kerr report, November 1, 2010).

19) On November 16, 2010, Employer controverted TTD and medical benefits based on Dr. Kerr's November 1, 2010 report. (Controversion, November 16, 2010).

20) On January 5, 2011, Employee's primary care physician, Cary Cole-Anthony, M.D., thought Employee "may" have a possible "recurrent" left knee meniscus tear. (Cole-Anthony report, January 5, 2011; record).

21) On June 17, 2011, Employee sought treatment for neck and back pain. She described: "Hurt left knee . . . at work on the Slope, putting a lot of pressure on Right side of body with walking, bending, etc. This has caused R. side back, hip, shoulder, neck pain from being off balance for so long." (Workers' Compensation Questionnaire, June 17, 2011).

22) On June 23, 2011, Employee followed-up with Dr. Cole-Anthony for her left knee and reported her right side was bothering her from limping. (Cole-Anthony report, June 23, 2011).

23) On November 4, 2011, Dr. Cole-Anthony predicted Employee would have the physical capacities to work as a general office clerk. (Cole-Anthony response, November 4, 2011).

24) On December 6, 2011, Employee filed a claim for a left knee injury, seeking TTD from November 2, 2010 continuing, PPI, medical and related transportation costs, interest and attorney fees and costs. (Claim, December 6, 2011).

25) On January 10, 2012, Dr. Kerr again evaluated Employee. Employee reported left knee pain and intermittent right-sided low back pain, which she thought was a result of compensating for her knee problems. Dr. Kerr diagnosed left knee tricompartmental arthritis, most significant

in medial compartment, and he continued to think work was the substantial cause of Employee's need for medical treatment. He opined Employee suffered a permanent aggravation to her left knee following her meniscus resection and recommended an evaluation for possible injections or knee arthroplasty. Dr. Kerr did not attribute Employee's back symptoms to work, but rather to age-related degenerative changes. Although Employee was unable to return to work as a commercial cleaner, in Dr. Kerr's opinion, she could return to work as a customer service representative or clerk. (Kerr report, January 10, 2012).

26) On February 3, 2012, Employee testified she worked as a Clerk III for the State of Alaska between 1992 and 2004, as a respite caregiver for REACH, which she characterized as babysitting for her granddaughter, and as customer service representative for Ferrell Gas. She also described her work for Employer. Employee first noticed her knee pain in February 2009, and later connected her knee pain to work activities in December 2009, when Dr. Schaab told her she had a job-related injury. After her first left knee surgery, she returned to work for Employer in May 2009 because she feared losing her job. Employee continued to work for Employer until December 2009. When Dr. Schaab released Employee to light duty work, she spoke with Employer and was told it did not have any light duty work available for her. (Employee's deposition, February 3, 2012).

27) On March 1, 2012, Dr. Cole-Anthony thought Employee's symptoms and examination were consistent with a left knee meniscus tear. (Cole-Anthony report, March 1, 2012).

28) On April 17, 2012, Employee saw Dr. Cole-Anthony for continuing left knee pain. Dr. Cole-Anthony opined Employee's knee problems arose from her work injury and referred Employee for an orthopedic evaluation. (Cole-Anthony report, April 17, 2012).

29) On April 20, 2012, Joel Zamzow, M.D., evaluated Employee for ongoing left knee pain and noted Employee's work injury was "well documented" in Dr. Hall's October 28, 2010 report. He interpreted Employee's most recent MRI as showing moderate arthritis and a torn medial meniscus, and recommended arthroscopic surgery. (Zamzow report, April 20, 2012).

30) On May 21, 2012, Dr. Zamzow undertook left knee arthroscopic surgery to address medial and lateral meniscus tears. (Operative Report, May 21, 2012).

31) On October 10, 2012, the parties filed a compromise and release agreement settling reemployment benefits and retroactive indemnity benefits for Employee's left knee injury.

(Injury Claims and Expense Reporting System (ICERS) entry, October 10, 2012; Compromise and Release Agreement, September 26, 2012).

32) On April 16, 2013, Dr. Zamzow opined Employee's left knee was medically stable and recommended cortisone or visco-supplement injections. (Zamzow responses, April 16, 2013).

33) On May 10, 2013, Donald Schroeder, M.D., undertook an EME and diagnosed left medial meniscus tear, possibly related to work; preexisting left knee tricompartment osteoarthritis, permanently aggravated by work; and a history of low back pain, depression and neck pain, unrelated to work. He thought Employee's work was the substantial cause of her symptoms and opined Employee would ultimately need a knee replacement, but if that procedure were indefinitely delayed, Employee was medically stable. (Schroeder report, May 10, 2013).

34) On May 31, 2013, Employer controverted additional TTD after May 10, 2013 based on Drs. Schroeder's and Zamzow's left knee medical stability opinions. (ICERS event entry 2013).

35) On January 17, 2014, Dr. Zamzow continued Employee's release from work on account of her left knee injury. (Activity Plan, January 17, 2014).

36) On March 26, 2014, Dr. Zamzow performed a left total knee replacement. (Operative Report, March 26, 2014).

