ALASKA WORKERS' COMPENSATION BOARD

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

VICTORIA C. LEGERAT, Employee, Claimant, v. ALASKA RAILROAD CORPORATION, Self-Insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 201617009 AWCB Decision No. 19-0005 Filed with AWCB Fairbanks, Alaska on January 14, 2019

Victoria Legerat's February 22, 2017 claim was heard in Fairbanks, Alaska on November 8, 2018, a date selected on September 5, 2018. Employee's July 20, 2018 affidavit of readiness for hearing gave rise to this hearing. Attorney John Franich appeared and represented Ms. Legerat (Employee), who also appeared and testified on her own behalf. Attorney Michael Budzinski appeared and represented Alaska Railroad Corporation (Employer). The record closed on November 23, 2018, upon expiration of Employee's time to reply to Employer's objections to Employee's attorney fees and costs.

ISSUES

Employer contends adequate medical facilities were available to Employee in Fairbanks, Alaska, so it is not liable for her medical transportation expenses to Wasilla, Alaska.

Employee contends her treating physician referred her to a physician in Wasilla, Alaska because her recommended surgery required a physician with highly specialized surgical skills, and since

a physician possessing the requisite surgical skills was not available in Fairbanks, Alaska, she is entitled to an award of transportation costs for her treatment in Wasilla, Alaska.

1) Is Employee entitled to medical transportation costs to Wasilla, Alaska?

Employer contends Employee made an unauthorized change of physician, so it is not liable for her medical transportation costs for treatment in Vail, Colorado. It also contends, since Employee could have received her surgical procedures from a physician in Wasilla, Alaska, neither is it liable for Employee's medical transportation costs to Vail, Colorado on this basis as well.

Employee contends the physician to whom her treating physician referred her does not perform the type of surgery she required, so the next physician she saw was a substitution of physician rather than a change of physician, and she is entitled to a medical transportations costs award. She also contends Employer's arguments based on the availability of surgical procedures in Wasilla, Alaska are based on "hindsight," and she contends her medical decision-making was "reasonable" such that medical transportation costs should be awarded.

2) Is Employee entitled to medical transportation costs to Vail, Colorado?

Employer contends some of Employee's medical transportation costs to Vail, Colorado were excessive and, if medical transportation costs are ordered, it requests those costs be paid according to the Workers' Compensation Division's most recent bulletin on medical travel.

Employee does not dispute Employer's contentions on excessive medical travel costs, but rather contends she an Employer can "work it out" if medical travel costs are ordered.

3) Were Employee's medical transportation costs to Vail, Colorado excessive?

Employee contends she was aided by her attorney's efforts and seeks attorney fees and costs based on any award of medical transportation benefits, as well as Employer's withdrawal of previous controversions.

Employer contends it recognizes some fees are due Employee's attorney for his work in securing the withdrawal of previous controversions, but it contends fees for time spent on issues for this hearing should not be awarded since Employee is not entitled to the medical transportation costs she seeks.

4) 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) On November 10, 2016, Employee was injured when she slipped and fell on ice, landing on her right elbow, while working for Employer as a Terminal Support Clerk. (First Report of Injury, November 23, 2016; WC Worksheet, November 16, 2016).

2) On November 16, 2016, Employee sought treatment at U.S. HealthWorks, complaining of pain in her right elbow that was shooting up into her right shoulder, and down into her right hand. (WC Worksheet, November 16, 2016). Right shoulder, right elbow, and right humerus x-rays showed no abnormalities and a right elbow computed tomography (CT) study was performed, ruling out an occult fracture. (X-ray reports, November 16, 2016; Raymond letter, undated). Since the supervising physician thought there might be a neuropathic component to Employee's symptoms, he referred her for nerve conduction studies and to McKinley Orthopedics for further evaluation. (Work Status Report, November 16, 2018; Raymond letter, November 21, 2016; Raymond letter, undated).

3) On November 17, 2016, Employee began treating with Jennifer Malcolm, D.O., at McKinley Orthopedics. Dr. Malcolm initially thought Employee had suffered a nerve injury, from which Employee might take a "significant amount of time to recover," but as Employee failed to improve, Dr. Malcolm later suspected a contusion with bursal inflammation and thought "further workup may be required." (Malcolm chart notes, November 17, 2016; November 29, 2016). Dr. Malcolm later began to think Employee's symptoms might be caused by unspecified labrum pathology. (Malcolm chart notes, December 6, 2016).

