ALASKA WORKERS' COMPENSATION BOARD

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

YVONNE MEILI, Employee, Claimant, v. STERLING ASSISTED LIVING, INC., Employer, and LIBERTY NORTHWEST INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 200902068 AWCB Decision No. 19-0092 Filed with AWCB Anchorage, Alaska on September 9, 2019

Yvonne Meili's (Employee) January 10, 2019 claim was heard on July 17, 2019, in Anchorage, Alaska, a date selected on April 9, 2019. A January 31, 2019 hearing request gave rise to this hearing. Attorney Keenan Powell appeared and represented Employee who appeared and testified. Attorney Rebecca Holdiman-Miller appeared and represented Sterling Assisted Living, Inc. and its insurer (Employer). Oral orders at hearing denied Employer's requests for a continuance, mediation and a second independent medical evaluation (SIME). However, the record remained open for 30 days so Employer at its option could depose David Paulson, M.D. There were no other witnesses. This decision examines the oral orders and decides Employee's claim on its merits. The record closed on August 16, 2019, when Employer advised that Dr. Paulson was unavailable for deposition within the allotted 30 days, withdrew its "Smallwood" objection to his reports and asked for the record to close and a written decision to issue.

ISSUES

Employer contended it needed a continuance to discover medical records. It contended joinder of Employee's last employer may be needed, and it "Smallwooded" Dr. Paulson, has not been given an opportunity to cross-examine him and he is unavailable to testify at hearing.

Employee contended Dr. Paulson is not a material witness because she does not rely on his reports. She contended Employer had no employer medical evaluation (EME) and has not joined her last employer. She contended any outstanding medical records were not relevant and a hearing set in May 2019 was already continued. An oral order denied Employer's petition for a continuance. Employer sought immediate reconsideration and another oral order denied this request as well.

1) **Were the orders denying Employer's request for a hearing continuance correct?**

As an alternative after oral orders denied the continuance request, Employer sought an order requiring Employee to participate in mediation. It gave no specific grounds for this request.

Employee objected and opposed an order requiring mediation. She contended a party cannot be forced to mediate. An oral order denied Employer's request for mediation.

2) **Was the order denying Employer's request for mediation correct?**

Employer contended opinions from Drs. Paulson and Shawn Johnston, M.D., who are Employee's attending physicians, versus opinions from David Bauer, M.D., an EME from a different employer, Heart & Hands, Inc. (H&H) create a medical dispute. It contended this is a complex case and an additional opinion from an SIME physician would assist the fact-finders in deciding this matter.

Employee contended there is no medical dispute between Employer's EME and Employee's attending physicians because Employer conducted no EME. Accordingly, Employee opposed Employer's SIME petition. An oral order denied Employer's SIME petition, citing primarily the absence of a medical dispute between an Employer EME and Employee's attending physicians.

3) **Was the order denying Employer's SIME request correct?**

Employer contends Employee knew for years she had ongoing pain but waited until nearly 10 years before filing a claim. It contends Employee's claim is barred because it was filed untimely.

Employee contends she filed a claim for benefits less than one month after receiving Dr. Bauer's EME report linking her current need for treatment to her 2009 injury. She seeks future benefits and a prospective determination on whether her injury is still compensable. Accordingly, she contends her claim is not barred.

4) Is Employee's claim barred as untimely?

Employee contends her February 8, 2009 injury with Employer is the substantial cause of her current need for medical treatment. She seeks an order finding continued compensability.

Employer contends Employee's May 2017 injury with H&H is the substantial cause of her current need for medical treatment. It contends the "*Morrison*" rule applies and Employee cannot prove her claim against Employer by a preponderance of the evidence.

5) Is Employee's February 8, 2009 injury with Employer the substantial cause of her current need for medical treatment?

Employee contends she needs additional medical treatment for her work injury with Employer, up to and including surgery. She seeks an order requiring Employer to pay for reasonable and necessary medical care.

Employer contends Employee's current need for medical treatment, if any, did not arise out of and in the course of her employment with it. Therefore, Employer denies liability for any medical treatment for Employee's low back.

6) Is Employee entitled to additional medical care?

Employee contends she is entitled to transportation costs for medical care. However, she concedes she has not filed a transportation log for any past travel costs.

Employer contends Employee is entitled to no additional medical benefits. Therefore, it contends she is not entitled to any transportation expenses.

7) Is Employee entitled to past and future medical transportation costs?

Employee contends she may have future periods of temporary total disability (TTD). She requests an order requiring Employer to pay TTD benefits if and when she becomes disabled in the future.

Employer contends Employee's future disability, if any, did not arise out of and in the course of her employment with it. Employer denies liability for any TTD benefits related to her back.

8) Is Employee entitled to additional TTD benefits?

Employee contends she will incur additional permanent partial impairment (PPI) benefits if she has surgery and gets a higher rating. She reserves her right to claim PPI benefits from Employer.

Employer contends it already paid Employee the PPI rating Dr. Johnston assigned her years ago. It denies liability for any additional PPI benefits for her work injury.

9) Is Employee entitled to additional PPI benefits?

Employee contends she incurred attorney fees and costs perfecting her claim. In the event she prevails, she seeks fully compensatory, reasonable attorney fees and costs.

Employer contends Employee should not prevail on any issue. It contends her claim for attorney fees and costs should be denied.

10) Is Employee entitled to an attorney fee and cost award?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) In 2007, Employee had a lumbar spine injury or symptoms for which she received an injection. Her symptoms resolved. (Employee).

2) On February 8, 2009, Employee, while working for Employer as a personal care assistant (PCA), injured her back while transferring a patient from a wheelchair to a recliner. (Report of Occupational Injury or Illness, February 16, 2009; Employee).

3) Employer accepted the injury and paid medical, temporary total and partial disability benefits and permanent partial impairment benefits. Employer's last benefit payment to her was a PPI benefit paid on August 9, 2010. (Compensation Report, September 7, 2010).

4) On February 16, 2009, Dr. Johnston charted Employee's previous history of lower back pain from a 2007 injury, and a magnetic resonance imaging (MRI) after the 2007 event, which revealed an L5-S1 disc bulge. Employee had an epidural for that injury, which had been helpful. She reported her current symptoms were not as bad as they were in 2007, but were still present with 99 percent back pain and the rest in her leg. There is a physician's report for Dr. Johnston's visit, which contains the February 8, 2009 injury date, but little other information. (Johnston report; Physician's Report, February 16, 2009).

5) On February 19, 2009, Harold Cable, M.D., read an MRI to show degenerative changes at multiple levels but greatest at L2 and L5. "Patient hurt her back at work." There was a central herniation at L5-S1 with an extruded fragment. The fragment put direct pressure on the left S1 nerve root, which was displaced. There was no stenosis. Employee's clinical history included hurting her back at work, with low back pain but no mention of lower extremity pain, "though she is said to have radicular features." (MRI report, February 19, 2009).

6) On March 27, 2009, Dr. Johnston responded to a letter from Employer's insurance adjuster. He diagnosed a lumbar disc extrusion and radiculopathy. Her subjective complaints were supported by objective findings. The February 8, 2009 work injury was the substantial cause of her low back pain and need for treatment. The work injury with Employer aggravated, accelerated or combined with a preexisting condition to produce the necessity for her medical treatment and disability. He had no alternative cause for her condition. Dr. Johnston recommended prescription medicine and possible surgery. Employee was not yet medically stable but Dr. Johnston expected a PPI rating for the February 8, 2009 injury. (Letter, March 25, 2009).

7) On April 17, 2009, Dr. Johnston said Employee had a lumbar disc extrusion, and conservative care had not helped. He referred her to a surgeon. (Johnston note, April 17, 2009).

8) On April 21, 2009, Kim Wright, M.D., examined Employee for her back injury. She admitted to back pain in 2007, which resolved with an epidural steroid injection. Employee said she had no

further trouble with her back until the February 8, 2009 work injury with Employer. She had one episode of pain radiating to the right lower extremity but mostly back pain. He recommended additional diagnostic imaging. (Wright report, April 21, 2009).

9) On April 23, 2009, radiologist David Moeller, M.D., read a computed tomography (CT) scan to show degenerative disc disease at L5-S1 with minimal degenerative changes in facets at L2-3, L3-4 and L4-5. There was no spinal or foraminal stenosis. (CT report, April 23, 2009).

10) On April 23, 2009, Chakri Inampudi, M.D., read Employee's bone scan to show abnormal increase in uptake in the S1 vertebral body. (Bone Scan, April 23, 2009).

11) On April 28, 2009, Dr. Wright reviewed the CT report and based on this additional evidence recommended a single level fusion at L5-S1. (Wright report, April 28, 2009).

12) On December 9, 2009, Dr. Cable read another MRI to show disc degeneration at multiple levels with a small, central herniation extending into the left lateral recess at L5-S1, contacting the S1 nerve root but not compressing it. He found a lateral protrusion into the foramina at L2-3 but without nerve root compression. There was no severe stenosis in the spinal canal or neural foramina. (MRI report, December 9, 2009).

13) On February 1, 2010, Dr. Wright performed an L5-S1 fusion. He reported Employee was "apparently injured at work" while assisting a resident in an assisted living facility. Since then she had been troubled with significant pain. (Operative Report, February 1, 2010).

14) On February 23, 2010, Dr. Wright evaluated Employee following her L5-S1 interbody fusion. She had occasional left leg pain. (Wright report, February 23, 2010).

15) On April 21, 2010, Employee told Patrick Dalessio, PA-C, she had low back and occasional right hip and leg pain. (Dalessio report, April 21, 2010).

