ALASKA WORKERS' COMPENSATION BOARD

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

MATTHEW LUBOV, Employee, Claimant,	FINAL DECISION AND ORDER
v.	AWCB Case No. 201613050
MCDOUGALL LODGE, LLC, Employer,	AWCB Decision No. 18-0028
ALASKA DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF HEALTH CARE SERVICES, and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, Defendants.	Filed with AWCB Anchorage, Alaska on March 21, 2018

Matthew Lubov's and Alaska Department of Health and Social Services, Division of Health Services' petition for review of the Board Designee's joinder of Alaska Department of Health and Social Services, Division of Health Services (Medicaid) and Mr. Lubov's November 28, 2016 claim were heard on January 24, 2018 in Anchorage, Alaska. This hearing date was selected on October 10, 2017. Attorney Andrew Wilson appeared and represented Mr. Lubov (Employee), who appeared and testified. Attorney Elliott Dennis appeared and represented McDougall Lodge, LLC (Employer). McKenna Wentworth appeared and represented the Worker's Compensation Benefits Guaranty Fund (Fund). Assistant Attorney General Judy Kuipers appeared and represented Medicaid. Witnesses included Anthony Bove and Ron Jewett. The record closed at the hearing's conclusion on January 24, 2018.

ISSUES

Medicaid, Employee, and the Fund all contend the Board Designee abused his discretion in joining Medicaid. Employer contends the designee did not abuse his discretion, but Medicaid could be dismissed if it agreed to be bound by the Board's decision in this case.

1. Did the Board Designee abuse his discretion in joining Medicaid?

Employee contends his work for Employer was the substantial cause of his disability and need for medical treatment. Employer and the Fund contend the cause of Employee's disability and need for medical treatment was the natural progression of a preexisting condition, not his employment with Employer. Medicaid took no position on this issue.

2. Was Employee's work for Employer the substantial cause of his disability and need for medical treatment?

Employee contends that because his work for Employer was the substantial cause of his disability and need for medical treatment he is entitled to time-loss benefits, medical costs, penalty, interest, and attorney fees and costs. Employer and the Fund contend Employee is not entitled to benefits because his work for Employer was not the substantial cause of his disability or need for medical treatment. Medicaid took no position on this issue.

3. If Employee's work for Employer was the substantial cause of his disability or need for medical treatment, to what benefits is he entitled?

Employee contends his attorney provided valuable services and he should be awarded actual attorney fees. Employer objected to Employee's affidavit because it was not notarized, and both Employer and the Fund objected because the affidavit did not include an itemization of the time expended or the work performed. Medicaid took no position on this issue.

4. Is Employee entitled to an award of attorney fees and costs?

FINDINGS OF FACT

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

1. For several years, Employee worked as a substitute teacher during the school year, then worked as a fishing guide for Employer, followed by work as a fishing guide for another lodge in the late summer before returning to work as a substitute teacher. (Employee).

2. Employer operates McDougall Lodge, a fishing lodge on the Yentna River. Access to the lodge is by float plane from Anchorage or a several hour trip by boat. (Employee).
3. Float planes land in the upstream direction and are tied off at the lodge's dock. Because the planes must take off in the downstream direction, they are rotated or "flipped" at the dock. Flipping a plane is a two–person job. One person unties the nose of the plane, and pushes it away from the dock into the current where it is carried downstream. The person at the tail holds on, and, as the plane approaches the downstream direction, shoves the tail away from the dock. It is a strenuous operation. (Jewett, Employee).
4. In 2015, while working for the other lodge, Employee experienced low back pain after chopping wood. He did not seek medical treatment until the season ended and he returned to Juneau. (Employee).
5. On September 28, 2015, Employee was seen by Jillian Peterson, D.C. He reported back pain that started about two weeks earlier. Employee described the pain as "cramp-like," but it was not bad enough that he needed to take any pain medication. (Dr. Peterson, Chart Note, September 28, 2015).
6. Employee was seen again by Dr. Peterson on October 1, 2015. (Dr. Peterson, Chart Note, October 1, 2015).
7. Between December 4, 2015, and December 29, 2015, Employee treated at City Center Chiropractic Clinic. (City Center Chiropractic Clinic, Chart Notes).
8. On January 19, 2016 Employee went to John Bursell, M.D, at the Juneau Bone & Joint Center. He reported low back pain that had begun in September, with pain radiating to his right foot, and right leg weakness. The pain had subsided until about a month before, when he experienced a flare up after exercising at a gym. Dr. Bursell noted that Employees pain was likely from a disc injury, and prescribed oral steroids. (Dr. Bursell, Chart Note, January 19, 2016).
9. On May 13, 2016, Employee returned to Dr. Bursell. He was doing well, but requested a repeat dose of oral steroids because he was leaving for the summer to work at a remote lodge and was worried about a recurrence of symptoms. (Dr. Bursell, Chart Note, May 13, 2016).
10. On May 17 or 18, 2016, Employee returned to McDougall lodge for the season, which would end about September 1, 2016. Because of its remote location, Employee lived at

