ALASKA WORKERS' COMPENSATION BOARD

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

JAMIE ROSALES, Employee, Claimant, v. INLET WORLDWIDE OIL, INC., Employer, and AMERICAN ZURICH INSURANCE CO., Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201604532 AWCB Decision No. 19-0118 Filed with AWCB Anchorage, Alaska on November 12, 2019.

Jaime Rosales's (Employee) June 20, 2017 claim and Inlet Worldwide Oil, Inc.'s (Employer) September 13, 2019 petition were heard on September 24, 2019, in Anchorage, Alaska, a date selected on June 7, 2019. Employee's December 24, 2018 hearing request gave rise to this hearing. Attorney Michael Patterson appeared and represented Employee who appeared and testified. Attorney Michelle Meshke appeared and represented Employer. Coby Shabolin appeared and testified for Employee. Ronald Teed, M.D., Daniel Kaufman, and Dan Asakawa appeared telephonically and testified for Employer. Bruce McCormack, M.D., appeared telephonically and testified. An oral order granted Employer's September 13, 2019 petition to exclude Exhibit 14 in Employee's September 6, 2019 exhibit list. This decision examines the oral order and decides Employer's June 20, 2017 claim on its merits. The record remained open for supplemental fee affidavit, objection and reply, and closed on October 11, 2019.

ISSUES

As a preliminary matter, Employer sought to exclude Exhibit 14 on Employee's September 6, 2019 Exhibit List based on hearsay and irrelevance. Exhibit 14 is a second independent medical evaluation (SIME) report of an unrelated claimant, Tanya Anderson, by Marvin Zwerin, D.O., which involves an employer's medical evaluation (EME) report from Dr. Teed and Dr. Zwerin's negative comments about Dr. Teed's opinion. Employer also contended medical report disclosure of an unrelated claimant may violate the Health Insurance Portability and Accountability Act (HIPAA) privacy rules.

Employee contended medical facts in Anderson's case were similar to those in Employee's case; therefore Exhibit 14 would be relevant to cross-examine Dr. Teed who relied on the controversial Bradford-Hill criteria in Anderson's case to establish a causal relationship between Anderson's work injury and her subsequent medical condition. Employee made an offer of proof that Anderson authorized him to use her SIME report and contended she would be a necessary witness for rebuttal or to authenticate Exhibit 14. An oral order issued granting Employer's request to exclude Exhibit 14.

1) Was the oral order excluding Exhibit 14 on Employee's September 6, 2019 Exhibit List correct?

Employee contends he sustained a compensable injury on September 27, 2015, while working for Employer, and is entitled to temporary total disability (TTD) benefits.

Employer disagrees; it contends the work injury is not the substantial cause of Employee's need for medical treatment, and his disability is due to the progression of a pre-existing condition.

2) Is Employee entitled to TTD benefits?

Employee contends he sustained a compensable injury on September 27, 2015, while working for Employer, and is entitled to permanent partial impairment (PPI) benefits.

Employer disagrees; it contends the work injury is not the substantial cause of Employee's need for medical treatment, and any permanent impairment due to progression of a pre-existing condition.

3) Is Employee entitled to PPI benefits?

Employee contends he needs continuing medical care and treatment for his work injury. He seeks an order requiring Employer to pay for all medical benefits necessitated by his work injury.

Employer contends Employee is entitled to no additional medical care or related transportation costs based on its EME opinions, and his claim should be denied.

4) Is Employee entitled to medical and transportation costs?

Employee contends he is entitled to interest on unpaid TTD and PPI benefits. He contends his attorney provided valuable services that will result in the award of benefits; consequently, he should be awarded attorney fees and costs.

Employer contends Employee is not entitled to interest, attorney fees and costs as it timely controverted his claims, and he is not entitled to any benefit in this case.

5) Is Employee entitled to interest, attorney fees or costs?