4) On November 21, 2016, Employee began physical therapy. (Daily Therapy Treatment Note, November 21, 2016).

5) On December 12, 2016, nerve conduction studies did not show evidence of nerve entrapment, neuropathy, plexopathy or mononeuropathy. (Foelsch report, December 12, 2016).

6) On December 14, 2016, a right shoulder magnetic resonance imaging (MRI) study showed mild supraspinatus and infraspinatus tendinopathy without rotator cuff tear. (MRI report, December 14, 2016).

7) On December 16, 2016, Employee reported her elbow, shoulder, and neck pain was worse following the nerve conduction studies, and her radicular pain, numbness and tingling would shoot up and down her arm from her elbow. Dr. Malcolm administered a subacromial injection, prescribed anti-inflammatory cream and discussed the "longevity of nerve recovery" with Employee. (Malcolm chart notes, December 16, 2016).

8) On December 22, 2016. Dr. Malcolm spent most of Employee's appointment time on "counselling and patient education" while discussing Employee symptoms. Dr. Malcolm now thought physical therapy was" the most important part of [Employee's] treatment process." (Malcolm chart notes, December 22, 2016).

9) On January 5, 2017, Employee continued to make slow progress with topical medication and physical therapy, and another six to eight weeks' physical therapy was ordered. (Employee Work Status Report, January 5, 2017).

10) On January 17, 2017, Employee's shoulder was "popping out all the time" and she was experiencing a "super sharp pain." She thought, "Everything seems to be going backwards," since her last visit with Dr. Malcolm, who did not have an explanation for the popping or pain in Employee's shoulder. Dr. Malcolm though continuing physical therapy was the best course of action. (Malcolm chart notes, January 17, 2017).

11) On January 24, 2017, Amit Sahasrabudhe, M.D., evaluated Employee on Employer's behalf. Dr. Sahasrabudge diagnosed a right elbow contusion resulting the work injury, which he thought had resolved by the date of his evaluation. He was unable to identifying any cause of Employee's right shoulder complaints and did not think additional medical treatment was necessary for either the elbow or the shoulder. (Sahasrabudhe report, January 24, 2017).

12) Employee made a decision to seek medical treatment from Richard Cobden, M.D., because Dr. Malcolm did not know "what was wrong" with her shoulder. (Legerat).

13) On February 2, 2017, Employer controverted all benefits. (Controversion Notice, February 2, 2017).

14) On February 21, 2017, Employee began treating with Dr. Cobden, and although her elbow pain had resolved, she was now experiencing shoulder pain and weakness, which would cause her to occasionally drop light objects. An additional MRI was ordered, which showed a partially torn infraspinatus tendon with tendinopathy, mild supraspinatus tendinopathy without tearing and a small labral tear. A steroid injection was administered. (Pomeroy chart notes, February 21, 2017; MRI report, February 28, 2017; Pomeroy chart notes, March 7, 2017).

15) On February 22, 2017, John Franich entered his appearance on Employee's behalf. (Employee's Entry of Appearance, February 21, 2017).

16) On March 31, 2017, Employee was experiencing pain shoulder "nearly round the clock." She was referred to Charles Haggerty, M.D., in Wasilla, Alaska, for evaluation of a possible sternoclavicular dislocation. (Pomeroy chart notes, March 31, 2017; Consultation Request, March 31, 2017). According to Employee, she was referred to Dr. Haggerty because Dr. Cobden did not think anyone in Fairbanks could treat a sternoclavicular dislocation since the surgery requires a cardiac surgeon be on standby due to the anatomical proximity of the joint to the heart. (Legerat).

17) Wasilla, Alaska is over 300 miles away from Fairbanks, Alaska, and the trip takes about five and one-half hours by car in fair weather conditions. (Experience).

18) This panel does not have any experience in the medical requirements for treatment of sternoclavicular dislocations. (*Id.*).

19) Employee attempted to schedule an appointment with Dr. Haggerty, but was unable to do so because Dr. Haggerty does not treat sternoclavicular dislocations. She then began looking for surgeons who did treat sternoclavicular dislocations. (Legerat).

20) On March 15, 2017, Employer controverted medical benefits. (Controversion Notice, March 15, 2017).