the lodge with his dog. Employee's back continued to bother him. Generally he treated it by stretching and immersion in the cold river, and occasionally used the oral steroids Dr. Bursell had prescribed. (Employee).

11. On July 13, 2016, Employee felt some tightness in his low back after flipping the plane, but no immediate pain. He awoke about 2:30 the next morning in excruciating pain. When he stood up, his right foot collapsed. He slowly made his way to the lodge dining room looking for help; there was no one there, and he wrote on a white board that his back was out. He took the oral steroids and immersed himself in the cold river without relief. The next day, he borrowed a tens unit from another employee, but it was also ineffective. He spent the next day, July 14, 2016, at the lodge figuring out what to do. He spoke to Mr. Jewett, and on July 15, 2016 he took the plane back to Anchorage. (Employee).
12. Employer was uninsured for workers' compensation liability at the time of Employee's injury. (Jewett Deposition, January 13, 2017).
13. On July 15, 2016, Employee was seen by PA-C Raymond Farrell. Employee reported he had back pain for a year and wondered whether his work as a fishing guide was causing his discomfort. PA Farrell noted an x-ray showed narrowing at the L4-5 and L5-S1 levels. He discussed with Employee the possibility of epidural steroid injections, but explained an MRI would be needed before that could be done. (PA Farrell, Chart Note, July 15, 2016).
14. The July 15, 2016 radiology report identifies a loss of disc space height at L4-5, but does not mention any abnormality at the L5-S1 level. (Radiologic Medical Services, Radiology Report, July 15, 2016).
15. Later on July 15, 2016, Employee went to the emergency room at Providence Medical Center, where he was seen by Vincent Imbriani, M.D. Employee explained he wished to return to the lodge, and then go to Juneau for follow-up care with his primary physician. Dr. Imbriani found no signs of a herniated disc, but prescribed steroids and recommended Employee get an MRI. (Providence Alaska Medical Center, ED Notes, July 15, 2016).
16. On July 21, 2016, Employee returned to Dr. Bursell. He reported that while working at a fishing lodge he had a recurrence of right radicular pain, and treated with oral steroids. An MRI had been recommended when he was in Anchorage, but he chose to return home

to Juneau for further care. Dr. Bursell ordered an MRI. (Dr. Bursell, Chart Note, July 21, 2016).

17. On August 8, 2016, the MRI ordered by Dr. Bursell was done. It showed small disc herniation at L4-5 and a right posterolateral extrusion and an epidural hematoma at L5-S1 that was causing a severe compression of the S1 nerve root. (Juneau Bone & Joint Center, MRI Report, August 8, 2016).
18. Dr. Bursell performed epidural steroid injections on August 11, 2016 and August 25, 2016. (Southeast Alaska Surgery Center, Operative Reports, August 11, 2016 and August 25, 2016).
19. On September 6, 2016, Employee filed a claim for TTD from July 13, 2016 through August 21, 2016, TPD after August 21, 2018, and medical costs. (Claim, September 6, 2016).
20. On September 22, 2016, Dr. Bursell wrote a "to whom it may concern" letter explaining that the August 8, 2016 MRI showed a right L5-S1 disc extrusion with a hematoma, which was the cause of his back pain and right leg symptoms. He explained that while he had previously treated Employee for similar symptoms, the presence of the hematoma indicated a recent injury. Dr. Bursell concluded Employee's earlier symptoms were the result of a lumbar disc injury, the injury in July likely resulted in the lumbar disc extrusion and hematoma. (Dr. Bursell, Letter, September 22, 2016).
21. On September 26, 2016, Dr. Bursell completed an off-work slip stating Employee had been unable to work from July 14, 2016 through the present, but released him to light duty on that date. (Dr. Bursell, Off-Work Slip, September 26, 2016).
22. On October 27, 2016, Dr. Bursell performed a third epidural steroid injection. (Southeast Alaska Surgery Center, Operative Report, 10/27/2016).
23. Employee did not work at the other lodge in 2016, but did return to work as a substitute teacher, which was light-duty work, on August 23, 2016. (Employee).
24. On November 28, 2016, Employee filed an amended claim, seeking TTD, TPD, medical and transportation costs, penalty, interest, and attorney fees. (Amended Claim, November 28, 2016).
25. On January 23, 2017, Medicaid sent Employee's attorney notice of a Medicaid lien. The letter notes Medicaid had paid some of Employee's medical costs related to the work