16) On June 7, 2010, Bryan Winn, M.D., read x-rays to show a stable lumbar fusion at L5-S1, no abnormal translation and mild, multilevel disc degeneration. (X-ray report, June 7, 2010).

17) On July 26, 2010, Dr. Johnston noted Employee "injured her lower back when she was transferring the patient" in February 2009, and had lumbar radiculopathy, which had improved and was now intermittent. He provided a 10 percent PPI rating for Employee's February 8, 2009 work injury. (Johnston report, July 26, 2010).

18) On August 9, 2010, Employer paid Employee $17,700 for her PPI rating. Since then, Employer has paid no benefits to her under AS 23.30.041, AS 23.30.180, AS 23.30.185, AS 23.30.190, AS 23.30.200, or AS 23.30.215. (ICERS database, Payments tab).

19) She did not file a claim for benefits within two years of August 9, 2010. (Agency file).

20) On March 22, 2011, Employee told Dr. Wright she had returned to work but experiencing sudden, severe back pain sufficient to drop her to her knees. Dr. Wright suspected possible hardware impingement and recommended a CT. (Wright report, March 22, 2011).

21) On March 23, 2011, Jon McCormick, M.D., read a CT to show a bilateral L5-S1 laminectomy with a healing, posterior fusion that was not fully mature. He found severe central stenosis at L4-5 and mild to moderate central stenosis at L2-3. (CT report, March 23, 2011).

22) On April 5, 2011, Dr. Wright reviewed the CT and opined the fusion was probably solid but screw heads from the hardware were possibly causing her pain. He recommended hardware removal. (Wright report, April 5, 2011).

23) On August 8, 2011, Dr. Wright removed the hardware from Employee's lumbar spine. (Operative Report, August 8, 2011).

24) The record does not reveal if Employee had disability following her second surgery and there is no evidence Employer paid her any indemnity benefits thereafter. (Agency file).

25) On May 18, 2011, Dr. Wright's office filed a claim for an unpaid medical bill and a related penalty for late payment. (Workers' Compensation Claim, May 16, 2011).

26) On July 6, 2011, Employer answered Dr. Wright's claim and admitted to a penalty on one medical bill. Employer did not raise any other defenses to the claim. (Answer to Employee's [sic] Application for Benefits, July 6, 2011).

27) On October 31, 2011, Dr. Johnston reiterated his 10 percent PPI rating following the fusion hardware removal. His diagnosis was lumbar disc herniation with residual radiculopathy, post hardware removal. (Johnston report, October 31, 2011).

28) On August 13, 2012, Employee reported back pain while babysitting her grandchild. She did no heavy lifting and had no explanation for her sudden pain. Sean Meadows, M.D., noted visible back spasms in the sacroiliac region and between L4 and L5. Employee stated she had "daily pain." (Meadows report, August 13, 2012).

29) On September 30, 2015, Employee reported three weeks' pain in the lower back. (Urgent Care report, September 30, 2015).

30) On October 8, 2015, Employee said she had low back, hip and groin pain. (Urgent Care report, October 8, 2015).

31) In May 2017, Employee was driving clients in a van while working for H&H. In her view, whether she had an injury that day has "been up for debate." She heard a noise behind her in the van, "turned really quickly" and felt a "terrible pinching" in her back. She did not "think much of it" and the pain happened again perhaps twice that week just with her moving about. Employee said she was "significantly hurting." (Deposition of Yvonne Meili, March 21, 2019, at 42-45).

32) Employee did not seek immediate medical attention for the May 2017 van incident or the subsequent pain episodes that week. (Medical records, and inferences drawn therefrom).

33) On May 27, 2017, Employee saw her family provider to obtain inhalers for her trip to Miami in six days because she had a productive cough for a month. She mentioned her past back surgeries and noted she had "pretty bad pain if sitting for lengthy periods of time." Employee requested pain medication since she would be sitting and having many stops while flying to Miami. The record does not mention the May 2017 van incident. (Urgent Care report, May 27, 2017).

34) On June 16, 2017, Employee saw her family provider and complained of non-stop lower back pain while vacationing in Florida. The history states she "hurt back went to urgent care there" and was told to follow up at home. She presented in a wheelchair. Pain radiated down her right leg. The clinic referred her to an orthopedic surgeon. (Urgent Care report, June 16, 2017).

35) Employee did not have an injury while vacationing in Florida. (Employee; judgment and inferences drawn from the above).

36) On June 16, 2017, Urgent Care restricted Employee from any work activities until June 21, 2017. (Urgent Care Work Status report, June 16, 2017).

37) On June 19, 2017, Urgent Care released Employee to return to modified work on June 21, 2017. She could not lift over 10 pounds or push wheelchairs for two weeks and could not climb stairs. (Urgent Care Work Status report, June 19, 2017).

38) Employee returned first to light-duty and finally to full-duty work for H&H. (Deposition of Yvonne Meili, March 21, 2019, at 42-49).

39) By September 3, 2017, Employee's lumbar pain was "very bad" and she acceded to undergo surgery to address her symptoms if necessary. (Urgent Care report, September 3, 2017).

40) On September 30, 2017, Employee saw her family practitioner to renew asthma prescriptions. She had right knee and lumbar pain. Employee said she had been diagnosed with scoliosis. Her provider diagnosed chronic back pain. (Urgent Care report, September 30, 2017).

41) On December 2, 2017, a provider diagnosed Employee with chronic low back pain, sciatica and radiculopathy with continued pain into her right leg. (Urgent Care report, December 2, 2017).

42) On January 15, 2018, Dr. McCormick read a new MRI to show severe central spinal stenosis at L4-5, which reflected "marked change since the prior study," which he did not identify by date. He also found moderate to severe central spinal stenosis at L3-4, which was a significant change from the prior study. The MRI showed a prior laminotomy at L5-S1 with a small recurrent protrusion to the left and early contact with the left S-1 nerve. He found disc material projecting bilaterally at several levels but no high-grade impact on nerves. (MRI report, January 15, 2018).

43) On February 7, 2018, Dr. Johnston diagnosed L3-4 and L4-5 severe lumbar stenosis and severe lumbar facet degenerative changes from L3 through L5-S1. He took over Employee's care from PA-C Norcross at Urgent Care. (Johnston report, August 30, 2018).

44) On August 24, 2018, Employee reported a lower back strain while pushing a client in a wheelchair at the state fair while working for H&H. Her symptoms increased and she ultimately resigned a few days later because her lower back pain became disabling. (First Report of Injury, August 30, 2018; (Deposition of Yvonne Meili, March 21, 2019, at 47-49).

45) On August 30, 2018, Employee still had low back and leg pain. Dr. Johnston recommended an epidural injection. (Johnston report, August 30, 2018).

46) On September 10, 2018, Employee reported ongoing low back pain. The majority of the pain came on after prolonged walking and standing at the fair where she was pushing a heavy client. "She has had substantial increase in pain in both the back and legs." Dr. Johnston recommended surgical intervention. In his opinion, Employee's underlying lumbar stenosis was "aggravated at least on a temporary level by her spending a substantial time walking and standing while at the state fair." (Johnston report, September 10, 2018).

47) On October 29, 2018, Dr. Johnston performed a bilateral L4-5 epidural injection to address Employee's severe L4-5 lumbar stenosis. (Johnston report, October 29, 2018).

48) On November 5, 2018, Employee reported right side and calf tingling but no relief from the epidural injection at the L4-5 level. (Johnston report, November 5, 2018).

49) On November 29, 2018, David Bauer, M.D., examined Employee for H&H as an EME for the August 24, 2018 state fair injury. He reviewed Employee's records going back to August 2007. Employee wanted Dr. Bauer to understand this was "a new injury," because her previous surgery was at L5-S1 and Dr. Johnston said her new issues were at L3-4 and L4-5. She asserted an injury

from repetitive motion with heavy patients and wheelchairs at the state fair. Dr. Bauer found no objective evidence of harm or change to the spinal structure and diagnosed preexisting lumbar degenerative disease without objective change at the time of the August 24, 2018 injury; narcotic habituation prior to the injury; and post L5-S1 fusion with stenosis at L4-5 and L3-4, preexisting the accident. When asked to identify all potential causes of Employee's disability or need for medical treatment following the August 24, 2018 incident, Dr. Bauer listed: temporary subjective symptoms after the straining injury; progressive degenerative disease, which he said would exist in the same state regardless of the injury; and a prior fusion at L5-S1, which "tends to accelerate" the degenerative changes at L4-5. He opined employment was not the substantial cause of her ongoing symptoms and concluded Employee's medical records did not indicate a significant change at the time of the August 24, 2018 injury. He noted she did not mention this incident to Dr. Johnston on her first visit after the event. She had been a candidate for surgery prior to the state fair incident and had not proceeded for financial reasons, but "the preexisting conditions are the substantial cause." Dr. Bauer stated if there was an industrial injury on August 24, 2018, Employee reached medical stability by September 10, 2018, when Dr. Johnston saw her and noted her condition was similar to her situation in the past. Dr. Johnston's injection was for preexisting conditions. She has no additional PPI rating and her prior rating was due in its entirety to the preexisting condition. No further medical care was necessary and no physical restrictions exist for the August 24, 2018 incident. (Bauer report, November 29, 2018).

50) On December 12, 2018, Dr. Johnston completed a "Letter of Medical Necessity: Initial Opioid Use" on Employee's behalf. The opioid medication he prescribed for Employee related to the August 24, 2018 work injury with H&H. Dr. Johnston said his diagnosis was an aggravation of an underlining degenerative lumbar spine. The anticipated length for the opioid therapy was "uncertain" but Dr. Johnston stated Employee "has a temp. aggravation of preexisting lumb. stenosis." (Letter, December 12, 2018).