21) On April 4, 2017, Employee completed an Initial Evaluation Form for Dr. Millett, who practices in Vail, Colorado. Employee indicated she was referred to Dr. Millett by the "internet." (Initial Evaluation Form, April 4, 2017). Employee confirmed at hearing she found Dr. Millett on the internet once she learned Dr. Haggerty does not treat sternoclavicular dislocations. Although Employee initially looked for surgeons in Alaska who treated sternoclavicular dislocations, she found none. Dr. Millett accepted Employee's representation she had a sternoclavicular dislocation. (Legerat).

22) On April 6, 2017, Dr. Millett ordered a CT study of Employee's chest to evaluate the position of Employee's proximal clavicle. (Prescription, April 6, 2017).

23) On April 7, 2017, a chest CT study was performed in Fairbanks, Alaska and Dr. Millett consulted with Employee via telephone. (CT report, April 7, 2017; Millett chart notes, April 7, 2017).

24) On April 12, 2017, Dr. Millett called Employee after reviewing the CT scan of her sternoclavicular joints and invited her to his clinic for further evaluation and possible sternoclavicular joint reconstruction, which could be performed during Employee's same trip to Vail, Colorado. (Millett chart notes, April 12, 2017).

25) On April 18, 2017, Dr. Millett evaluated Employee in Vail, Colorado, and found her clinical examination to be consistent with a mild long thoracic nerve palsy leading to serratus anterior muscle weakness and scapular winging, which in turn led to impingement syndrome and anterior shoulder pain. Dr. Millett recommended a right shoulder arthroscopy with possible labral repair, subacromial decompression, possible rotator cuff repair, probable open biceps tenodesis, and a possible pectoralis minor release with brachial plexus neurolysis. Employee decided to proceed with surgery, which was performed the following day. (Millett chart notes, April 18, 2017; Surgical Report, April 19, 2017). Employee began physical therapy in Colorado and continued it in North Pole, Alaska upon her return. (Initial Evaluation, April 20, 2018; Initial Evaluation, April 27, 2017).

26) On April 20, 2017, Dr. Sahasrabudhe reiterated he had no objective orthopedic explanation for the "multitude" of Employee's right upper extremity complaints. (Sahasrabudhe report, April 18, 2017).

27) On May 2, 2017, Employee resumed treating with Dr. Cobden, who referred Employee back to Dr. Haggerty because she "did not have a good experience in Colorado." (Pomeroy chart notes, May 2, 2017; Cobden chart notes, May 18, 2017). Dr. Cobden later retired. (Legerat).

28) On June 1, 2017, Dr. Haggerty evaluated Employee, who was complaining of intermittent shoulder popping and worsening numbness and tingling in her right upper extremity since her surgery. Dr. Haggerty ordered an additional three to six month's physical therapy. (Haggerty chart notes, June 1, 2017).

29) On June 9, 2017, Dr. Sahasrabudhe reviewed additional medical records, including those involving Dr. Millett's surgery in Colorado, and was unable to explain how, what he believes to

have been a right elbow contusion from the work injury, resulted in Employee's neurogenic complaints. However, Dr. Sahasrabudhe left open the possibility that the work injury could have caused the conditions diagnosed by Dr. Millett, and he further thought Employee's postoperative medical records would indicate to him whether the work injury was the cause of Employee's surgery. (Sahasrabudhe Addendum, June 9, 2017).

30) On February 19, 2018, Employee was doing much better, although she was still experiencing pain with activity. Dr. Haggerty administered a steroid injection and discussed surgical recommendations, which included a right shoulder arthroscopy, with possible posterior labral repair, possible revision biceps tenodesis and possible brachial plexus neurolysis. (Haggerty chart notes, February 19, 2018).

31) When asked if Dr. Haggerty could have performed the same surgical procedures Dr. Millett did in Colorado, Employee answered, "I'm sure he could have, but I was already in Colorado." (Legerat).

32) On April 13, 2018, Dr. Sahasrabudhe could not identify any preexisting shoulder pathology that would have caused Employee to seek medical treatment, and from a temporal perspective, it would not be "unreasonable for one to consider that her right shoulder symptoms started after the industrial accident in question." However, Dr. Sahasrabudhe still could not explain how the mechanism of injury would have caused Employee's need for medical treatment, and he did not think revision surgery should be attempted because of scar tissue development around the brachial plexus. (Sahasrabudhe Addendum, April 13, 2018).