injury, and Employee was required to repay those benefits if he recovered from a third party. At the time, Medicaid had paid $5,241.72. The letter concluded by stating, "The State considers itself a party with an interest in the recovery at issue and in any payments made in settlement." (Medicaid, Notice of Medicaid Lien, January 23, 2017).

26. On March 8, 2017, Employer filed an answer to Employee's November 28, 2016 claim, denying all requested benefits. (Answer, March 8, 2017).
27. On April 6, 2017 Employee was seen by PA-C Darcie Sorenson (at the request of the Fund. She noted that Employee had significantly improved after the July 13, 2016 injury, and was neurologically stable. She recommended continued conservative care. Anchorage Neurosurgical Associates, Chart Note, April 7, 2016).
28. At the April 24, 2017 prehearing conference, the Board Designee questioned why Medicaid should not be joined as a party given its Notice of Lien. The Board Designee asked that the parties address the issue at the next prehearing conference. (Prehearing Conference Summary, April 24, 2017).
29. At the May 16, 2017 prehearing conference, Employer stated a joinder notice should be sent to Medicaid because it had an independent right to file a claim with the Board. Employee agreed Medicaid could file its own claim with the Board, but joinder of Medicaid would unnecessarily delay resolution of Employee's claim. The Fund did not necessarily oppose joinder, but joinder was unnecessary because it worked with Medicaid anyway. Based on the statement in Medicaid's Notice of Lien that it considered itself a party in interest, the Board Designee concluded Medicaid was an entity that may have a right to relief arising out of the injury and issued a Notice to Join to Medicaid. The notice stated Medicaid would be joined as a party if no one objected within 20 days. If any party objected, joinder would be considered at the next prehearing conference. (Prehearing Conference Summary, May 16, 2017).
30. On June 5, 2017, Employee objected to the joinder of Medicaid. (Employee, Objection to Joinder, June 5, 2017).
31. On June 6, 2017, Medicaid objected to being joined as a party. Medicaid explained while it was entitled to repayment if Employee recovered benefits from a third party, it could not force Employee to pursue recovery, and it could not pursue the benefits on its own. (Medicaid, Objection to Joinder, June 6, 2017).

32. At the June 9, 2017 prehearing conference, the Board Designee considered the objections but decided Medicaid should be joined as a party. The Designee noted Medicaid would not be bound by a Board decision if it was not joined, potentially resulting in a separate claim by Medicaid, creating the risk of inconsistent decisions. (Prehearing Conference Summary, June 9, 2017).
33. An MRI on August 10, 2017 showed the extrusion at L5-S1 was much smaller than in the previous MRI. The hematoma had been resorbed. Although Employee has "near complete resolution" of the extrusion, Dr. Bursell also mentioned potential surgery, so it is unclear whether he considers Employee to be medically stable. (Dr. Bursell, Chart Note, August 18, 2017; Observation).
34. On August 15, 2017, Medicaid sent Employee's attorney a letter clarifying its lien was for $5,320.59. Attached to the letter was a spreadsheet showing providers had billed a total of $19,828.88 for services and prescriptions from July 15, 2016 through May 26, 2017. Medicaid paid $5,320.59 of that amount. (Medicaid, Letter, August 15, 2017).
35. Anthony Bove was the chef at McDougall Lodge during the summer of 2016. He had provided Employee bags of frozen vegetables to use as ice packs on his back. He had seen employee immersing himself in the river, but had seen others doing the same thing. Mr. Bove noted Employee appeared to be in more discomfort after the July 13, 2016 incident. (Bove).
36. Ron Jewett was the manager of McDougall lodge. He knew Employee from his prior work at the lodge, and in 2106, he was aware Employee had low back pain. After the injury, he arranged for Employee to travel to Anchorage for medical care, but expected he would return to work. Employer would have accommodated Employee's job restrictions if he had returned. (Jewett).
37. Employer filed the statement of Colleen Dye, an employee at the lodge. Ms. Dye stated that on July 13, 2016, Employee had been "wrestling" with his dog on the ramp to the dock, when Employee slipped and partially fell. (Colleen Dye, Statement, January 21, 2017).
38. Dr. Bursell was deposed on January 18, 2018. When Employee returned to him in July 2016, he was in more pain than before and was limping, which he had not done before. Dr. Bursell explained the hematoma shown on the August 8, 2018 MRI indicates