37) On May 23, 2014, Dr. Zamzow performed left knee manipulation under anesthesia in order to break scar tissues and adhesions. (Operative Report, May 23, 2014).

38) On February 10, 2015, Dr. Schroeder performed another evaluation on Employer's behalf and continued to opine Employee's work was the most significant cause of Employee's left knee condition since it permanently worsened her pre-existing arthritis. During his evaluation, Employee remarked her knee was worse than it was before her total knee replacement. Dr. Schroeder explained some patients tend to form excessive scar tissue that prevents restoration of the normal range of motion following the procedure. According to Dr. Schroeder, Employee was not medically stable and Dr. Schroeder thought Employee would benefit from another procedure consisting of an arthroscopic lysis of adhesions to gain additional flexibility. He recommended obtaining a second opinion on Employee's options. (Schroeder report, February 10, 2015).

39) On May 29, 2015, Dr. Zamzow continued Employee's release from work due to left knee pain and stiffness. (Report of Workability, May, 29, 2015).

40) On June 26, 2015, Dr. Schroeder issued an addendum to his two prior reports and reiterated Employee would not be medically stable until the second opinion was obtained. He continued to think Employee's work was the most significant factor in her need for left knee medical treatment. (Schroeder addendum, June 26, 2015).

41) On August 10, 2015, Employee obtained a second left knee medical opinion from Mark Thomas, M.D., who concluded, "Without definite reason for her pain I think the best approach is to simply observe." (Thomas report, August 10, 2015).

42) On September 4, 2015, Employer petitioned for an order allowing an offset of left knee disability benefits based on overpayments and Employee's receipt of Social Security benefits. (Employer's petition, September 4, 2015).

43) On September 16, 2015, Dr. Schroeder authored another addendum, and based on Dr. Thomas' recommendation for observation with no additional surgery, Dr. Schroeder thought Employee was medically stable. He opined Employee had incurred an eight percent PPI. (Schroeder addendum, September 16, 2015).

44) On September 29, 2015, Employer controverted medical and disability benefits past September 16, 2015 and PPI above eight percent, based on Dr. Schroeder's opinions. It also asserted a right to recoup overpaid benefits. (Controversion, September 29, 2015).

45) Employer paid Employee an additional seven percent PPI on top of the one percent it previously paid for Dr. Kerr's November 1, 2010 rating. (Compensation report, August 11, 2016).

46) On October 20, 2015, Dr. Zamzow assessed right knee arthritis and opined this was secondary to Employee compensating for her left knee condition. Employee was nearly 64 years old. He also thought Employee's left knee arthrofibrosis was severe and required additional surgery consisting of an arthrotomy with lysis of adhesions. He planned to schedule the surgery once it had been approved by workers' compensation. (Zamzow report, October 20, 2015).

47) On November 27, 2015, Employee filed a medical summary containing Dr. Zamzow's October 20, 2015 report. She also filed an amended claim arising from left and right knee injuries seeking TTD from September 17, 2015 continuing, additional PPI, medical and transportation costs, interest, and attorney fees and costs. (Employee Medical Summary, November 25, 2015; Claim, November 25, 2015).

48) On December 18, 2015, Dr. Zamzow documented a 15-minute conference with Employer's attorney, during which he answered questions regarding Employee's left knee treatment and the work-relatedness of Employee's right knee symptoms. (Zamzow chart notes, December 18, 2015).

49) On December 21, 2015, Dr. Schroeder indicated Employee's work injury was not the substantial cause of her need for right knee medical treatment because "problems with the left knee do not cause problems with the right." (Schroeder response, December 21, 2015).

50) On December 23, 2015, Employer answered Employee's November 25, 2015 claim and controverted benefits sought based on Dr. Schroeder's opinions. (Employer's Answer and Controversion, December 23, 2015).

51) On February 12, 2016, Employee saw Dr. Zamzow for right knee pain. Dr. Zamzow opined Employee's right knee pain was related to her poor gait and the poor function of her left knee. He continued to recommend additional surgery for Employee's left knee and thought Employer's workers' compensation carrier "really does need to step up to the plate . . . and authorize this surgery for her." (Zamzow report, February 12, 2016).

52) On April 29, 2016, Dr. Zamzow reiterated Employee's need for left knee surgery. He wanted to schedule the surgery in June, but was waiting for approval. Dr. Zamzow also continued Employee's release from work. (Zamzow letter, April 29, 2016; Report of Workability, April 29, 2016).

53) On June 16, 2016, Employer agreed to pay for Dr. Zamzow's recommended left knee lysis of adhesions surgery and also pay Employee eight weeks' TTD for follow-up care and physical therapy in exchange for Employee agreeing to suspend the SIME process and participating in mediation. (Stipulation, June 16, 2016).

54) On August 8, 2016, Dr. Zamzow performed a revision left total knee arthroplasty and an extensive synovectomy with release of lysis of adhesions and scar tissue. (Operative Report, August 8, 2016).

55) On September 9, 2016, Dr. Zamzow stated Employee was doing "reasonably well" following her left knee surgery. He thought non-operative care in the form of injections was indicated for Employee's right knee, but in the future, right knee replacement might also be undertaken. Dr. Zamzow continued Employee's release from work for another month on

account of her left knee injury. (Zamzow letter, September 9, 2016; prescription slip, September 9, 2016).