51) On December 21, 2018, H&H served a notice on Employee denying her right to benefits in its case based on Dr. Bauer's EME report. The notice states, in reference to the August 24, 2018 injury, "Employment is not the substantial cause of her ongoing symptoms." It advised Employee that Dr. Bauer opined there was no significant change in her spine with the August 24, 2018 injury, notwithstanding her opinion to the contrary. (Controversion Notice, December 21, 2018).

52) By December 24, 2018, Employee would have received the denial notice from H&H (December 21, 2018 + three days for mailing = December 24, 2018). By then, she knew or should have reasonably known that Dr. Bauer opined her H&H employment was not the substantial cause of her disability or need for additional treatment and something else was. (Experience, judgment).

53) On December 24, 2018, Employee had knowledge of the nature of her disability and its relationship to her February 8, 2009 injury with Employer and she knew she had become disabled beginning around Labor Day 2018. (Experience, judgment; Employee).

54) On December 28, 2018, Dr. Johnston completed an unemployment insurance form on Employee's behalf. He stated her injury or disability began in 2009 with intermittent symptoms since then. Her diagnosis included L3-4 and L4-5 lumbar stenosis. He did not advise her to quit work and opined she could work full-time at sedentary to light duty if she could change positions as needed. (Unemployment form, December 28, 2018).

55) On January 10, 2019, Employee claimed unspecified TTD and PPI benefits, medical and related transportation costs, and attorney fees and costs against Employer. She filed a claim for disability within two years after she had knowledge of the nature of her disability and its relationship to her employment and after she became disabled. (Claim for Workers' Compensation Benefits, January 10, 2019; experience, judgment and inferences drawn from the above).

56) On January 30, 2019, Employer controverted Employee's claim. It denied TTD on grounds Employee filed no claim for these benefits for nearly 10 years following her work injury and her claim was therefore barred under AS 23.30.105 and AS 23.30.110. It further contended TTD benefits were not payable after medical stability. Employer denied PPI benefits above 10 percent previously paid. It cited superseding intervening events as causing any disability or need for medical treatment. Employer denied unreasonable and unnecessary medical costs and related transportation expenses and attorney fees and costs. It invoked the last injurious exposure rule against Employee's subsequent employer H&H and relied on Dr. Bauer's EME opinion from her 2018 H&H case. Employer also noted her comorbid medical conditions may complicate Employee's current low back issues and contended she failed to attach the presumption of compensability against Employer. Its concurrent answer was similar. (Controversion Notice; Answer to Employee's Workers' Compensation Claim, January 30, 2019).

57) On January 31, 2019, Employee requested a hearing on her January 10, 2019 claim. (Affidavit of Readiness for Hearing, January 31, 2019).

58) On February 20, 2019, the designee set a hearing on Employee's claim for May 21. 2019, over Employer's objection based on incomplete discovery. Employer said it was also looking into joining other employers. (Prehearing Conference Summary, February 20, 2019).

59) On February 22, 2019, Employer sent out medical record releases. (Employer's statement).

60) On February 27, 2019, Employer asked to postpone the May 21, 2019 hearing. It sought additional time for discovery. Employer specifically mentioned Employee's August 24, 2018 injury with H&H, which "may require joinder." It also noted an EME the EME physician's deposition may be required prior to the scheduled hearing. Lastly, Employer contended ultimately an SIME may also be required. (Petition; Employer's Memorandum in Support of Petition for Continuance of Hearing, February 27, 2019).

61) On April 9, 2019, Dr. Johnston referred Employee to a neurosurgeon for a surgical evaluation. (Johnston referral, April 9, 2019).

62) On April 9, 2019, the parties continued the May 21, 2019 hearing "as the ER approved a one-time consultation with Dr. Paulson." (Prehearing Conference Summary, April 9, 2019).

63) On May 23, 2019, David Paulson, M.D., examined Employee and reviewed her history of gradually progressive low back pain, "which sounds to have started in 2009 from a work-related injury." She reported the pain was relatively tolerable until "approximately 2016 when pain increased significantly and started to limit her ability to walk." He opined Employee was symptomatic primarily from severe, multilevel lumbar stenosis and had clear symptoms of neurogenic claudication. He recommended a multilevel lumbar decompression extending from L2-5. Dr. Paulson said, "I am uncertain that this multilevel stenosis has developed from the injury was [sic] she originally suffered in 2009." He would need imaging before proceeding. After obtaining imaging, Dr. Paulson diagnosed lumbar spinal stenosis with claudication, lumbar spondylosis and trochanteric bursitis. He concluded Employee's L5-S1 fusion appeared solid. She had severe central canal and foraminal stenosis at L2-3 through L4-5 and he concluded Employee may benefit from multilevel bilateral laminectomies and foraminotomies. Employee said she would consider surgery. (Paulson report, May 23, 2019).

64) On March 31, 2019, Employee said she went through 10th grade and years later obtained a diploma. She subsequently worked as a PCA but is not licensed. Employee terminated her employment with Employer on September 16, 2010. She has worked for several assisted living facilities since leaving her job with Employer. She worked briefly for Preferred Care and when

asked how her back felt while working there, she said, "Oh, it was okay." Employee began working for H&H as a PCA in 2013 and continued working there until August 31, 2018. On or about that date, she called in sick because she "couldn't move" because she was "in too much pain" in her back. Employee said in May 2017, while driving the H&H work van she turned quickly and felt terrible pinching in her back. Supervisor Cathy Lee told her to fill out a "workman's comp. thing," but Employee declined stating she was going on vacation and "should be fine." Employee thought she had pulled a muscle and "didn't really give it much thought after that." Before leaving for vacation, Employee saw her provider to refill asthma and pain medications prior to her long flight. By the time she got to Miami, Employee was hurting so badly she could not enjoy her trip. While in Florida, her pain gradually increased until she could barely move so she went to an urgent care clinic. The Florida providers thought she had sciatic pain; she ended up returning to Alaska in a wheelchair. When asked to describe how her back felt before the May 2017 van incident, Employee said, "I was fine." She clarified stating, "Yeah, I was doing my job, no problem, day in and day out, for years." Employee said:

> It was just a jabbing, sharp pinch, and, you know, between talking to coworkers and stuff, you know, we all kind of came to the conclusion, you're hitting the beach, going to Miami, go and relax, you know. We all kind of thought the same thing. I probably just pulled a muscle, you know. Good dose of sunshine is exactly what I needed. Didn't turn out that way.

Employee said she needed her job so she never filed for workers' compensation benefits. "I should have, yes, absolutely. Because it's gotten so much worse." She likened the pain to "exactly like when I had transferred that patient." It was "excruciating," like somebody was "sticking a knife" in her and the pain was starting to shoot down her leg. Each day, Employee could feel the pain gradually going down her leg all the way to her foot. She was off work for about a month following that event. She eventually returned to work with H&H on light duty for about a month and ultimately full duty. Employee felt pressured to go back to work to keep her job. While working full duty as a driver, she felt pain on a daily basis. In 2018, her H&H supervisor told her to take a client to the state fair. That trip is what "aggravated the whole thing. You know, put [her] right back at square one." At the state fair in 2018, Employee pushed a heavy client in a wheelchair for several hours. H&H's owner Susanna Dolan was with the group and knew Employee was having back pain. Dolan was walking behind Employee and noticed she was limping badly; Dolan asked

Employee if she was okay. Employee told Dolan she had a pinched nerve. She continued to work the following week but eventually went to see Dr. Johnston who agreed that going to the fair aggravated her condition. Employee decided she could no longer push wheelchairs and on or about September 3, 2018, submitted her resignation. While returning the van the day after Labor Day, Employee told her supervisor she was going back to see Dr. Johnston to see if she "did something else to [her] back at the fair," like "a new injury." She decided she would file a workers' compensation "claim," depending upon what Dr. Johnston said. When asked if the state fair incident in August 2018 caused "an increase or different kind of pain," Employee said, "it definitely caused an increase, but like I said, I didn't want to fill any claims without . . . knowing for sure . . . is this . . . part of an existing problem or is this something new." Following the 2017 H&H van incident, Employee got "well enough" so she could do her "full job again without . . . interruption, and then [she went] to the fair and, boom, [she was] back at square one again." Employee completed an injury report within 30 days after returning the H&H van. Within two weeks, she spoke with an adjuster for H&H. The adjuster told her she quit before she had an off-work note from her doctor, and Employee "just kind of figured it was pointless" to pursue the H&H case. Employee remained off work from around September 3, 2018, until she returned to work for her current employer around January 24, 2019. Employee felt she did not have any choice but to resign in September 2018 because H&H continued to give her 400 pound clients to push around and she could not put herself "at risk anymore." When asked to clarify the shape her back was in "up until the incident -- the van incident" in May 2017, Employee said, "It was in good shape." When asked if she thought May 2017 was when her "back condition change," Employee responded, "Absolutely." The "change" was that the pain got worse each day while she was on vacation in Miami. Employee further explained:

> Q. Can I ask you before the van incident in May 2017, did you have any symptoms in your low back?
> A. No.
> Q. Right before that?
> A. No.
> Q. Did you have any symptoms into your leg?
> A. Never.
> Q. Since the May 2017 incident, have your symptoms in your back and leg continued?
> A. Worse at times, yes.
> Q. They have never gone away?

> A. . . . When I had my first surgery, the workman's comp. people, again, was [sic] just asking me all the time about this -- I call it the imaginary pain. I know now what pain they're talking about, the sciatic pain down the leg. I never experienced that.
> Q. In the first injury?
> A. In the first injury. . . . I wasn't about to say I did, but in . . . 2017, I discovered what sciatica was and big time.
> Q. That was after the van incident?
> A. Yes.
> Q. Did they came [sic] back again after you walked around the State Fair?
> A. Yes.
> Q. Or did it continue?
> A. I never really got a hundred percent better after . . . turning in the van. . . .