relatively recent trauma. Although the time cannot be determined with precision, hematomas are resorbed within three months to one year, and the hematoma indicates the injury was within days or a few weeks. Based on the description of "flipping" the plane, Dr. Bursell stated that action could definitely cause a disc to herniate and result in a hematoma, and it was highly unlikely Employee had the hematoma before that time. Dr. Bursell explained that it was likely Employee had initially injured his L5-S1 disc in the 2015 incident resulting in an annular tear or bulge, and his symptoms decreased with conservative care. Then, the 2016 incident caused the disc to basically "pop," extruding a fragment and causing the hematoma. He recommended Employee not return to work as a fishing guide. (Dr. Bursell, Deposition, January 18, 2018).

39. In 2016, Employee was paid a daily rate of $104.16 per day, and was paid through July 15, 2016. (Employer 2013-2016 Payroll Summary).
40. There is no record of Employee's earnings for 2104, and the record of his 2015 earnings is incomplete. The Fund filed Employee's 2015 W-2s from Employer and the school district, but Employee's earnings from the other lodge are not included. (Fund, Notice of Intent to Rely, September 12, 2017).
41. Employee filed statements from Dr. Bursell showing a current balance of $6,462.00 due as of August 25, 2017 and a balance due to his chiropractor of $5,753.00. (Employee, Notice of Intent to Rely, August 25, 2017).
42. At the January 24, 2018 hearing, Medicaid explained its January 23, 2017 Notice of Lien was a form letter used in any case where the recipient might recover benefits. The statement that it considered itself to be a party in interest was not meant to mean Medicaid considered itself a party to the workers' compensation proceeding. Medicaid cannot force a recipient to pursue recovery from another source, and does not pursue recovery on its own. All parties agreed to the amount of Medicaid's lien, and agreed Medicaid was not a necessary party to the resolution of Employee's claim. (Medicaid, Hearing Representations).
43. On January 19, 2018, Employee filed an Affidavit of Fees and Costs. In the affidavit, Employee's attorney represents his statements are made under oath, but the notarization is blank. Additionally, the affidavit states attorney fees, paralegal fees, and costs total $39,060.00 to date. Of that amount, costs were $1,236.58. The affidavit does not

provide any further details or itemization of either fees or costs. (Affidavit of Fees and Costs, January 19, 2018).

PRINCIPLES OF LAW

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.

Under the "remote site" doctrine, everyday activities that are normally considered non-work- related are deemed a part of a remote site employee's job for workers' compensation purposes because the requirement of living at the remote site limits the employee's activity choices. Workers' compensation liability is to be imposed whenever employment is established as a causal factor in the disability, and a causal factor is a legal cause if it is a substantial factor in bringing about the harm at issue. *Doyon Universal Services v. Allen*, 999 P.2d 764 (Alaska 2000).

The principle behind the remote site doctrine is that because work at a remote site requires workers, as a condition of employment, to eat, sleep and socialize on work premises, activities normally divorced from work become part of working conditions to which the worker is subjected. *Norcon, Inc. v. Siebert*, 880 P.2d 1051 (Alaska 1994). Under the Workers' Compensation Act, coverage is established by the "work connection" and the test of work connection is that, if accidental injury or death is connected with any of incidents of one's employment, then injury or death both would arise out of and be in the

course of employment. *M-K Rivers v. Schleifman*, 599 P.2d 132 (Alaska 1979). When an employee is required by conditions of his employment to reside on employer's premises where he is constantly on call, compensation may be awarded even though an accident occurred during hours when the employee is off duty, and most activities necessary to personal comfort of the employee and most recreational activities which occur upon premises are found to be within coverage of workers' compensation statutes. *Anderson v. Employers Liability Assurance Corp.*, 498 P.2d 288 (Alaska 1972).