56) On November 17, 2016, Employer petitioned for an order allowing an offset of left knee disability benefits based on Employee's receipt of Social Security benefits. (Employer petition, November 17, 2016).

57) On November 15, 2016, the parties participated in an unsuccessful mediation. (ICERS event entry, November 15, 2016).

58) On December 9, 2016, Dr. Zamzow saw Employee for a follow-up visit and noted:

> OF NOTE: Apparently [Employee] had some kind of preliminary hearing and apparently the defense attorney did say that he had talked to me and that I had said that the patient apparently had some type of a low threshold of pain and will do well with her right knee once her left knee is recovered and I made no such statements. This is grossly false and is [a] complete misrepresentation of anything I would attest to. In fact, no such conversation ever occurred, so really I think if what [Employee] is telling me is accurate, and I have no reason to believe that is not accurate, then I think this is gross lying and dishonesty in regard to [Employee's] work comp insurance carrier attorney tactics, in my opinion, because no such conversation ever occurred and this was discussed with [Employee] in detail. . . . I really do believe that her right knee is also related to her left knee in regard to favoring it over the years. This was discussed with her also today.

Dr. Zamzow continued Employee's release from work for her left knee injury. (Zamzow report, December 9, 2016; Report of Workability, December 9, 2016).

59) On March 22, 2017, William Curran, M.D., performed a secondary independent medical evaluation (SIME) and concluded Employee was disabled by bi-compartmental osteoarthritis of her right knee, and postoperative arthrofibrosis of her left knee. Employee's work, in Dr. Curran's opinion, was the substantial cause of her bilateral knee complaints and both knees would require ongoing medical treatment. Although Dr. Curran opined Employee's left knee to be medical stable, her right knee was not, and he recommended various right-knee treatments. Should those treatments fail, according to Dr. Curran, a right total knee arthroplasty would be reasonable. In Dr. Curran's opinion, Employee had incurred a 30 percent lower extremity impairment, but he did not convert the lower extremity rating to the whole person. (Curran report, March 22, 2017).

60) On April 25, 2017, Employer petitioned for an order allowing an offset of disability benefits based on Employee's receipt of pension benefits. (Employer's petition April 25, 2017).

61) On May 25, 2017 and May 26, 2017, Employer surveilled Employee at her home and captured approximately 35 minutes of video. Employer filed a small portion of its surveillance video, two minutes 20 seconds, as evidence. The video evidence shows Employee walking around her residence, weeding her garden and carrying open boxes that appear to be largely empty. During one portion, Employee can be seen walking with a limp and she walks with the assistance of a short shovel, using it as a cane. (Surveillance Summary, May 30, 2017; record; observations).

62) On June 5, 2017, Dr. Curran responded to interrogatories posed by Employer and indicated he thought it "extremely unusual" Employee did not report her left knee pain was work-related until nine months after the work injury. He then stated, "If that is truly the case, then I would opine [Employee's] left knee complaints and need for treatment were not causally related to an occupational injury dated March 23, 2009." (Curran answers, June 5, 2017).

63) On July 25, 2017, Dr. Curran responded to interrogatories posed by Employee and opined Employee had pre-existing tri-compartmental osteoarthritis of her left knee, but her work for Employer accelerated the arthritic pathology to the point where she became symptomatic on March 23, 2009. He also stated he agreed with Dr. Schaab's causation opinion. (Curran letter, July 25, 2017).

64) On September 26, 2016, Employee followed-up with Dr. Zamzow, who continued to think Employee's left knee was "work comp related." (Zamzow report, September 26, 2017).

65) On October 4, 2017, Dr. Curran testified a one-inch difference in mid-thigh girth between Employee's right and left thighs was due to atrophy and her multiple surgical procedures. Employee's left knee osteoarthritis was a pre-existing condition that was accelerated by her work for Employer. Arthrofibrosis is scarring of a joint, and Employee's arthrofibrosis was caused by her multiple left knee surgeries. Employee's right knee complaints were attributable to her favoring her left lower extremity. Employee had asymptomatic arthritis in her right knee, and because she was placing weight, stress, and strain on her right side, it "lit up" her asymptomatic arthritic condition. Dr. Curran has also seen this happen to patients in his practice who have arthritis in both knees. Dr. Curran had reviewed the surveillance video and he saw Employee limping on her left side. The surveillance video did not change Dr. Curran's opinions expressed

in his report. When Employee was recovering from her surgeries, she was going to have periods of temporary total disability and the length of those periods would depend on the surgeries' magnitude and results. Between December 2015 and August 8, 2016, Employee was capable of working as a general clerk. Employee was also capable of returning to work as a clerk on January 8, 2017, five months after her August 8, 2016 surgery. Dr. Curran did not observe Employee magnifying her symptoms and neither did he see evidence of secondary gain. Employee's left knee is medically stable, but her right knee is not and it requires further treatment. He rated Employee's left knee as a 30 percent lower extremity permanent impairment, which translates into a 12 percent whole person PPI. (Curran deposition, October 4, 2017).