33) On May 3, 2018, Dr. Sahasrabudhe opined revision brachial plexus surgery was "not beyond the realm of medically accepted treatment options," but he continued to recommend against any such attempt because of scar tissue development around the brachial plexus. (Sahasrabudhe Addendum, May 3, 2018).

34) On June 7, 2018, Employer withdrew its February 2, 2017 and March 15, 2017 controversions. (Notice of Withdrawal, June 7, 2018).

35) On September 4, 2018, Employer controverted medical travel costs outside of Fairbanks, Alaska. (Controversion Notice, September 4, 2018).

36) On November 6, 2018, Employee claimed a total of $18,540.50 in attorney fees and costs. This amount included paralegal costs for time spent by Abby Dillard (10.3 hours billed at $200 per hour), Asta Reh (0.10 hours billed at $175 per hour), Heidi Wilson (51.4 hours billed at $210

per hour), and Jennifer Desrosiers (1.8 hours billed at $175 per hour). Attorney John Franich's time amounted to 13.2 hours, which was billed at $400 per hour. Employee's non-paralegal litigation costs were $76.50. (Attorney fee affidavit, November 8, 2018).

37) In lieu of Employee submitting a supplemental affidavit, Employer stipulated to Employee adding an additional two hours' of attorney time for her attorney's appearance at hearing. It also recognized some fees are due Employee's attorney for his work in securing the withdrawal of previous controversions. The parties agreed Employer would have until November 19, 2018 to object to Employee's paralegal costs, and Employee would have until November 23, 2018 to reply to Employer's objections. (Hearing Record).

38) Employee contends she got a referral from Dr. Cobden to Dr. Haggerty for a particular type of surgery, but since Dr. Haggerty does not perform that type of surgery, her treatment with Dr. Millett is a substitution of physician, rather than a change of physician. She further contends she had a specific diagnosis of a sternoclavicular dislocation, and given that diagnosis, Dr. Millett was the closest physician she could find to treat that condition. Although the type of surgery required changed once she was in Vail, Colorado, she was already there, so her decision to proceed with surgery was a "reasonable" one, and medical transportation costs should be reimbursed, according to Employee. In response to Employer's objection to her $450 per night room at the Four Season's Resort, Employee contends, if medical transportation are ordered, the panel need not address each "line item" of her costs, but rather she and Employer will "work it out." (Employee's hearing arguments).

39) Employer contends it is only liable for medical transportation costs to the nearest point where "adequate medical facilities" are available, and it further contends this panel should use its "experience, judgment and observations" to conclude adequate medical facilities were available to Employee in Fairbanks, Alaska. (Employee's Hearing Brief, October 30, 2018). Employer also contends Employee changed her physician from McKinley Orthopedics to Dr. Cobden because she was dissatisfied with her treatment at McKinley Orthopedics, and she then made another unauthorized change of physician when she treated with Dr. Millett in Vail, Colorado. Employee should not be awarded medical transportation costs on each of these bases, according to Employer. Employer acknowledged this is an "odd" case, which involves different diagnosis, and contends there are very few references in the medical record to "dislocations," yet Employee believed she had a dislocation, and upon surgery, she was found not to have a dislocation.

Employee "defined the surgery," according to Employer, based upon her belief in a diagnosis that did not exist. It contends it is "unusual" to have a claimant calling physicians requesting a particular type of surgery and cites Dr. Haggerty's February 19, 2018 chart notes as evidence the surgical procedures Employee ultimately obtained from Dr. Millett in Vail, Colorado could have been obtained from Dr. Haggerty in Wasilla, Alaska. Employer also contends some of Employee's medical transportation costs in Vail, Colorado were excessive, such as a $450 per night room at the Four Seasons Resort. If medical travel costs are ordered, Employer contends they should be paid pursuant to the Workers' Compensation Division's most recent bulletin on medical travel. Employer further contends the designated physician is like a "hub on a wheel," and Employee should have returned to Dr. Cobden after seeking treatment from Dr. Haggerty, then Dr. Cobden could have referred Employee elsewhere. The role of a designated physician is a cost containment feature of the Act, according to Employer, and while Employee can make medical decisions on her own, those decisions can have consequences under the Act. (Employer's hearing arguments).

40) The per diem allowance for travel to Vail, Colorado in April of 2018 is $149. (U.S. General Services Administration's online Meals and Incidental Expenses (M&IE) Rate Table).