In *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413 (Alaska 2004), Ugale worked at the employer's remote processing facility in Excursion Inlet, 35 miles west of Juneau. The decedent's family contended Ugale quit his job out of fear for his life because of threats from a co-worker. No available flights out were scheduled that day, and by the time a flight arrived, Ugale was missing. His body was found later that day in the boat harbor with his wallet and wedding ring missing. While the medical examiner determined Ugale had drowned, the manner of death was unknown. Ugale's family argued Excursion Inlet is a remote location, he was waiting on an employer-provided flight out, which was the only way out and his death arose out of his employment and therefore should be presumed compensable. The Alaska Supreme Court held in a *per curiam* decision Ugale's death was compensable, because the condition of confinement at the remote location was an incident of employment. Ugale could not leave the location until the next available flight, and regardless of the fact the death likely occurred off the employer's premises and was not directly connected to employment, there was insufficient evidence to rebut the presumption of compensability.

In cases where an employee has a previous injury or preexisting condition, AS 23.30.010(a) requires the Board to evaluate all relevant causes of the disability or need for medical treatment; only if employment is "the substantial cause" is the Employee entitled to benefits. *Alaska Interstate Construction, LLC v. Morrison*, AWCAC Decision No. 243, (January 25, 2018).

> **AS 23.30.045. Employer's liability for compensation.**
> (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180--23.30.215.
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> (b) Compensation is payable irrespective of fault as a cause for the injury. . . .
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> **AS 23.30.082. Workers' compensation benefits guaranty fund.**
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> (c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter.
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> (d) If the fund pays benefits to an employee under this section, the fund shall be subrogated to all of the rights of the employee to the amount paid, and the employee shall assign all right, title, and interest in that portion of the employee's workers' compensation claim and any recovery under AS 23.30.015 to the fund. Money collected by the division on the claim or recovery shall be deposited in the fund.

The Fund is not liable for payment of compensation or benefits until three conditions are satisfied: 1) the employer fails to pay compensation or benefits, 2) a claim for payment by the Fund is filed, and 3) the employer has no defenses that the Fund can assert. *Workers' Comp. Benefits Guaranty Fund v. West*, AWCAC Decision No. 145 at 19 (Jan. 20, 2011). Although the Fund may be liable for interest and attorney fees, it is not liable for penalties assessed against the employer. *Id*. at 15-16.

> **AS 23.30.095. Medical treatments, services, and examinations. . . .**
> (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require.
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> **AS 23.30.120. Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
> (1) the claim comes within the provisions of this chapter . . . .

Under AS 23.30.120(a), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce some minimal relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Kramer* at 473-74, quoting *Smallwood* at 316. To rebut the presumption, an employer must present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment or (2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381. At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

AS 23.30.145. Attorney fees.
(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees, the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after they become 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.

8 AAC 45.180. Costs and attorney's fees
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(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the

> hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.
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> (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, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section. (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

Attorney's fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging,* 787 P.2d 103 (Alaska 1990).

In *Israelson v. Alaska Marine Trucking,* AWCAC Decision No. 226 (May 27, 2016), the Commission addressed the Board's award of statutory minimum fees where the attorney had filed an affidavit of fees and costs one day late. The Commission did not find there was excusable neglect, and, because the attorney had filed nothing within the time allowed, did not find substantial compliance. However, the Commission held the late filed affidavit was also an implicit petition for an extension of time which the Board should have granted.

In *Patterson v Matanuska-Susitna Borough School District*, AWCB Decision No. 18-0005 (January 12, 2018). The employee's attorney filed his fee affidavit two days late, on a Friday. The following Monday was a holiday, and the hearing was the next Tuesday. As a result, the

employer had only one working day to review the affidavit. The Board found the employer was prejudiced by the late filing and good cause did not exist to extend the filing deadline.

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. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating

(1) that the right of the employee to compensation is controverted;
(2) the name of the employee;
(3) the name of the employer;
(4) the date of the alleged injury or death; and
(5) the type of compensation and all grounds upon which the right to compensation is controverted.