66) On October 9, 2017, Employee claimed $18,165 in attorney fees, $12,370.50 in paralegal costs and $1,248.25 in litigation costs, for a total of $30,535.50. Attorney time was billed at $350 per hour and paralegal time was billed at $150 per hour. (Employee's affidavits, October 9, 2017).

67) On October 9, 2017, Employee also attached to her hearing brief receipts for a medical device and a prescription, a balance due statement from Lakeshore Lutheran Home, a medical bill from Orthopedic Associates of Duluth and documentation claiming 742 miles of transportation costs for travel to physical therapy administered by Majestic Pines between July 22, 2016 and October 21, 2016, all of which she contends are unpaid. (Employee's Hearing Brief, October 9, 2017).

68) At hearing, Employee testified she began working for Employer on November 11, 2008 and her work schedule was originally three weeks on and three weeks off, but later changed to two weeks on and two weeks off. Her work hours were 6 a.m. to 6 p.m. She initially noticed left knee pain in late February 2009 and was having trouble getting into the big water trucks she cleaned. Employee worked in a 65,000 square foot garage with a concrete floor. She bought special steel-toe shoes with inserts to make work more comfortable. She was responsible for keeping the garage clean of mud and snow and ran a zamboni to accomplish this. Employee swept "constantly," did windows and would take out trash, which contained heavy metal items. She is short and would have to jump up to get into the heavy equipment trucks she cleaned. Employee was on her feet most of the time. She fractured her patella in 1968 and never had any problems with her knees after that. Employee saw Dr. Schaab in March 2009 because she had

extreme pain in her left knee and could not climb stairs. She claimed short-term disability at the time because she did not think her knee problem was work related. Employee underwent left knee surgery, was released back to work on May 20, 2009, and returned to work on June 11, 2009. She undertook physical therapy, but that did not really help her knee and her pain returned. Employee's knee pain kept coming back and she saw Dr. Schaab on December 10, 2009, which was when she became aware her knee problem was work related. Ultimately, she was laid off in November or December of 2009. Employee began experiencing right-sided pain in June 2011, including her neck, back and hip, as a result of being "off-balance." By 2014, she was seeing Dr. Zamzow for bilateral knee pain. Employee's left knee was worse after her total knee replacement and she underwent a fifth surgery because of scar build-up. Her sixth knee surgery was a total knee revision and her condition still has not resolved. Employee still has left knee swelling and pain. Her left knee surgeries caused her to limp and favor her right knee. She uses a cane to help her with balance. Employee believes her right knee symptoms are related to her left knee. She worked for REACH at the same time she was working for Employer. REACH provides services for kids with disabilities and she assisted her granddaughter with such things as brushing her teeth, combing her hair and getting dressed. Her granddaughter is now 23 years-old, but has the mental capabilities of a seven or eight year-old. This was not regular work, but occurred only when her granddaughter came home in the summer. Employee stopped working for REACH about five or six years ago. She denies her workers' compensation claim was retaliatory. Employee was collecting Social Security disability benefits, but is now collecting Social Security retirement benefits in an amount of $425 per month. She also receives State of Alaska PERS benefits in an amount of $314 per month, which represents a $384 per month benefit, less $70 for health insurance. Employee worked as a clerk for the State of Alaska for 15 years, but is not sure whether she could return to work as a clerk because of her poor typing skills. She did not use any of her lump sum settlement proceeds to take a typing class or undertake job retraining because she has too many bills. (Employee).

69) Employee's testimony was natural and spontaneous, even on cross-examination. She is credible. (Experience, judgment and observations).

70) At hearing, Dr. Schroeder testified that, at the time of Dr. Schaab's first surgery, Employee had chondromalacia in all three compartments. Employee was "well on her way" to developing arthritis, which was caused by wear and tear on her knee. "A lot of factors" are responsible for

causing arthritis, but genetics is the greatest. Nothing described in Dr. Schaab's operative report could be attributed to trauma. Dr. Schroeder disagrees with Dr. Curran's opinion that Employee's left knee condition caused her right knee condition. He has never seen any medical literature documenting problems with an opposite leg because of favoring the involved leg. There would have been a four to six week period of disability following Employee's August 8, 2016 left knee surgery, so Employee was medically stable by September 16, 2016 and she could have returned to work as a clerk. Progressive trauma could cause arthritis, but Dr. Schroeder does not know if there is a relationship in this case. He also thinks Employee likely had arthritic changes in her knee at the same time she was working. Dr. Schroeder initially thought there was a connection between Employee working on concrete and her need for left knee treatment because later "scopes" showed meniscal changes. As a result, Dr. Schroeder "went along" with Dr. Zamzow's opinion and stated work was the cause of Employee's need for left knee treatment. After Employee began getting surgeries, she developed scars and then needed a knee replacement. This "started the pendulum moving" to where all subsequent treatment is attributed to the original cause. Employee did not mention right knee symptoms when Dr. Schroeder first evaluated her, so he later opined on her right knee in an addendum. Because there was no history of a right knee injury, and because Employee's right knee symptoms developed several years later, and based on the medical literature, Employee's need for right knee treatment is not related to her left knee. However, Dr. Schroeder continues to think Employee's left knee is related to work. In his 50 plus years of practicing medicine, Dr. Schroeder has seen patients whose antalgic gait cause transient symptoms but not pathological changes. He also thought Employee's right-sided symptoms were transient and did not necessarily have any relationship to her gait. Dr. Schroeder agrees with Dr. Curran's 12 percent PPI rating. His opinion is Employee probably had osteoarthritis of the right knee in 2009, even though it may have been asymptomatic at the time, and the arthritis simply progressed irrespective of her gait. (Schroeder).