After the van incident, Employee pushed herself to work and took steroids and anti-inflammatories. She was able to perform her job duties as required until the fair incident when she just "knew [she could not] do this anymore." Her current work at Mama's Assisted Living is modified for her to perform her full duties. Most clients there are ambulatory and she works nights so she does not have to perform as many PCA duties. Her back is getting worse and Dr. Johnston recommended a spinal fusion. Employee is terrified of having another surgery but wants to return to "where [she] was before May of 2017." (Deposition of Yvonne Meili, March 21, 2019).

65) On June 14, 2019, Employer filed a *Smallwood* objection on Dr. Paulson's April 25, 2019 and May 23, 2019 medical reports. (Request for Cross-Examination, June 14, 2019).

66) On June 14, 2019, Employer asked to continue the July 17, 2019 hearing. As grounds, based on testimony from Employee's March 21, 2019 deposition, it again said discovery was not complete and another party may have to be joined. (Petition, June 14, 2019).

67) On June 27, 2019, Employer asked to join H&H as a party to this case. Employer served this request on Employee's attorney but not on H&H. (Petition, June 27, 2019).

68) As grounds to join H&H, Employer contended Employee had a low back injury on August 24, 2018, while working for H&H. It contended H&H in case 201814204 must be joined to this case to determine if the 2018 work incident further complicated Employee's condition. (Employer's Memorandum in Support of Petition for Joinder, June 27, 2019).

69) On June 27, 2019, Employer also requested an SIME. Its SIME form premised the request on an alleged medical dispute between Employee's physicians Drs. Johnston and Paulson versus H&H's Dr. Bauer EME. (Petition; SIME form, June 27, 2019).

70) Dr. Bauer is not Employer's EME. There is no evidence Employer obtained an opinion from its own EME. There is no medical dispute between Employee's attending physicians and Employer's medical expert because Employer filed no expert report. (Agency file).

71) At hearing on July 17, 2019, Employee said after her 2010 surgery, she was losing sensation in her legs. The second surgery helped somewhat. Employee still had pain and Dr. Wright told her "this is your life" and she would always have pain to some degree. Since her work injury with Employer, she has had "good days and bad days," but recently more bad days than good. Employee had "God-awful pain" in her back after the 2017 van incident. She recalled her deposition testimony that her back was "good," before this incident but to her "good" is a relative term and said she is not a physician and can only explain how she feels. Sitting and standing have given her back pain occasionally since her 2009 work injury. Employee had been treating for chronic back pain, taking medication and getting injections prior to the state fair. She filed an injury report with H&H because after the wheelchair incident she knew she could no longer perform her PCA job because she could barely walk. H&H controverted her case based on its EME Dr. Bauer's opinion. Employee said she had no way of knowing which event was the substantial cause of her most recent need for medical care. She relied on her doctors to tell her. However, Employee believes "it all originates back to 2009." (Employee).

72) Employee began working for H&H around 2014 and conceded she had back pain while working there. Her supervisor was aware because Employee would occasionally ask to take time off work. She did not complete an injury report in 2015 when she had occasional back pain and concluded it was just another "bad day at work." Employee was "never completely out of back pain, never" after 2009. Before the May 2017 van incident, Employee said she did not have symptoms down her right leg. When she twisted in the van in 2017, "it hurt like crazy." Nonetheless, she was able to work until the 2018 Alaska State Fair incident. Employee's symptoms have been "getting a lot worse" and progressing since she returned from her Florida vacation, which is why H&H did not send her to the state fair in 2017. By September 3, 2018, Employee's pain medications were no longer working, she had taken days off due to pain and she realized "this is it," so she quit her H&H job. Between 2011 and 2017, Employee had limited medical treatment because she "gave up." During that period, Employee occasionally took pain medication but not daily. When asked about her deposition testimony regarding May 2017 being

a turning point in her symptoms and need for treatment, Employee explained she was referring to the symptoms shooting down her right leg. (*Id*.).

73) Employee said September 3, 2018 was the first time she became disabled from any injury or incident since 2011. Dr. Johnston never took her off work. Beginning September 2018, she stayed home, sat in a recliner and went to doctor appointments. Eventually her pain improved after a few months though she still has right leg symptoms but she was no longer pushing 400 pound clients in wheelchairs. Upon returning to work in January 2019 at her new job, Employee noted her symptoms were about the same as they were when she worked for H&H. (*Id*.).

74) Employee's back is "not good" and she is in constant pain from the time she wakes up until the time she goes to bed. She takes Vicoprofen for her back symptoms. Were she to prevail in her hearing, she intends to obtain the recommended back surgery "as soon as possible." Employee's pain still radiates down her right leg though not as bad as it was after she returned from her Miami trip. Her symptoms "are getting a lot worse" and she can only walk short distances. The pain at times "gets excruciating." (*Id*.).

75) Employer filed six medical summaries prior to hearing along with approximately 467 attached medical records from various providers dated as far back as 1996 including Providence Hospital, Urgent Care, Diagnostic Imaging of Alaska, Orthosport, BEAR Physical Therapy, Thomas Dempsey, M.D., and Primary Care Associates. (Medical Summary, February 1, 2019, March 21, 2019, March 29, 2019, May 13, 2019, June 14, 2019, June 27, 2019).

76) At hearing, the first issue decided was Employer's SIME petition. An oral order denied it based on the fact Dr. Bauer, upon whom Employer relied as a basis for the medical dispute, is not Employer's EME. He is H&H's expert and H&H is not a party to this case. (Record).

77) The next issue resolved was Employer's continuance request. Employer contended that on February 22, 2019, it requested medical records from Providence Hospital, which not yet been provided although this provider says it has records that must first be routed through its legal department. Employer contended on the same date it also requested records from Urgent Care, Diagnostic Imaging of Alaska, Ortho Sport, Bear Physical Therapy, Thomas Dempsey, M.D., and Primary Care Associates, requests it implied were still outstanding. It also cited Dr. Paulson's unavailability for a deposition or hearing testimony as additional grounds to continue the hearing. Employer wanted to ask him questions and hoped to rely on his answers. It opposed leaving the

record open, to avoid piecemeal litigation. Employee contended Employer's *Smallwood* objection to Dr. Paulson's reports was immaterial as she did not need them. (*Id*.).

78) An oral order denied Employer's continuance request. Citing the applicable regulation, the order cited Dr. Paulson's unavailability for a prehearing deposition or testimony at hearing. The order left the record open at Employer's option to depose Dr. Paulson. If Employer chose not to depose him, Dr. Paulson's "Smallwooded" notes would not be considered. As for Employer's contention it had not completed discovery because requested medical records were missing, the order stated if Employer were to lose, it would have a full year to petition for modification if and when it received additional medical records likely to change the decision's outcome. Lastly, the order said not continuing the hearing a second time but leaving the record open for a deposition follows the legislative mandate for quick, efficient, fair and predictable delivery of benefits to Employee if she is entitled to them, at a reasonable cost to Employer. (*Id*.).

79) Employer asked for immediate reconsideration. It contended it agreed to pay for Dr. Paulson to examine Employee to "move the case forward," and now has been "rushed to a hearing" even though Dr. Paulson is not available to give an opinion. Employee contended Dr. Paulson's examination was not her idea or suggestion. She contended Employer offered it in exchange for Employee agreeing to continue the May 2019 hearing. Employee contended Dr. Paulson has given a written opinion and Employer simply made a tactical decision to *Smallwood* his report to delay the hearing. She contended Employer had since May 3, 2019, when it received his report to take Dr. Paulson's deposition. Employee opposed reconsidering the oral order. An oral order denied Employer's request for immediate reconsideration. (*Id*.).

80) It is not uncommon for records to remain open for additional depositions. (Experience).

81) Following the oral orders denying its request to continue the hearing, Employer requested an order requiring mediation. Employee objected to the mediation request and contended a party cannot be forced to mediate a case. An oral order denied the request for an order requiring mediation, distinguishing this from difficult cases where the board had ordered claimants represented by non-attorney representatives to attempt mediation. (Record).

82) At the July 17, 2019 hearing, an oral order left the record open: (a) for 30 days at Employer's option to depose Dr. Paulson; (b) for one week following receipt of the Paulson transcript for the parties to file five-page briefs addressing his testimony; and (c) for attorney Powell to file her supplemental attorney fee and cost affidavit along with her brief. The order expressly advised the

parties that if Dr. Paulson was not available within 30 days they could request an extension of time to leave the record open longer until he was available for his deposition testimony. (*Id*.).

83) At hearing, Employee clarified her claim was for a continued compensability finding, future TTD and PPI benefits in the event she had surgery and obtained a higher rating; medical costs; transportation costs and attorney fees and costs. Employee conceded she had filed no travel log for past transportation expenses, without further elaborating. (*Id*.).

84) On August 13, 2019, Employee's attorney timely submitted her final attorney fee and cost affidavit. Attorney Powell bills at $400 per hour when performing attorney services and at $185 for paralegal services. Her legal and paralegal services rendered are $18,434.50 and her other costs are $522.36. Fees and costs incurred in this case total $18,956.86. (Supplemental Affidavit of Counsel Regarding Fees and Costs, August 13, 2019).

85) Attorney Powell's hourly rate for attorney and paralegal services are reasonable and the board has awarded fees and costs at these rates to her in other cases. They are commensurate with rates awarded other workers' compensation claimant attorneys and paralegals practicing in this area. (Experience, judgment and observations).