(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.

. . . .

(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 . . .
>
> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment

Under the AMA Guides, an impairment rating may not be done until the person is medically stable. In *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC Decision No. 153 (June 14, 2011), the Commission stated that when an employee is dissatisfied with a PPI rating the employer has obtained the Employee is required to obtain his or her own rating.

> **AS 23.30.200. Temporary partial disability.**
> (a) In case of temporary partial disability resulting in decrease of earning capacity, the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

> **AS 23.30.220. Determination of spendable weekly wage.**
> (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
> . . . .
>
> (2) if at the time of injury the employee's earnings are calculated by the month, the employee's gross weekly earnings are the monthly earnings multiplied by 12 and divided by 52;
> . . . .
>
> (6) if at the time of injury the employee's earnings are calculated by the week under (1) of this subsection or by the month under (2) of this subsection and the employment is exclusively seasonal or temporary, then the gross weekly earnings are 1/50 of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury;

> **8 AAC 45.060. Parties**
> . . . .

(c) Any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party.

(d) Any person against whom a right to relief may exist should be joined as a party.
. . . .

(f) Proceedings to join a person are begun by
. . . .

(2) the board or designee serving a notice to join on all parties and the person to be joined.
. . . .
(j) In determining whether to join a person, the board or designee will consider
(1) whether a timely objection was filed in accordance with (h) of this section;

(2) whether the person's presence is necessary for complete relief and due process among the parties;

(3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations;

(4) whether a claim was filed against the person by the employee; and

(5) if a claim was not filed as described in (4) of this subsection, whether a defense to a claim, if filed by the employee, would bar the claim.

8 AAC 45.065. Prehearings
(a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on
. . . .
7) petitions to join a person;

In *Barrington v. Alaska Communications Systems Group, Inc.*, 198 P.3d 1122 (Alaska 2008), the Board and the Appeals Commission had denied a medical provider's claim after the employee had settled all medical benefits for an amount that was inadequate to pay all of the providers. The medical provider had not been joined as a party and was not given notice of the settlement agreement before it was finalized. The Supreme Court reversed, holding the provider should have been joined or given notice of the settlement. In its analysis, the Court stated the Board's joinder regulation did not require the joinder of every creditor who may have provided services or treatment of the worker's compensation injury. The Court stated:

> In the abstract, board regulations appear adequate to protect the due process interests of healthcare providers in board proceedings. But the manner in which the board applied the regulations here subjected Dr. Barrington to the risk that he would be unable to obtain payment for his services. *Id*. at 1133.

In *Sherrod v. Municipality of Anchorage*, 803 P.2d 874 (Alaska 1990), an injured worker's health insurance had paid some medical costs related to the work injury and was asserting a claim for reimbursement because its policy did not cover work-related injuries. The Board denied the injured worker's petition to join the insurer. The Supreme Court reversed and instructed the Board to join the insurer and determine whether the services in question were compensable.

> **AS 23.30.395. Definitions.**
> In this chapter,
> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .

ANALYSIS

1. Did the Board Designee abuse his discretion in joining Medicaid?

Under 8 AAC 45.065(a), the Board Designee at a prehearing must exercise discretion in determining whether a party should be joined. Under 8 AAC 45.060(c), any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party. Medicaid is somewhat unique in that it does not pursue recovery from third parties on its own and cannot force a recipient to seek recovery from a third party. It can only recover benefits if the recipient is actually awarded benefits. In contrast, medical providers and health insurers who pay under a reservation of rights may file claims and may, at least in some circumstances, pursue recovery from a claimant if the claim is denied. Nevertheless, Medicaid may have a right to relief in respect to a work injury. The Board Designee's decision to join Medicaid was not an abuse of discretion.

While the joinder of Medicaid was not an abuse of discretion, the question becomes whether it is still a necessary party. At the January 24, 2018 hearing, Employee, Employer, and the Fund did not dispute the amount of Medicaid's lien, and they all agreed Medicaid's presence was not necessary to resolve any of the issues in the case. Given the lack of dispute as to the lien and the parties' agreement, Medicaid will be dismissed as a party.