71) Employer did not make any discernable arguments that Employee's left knee injury was not compensable, either in its hearing brief or at hearing. Neither did it dispute Employee's contention she has unpaid medical and transportation costs from her left knee injury. (Employer's Hearing Brief, October 10, 2017; record).

72) On October 19, 2017, Employee supplemented her attorney fees and costs, claiming $23,240 in attorney fees, $13,045.50 in paralegal costs and $1,736.68 in litigation costs, for a total of $38,022.18. (Employee's supplemental affidavits, October 19, 2017).

73) On October 26, 2017, Employee revised her supplemented attorney fees and costs, claiming $23,240 in attorney fees, $12,667.50 in paralegal costs and $2,297.18 in litigation costs, for a total of $38,204.68. (Employee's supplemental affidavits, October 26, 2017).

74) Employee receives $424 per month in social security retirement benefits and $379 per month in State of Alaska pension benefits. (Social Security Administration correspondence, numerous dates; State of Alaska letter, October 5, 2017).

PRINCIPLES OF LAW

The board may base its decisions 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).

> **AS 23.30.010. Coverage**. Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an Employee if the disability . . . 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 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 the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . 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 . . . 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 the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

> **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 . . . .

> **AS 23.30.100. Notice of injury or death.** (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.
> . . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
> . . . .
>
> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
>
> (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
> . . . .

An employee must provide formal written notice to an employer within 30 days of an injury in order to be eligible for workers' compensation benefits. *Cogger v. Anchor House*, 936 P.2d 157, 160 (Alaska 1997). The purpose of the statute is to afford an employer the opportunity to provide immediate medical diagnosis and treatment to minimize the seriousness of the injury and to facilitate the earliest possible investigation of the facts surrounding the injury. *Alaska State Housing Authority v. Sullivan*, 518 P.2d 759, 761 (Alaska 1974).

Although the statute requires written notice, actual knowledge of an injury can serve as a substitute for formal written notice if the employer has not been prejudiced. *Tinker v. Veco, Inc.*, 913 P.2d 488, 492 (Alaska 1996) (writing, "[i]t would take an exceptional set of circumstances for [the] difference in the form by which the information was conveyed to prejudice the employer."). Thus, when an employer's agents knew an employee was experiencing eye problems, the employee's failure to give timely injury notice may be excused under § 100(d)(1) when the delay in reporting did not prejudice the employer's interest in conducting a timely investigation or in providing prompt medical diagnosis and treatment. *Defermo v. Municipality of Anchorage*, 941 P.2d 114, 118-119 (Alaska 1997).

The relevant timeframe under the statute is the delay between the deadline for notice of injury

and the date when the claimant gave notice, not the delay between the date of injury and the date when the claimant gave notice. *Kolkman v. Greens Creek Mining Co.*, 936 P.2d 150, 156 (Alaska 1997). For fairness reasons, the Alaska Supreme Court has read a "reasonableness" standard into the excuse under § 100(d)(2). Under this standard, the 30-day period begins when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." *Sullivan* at 761 (quoting 3 Arthur Larson, Workmen's Compensation § 78.41, at 60 (1971)).

> **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 . . . .
>
> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id.* An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Burgess*

Construction Co. v. Smallwood, 623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc*., 372 P.3d 904; 919 (Alaska 2016). "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). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds by *Huit*). If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller v. ITT Services*, 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary

> conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual finding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001; 1008 (Alaska 2009). If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, it may rely on one opinion and not the other. *DeRosario v. Chenega Lodging*, 297 P.3d 139, 147 (Alaska 2013).

> **AS 23.30.224. Coordination of benefits.**
> . . . .
>
> (c) . . . [T]he liability of an employer for payment of compensation for an injury or illness under . . . 23.30.185 to an employee who is covered by a union or group retirement system to which the employer makes contributions under a collective bargaining agreement or by membership in a welfare or pension plan or trust may not exceed the lesser of
>
> > (1) the difference between 100 percent of the employee's spendable weekly wage and an amount equal to the disability benefit, disability pension, or medical retirement benefit that the employee is eligible to receive as a result of the injury or illness, as calculated on a weekly basis, under the retirement system or welfare or pension plan or trust; or
> >
> > (2) the maximum compensation rate calculated under AS 23.30.175.
>
> **AS 23.30.225. Social security and pension or profit sharing plan offsets.** (a) When periodic retirement . . . benefits are payable under 42 U.S.C. 401 - 433 (Title II, Social Security Act), the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.
> . . . .
>
> **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. . . .

> (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 a reasonable attorney fee. 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. 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*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-53.