41) On November 19, 2018, Employer objected to the hourly rates billed for Employee's paralegals. It contended a 2016 decision and order had determined a reasonable rate for Employee's paralegal, Heidi Wilson, was $175 per hour, so that amount should be used here since there is no compelling justification for a substantial increase in paralegal billing rates. Employer also suggested rates of $165 per hour for Employee's paralegal, Abby Dillard, and $140 per hour for Employee's paralegal, Jennifer Desrosiers. It did not suggest a rate for Employee's paralegal, Asta Reh. (Employer's Objections, November 19, 2018).

42) Employee did not reply to Employer's November 19, 2018 objections to her paralegals hourly rates. (Observations).

43) A survey of paralegal cost awards over the last year show the following hourly rates: $70 per hour, *Vogel v. Alaska Airlines, Inc.*, AWCB Decision No. 18-0122 (November 19, 2018); $150 per hour, O*lson v. Tyee Airlines, Inc.*, AWCB Decision No. 18-0045 (May 15, 2018); $150 per hour, *Doty v. CH2M Hill Companies, Ltd.*, AWCB Decision No. 18-0021 (February 27, 2018); $170 per hour, *Ge Vue v. Walmart Associates, Inc.*, AWCB Decision No. 18-0037 (April 12, 2018); $175 per hour, *Longway-Marotta v. Colaska, Inc.*, AWCB Decision No. 17-0137

(December 8, 2017); $165 and $195 per hour, *McNamee v. Nabors Industries, Inc.*, AWCB Decision No. 18-0004 (January 11, 2018).

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**. (a) . . . [C]ompensation or benefits are payable under this chapter . . . 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. . . .
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> **AS 23.30.030. Required policy provisions.** A policy of a company insuring the payment of compensation under this chapter is considered to contain the provisions set out in this section.
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> > (4) The insurer will promptly pay to the person entitled to them the benefits conferred by this chapter, including . . . transportation charges to the nearest point where adequate medical facilities are available . . . .
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> **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 . . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
> . . . .

> (e) . . . .The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. . . .

Under the Act, both an employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. *Colette v. Arctic Lights Electric, Inc.*, AWCB Decision No. 05-0135 (May 19, 2005). One of the purposes of the "one change of physician" rule is to curb potential abuses, especially doctor shopping. *Bloom v. Tekton, Inc.*, 5 P.3d 235, 237 (Alaska 2000). However, the statute has been consistently interpreted to allow an employee an opportunity to "substitute" a new physician in cases where the current treating physician is either unwilling or unable to continue providing care. *Id.* at 238. These substitutions do not count as changes in attending physicians. *Id.* Allowing an employee to substitute an attending physician under these circumstances is consistent with the well-settled rule under the statute an injured worker is presumed entitled to continuing medical treatment. *Id.* The substitution policy ensures that the employee's right to continuing care by a physician of his choice will not be impeded by circumstances beyond the employee's control. *Id.*

In *Guys with Tools v. Thurston*, AWCAC Decision No. 062 (November 8, 2007), the Alaska Workers' Compensation Appeals Commission (Commission) discussed the role and purpose of a designated attending physician. The attending physician is explicitly charged with responsibility for all "medical and related care," which includes making referrals to a specialist. *Id.* at 10. Requiring the attending physician to make referrals furthers the policy of preventing costly, abusive over-consumption of medical resources through duplication of services when an employee's care is directed by an ever-expanding number of specialists. *Id.* Imposing responsibility to make referrals on the attending physician ensures the attending physician is fully informed of all the medical and related care the employee receives. *Id.* The statute represents a compromise between preventing costly overtreatment and protecting an employee's free choice of physician. *Id.* at 11. At the time *Guys with Tools* was decided, the remedy for an excessive change of physician was the employer is not liable to pay for the care because it was not provided pursuant to the workers' compensation statutes. *Id.*

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

"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 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).

> **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.*

AS 23.30.395. Definitions. In this chapter,

. . . .

(26) "medical and related benefits" includes but is not limited to . . . transportation charges to the nearest point where adequate medical facilities are available;

. . . .

8 AAC 45.082. Medical treatment. . . .

. . . .

(b) Physicians may be changed as follows:

. . . .

(2) Except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury. If an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician.

. . . .

(4) Regardless of an employee's date of injury, the following is not a change of an attending physician:

. . . .

(B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employer thereafter is a substitution of physicians and not a change of attending physicians;

. . . .