86) On August 16, 2019, Employer notified the board and Employee that Dr. Paulson was not available for deposition within 30 days. It withdrew its *Smallwood* objection against Dr. Paulson's reports and asked the record to close and a decision and order to issue. (Letter, August 16, 2019).

87) On August 22, 2019, Employer objected to Employee's August 13, 2019 supplemental fee affidavit. It contends the record was not left open for Employee to submit this document so it is untimely. Employer also contends all attorney fee entries prior to January 31, 2019 are related to the H&H case and not this one. It contends January 11, and January 17, 2019 entries relate to a settlement offer from H&H and should not be paid if Employee succeeds here. It further contends her fee affidavit is "inflammatory, irrelevant, irresponsible and admittedly excessive." Employer requests a "*Murphy*" analysis and takes umbrage at Employee's suggestion it filed "spurious pleadings." It contends she should receive no attorney fees or costs. (Employer's Objection to Employee's Supplemental Affidavit of Attorney's Fees and Costs, August 22, 2019).

88) Employee's attorney fee entries for January 11, and January 17, 2019, totaling $160 relate to a settlement offer in the H&H case and are not relevant to the instant matter. (Judgment).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> > (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . subject to the provisions of this chapter.
> > . . . .
> >
> > (4) hearings . . . shall be impartial and fair to all parties and . . . all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The general purpose of workers' compensation statutes is to provide workers with a simple, speedy remedy to be compensated for injuries arising out of their employment. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978).

> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
> . . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage**. (a) . . . compensation or benefits are payable under this chapter for disability or . . . need for medical treatment of an employee if the disability . . . of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

DeYonge v. NANA/Marriott, 1 P.3d 90 (Alaska 2000) held a temporary, symptomatic worsening constitutes an injury under the Act.

In *Morrison v. Alaska Interstate Construction, Inc*., 440 P.3d 224 (Alaska 2019), the Alaska Supreme Court for the first time construed AS 23.30.010(a) and its relationship to the *DeYonge* doctrine and the "last injurious exposure rule." Morrison hurt his knee at work in 2004, underwent surgery and returned to work but his physician said he might later need treatment for posttraumatic osteoarthritis. His 2004 employer paid all benefits related to this injury. In Morrison's view, the surgery was successful because he returned to work and performed all his heavy job duties without significant problems or any need to see a physician for his knee until he injured it again in 2014 while working for a different employer. (*Id*. at 227).

In 2014, Morrison twisted his right knee at work. Imaging showed mild to moderate osteoarthritis, a medial meniscal tear and cartilage loss. A surgeon in 2015 suggested arthroscopic surgery. The 2014 employer's EME opined the 2014 injury was not the substantial cause of Morrison's current need for medical care. The EME diagnosed a knee strain that resolved in six to 12 weeks and stated surgery was not reasonable or necessary because it was no more effective than physical therapy. Based on this opinion, the 2014 employer denied all benefits. The EME further stated the 2014 surgery was a factor in causing or significantly accelerating Morrison's right knee osteoarthritis, which made it "a substantial factor" in his need for surgery in 2015, but not "the substantial cause." He also said the 2004 injury was a substantial factor in Morrison's current need for treatment because the earlier surgery accelerated any minor arthritic changes existing at the time of that injury. The EME opined Morrison probably had symptoms of right knee arthritis prior to 2014 but did not perceive them because he was stoic. The EME said he would not treat osteoarthritis until a patient had symptoms and said Morrison's knee would have become symptomatic eventually and agreed twisting can cause arthritis to become symptomatic. The EME stated if subjective symptoms were the only thing substantiating a substantial cause, the subjective complaints would be adequate. Morrison filed a claim against the 2014 employer. (*Id*. at 227-29).

The board joined the 2004 employer to the 2014 injury claim and ordered an SIME. The SIME listed a right knee strain and moderate degenerative arthritis as causes for Morrison's need for medical treatment and said the 2014 injury aggravated the preexisting arthritis, causing the need for treatment. It also opined the 2014 injury caused a permanent change in the arthritis and said without the 2014 injury it was not likely the condition would have become symptomatic when

Morrison twisted his knee. The SIME concluded the 2014 twisting injury was the substantial cause of the need for treatment, and recommended physical therapy and other treatment, but not surgery. It agreed doctors only treat osteoarthritis when it becomes symptomatic. The SIME could not say which injury was responsible for the need for treatment and said, "They both are." (*Id*. at 229).

Morrison said he had continued pain following the 2014 accident though he missed no work. He limped for a few months. By 2015, Morrison still had continuing right knee pain. A year later, Morrison said his pain had continued for 26 months and may have become slightly worse. He continued to work as needed to reach his earnings goal, did not believe subsequent employment impacted his knee pain and had no right knee care between 2005 and 2014. (*Id*. at 229-30).

At hearing, the SIME opined if apportionment were appropriate he would allot 80 to 90 percent responsibility to the 2004 injury and 10 to 20 percent to the 2014 event. The board decided the 2014 injury had caused a permanent increase in Morrison's right knee symptoms and found it the substantial cause of his current need for medical treatment. (*Id*. at 230).

The 2014 employer appealed arguing the board had erred in applying prior Supreme Court case law that preceded the 2005 amendments to the Act regarding causation. The commission reversed stating the board had mis-applied the law and remanded for the board to determine the relationship between the 2004 and 2014 injuries to find the substantial cause for treatment. The commission identified the question as whether an increase in symptoms meets the definition of "the substantial cause," or whether the underlying medical condition must be changed before increased symptoms become "the substantial cause." It also said hastening the need for treatment did not necessarily make an injury "the substantial cause." In short, the commission said the board on remand had to weigh all relevant causes before determining which injury was the substantial cause of Morrison's ongoing medical care, notwithstanding the last injurious exposure rule. (*Id*. at 231).

Morrison found the legislature did not abrogate the *DeYonge* rule when it amended the coverage statute in 2005. It held the commission's inquiry improperly focused on what qualifies as an injury, "which is not how the legislature chose to reduce the number of potentially compensable claims." (*Id*. at 233). Interpreting AS 23.30.010(a), *Morrison* held the board decides whether "the

employment" was "the legal cause," *i.e*., "a cause important enough to bear legal responsibility for the medical treatment needed for the injury," by looking at the "*causes* of the injury or symptoms" rather than considering the injury type. (*Id*. at 233-34; emphasis in original). *Morrison* noted the last injurious exposure rule imposed full liability on the employer at the time of the most recent injury that bears a causal relationship to disability. The court said legislative history strongly suggests the legislature in amending the coverage statute in 2005 intended to permit later employers "to try to shift liability to an earlier employer," thus modifying the last injurious exposure rule. (*Id*. at 235). *Morrison* interpreted this history to mean the 2005 amendments "modified" the last injurious exposure rule by allowing the board to impose full liability for an injury "on an earlier employer," but the legislature did not eliminate the rule or adopt apportionment. (*Id*.). *Morrison* explained:

> But *allowing* an earlier employer to be found responsible does not *require* the earlier employer to be found responsible: the possibility that a later employer may shift responsibility for payment to an earlier employer does not compel the Board to do so. In this case the Board relied on medical testimony to identify employment with both [the 2014 employer] and [the 2004 employer] as possible causes of Morrison's need for medical treatment. The Board decided after weighing the evidence that the injury with [the 2014 employer] was the substantial cause of the medical treatment Morrison needed at the time of the hearing (*Id.* at 235-36; emphasis in original).

Conversely, *Morrison* held there is no rule that in all cases a later employer can shift responsibility for medical care to an earlier one. (*Id*. at 236). It held AS 23.30.010(a) is not complex and requires the board to consider different causes "of the benefits sought" and the extent to which each contributed to the need for the specific benefit. The board must then identify one cause as "the substantial cause," meaning, which "is the most important or material cause related to that benefit." Based on legislative history, *Morrison* found the legislature did not intend to require that the substantial cause be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." The comparison made is "among the causes identified, not in isolation or in comparison to an abstract idea." It is a "flexible" and "fact dependent" determination. (*Id*. at 237-38). *Morrison* held the board has the right and responsibility to interpret evidence and draw its own inferences. (*Id*. at 239). Finding no board error, *Morrison* reversed the commission and remanded the case with instructions to reinstate the board's award. (*Id*. at 240).

> **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.
> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board.
>
> **AS 23.30.105. Time for filing of claims.** (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. . . .

The question of when an injured worker learned of his disability sufficient to trigger the two-year statute of limitations for filing a claim under AS 23.30.105(a) is a factual question, which must be supported by substantial evidence. The burden of proof is on the employer to establish this affirmative defense, which is a disfavored one. *Egemo v. Egemo Construction Co.*, 998 P.2d 434 (Alaska 2000). *Egemo* determined a claim was not ripe for filing until the injury caused wage loss. Medical claims are revived when there is new treatment and disability claims related to the new treatment are also revived. AS 23.30.105(a) allows for more than one disablement for a given injury. Each disability period "is characterized by a conjunction of a work-related injury or illness and wage-loss. If these two factors are present, the clock begins anew." If both factors are not present the clock does not begin to run. Both injury knowledge and disablement must be conjoined before the employee is required to file a claim. Therefore, because the injured worker in *Egemo* was not disabled by his work injury until he had surgery for it, his pre-surgery claim, though not filed within two years of the injury date, was timely. *Id*. at 439-40.

The Alaska Supreme Court said one does not know the nature of his disability and its relationship to work until one knows its full effect on his earning capacity. "The mere awareness of the disability's full physical effects is not sufficient." *Leslie Cutting, Inc. v. Bateman*, 833 P.2d 691,

694 (Alaska 1992). In *Bateman*, the injured worker continued to work and treated a work-related allergy with medicine and avoidance techniques for several years until he eventually could no longer treat it effectively or continue to work. Once the injured worker's routine no longer was effective, he was fully aware of his injury's economic impact and he could file a claim. *Id*. at 694.