> Although the supreme court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (citation omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (citation omitted). Subsection (b) may apply to fee awards in controverted claims (citation omitted), in cases which the employer does not controvert but otherwise resists (citation omitted), and in other circumstances (citation omitted).

Uresco Construction Materials, Inc. v. Porteleki, AWCAC Decision No. 09-0179 (May 11, 2011).

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975. Since a claimant is entitled to full reasonable attorney fees for services on which the claimant prevails, it is reasonable to award one-half the total attorney fees and costs

where the claims on which the claimant did not prevail were worth as much money as those on which he did prevail. *Bouse v. Fireman's Fund Ins., Co.*, 932 P.2d 222; 242 (Alaska 1997).

> **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. . . .
> . . . .
>
> (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. . . .
>
> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.
>
> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
>
> **AS 23.30.395. Definitions.**
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment . . . .
>
> **8 AAC 45.180. Costs and attorney's fees**
> . . . .
>
> (d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.
>
> (1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed . . . .
>
> (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the

> attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.
> . . . .
>
> (f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. . . .

8 AAC 45.225. Social security and pension or profit sharing plan offsets

> (a) An employer may reduce an employee's or beneficiary's weekly compensation under AS 23.30.225(a) by
>
> (1) getting a copy of the Social Security Administration's award letter showing the
>
> (A) employee or beneficiary is being paid retirement or survivor's benefits;
>
> (B) amount, month, and year of the initial entitlement; and
>
> (C) amount, month, and year of each dependent's initial entitlement;
>
> (2) computing the reduction using the employe's or beneficiary's initial Social Security entitlement, and excluding any cost-of-living adjustments; and
>
> (3) completing, filing with the board, and serving upon the employee or beneficiary a Compensation Report form showing the reduction and how it was computed, together with a copy of the Social Security Administration's award letter.

ANALYSIS

1) Are left knee benefits barred for untimely injury reporting?

An injured worker is required to provide notice of the injury within 30 days in order to be eligible for benefits. *Cogger*. For fairness reasons, the Alaska Supreme Court has read a "reasonableness" standard into the statute. *Sullivan.* Under this standard, the 30-day period begins when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." *Id.*

Employee first sought treatment specifically for her left knee on March 23, 2009. Although Employee described her work activities to Dr. Fischer at that appointment, Dr. Fischer thought Employee's exam was "confusing" because Employee had significant pain "without a clear cause." Employee could not relate her knee pain to any specific activity on March 25, 2009, when she saw Dr. Schaab, nor did she think her disability was work related when she completed her short-term disability application on April 13, 2009 following her first surgery. Employee diligently pursued medical care from March 29, 2009 until December 10, 2009, when Dr. Schaab ultimately attributed her need for treatment to work. At this point, a reasonable person would know she suffered a compensable injury and the 30-day injury-reporting period began to run. *Sullivan*. Employee completed her report four days later, so her report was timely. AS 23.30.100(a).

2) Are right knee benefits barred for untimely injury reporting?

Employee began reporting right-sided symptoms on June 17, 2011, but at that time, those symptoms did not involve her right knee. Employee's right knee arthritis, which Dr. Zamzow opined was secondary to her left knee work injury, was not diagnosed until October 20, 2015. On November 27, 2015, 38 days later, Employee filed her instant claim along with a medical summary including Dr. Schaab's October 20, 2015 report, effectively noticing Employer of her right knee injury. *Tinker*. Under the statute, Employee's notice was eight days late. *Kolkman*.

The injury reporting statute provides two exceptions for a late report. The first applies when the employer has chargeable knowledge of the injury and has not been prejudiced by the late report. AS 23.30.100(d)(1). The second is a general excuse requiring "some satisfactory reason" why notice could not be given. AS 23.30.100(d)(2). Employee contends Employer did not suffer any prejudice as a result of her late right knee injury reporting, and this panel agrees. Here, there is no evidence an eight-day delay in providing notice would have had any significant impact on Employer's ability to investigate the injury, secure a diagnosis or provide treatment. *Defermo*. At the time of her right knee diagnosis, Employee was already under Dr. Zamzow's care, and had been for three and one-half years previous. Moreover, Dr. Zamzow's December 21, 2015 conference with Employer's attorney demonstrates Employer was able to undertake a prompt investigation. However, a lack of prejudice is but one element of the excuse under § 100(d)(1).

It must also be shown that Employer knew of the injury. Employee points to no evidence demonstrating Employer was aware of a right knee injury prior to November 27, 2015, and none is apparent from the record. Neither did she offer any satisfactory reason why notice could not be given under § 100(d)(2). For these reasons, Employee's late reporting of her right knee injury will not be excused and right knee benefits are statutorily barred. AS 23.30.100(a).

3) Is Employee's left knee medical treatment compensable?

Employee contends she sustained a cumulative injury to her left knee by repetitive climbing in and out of trucks and walking, kneeling and standing on concrete floors for up to 12 hours per day during her employment with Employer. She contends her work for Employer is the substantial cause of her need for left knee medical treatment, and since she has a "few" outstanding medical bills, she seeks an award of medical and related transportation costs for her left knee. Employer did not make any discernable arguments that Employee's left knee injury was not compensable, either in its hearing brief or at hearing. Instead, it primarily relies on its left knee notice defense, which was decided in Employee's favor above.