FINDINGS OF FACT

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

1) Employee was born with a high riding left testicle. Once as a child, he had to go to the hospital due to testicular pain. (Medical Summary, March 23, 2019; Employee).

2) Employee has had intermittent lower back pain since he was 17 years old. He had been involved in three car accidents, which aggravated his pain but resolved. (Medical Summary, Brandy Atkins, DNP, report, January 8, 2018; Employee).

3) In 2008, working as a cashier at Fred Myers, Employee developed back pain that radiated to the front of his groin. An emergency room physician diagnosed sciatic nerve pain. Employee has had a sore back since. (Affidavit of Service, September 17, 2019).

4) On November 15, 2011, Employee was involved in a car accident. (Medical Summary, Patient Information, February 5, 2018).

5) On December 2, 2011, Employee visited Diamond Medical Clinic for back pain caused by the November 15, 2011 accident. (Medical Summary, Diamond Medical Clinic, March 7, 2018).

6) On December 6, 2011, Employee saw Douglas Luther, D.C. An x-ray showed no evidence of fracture, tumor, or other pathological conditions in his back. Dr. Luther diagnosed subluxation of cervical, thoracic, and lumbar spine, and recommended chiropractic treatment three times per week. (Medical Summary, Radiology Report, February 5, 2018).

7) On March 28, 2012, Employee reported 90 percent improvement since starting care with Dr. Luther. He also reported having "no pain at the moment" and being able to "lift heavy weights without extra pain." (Medical Summary, Interim Reexamination Questionnaire, February 5, 2018).

8) On March 29, 2012, Dr. Luther concluded Employee reached "maximal medical improvement" and instructed him to return for symptomatic relief on an as-needed basis. (Medical Summary, Luther report, February 5, 2018).

9) In May 2012, Employee began working for Employer. (Employee).

10) On August 15, 2012, Richard Peterson, D.C., opined he expected no low back injury from the November 15, 2011 accident due to its minimal nature, only a mild strain to the cervical and thoracic regions, which "would usually resolve within six weeks." (Medical Summary, Independent Medical Records Review, March 7, 2018).

11) On September 27, 2015, Employee injured his low back lifting a tire while working for Employer. He had been working extended hours changing tires since the winter tire season started. (Deposition of Jaime Rosales, March 27, 2018, at 30; Medical Summary, Atkins report, January 8, 2018).

12) Employee was an assistant manager, and his job was mostly administrative until Employer introduced the tire changeover services in 2014. (Kaufman; Employee).

13) In Alaska, businesses generally offer winter tire changeover services beginning the 15th of September. (Observation; knowledge).

14) Employee reported his September 27, 2015 injury to Daniel Kaufman, his supervisor. Kaufman could not recall the exact date Employee reported the work injury. (Kaufman).

15) On September 28, 2015, Employee woke up with pain in bilateral lower extremities mainly to the buttock region. (Employee's Exhibit List, September 6, 2019, Exhibit 1).

16) On September 29, 2015, Employee visited First Care due to intense pain in his lower back and was given a Toradol shot. The First Care medical record reads "History of sciatica, left side, then right side after car accident. No injury." Later on the same date, Employee saw Kathleen Nuttle, PA-C. He denied any specific injury, but stated he recently changed heavy tires at work. PA-C Nuttle diagnosed low back pain and a probable bulging disc at L5-S1. An x-ray showed moderate disc space narrowing at L4-5 and L5-S1 without evidence of compression fracture or instability. (Medical Summary, January 8, 2018).

17) On October 12, 2015, a magnetic resonance imaging (MRI) showed an L4-5 disc protrusion and degenerative joint disease with severe bilateral lateral recess, right neural foraminal, and mild left neural foraminal stenoses. It also showed an L5-S1 disc protrusion and degenerative joint disease with mild canal bilateral lateral recess and neural foraminal stenoses. (Employer's Hearing Brief, September 17, 2019, Exhibit D).