Summers v. Korobkin Construction, 814P.2d 1369 (Alaska 1991), said an injured worker has a right to a prospective determination on whether his injury is compensable. *Fox v. Alascom, Inc.*, 783 P.2d 1154, 1159 (Alaska 1989) said an "employee need not claim disability for every pang of pain in order to claim disability benefits for a more fully developed injury." In cases defended under AS 23.30.105(a), the board must make a factual finding concerning the date the injured worker had knowledge of the nature of his disability. *Wade v. Anchorage School District*, 741 P.2d 634 (Alaska 1987). *Morrison-Knudsen Company, Inc. v. Vereen*, 414 P.2d 536 (Alaska 1966), held an injured worker whose physician released him as fit for work, who then had subsequent back symptoms, timely filed a claim within two years of a second physician stating his back symptoms related back to his original work injury.

> **AS 23.30.107. Release of information**. (a) Upon written request, an employee shall provide written authority to the employer . . . to obtain medical . . . information relative to the employee's injury.

> **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. . . .

Benefits sought by an injured worker are presumed compensable. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption applies to "every element of a factual determination." *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The presumption involves a three-step analysis. To attach the presumption, an employee must establish a "preliminary link" between his injury and the employment. (*Id*.). The employer may rebut the presumption at the second stage with evidence showing the injury did not arise out of or in the course of the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must

prove his case by a preponderance of evidence. This means he must "induce a belief" in the minds of the fact-finders that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn and credibility is considered. *Excursion Inlet Packing Co. v. Ugale,* 92 P.3d 413 (Alaska 2004).

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

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

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

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

The board has broad statutory authority in conducting hearings. *De Rosario v. Chenenga Lodging*, AWCB Decision No. 10-0123 (July 16, 2010). *Lindeke v. Anchorage Grace Christian School*, AWCB Decision No. 11-0040 (April 8, 2011), ordered the parties to attempt mediation, while not requiring them to settle the case. In *Lindeke,* a non-attorney represented the injured worker unsuccessfully and her case had languished for years with no end in sight.

As a general rule of statutory interpretation, the same words used twice in the same statute have the same meaning. *ARCTEC Services v. Cummings*, 295 P.3d 916 (Alaska 2013).

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

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers will have competent counsel available. *Cortay v. Silver Bay Logging,* 787 P.2d 103, 108 (Alaska 1990). Fees for time spent on minor issues will not be reduced if the employee prevails on the primary issues at hearing. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 at 14-16 (May 11, 2011).

In *Murphy v. Fairbanks North Star Borough*, AWCB Decision No. 18-0043 (May 9, 2018), an injured worker filed a claim seeking thousands in additional PPI benefits and penalties but succeeded only on interest on an airplane ticket and a $160.90 penalty. His attorney fee and costs totaled $29,000. The insurer agreed to pay $5,032.33 in attorney fees and the board awarded $4,195.58 in additional attorney fees and costs.

> **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;

> **8 AAC 45.054. Discovery**. (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. . . . .

> **8 AAC 45.070. Hearings.** (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

8 AAC 45.074. Continuances and cancellations. (a) A party may request . . . a continuance. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;
. . . .

(F) a second independent medical evaluation is required under AS 23.30.095(k);
. . . .

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
. . . .

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

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

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile. . . .
. . . .

(d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or more have accumulated, or upon completion of medical care, whichever occurs first.

ANALYSIS

1) Were the orders denying Employer's request for a hearing continuance correct?

Employer gave several reasons for requesting a continuance: (a) it needed more time for discovery because some medical providers had not responded to its record requests; (b) it may need to join Employee's subsequent employer as a party; and (c) material witness Dr. Paulson was not available for either a deposition or hearing testimony. Hearings are held when scheduled. 8 AAC 45.070(a). Continuances are not favored and will not be routinely granted. A hearing may be continued only when the requesting party demonstrates "good cause" for the continuance. 8 AAC 45.074(b)(1).

(a) *Outstanding discovery.*

Parties are entitled to discovery. AS 23.30.107(a); 8 AAC 45.054(a). Employer contended it sent medical releases to providers on February 22, 2019, requesting Employee's records and followed up on the requests on the morning of hearing. It contended it had not yet received some records. Employer contended proceeding with the hearing would violate its due process rights to a fair hearing because new information about Employee's subsequent work injuries had come to light following her March 2019 deposition and required further investigation to support a possible last-injuries-exposure defense. 8 AAC 45.074(1)(K). But Employer did not request the hearing and sent the releases before Employee's deposition. Employer does not suggest Employee withheld releases or otherwise delayed medical record discovery. It also contended Employee had no medical evidence to support her claim and implied Employer's further discovery might provide such evidence. Employee contended she had adequate evidence to support her claim. She questioned Employer's diligence in following up on its record requests and noted her hearing had been continued once. She was in pain, wanted resolution and opposed another continuance.

Employer filed six medical summaries with 467 medical records from various providers from as far back as 1996 including Providence Hospital, Urgent Care, Diagnostic Imaging of Alaska, Orthosport, BEAR Physical Therapy, Thomas Dempsey, M.D., and Primary Care Associates. Employer did not identify specific records missing and necessary to complete its defense. Meanwhile, it concurrently argued the available evidence did not support Employee's position but rather supported its defenses. The legislature mandated "quick, efficient, fair, and predictable

delivery of indemnity and medical benefits" to Employee if she is entitled to them, at a "reasonable cost" to Employer. All parties must be afforded due process, a hearing and fair consideration of their arguments and evidence. AS 23.30.001(1), (4). Employer's reference to unspecified missing medical records did not provide convincing evidence or argument that its due process rights were violated or irreparable harm would result by having a hearing. 8 AAC 45.074(b)(1)(N). Employer may still defend on modified "last injurious exposure" grounds. *Morrison*. Furthermore, if Employer loses but obtains admissible, newly discovered evidence demonstrating the panel made "a mistake in its determination of a fact," Employer has a year to petition for modification based on this evidence. AS 23.30.130(a). Employee's hearing was continued once already, she is in pain and needs a "quick," and "summary and simple" resolution to her claim. Win or lose, Employee is entitled to a simple, speedy remedy and a decision so she can decide how to obtain her medical treatment. AS 23.30.001(1); AS 23.30.005(h); *Hewing*; *Summers*. The oral orders denying a continuance based on unspecified missing medical records were correct.

(b) *Possible joinder*.

On June 27, 2019, Employer petitioned to join H&H as a party to this case. On July 12, 2019, Employer withdrew its petition. Nevertheless, at hearing five days later on July 17, 2019, Employer suggested a continuance was necessary because H&H may need to be joined. Employee, represented by an experienced attorney, opposed. She is entitled to decide her own litigation strategy. One party's view of another represented party's litigation approach is not included in 8 AAC 45.074(b)(1) as "good cause" to continue a hearing. Under these facts, the oral orders denying the continuance request based on possible joinder grounds were correct.

(c) *Unavailable material witness.*

Employer contended Dr. Paulson's unavailability prejudiced its case because, while it did not necessarily want to keep his opinions out, it wanted to ask additional questions and expected to rely on his opinions in part. 8 AAC 45.074(b)(1)(A). It opposed leaving the record open to receive Dr. Paulson's post-hearing deposition, to avoid piecemeal litigation. Employer contended it was still trying to determine the substantial cause of Employee's current need for treatment. Employee contended Dr. Paulson was immaterial as he was not necessary for her case.

It is not unusual for a witness to be unavailable to provide a deposition or hearing testimony. Hearing records are left open occasionally so a party can depose an unavailable witness. *Rogers & Babler*. The oral order gave parties 30 days to take Dr. Paulson's deposition. It also provided if Dr. Paulson could not make himself available during the 30 day period, a party could petition for additional time to obtain his deposition. Consequently, the oral order denying the continuance on grounds Dr. Paulson was not available was correct, though Employer later rendered it moot. On August 16, 2019, Employer said Dr. Paulson was not available within 30 days after the hearing. It withdrew its *Smallwood* objection and asked for the record to close and for this decision to issue.

2) Was the order denying Employer's request for mediation correct?

Common law, evidence rules and formal procedures do not apply to workers' compensation cases except as provided in the Act. Leeway exists in how investigations, inquiries and hearings are conducted. The goal is to "best ascertain the rights of the parties." *De Rosario*; AS 23.30.135(a). In some instances, it may be proper to order parties to at least attempt mediation in difficult cases, even though settlement through mediation cannot be mandated. Mediation has been ordered in a case where an injured worker and her non-attorney representative had been unsuccessful in moving an exceptionally litigious case forward. *Lindeke*. By contrast, Employee has a competent attorney representing her and there is no need to second-guess her decision to decline mediation. The oral order denying the mediation request was correct.

3) Was the order denying Employer's SIME request correct?

Parties have the right to request an SIME, but the statute's "may" language makes ordering one discretionary. An SIME is predicated on a medical dispute between "the employee's attending physician" and "the employer's independent medical evaluation." AS 23.30.095(k). The article "the" in each instance necessarily refers to the injured worker and his or her employer, both parties to the case at hand. There is a distinct difference between articles "an" and "the." Employer, "the employer" who is a party to this case, has either not obtained an EME report or not filed it. Rather, it bases its SIME request on an alleged medical dispute between Employee's attending physicians and a different, non-party employer's EME. Employer wants the words "the employer's" interpreted broadly to include any employer's EME's opinions vis-à-vis Employee's attending

physicians'. However, the statute is clear, simple and needs no strained interpretation. If Employer's interpretation were correct, the same word "the" in other phrases in the same statute must also have the same meaning. *Cummings*. For example, the "cost of an examination and medical report shall be paid by the employer." AS 23.30.095(k). Employer's overly broad interpretation would require non-party H&H to pay for Employer's requested SIME. Because Employer has filed no EME report, there can be no medical dispute between "the employer's" EME and Employee's attending physicians. The oral order denying the SIME request was correct.