(c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

. . . .

(e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by

> receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.

Bulletin No. 18-02 (January 18, 2018) clarifies "reasonable" medical travel costs under the regulation and directs readers to the U.S. General Services Administration's Meals and Incidental Expenses (M&IE) rate tables for travel outside Alaska.

> **8 AAC 45.120. Evidence.**
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.
> . . . .
>
> **8 AAC 45.180. Costs and attorney's fees.**
> . . . .
>
> (f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. . . . The following costs will, in the board's discretion, be awarded to an applicant:
> . . . .
>
> (14) fees for the services of a paralegal or law clerk . . . .

Carmichael v. Lowe's HIW, Inc., AWCB Decision No. 16-0109 (November 9, 2016), previously rejected Employee's attorney attempts to bill $210 per hour for paralegal work performed by Heidi Wilson. In November 2016, *Carmichael* found recent paralegal costs ranged from $125 to $180 per hour. The ceiling rate of $180 per hour had been awarded "to a licensed attorney with ten years' workers' compensation experience, who was performing her own paralegal work." The decision took Ms. Wilson's education and experience into account and found they did not support awarding Employee's paralegal an hourly rate "substantially greater than a licensed

attorney performing paralegal services," and concluded a "reasonable rate for Ms. Wilson would be $175 per hour."

ANALYSIS

1) Is Employee entitled to medical transportation costs to Wasilla, Alaska?

The law requires Employer to provide medical transportation for Employee to the nearest point where adequate medical facilities are available. AS 23.30.030(4); AS 23.30.395(26). Employer contends adequate medical facilities were available to Employee in nearby Fairbanks, Alaska, so it is not liable for her medical transportation expenses to Wasilla, Alaska. Employee contends her treating physician referred her to another physician in Wasilla, Alaska because her recommended surgery required a physician with highly specialized surgical skills, and since a physician possessing the requisite surgical skills was not available in Fairbanks, Alaska, she is entitled to an award of transportation costs for her treatment in Wasilla, Alaska. Whether adequate medical facilities were available to Employee in Fairbanks is a factual dispute to which the presumption of compensability applies. *Sokolowski*.

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the medical transportations benefits she seeks. AS 23.30.120(a). She attaches the presumption with Dr. Cobden's March 31, 2018, sternoclavicular dislocation consultation request, which specifically names Dr. Haggerty as the referred physician. *Cheeks*. Given that Wasilla, Alaska is over 300 miles away from Fairbanks, Alaska, and the trip takes about five and one-half hours by car in fair weather conditions, Dr. Cobden's referral to Dr. Haggerty is prima facie evidence that adequate medical care was not available to Employee in Fairbanks. *Rogers & Babler*. Additionally, Employee's testimony that Dr. Cobden referred her to Dr. Haggerty because Dr. Cobden did not think anyone in Fairbanks could treat a sternoclavicular dislocation supplements Dr. Cobden's written referral to Dr. Haggerty. 8 AAC 45.120(e).

Employer does not offer substantial evidence in rebuttal. Instead, it requests this panel to use its "experience, judgment and observations" to conclude adequate medical facilities were available to Employee in Fairbanks. However, this panel is ill-equipped to do so, primarily because it is not familiar with medical requirements for sternoclavicular dislocation treatment. For example,

Employee testified sternoclavicular joint reconstruction surgery requires a cardiac surgeon be "on standby" because of the proximity of the joint to the heart. Outside of Employee's otherwise credible testimony, this panel has no basis to know whether having a cardiac surgeon on standby is a requirement for sternoclavicular reconstructive surgery, and while the panel does know cardiologists practice in Fairbanks, it is not aware of a cardiac surgeon practicing in Fairbanks. Given Employer introduced no evidence in these regards, the presumption remains unrebutted, Employee will be awarded her medical transportation costs to Wasilla, Alaska. AS 23.30.010(a).

2) Is Employee entitled to medical transportation costs to Vail, Colorado?

Employee seeks medical transportation costs for her treatment with Dr. Millett in Vail, Colorado. Employer raises two defenses to Employee's claim for such costs. Each will be addressed in turn. First, Employer contends Employee made an unauthorized change of physician, so it is not liable for medical transportation costs Employee seeks. Employee readily acknowledged at hearing she made the physician changes Employer contends; however, she contends her second change was an allowable physician substitution based on Dr. Haggerty's refusal to treat. Whether Employee made a permissible physician change is a factual dispute to which the presumption applies. *Sokolowski*.