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the benefits she seeks. AS 23.30.120(a). She attaches the presumption with Dr. Schaab's December 10, 2009 report, initially connecting her need for left knee medical treatment to her work for Employer. *Cheeks*. Employer is unable to offer substantial evidence in rebuttal. Both of its own medical evaluators, Drs. Kerr and Schroeder, opined Employee's work was the substantial cause of her need for left knee medical treatment. Dr. Kerr thought Employee had suffered a "wear and tear" type work injury, while Dr. Schroeder thought Employee's work permanently worsened pre-existing arthritis. Employee's treating physicians have also uniformly attributed her need for left knee medical treatment to work. Dr. Schaab opinion is set forth above. Dr. Schwarting related Employee's medical treatment to a work injury, as did Dr. Cole-Anthony, and Dr. Zamzow thought Employee's left knee work injury was "well documented." Finally, the SIME physician, Dr. Curran, opines work was the substantial cause of Employee's need for left knee medical treatment since it accelerated her pre-existing arthritis. As Employer is unable to rebut the presumption, Employee's left knee medical treatment is compensable. AS 23.30.010(a).

4) Is Employee's right knee medical treatment compensable?

Although right knee benefits were found to be statutorily barred above, an alternative analysis will be undertaken. If Employee's right-knee injury report were timely, and if she still enjoyed the presumption of compensability, notwithstanding the limitation set forth at AS 23.30.120(b), her claim would be analyzed as follows: Employee's treating physician, Dr. Zamzow, and the SIME physician, Dr. Curran, both attribute Employee's need for right knee medical treatment to her compensating for her left knee injury. On the other hand, Dr. Schroeder thinks Employee's antalgic gait would have only caused transient symptoms and not permanent pathological changes requiring medical care. Instead, Dr. Schroeder's opinion is Employee probably had osteoarthritis of the right knee in 2009, even though it may have been asymptomatic at the time, and the arthritis simply progressed irrespective of her gait. Genetics is the greatest causative factor for arthritis, according to Dr. Schroeder. The presumption of compensability applies to this causation dispute. *Meek.*

Employee attaches the presumption with her June 17, 2011 description, "Hurt left knee . . . at work on the Slope, putting a lot of pressure on Right side of body with walking, bending, etc. . . ." *Cheeks*. Employer rebuts the presumption with Dr. Schroeder's hearing testimony where he attributed Employee's need for right knee medical treatment to the natural progression of arthritis rather than her work for Employer. *Miller*. Employee must now prove, by a preponderance of the evidence, that her work for Employer is the substantial cause of her disability or need for right knee medical treatment. *Koons.*

As a preliminary matter, Dr. Zamzow's lengthy notation in his December 9, 2016 report demonstrates a degree of anti-employer animus seldom, if ever, seen in medical reports. *Rogers & Babler*. It, along with his gratuitous February 12, 2016 comment, set forth personal, rather than medical, opinions, and the passion with which Dr. Zamzow expresses his personal opinions calls into question the objectivity of his medical opinions. Moreover, Dr. Zamzow's personal opinions further suggest he may have ulterior motives incompatible with the fair adjudication of

Employee's claim. His right-knee causation opinion, therefore, will be afforded little, if any, weight. AS 23.30.122.

Meanwhile, Drs. Curran and Schroeder both base their medical opinions on their practice experience, but Dr. Schroeder's opinion is also based on his knowledge of medical literature, which does not document problems arising in an opposite leg because of favoring the involved leg. Dr. Schroeder also cites the delayed development of Employee's right knee arthritic symptoms as a basis for his opinion and the facts support his opinion in this regard. Employee's right-knee arthritis diagnosis was six-and-one-half years removed from her work for Employer and Employee was nearly 64 years old at the time of that diagnosis. *Rogers & Babler*. These facts indicate the natural progression of pre-existing arthritis is a more plausible explanation for Employee's need for right knee medical treatment than her left knee cumulative work injury. *Saxton*. Based on these differences between Dr. Curran's and Dr. Schroeder's opinions, more weight will be afforded Dr. Schroeder's. Thus, when identifying all the potential causes of Employee's need for right knee medical treatment, including the natural progression of arthritis, and Employee compensating for her left knee work injury, the greater weight of Dr. Schroeder's opinion supports the former as the substantial cause. Consequently, Employee's right knee medical treatment is not compensable. *Id.*; AS 23.30.010(a).

5) Is Employee entitled to TTD?

On September 16, 2015, Employer's medical evaluator, Dr. Schroeder, opined Employee was medically stable and Employer subsequently controverted benefits from that date forward. As a result, Employee seeks TTD from September 17, 2015 and continuing. For Employee to be entitled to TTD, she must have been both disabled and not medically stable. AS 23.30.185.

The difficulty with Dr. Schroeder's September 16, 2015 medical stability opinion is, little more than a month later, Employee's physician, Dr. Zamzow, recommended lysis of adhesions surgery, the very same procedure Dr. Schroeder himself had recommended back on February 10, 2015. These facts demonstrate Employee was not medical stable on September 16, 2015, as Dr. Schroeder had opined. Dr. Zamzow continued to recommend lysis of adhesions surgery until that surgery was ultimately performed on August 8, 2016, after Employer agreed to pay for it.