4) Is Employee's claim barred as untimely?

Employer contends Employee's claim is barred because she did not file it within two years after she had knowledge of the nature of her disability and its relation to her employment with Employer. AS 23.30.105(a). It contends Employee had this knowledge since her 2009 injury. Employee contends she filed her claim within two years of the date she became disabled and only after Dr. Bauer concluded her 2018 injury was not the substantial cause of her current disability and need for treatment. (*Id*.).

The two-year statute of limitations in AS 23.30.105(a) is a "disfavored" affirmative defense and Employer bears the burden to establish it. *Egemo*. The law requires a finding concerning the date Employee had knowledge of the nature of her disability and its employment relationship. *Wade*. "Nature of the employee's disability" is not defined in the Act. The Act defines "disability" as incapacity because of injury to earn the wages Employee was receiving at the time of injury in the same or any other employment. AS 23.30.395(16). But Employee does not seek disability benefits incurred prior to her January 10, 2019 claim; she seeks only future disability benefits. She need not claim disability for "every pang of pain in order to claim disability benefits for a more fully developed injury." *Fox*. She could not know the nature of her disability and its relationship to work until she knew its full effect on her earning capacity. Her awareness of the disability's full physical effects is not sufficient to start the statute running. *Bateman*. Stated another way, Employee could have knowledge of the nature of her disability, its relationship to her employment and actually be disabled yet not seek disability benefits for that past period. This appears to be Employee's approach in this case. She seeks an order finding the February 8, 2009 injury remains the substantial cause of her current need for treatment. In other words, she seeks a prospective

determination on whether her February 8, 2009 injury remains compensable. *Summers*. So long as she filed her claim for disability within two years of the date she obtained knowledge of the nature of her disability, its relationship to her employment with Employer and she actually became disabled, the statute of limitations in AS 23.30.105(a) does not bar her claim for disability.

Employee's testimony and the medical records demonstrate that, regardless of cause, she had no "disability" as defined in the Act after she recovered from her 2011 surgery until June 16, 2017, when Urgent Care following the van incident restricted her from all work until June 21, 2017. However, there is no evidence in the medical records and no testimony suggesting Employee knew or should have known her symptoms from the van incident related back to her 2009 injury with Employer. To the contrary, Employee steadfastly believed her 2017 event was a "new injury," as she impressed upon Dr. Bauer during his EME. To a layperson, Employee's increased symptoms especially in her right leg following the van incident could easily be taken for a "new injury." *Rogers & Babler*. Even if chargeable knowledge could be attributed to her, Employee filed her claim on January 10, 2019, well within two years of June 16, 2017.

Employee quit her job with H&H following the state fair incident in August 2018. After that incident, on or about Labor Day September 2018, Employee's low back and leg symptoms caused her to cease employment, which caused her earning loss and thus "disability." Employee credibly testified she remained off work from on or about September 3, 2018, until she returned to work for her current employer on approximately January 24, 2019. AS 23.30.122; *Smith*. While off work, Employee attended H&H's Dr. Bauer EME. The record is not clear when she first became aware of Dr. Bauer's opinions, but H&H served notice on Employee on December 21, 2018, and controverted her case based on his opinions. She would have received H&H's Controversion Notice within three days, or by December 24, 2018. *Rogers & Babler*. At that point, Employee, who did not graduate from high school but did later obtain a diploma, knew or should have reasonably known that Dr. Bauer had opined her employment with H&H and the August 24, 2018 H&H injury at the state fair were not the substantial cause of her ongoing symptoms, and there was no significant change to her spine resulting from that event. *Vereen.* Something else was.

Employee filed a claim for disability on January 10, 2019, less than a month after the date she knew or reasonably should have known the nature of her disability, its relationship to her February 8, 2009 injury and after she became disabled. Employer did not meet its burden to prove its affirmative defense and Employee's claim for disability is not barred. Furthermore, the statute's plain language makes it applicable only to claims for "disability." Thus, the affirmative defense would not bar any other type of benefit in any event. AS 23.30.105(a).

5) Is Employee's February 8, 2009 injury with Employer the substantial cause of her current need for medical treatment?

Employee contends her injury with Employer is the substantial cause of her current need for medical treatment. Employer contends it is not. This creates a factual dispute to which the presumption applies. AS 23.30.120(a); *Meek*. Employee raises the presumption on continued compensability with Dr. Bauer's November 29, 2018 EME report, Dr. Johnston's December 12, and December 28, 2018 reports and Dr. Paulson's May 23, 2019 report. Dr. Bauer said the substantial cause of Employee's current symptoms was her preexisting degenerative disease accelerated by surgery for the 2009 injury. Dr. Johnston said the H&H injury was only a temporary aggravation of Employee's preexisting lumbar stenosis. He later said her injury or disability began in 2009 with intermittent symptoms since then. Dr. Paulson opined her long-standing and gradually progressing low back pain started in 2009 from a work injury. *Sokolowski*.

Employer must rebut the raised presumption by substantial evidence to the contrary. *Tolbert*. There is no evidence Employer obtained an EME in this case; if it did, the report is not in the agency file. Instead, Employer relies on Employee's testimony and Dr. Bauer's EME report to rebut the presumption. It contends the May 2017 H&H van incident or perhaps the August 24, 2018 state fair injury with H&H was the substantial cause thus relieving Employer from liability.

Without weighing her credibility, Employee said she felt a "terrible pinching" and was "significantly hurting" after the May 2017 incident when she twisted in the van. She said her back was "good" before this event. About a week later, Employee was wheelchair-bound as she returned from her Florida vacation. Her lumbar pain was "very bad." Employee reported a substantial increase in leg and lower back pain. Her leg pain increased significantly after the van

incident, which she called "God-awful" pain. Employee said she never got 100 percent better after turning around in the van. On August 24, 2018, Employee strained her low back while pushing a client in a wheelchair at the state fair. Employee eventually stopped working because she knew she could no longer continue to perform her duties due to pain. She insisted Dr. Bauer recognize she had a "new injury" on August 24, 2018. Employee's lay testimony is adequate to rebut the raised presumption. *Tolbert*.

However, without weighing his credibility, Dr. Bauer's opinions are not adequate to rebut the raised presumption. He does not specifically address the May 2017 van incident and states the August 24, 2018 injury is not the substantial cause of her ongoing symptoms. He acknowledged the surgery for the 2009 injury accelerated degeneration at the level above the prior surgery. Nevertheless, Employee's testimony rebuts the presumption and she must prove her claim by a preponderance of the evidence. *Saxton*. This decision now turns to the compensability analysis.

Employer did not dispute the 2009 injury, paid Employee benefits and even admitted to a penalty on a medical provider's claim in 2011. Employer now mounts a last injurious exposure defense. However, *Morrison* modified the last injurious exposure rule, which is now essentially "the last injurious exposure possibility." *Morrison* considered the interaction among "the substantial cause" compensability standard, the last injurious exposure rule and the *DeYonge* rule, which states that an increase in symptoms can constitute a compensable injury. Under *Morrison*, this decision must determine a legal cause for Employee's need for medical treatment by looking at the "*causes* of the injury or symptoms" rather than the "type of injury." *Morrison* decided the last injurious exposure rule no longer requires liability to be placed on the most recent injury that bears a causal relationship to medical treatment or disability. Rather, the modified doctrine permits later employers to try to shift liability to an earlier one. Thus, the 2005 amendments allow liability for an injury on an earlier employer, but do not require the earlier employer to be found responsible. Likewise, the possibility a later employer may shift responsibility for payment to an earlier one does not compel that result. In short, under *Morrison* "the substantial cause" need not be 51 percent or greater or even the primary cause of the need for medical care. The proper comparison is among the causes identified, "not in isolation or in comparison to an abstract idea." The result is a "flexible" and "fact dependent" determination. *Morrison*.

Though Employee's testimony in deposition and at hearing was credible, she is not a medical doctor and her strongly held views on whether she suffered a new injury in May 2017 or August 2018 sufficient to absolve Employer from liability are given less weight. AS 23.30.122; *Smith*. Employee used dramatic adjectives to describe her pain in 2017 after twisting in the van. She felt a "terrible pinching" was "significantly hurting" and the pain was "excruciating" like "someone sticking a knife" in her. Yet, it is undisputed Employee never completed an injury report, though she advised her supervisor about the event, did not seek immediate medical attention even though the pain repeated at least twice the same week with normal movements, and never mentioned the event to her family provider when she obtained medication for her Florida trip a week later. When she saw her provider for medication, her primary concern was asthma; she requested pain medicine as an aside noting she would have multiple stops on her flight to Florida. Likewise, Employee did not mention the 2017 van incident to Dr. Johnston when she returned in a wheelchair from her vacation. Employee got "well enough" after the van incident to continue to perform her full job. Notwithstanding her dramatic descriptions in 2017 and 2018, Employee's symptoms sound like acute flare-ups of her chronic low back condition. *Rogers & Babler*.