2. Was Employee's work for Employer the substantial cause of his disability and need for medical treatment?

Employee contends he was injured while flipping the plane. Employer contends either that Employee did not suffer an injury, and his need for treatment was the progression of his 2015 injury, or that he was injured while engaged in personal pursuits at the lodge.

The presumption of compensability AS 23.30.120 applies to the question of whether the work for Employer was the substantial cause of Employee's disability or need for medical treatment. However, the scope of "work for the employer" is a question of law. McDougall Lodge is a remote site; by necessity, Employee was required to eat, sleep, and socialize on work premises. Whether Employee was engaged in recreational activities on the premises or while flipping the plane would make no difference. Under the remote site doctrine, both activities would fall within the scope of his work for Employer.

The question remains whether some activity at the lodge, whether wrestling with his dog or flipping the plane, was the substantial cause of Employee's disability or need for medical treatment. The first step of the presumption analysis requires Employee to produce some evidence establishing a "preliminary link" between the claimed injury and the employment. Witness credibility is not considered at this step, nor is Employee's evidence weighed against other evidence. Employee raised the presumption through his own testimony as to when the injury occurred and Dr. Bursell's deposition testimony that the hematoma indicated the injury had occurred within days or a few weeks of the MRI, and that while Employee may have had an existing tear or bulge in his disc, the 2016 incident caused the disc to basically "pop," extruding a fragment and causing the hematoma.

Because Employee successfully raised the presumption, Employer was required to rebut it. To do so, Employer had to present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment or (2) that work could not have caused the disability or need for medical treatment. Employer produced evidence Employee had injured his back in 2015. That alone, however, is not substantial evidence that something other than work caused the disability or need for medical treatment. Employer offered no medical evidence that the 2015 injury was the substantial cause of Employee's need for treatment after the 2016 injury. Employer failed to rebut the presumption, and Employee prevails on the raised but unrebutted presumption.

Alternatively, even if Employer had raised the presumption, Employee has proved by a preponderance of the evidence that the July 13, 2016 injury was the substantial cause of his disability or need for medical treatment. Dr. Bursell's opinion that flipping the plane could definitely cause a disc to herniate and result in a hematoma, and it was highly unlikely Employee had the hematoma before that time, is uncontroverted. The preponderance of the evidence is that Employee's work for Employer was the substantial cause of his disability and need for medical treatment.

3. If Employee's work for Employer was the substantial cause of his disability or need for medical treatment, to what benefits is he entitled?

Disability Benefits:

Under AS 23.30.185, TTD is payable during the period of time an injured worker is totally unable to earn the wages he or she was earning at the time of the injury because of the work injury. The only medical evidence regarding Employee's ability or inability to work is Dr. Bursell's September 26, 2016 off-work slip. He stated Employee had been unable to work from July 14, 2016 through that date, but released him to light duty work. However, despite Dr. Bursell's work slip, Employee actually returned to work as a substitute teacher a month earlier, on August 23, 2016, thus demonstrating his ability to work. Additionally, Employer paid Employee through July 15, 2016. Consequently, Employee was temporarily totally disabled from July 16, 2016 through August 22, 2016.

Although Employee asked that this decision set out the amount of benefits due, that cannot be done based on the current record. Employee's compensation rate is based on his spendable weekly wage. Because Employee was paid by the day, his spendable weekly wage is calculated under AS 23.30.220(a)(4), based on the higher of his gross earnings in either of the two preceding calendar years. The Fund's hearing brief suggests the parties may have that information, but it has not been filed with the Board, and his compensation rate cannot be determined.

Employee may also be entitled to TPD for dates after August 22, 2016, however, under AS 23.30.200, TPD is calculated by comparing an employee's actual weekly earnings with his spendable weekly wage. Because Employee's spendable weekly wage cannot be determined based on the current record, whether, or for what periods, Employee may be entitled to TPD also cannot be determined.

Permanent Partial Impairment:

An impairment evaluation cannot be done until an individual is medically stable. Dr. Bursell's August 18, 2017 chart note is the last medical record in the file. At that time, Dr. Bursell noted Employee had "near complete resolution," but he also mentioned the possibility of surgery. As there is not yet evidence Employee is medically stable, the issue of permanent partial impairment is premature.