During this time, Employee was unable to work, according to Dr. Zamzow, and was not medically stable while awaiting surgery. AS 23.30.395(28). These same facts also undercut Dr. Curran's SIME opinion that Employee was capable of working as a general clerk between December 2015 and August 8, 2016.

Dr. Curran also opined Employee would have had periods of temporary total disability following her numerous surgeries, and the length of those periods would depend on the surgeries' magnitude and the results obtained. By September 9, 2016, Dr. Zamzow thought Employee was doing "reasonably well" following surgery. According to Dr. Schroeder's hearing testimony, Employee would have had a four to six week period of disability following surgery, so by September 16, 2016, Employee would have been medically stable and could have returned to work as a clerk. Meanwhile, Dr. Curran set forth a much longer period of disability at his deposition, where he opined Employee was capable of returning to work as a clerk five months after her August 8, 2016 surgery. Since Dr. Schroeder's September 16, 2016 medical stability date is contemporaneous with Dr. Zamzow's December 9, 2016 positive assessment of Employee's recovery, it will be relied upon here. *Saxton*. Therefore, Employee is entitled to TTD from September 17, 2015 until September 16, 2016, less the eight weeks' Employer previously paid pursuant to the parties' June 16, 2016 agreement. AS 23.30.185.

6) Is Employee entitled to PPI?

When the SIME physician, Dr. Curran, evaluated Employee following her last surgery, he rated her whole person permanent impairment at 12 percent. Employer's medical evaluator, Dr. Schroeder, also agrees with this rating. Therefore, since Employer has previously paid Employee a total of eight percent PPI, Employee is entitled to an additional four percent PPI. AS 23.30.190(a).

7) Is Employer entitled to offsets based on Employee's receipt of Social Security retirement and State of Alaska pension benefits?

Employer seeks to offset Employee's TTD based on her receipt of Social Security retirement benefits and it enjoys a statutory entitlement to do so. AS 23.30.225(a). However, it also seeks an offset based on Employee's receipt of State of Alaska pension benefits pursuant to AS

23.30.224(c), which affords an offset to "*the* employer" who contributed to the pension plan. Although Employee does not object to either offset, since Employer was not the employer that contributed to Employee's pension plan, neither is it entitled to the offset. AS 23.30.224(c).

8) Is Employee entitled to attorney fees and costs?

Employee seeks an award of attorney's fees and costs. Here, Employer resisted paying compensation by controverting and litigating benefits. Employee retained counsel, who has successfully litigated the compensability of Employee's claim and made valuable medical and indemnity benefits available to her. Thus, Employee is entitled to reasonable attorney fees and costs under AS 23.30.145(b).

In making attorney's fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on the employee's behalf, and the benefits resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings, and fully but reasonably compensate attorneys, commensurate with their experience, for services performed on issues for which the employee prevails. *Bignell.*

Employer did not object to Employee's claimed fees and costs. Mr. Lambert is an experienced litigator and has represented injured employees in workers' compensation cases for years. Employer controverted benefits and continued to deny them throughout two years' of litigation, which necessitated a hearing on the merits of Employee's case. Litigation in this case has involved complex factual issues and included an SIME. Additionally, given the conflicting medical opinions and other disputed facts, the outcome of litigation was far from certain. For these reasons, Employee will be awarded attorney fees and costs in the amount of $38,022.18.

CONCLUSIONS OF LAW

1) Left knee benefits are not barred for untimely injury reporting.
2) Right knee benefits are barred for untimely injury reporting.
3) Employee's left knee medical treatment is compensable.
4) Employee's right knee medical treatment is not compensable.

5) Employee is entitled to TTD from September 17, 2015 until September 16, 2016.
6) Employee is entitled to an additional four percent PPI.
7) Employer is entitled to a TTD offset based on Employee's receipt of Social Security retirement benefits, but is not entitled to an offset based on Employee's receipt of State of Alaska pension benefits.
8) Employee is entitled to attorney fees and costs in the amount of $38,022.18.

ORDERS

1) Employee's November 25, 2015 claim is granted in part and denied in part.
2) Employer shall pay any remaining left knee medical and transportation costs.
3) Employer shall pay Employee TTD from September 17, 2015 until September 16, 2016, less the eight weeks it previously paid.
4) Employer shall pay Employee an additional four percent PPI.
5) Employer may offset Employee's TTD based on her receipt of Social Security retirement benefits, but it shall not offset Employee's TTD based on her receipt of State of Alaska pension benefits.
6) Employer shall pay Employee attorney fees and costs in the amount of $38,022.18.

Dated in Fairbanks, Alaska on February 27, 2018

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
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 SHARON K. DOTY, employee / claimant; v. CH2M HILL COMPANIES, LTD., employer; CH2M HILL COMPANIES, LTD., insurer / defendants; Case No. 200918284; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on February 27, 2018.

/s/
Ronald C. Heselton, Office Assistant II