Likewise, her medical records belie Employee's symptom recollections. For example, in her deposition, Employee stated she never had any leg symptoms before the May 2017 van incident. However, a February 16, 2009 chart note mentions leg symptoms. The February 19, 2009 MRI report notes radicular features. An April 21, 2009 report charts one episode of radiating pain into the right leg. On February 23, 2010, Employee mentioned occasional left leg pain. An April 21, 2010 chart note records occasional right leg pain. On July 26, 2010, Employee reported improved lumbar radiculopathy. On October 31, 2011, Dr. Johnston diagnosed residual radiculopathy. Employee also said she had no low back symptoms right before the May 2017 van incident. But on August 13, 2012, Dr. Meadows recorded "daily pain" in Employee's low back. And on September 30, 2015, a provider noted Employee had three weeks of low-back pain. This all occurred prior to the May 2017 van incident. These reports to physicians are given greater weight and sound like chronic pain from a degenerating lumbar spine condition. AS 23.30.122; *Smith*.

In retrospect, Employee recalled Dr. Wright telling her "this is your life" and she would always have pain to some degree. Employee said since her work injury with Employer, she has had "good

days and bad days." She went to the emergency room in 2012 with back pain with no inciting event. Addressing her deposition testimony that her back was "good," prior to the van incident, Employee explained to her "good" is a relative term. When she had back pain in 2015, she thought it was just another "bad day at work." Notwithstanding stating her back and right leg pain "hurt like crazy" after the May 2017 van incident, she returned to work until the August 24, 2018 state fair injury. Her credible though dramatic testimony describes waxing and waning pain from her chronic, accelerating degeneration. AS 23.30.122; *Smith*.

The medical evidence also supports Employee's contention the February 8, 2009 injury remains the substantial cause of her need for treatment. Dr. Cable's December 9, 2009 MRI demonstrated "no severe stenosis" in Employee's lumbar spine. But by April 5, 2011, Dr. McCormick's CT showed "severe" central stenosis at L4-5 and only mild to moderate stenosis at L2-3, with no intervening injury. However, on January 15, 2018, Dr. McCormick read an MRI to show severe L3-4 and L4-5 stenosis, which he described as a "marked change" from a previous study.

On September 10, 2018, Dr. Johnston diagnosed lumbar stenosis aggravated "at least temporarily" by the state fair event. Dr. Bauer disagreed with Employee's view that the August 24, 2018 event was a "new injury." He diagnosed no objective change in her spinal structure resulting from that injury. He identified potential causes of Employee's need for medical treatment following the August 24, 2018 incident to include temporary subjective symptoms after the August 24, 2018 "lumbar strain"; progressive degenerative disease; and a prior fusion at L5-S1, which he said tends to accelerate the degeneration at L4-5. Dr. Bauer opined "the pre-existing conditions are the substantial cause" of her need for treatment. The only conditions preexisting the August 24, 2018 injury he identified were progressive degenerative disease and her prior fusion, which accelerated the degeneration and is part of the accepted 2009 work injury with Employer. He expressly stated H&H employment and the August 24, 2018 injury were not the substantial cause.

On December 28, 2018, Dr. Johnston stated Employee's injury began in 2009 with intermittent symptoms since then. On May 23, 2019, Dr. Paulson said Employee had gradually progressing low back pain "which sounds to have started in 2009 from a work-related injury." The fact he said

he was uncertain that her multilevel stenosis developed from the 2009 injury is immaterial because those remarks do not address the proper legal analysis. *Morrison*.

These medical opinions are given the greatest weight. AS 23.30.122; *Smith*. Taking into account the relative contribution of different identified causes of the current need for medical treatment, and given the above analysis, the medical evidence shows Employee's February 8, 2009 work injury causing two lumbar surgeries and their sequela remains the substantial cause of Employee's current symptoms and her need to address those symptoms with additional medical care and treatment. AS 23.30.010(a); *Ugale*.

6) Is Employee entitled to additional medical care?

Employee's February 8, 2009 injury with Employer remains the substantial cause of her need for medical treatment. Drs. Johnston and Paulson recommended surgical intervention and Dr. Paulson said she may benefit from multilevel bilateral laminectomies and foraminotomies. Employee wants surgery to obtain relief. There is no medical opinion suggesting Employee does not need the recommended surgical procedure to address her symptoms. While Dr. Bauer said no additional medical care was necessary, he was referring to treatment for the August 24, 2018 work injury with H&H. Given the surgical recommendation from two physicians and a lack of any opposing medical opinion, Employee is entitled to additional medical care for the February 8, 2009 injury from Employer, including but not limited to the recommended surgery. AS 23.30.095(a).

7) Is Employee entitled to past and future medical transportation costs?

Employee claims medical transportation expenses. 8 AAC 45.084(a), (b)(1), (d). She concedes she filed no log itemizing past transportation costs. Employee gave no explanation for her failure to submit proof. Her claim for past medical transportation expenses will be denied for failure of proof. However, as this decision finds the February 2009 work injury remains the substantial cause for additional lumbar spine medical care, Employer is liable for medical transportation costs in accordance with the Act and the applicable regulations, from the date of hearing forward. Employer retains its right to object to reasonableness of any submitted transportation costs.

8) Is Employee entitled to additional TTD benefits?

Dr. Johnston tried an epidural steroid injection in October 2018, but Employee got no relief. The only other current recommendation for medical care is the above-referenced multilevel surgery. Employee is currently working. Her claim for TTD benefits is for future disability. Therefore, if Employee undergoes the surgery, Employer is liable for additional TTD benefits in accordance with the Act. This does not preclude her from entitlement to TTD benefits for other lower back related treatment should a physician restrict her ability to work and find her not medically stable.

9) Is Employee entitled to additional PPI benefits?

Dr. Johnstone gave Employee a 10 percent PPI rating, which Employer paid many years ago. Her PPI benefit claim is for possible future PPI. If Employee undergoes the recommended lumbar surgery and if she has a higher PPI rating following medical stability for that surgery, she is entitled to additional PPI benefits from Employer. Employer retains its right to challenge any PPI rating's calculation, if and when it occurs, in accordance with the Act and the regulations.

10) Is Employee entitled to an attorney fee and cost award?

Employer controverted Employee's claim. She retained an attorney who successfully prosecuted it. Employee succeeded on all her claims with exception of past transportation expenses, which is a minor issue. Attorney fees will not be reduced for her failure on this issue. *Porteleki*. Employee is entitled to attorney fees awarded under AS 23.30.145(a). This was a moderately complex case on its medical facts but litigated briefly. Employee's attorney provided helpful briefing and argument and succeeded in obtaining a significant benefit for her in a prompt manner. Powell requests $400 per hour for attorney services and $185 per hour for her services as a paralegal. These are rates Powell has received in prior decisions. *Rogers & Babler*. They are reasonable given Powell's experience and rates charged by comparable attorneys who practice in this area. She seeks $18,434.50 in attorney and paralegal fees and $522.36 in other costs. *Id*.

Employer objects to Powell's fees on several grounds. It first contends the attorney fee affidavit was untimely; it states the record was not left open to receive Powell's supplemental attorney fee and cost affidavit. Employer is mistaken; the designated chair expressly left the record open for

Dr. Paulson's deposition, five page written arguments and Employee's supplemental affidavit of attorney fees and costs. Employer next contends some fees are not related to this claim and cannot be awarded. It contends all entries before January 31, 2019, should not be included because they relate to the H&H case. Specifically, Employer points to settlement discussions regarding the H&H case on January 11, 2019 and January 17, 2019. It does not explain why other entries where Powell gave Employee legal advice before January 31, 2019 should not be included in the attorney fee and cost awards in this case. The January 11, 2019 entry for $120 and the January 17, 2019 entry for $40 appear related solely to settlement discussions with H&H. If Employee settles the case with H&H, she will be entitled to an attorney fee in respect to work done in that case. However, Powell's affidavit does not demonstrate how settlement discussions in another matter are relevant to this case. Therefore, Powell's attorney fee request will be reduced by $160 for these two, unrelated entries.

Lastly, Employer relying on *Murphy* objects to Employee's attorney fee request contending it is "inflammatory, irrelevant, irresponsible and admittedly excessive." *Murphy* is distinguishable from this case because the claimant in that case prevailed on nothing more than interest on a plane ticket and a $160.90 penalty. Employer's additional objections and arguments do not present a legal basis for reducing an attorney fee or cost award based solely on Employer's arguments.

Employee will be awarded $18,274.50 in attorney and paralegal fees and $522.36 in other costs for a total of $18,796.86 ($18,956.86 - $160 = $18,796.86), which are fully compensatory and reasonable attorney fees and reasonable costs. *Cortay*.

CONCLUSIONS OF LAW

1) The orders denying Employer's request for a hearing continuance were correct.
2) The order denying Employer's request for mediation was correct.
3) The order denying Employer's request for an SIME was correct.
4) Employee's claim is not barred as untimely.
5) Employee's February 8, 2009 injury with Employer is the substantial cause of her current need for medical treatment.
6) Employee is entitled to additional medical care.

7) Employee is not entitled to past but may be entitled to future medical transportation costs.

8) Employee may be entitled to additional TTD benefits.

9) Employee may be entitled to additional PPI benefits.

10) Employee is entitled to an attorney fee and cost award.

ORDER

1) Employee's January 10, 2019 claim is granted.

2) Employer will pay medical costs, including surgery, in accordance with this decision.

3) Employer will pay other benefits in accordance with this decision.

4) Employer will pay attorney Powell $18,796.86 in attorney fees and costs.

Dated in Anchorage, Alaska on September 9, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Kimberly Ziegler, Member

/s/
Donna Phillips, 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 Yvonne Meili, employee / claimant v. Sterling Assisted Living, Inc., employer; Liberty Northwest Insurance Company, insurer / defendants; Case No. 200902068; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on September 9 2019.

/s/
Charlotte Corriveau, Office Assistant