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the medical transportations benefits she seeks. AS 23.30.120(a). The law allows an opportunity to substitute a new physician in cases where the current treating physician is either unwilling or unable to provide care. *Bloom*; 8 AAC 45.082(b)(4)(B). Considering Employee only need produce some, minimal evidence to attach the presumption, she does so with her testimony she attempted to schedule an appointment with Dr. Haggerty but was unable to do so since he does not treat sternoclavicular dislocations. *Cheeks*. She then sought out Dr. Millett. As in the above analysis, Employer offers no substantial evidence to the contrary. Therefore, its defense on an unauthorized physician change fails, and Employee remains presumed entitled to the benefits she seeks. AS 23.30.010(a).

Employer also contends, since Employee could have received her surgical procedures from Dr. Haggerty in Wasilla, Alaska; neither is it liable for Employee's medical transportation costs to

Vail, Colorado on this basis as well. Employee does not dispute Employer's contention that Dr. Haggerty could have performed the same surgical procedures she received from Dr. Millett, so the dispute presented is legal rather than factual. Instead, Employee contends Employer's arguments based on the availability to surgical procedures in Wasilla, Alaska are based on "hindsight," and she contends her medical decision-making was "reasonable" so medical transportation costs should be awarded.

Indeed, Dr. Haggerty's February 19, 2018, chart notes do show he suggested the same surgical procedures to Employee that she had received in Colorado. However, *prior* to that, the medical record also shows the focus of Employee's medical treatment was a sternoclavicular dislocation. The basis for Dr. Cobden's March 31, 2017, referral to Dr. Haggerty was a possible sternoclavicular dislocation. Additionally, on April 6, 2017, Dr. Millett ordered a CT study to evaluate the position of Employee's proximal clavicle, and even after reviewing that study on April 12, 2017, Dr. Millett was still contemplating possible sternoclavicular reconstruction surgery. It was only upon Dr. Millett's physical examination in Vail, Colorado on April 18, 2017, that the purpose of Employee's surgery changed, and at that point, "the nearest point where adequate medical facilities are available" was Dr. Millett's clinic. AS 23.30.030(4); AS 23.30.395(26). Therefore, Employee will be awarded the medical transportation costs to Vail, Colorado. *Id.*

3) Were Employee's medical transportation costs to Vail, Colorado excessive?

Employer contends some of Employee's medical transportation costs to Vail, Colorado were excessive and, if medical transportation costs are ordered, it requests those costs be paid according to the Workers' Compensation Division's most recent bulletin on medical travel. For example, Employer contends Employee incurred costs of $450 per day while staying at the Four Seasons Resort in Vail. Employee does not dispute Employer's contentions on excessive medical travel costs, but rather contends she and Employer can "work it out" if medical travel costs are ordered.

Compensation for lodging and meal costs during medical travel are limited to a "reasonable" amount. 8 AAC 45.084(e). The Alaska Workers' Compensation Division's Bulletin No. 18-02

(January 18, 2018) clarifies "reasonable" medical travel costs under the regulation and directs readers to the U.S. General Services Administration's Meals and Incidental Expenses (M&IE) rate tables for travel outside Alaska. According to those tables, the per diem allowance for travel to Vail, Colorado in April of 2018 is $149. Therefore, Employee's costs are excessive and reimbursement of those costs will be pursuant to the bulletin as Employer requests. 8 AAC 45.084(e).

4) Is Employee entitled to attorney fees and costs?

Employee seeks $18,540.50 in reasonable attorney fees and costs. Here, Employer resisted paying compensation by controverting and litigating Employee's medical transportation benefits, and Employee's counsel successfully litigated the compensability of Employee's claim and made valuable medical transportation benefits available to her. Thus, Employee may be awarded attorney fees under either AS 23.30.145(a) or (b). *Moore*; *Porteleki*.