Medical Costs:

Because the work injury was the substantial cause of Employee's need for medical treatment, AS 23.30.095 obligates Employer to pay the reasonable and necessary medical costs due to Employee's injury. However, employers are only obligated to pay the amounts set out in the fee schedule established under AS 23.30.097. The fee schedule often provides for payment at less than the billed amount. A determination of the amount allowed under the fee schedule requires billing and coding information for each service, and because that information is not in the Board's file, the actual amount of medical costs due cannot be determined.

Penalty:

Under AS 23.30.155(e), if any installment of compensation payable without an award is not paid within seven days after it becomes due, a 25 percent penalty is imposed. This decision held Employee was entitled to TTD from July 16, 2016 through August 22, 2016. He is entitled to a penalty on that TTD. If Employee establishes he was entitled to TPD after August 22, 2016, he is entitled to a penalty on that as well. Under AS 23.30.097(d), payment for medical bills was due within 30 days of the date Employer had both the bill and the medical report. Any medical providers that were not paid within that time are entitled to a penalty. Although Employer may be is obligated to pay any penalties awarded, under *West*, that obligation does not extend to the Fund.

Interest:

AS 23.30.155(f) requires an employer to pay interest on compensation that is not paid when due. Employee is entitled to interest on TTD benefits for the period from July 16, 2016 through August 22, 2016, as well as on TPD to which he may be due after August 22, 2016. Medical providers are entitle to interest on any payment not timely made as required by AS 23.30.097.

4. Is Employee entitled to an award of attorney fees and costs?

Employee seeks actual attorney fees rather than statutory fees under AS 23.30.145(a). However, 8 AAC 45.180(b) requires an attorney requesting fees in excess of statutory fees to file an affidavit "itemizing the hours expended as well as the extent and character of the work performed." Employer and the Fund object to actual attorney fees on the grounds Employee's fee affidavit was not notarized and it does not itemize the hours expended or identify the extent and character of the work.

The requirement that the affidavit be notarized might well be waived under 8 AAC 45.195. In this case, there is no evidence the lack of notarization prejudiced either Employer or the Fund, and Employee's attorney vouched for the accuracy of the affidavit at hearing. More problematic is the failure to itemize the hours expended or identify the extent and character of the work performed. This failure deprived both Employer and the Fund of the ability to review the claimed fees. In *Israelson*, the Commission held a late filed affidavit was also an implicit

petition for an extension of time, however neither the Board nor the Commission found the employer in that case was prejudiced by the late filing. In contrast, in *Patterson* the Board found a late-filed fee affidavit did prejudice the employer, and declined to extend the filing deadline. Although the issue in this case is the lack of itemization rather than late filing, the prejudice is similar to *Patterson*, Employer and the Fund were denied the opportunity to review Employee's attorney's services and charges. Attorney fees in excess of the statutory minimum in AS 23.30.145(a) will not be awarded.

CONCLUSIONS OF LAW

1. The Board Designee did not abuse his discretion in joining Medicaid, but Medicaid was dismissed as a party.

2. Employee's work for Employer was the substantial cause of his disability and need for medical treatment.

3. Employee is entitled to disability benefits, medical costs, penalty, and interest, although the amount of those benefits cannot be determined on the present record.

4. Employee is entitled to an award of statutory attorney fees and costs under As 23.30.145(a).

ORDER

1. Medicaid is dismissed as a party to this case.
2. Employee's work for Employer is the substantial cause of his disability and need for medical care.
3. Employee is entitled to TTD benefits from June 15, 2016 through August 22, 2016.
4. Employee, Employee's medical providers, and Medicaid are entitled to medical costs in accordance with the 2016 Alaska Workers' Compensation Medical Fee Schedule.
5. Employee or Employee's medical providers are entitled to penalty and interest on amounts not paid when due.
5. Employer shall pay Employee statutory fees on all benefits paid to Employee.

6. Jurisdiction is retained as to Employee's entitlement to further benefits or the amount of any benefits.

7. Should Employer fail to pay the above amounts within 30 days of the date ordered in this Decision, the Fund shall pay the TTD, medical costs, interest, and attorney fees and costs as ordered herein.

Dated in Anchorage, Alaska on March 21, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Bradley Evans, 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 MATTHEW LUBOV, employee / claimant; v. McDOUGALL LODGE, LLC, employer; ALASKA DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF HEALTH CARE SERVICES, and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, defendants; Case No. 201613050; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 21, 2018.

/s/
Nenita Farmer, Office Assistant