In making attorney 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*. Though Employee's attorney is quite experienced, and has represented injured workers for many years, litigation in this case was neither complex, nor protracted. Neither did it involve any novel issues of law. Although the medical transportation costs awarded by this decision are a relatively modest benefit, as Employer acknowledged at hearing, Employee's attorney was also previously successful in obtaining Employer's withdrawal of its earlier controversions, thus making more valuable benefits available to Employee, such as medical and indemnity benefits. Moreover, though he represented Employee for 20 months, Employee attorney billed a relatively modest 13.2 hours. Significantly, Employer does not object to either the hourly rate billed by Employee's attorney, or the time he spent pursuing benefits on Employee's behalf. For these reasons, Employee will be awarded all her claimed attorney fees of $5,200, plus an additional two hours, as stipulated by Employer for her attorney's appearance

at hearing, for a total of $6,000 ($5,200 x (2 hours x $400 per hour) = $6,000. She will also be awarded her $76.50 in non-paralegal litigation costs. *Id*.

However, Employer objects to the hourly rates Employee claims as paralegal costs. Those costs include four paralegals: Abby Dillard, whose time was billed at $200 per hour; Asta Reh, whose time was billed at $175 per hour; Heidi Wilson whose time was billed at $210 per hour; and Jennifer Desrosiers, whose time was billed at $175 per hour. Employer contends *Carmichael* determined a reasonable rate for Heidi Wilson was $175 per hour in 2016, so that rate should be used here since there is no compelling justification for a substantial increase in paralegal billing rates. Employer also suggested rates of $165 per hour for Abby Dillard, and $140 per hour for Jennifer Desrosiers. It did not suggest a rate for Asta Reh.

Litigation costs awards are subject to a reasonableness standard. 8 AAC 45.180(f). In 2016, *Carmichael* rejected a previous attempt by Employee's attorney to bill $210 per hour for paralegal work performed by Heidi Wilson. It found recent paralegal costs at the time ranged from $125 to $180 per hour. The ceiling rate of $180 per hour had been awarded "to a licensed attorney with ten years' workers' compensation experience, who was performing her own paralegal work." The decision took Ms. Wilson's education and experience into account and found they did not support awarding Employee's paralegal an hourly rate "substantially greater than a licensed attorney performing paralegal services," and concluded a "reasonable rate for Ms. Wilson would be $175 per hour."

A survey of more recent paralegal cost awarded over the last year show the following hourly rates: $70 per hour, *Vogel*; $150 per hour, O*lson*; $150 per hour, *Doty*; $170 per hour, *Vue*; $175 per hour, *Longway-Marotta*; and $165 and $195 per hour, *McNamee*. Discounting the obvious outliers of $70 per hour and $195 per hour, the remaining awards show a consistent range of $150 per hour to $175 per hour – nearly identical to hourly rates in 2016. Thus, as Employer contends, a compelling justification for a substantial increase in paralegal billing rates is not apparent, and neither did Employee provide one, since she failed to reply to Employer's objections. Therefore, Heidi Wilson's rate will remain at $175 per hour. 8 AAC 45.180(f).

Similarly, as for the remaining paralegals, Employee provided no basis for why the remaining paralegals should be billed at, and above, the highest hourly rates recently awarded. Employer suggested rates of $165 per hour for Abby Dillard, and $140 per hour for Jennifer Desrosiers. These rates are squarely in the range of those recently awarded, so they will be utilized here. *Id*. Employer did not suggest a rate for Asta Reh's time, but since her time totaled a mere one-tenth hour, her rate will not be disturbed. Therefore, Employee's attorney fee and costs award will also include an additional $1,699.50 for Abby Dillard's time (10.3 hours x $165 per hour); $17.50 for Asta Reh's time (0.10 hour x $175 per hour); $8,995 for Heidi Wilson's time (51.4 hours x $175 per hour) and $252 for Jennifer Desrosiers' time (1.8 hours x $140 per hour).

CONCLUSIONS OF LAW

1) Employee is entitled to medical transportation costs to Wasilla, Alaska.
2) Employee is entitled to medical transportation costs to Vail, Colorado.
3) Employee's medical transportation costs to Vail, Colorado were excessive.
4) Employee is entitled to attorney fees and costs.

ORDERS

1) Employer shall pay Employee's past medical transportation costs to Wasilla, Alaska and Vail Colorado. Payment of such costs shall be subject to Bulletin No. 18-02.
2) Employer shall pay Employee attorney fees and costs as set forth above.

Dated in Fairbanks, Alaska on January 14, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Lake Williams, 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 VICTORIA LEGERAT, employee / claimant v. ALASKA RAILROAD CORPORATION, self-insured employer / defendant; Case No. 201617009; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on January 14, 2019.

/s/
Ronald C. Heselton, Office Assistant II