18) On October 19, 2015, DNP Atkins saw Employee and diagnosed a large disc herniation with a severe central canal stenosis at L4-5 and to a lesser degree at L5-S1 and a lumbar facet arthropathy at L4-5 and L5-S1. DNP Atkins prescribed Celebrex, Gabapentin, and Norco. She recommended an epidural steroid injection (ESI), but Employee declined. (Medical Summary, Atkins report, January 8, 2018).

19) On November 24, 2015, Employee saw Bryan Kirkpatrick, P.T., and reported he suffered a significant increase in low back pain after changing tires at work. He had been able to work full time but with significant pain in his low back and left leg. (Employee's Hearing Brief, September 17, 2019, Exhibit 22).

20) On November 30, 2015, Employee saw DNP Atkins and reported improving lower back pain. (Medical Summary, Atkins report, January 8, 2018).

21) On March 4, 2016, Employee saw Christopher Gay, M.D., a pain specialist, and reported having lower back pain that "radiates into the left testicle and down the left leg." Employee also said he had "intermittent low back pain since he was 17 but the current episode began after doing tire changes at work (Jiffy Lube) in October. The next day, he couldn't get out of bed." Dr. Gay diagnosed low back pain, displacement of a lumbar intervertebral disc without myelopathy, lumbar radiculopathy, and opioid dependence. Employee deferred injections and physical therapy due to

financial concerns. Hydrocodone was prescribed for sparing use. Lastly, Dr. Gay stated Employee's injury was work-related. (Medical Summary, Gay report, January 8, 2018; Deposition of Jaime Rosales, March 27, 2018, at 36).

22) On March 23, 2016, Dr. Gay confirmed Employee's lower back and left leg pain "started after an injury at work." Hydrocodone was refilled. (Medical Summary, Gay report, January 8, 2018).

23) On March 23, 2016, Employee reported his September 27, 2015 work injury to Employer with October 1, 2015, as "Date of Injury," and October 2, 2015, as "Date Employer First Knew." "Accident Description" stated "doing a tire changeover back strain." (ICERS, First Report of Injury, March 23, 2016).

24) On April 21, 2016, Employee saw Dr. Gay and reported a gradual decrease in symptoms since his initial visit. Employee said medications were helping and he only needed Hydrocodone sparingly. Hydrocodone refill was not needed. (Medical Summary, Gay report, January 8, 2018).

25) On May 5, 2016, Dr. Gay refilled Hydrocodone. (Medical Summary, Gay report, January 8, 2018).

26) On May 12, 2016, x-rays showed changes of early lumbar spondylosis at L5-S1 with 50 percent loss of disc height, endplate sclerosis and facet joint hypertrophic changes in the lower lumbar spine. (Employer's Hearing Brief, September 17, 2019, Exhibit I).

27) On May 19, 2016, Dr. Teed saw Employee for an EME. He noted Employee denied a specific injury but described "pain that was gradually and progressively coming on as he was doing tire changes on cars for winter tires." Employee said he was "experiencing left lower pain that would radiate into the left testicle." Under "DIAGNOSTIC STUDIES," Dr. Teed wrote:

> "October 12, 2015 MRI shows multilevel disc desiccation with associated disc height loss and posterior disc bulging at L4-L5, L5-S1 levels associated with facet hypertrophy. The disc bulges are broad-based resulting in mild central canal, moderate bilateral foraminal narrowing at the L5-S1 level and mild bilateral foraminal narrowing at the L4-L5 level."

Dr. Teed concluded Employee's October 1, 2015 injury was not the substantial cause of his need for medical treatment or disability because Employee described "an on-the-job injury with increased lower back pain on October 1, 2015, but [he] was seen just days prior on September 29, 2015, at FirstCare Medical Center for increased lower back pain after a car accident; description

of the pain was that of chronic lower back pain with flare-up, pain diagram consistent with [his] complaints." Dr. Teed further noted Employee had experienced intermittent back pain since he was 17 and reached "maximum medical improvement"; therefore, Employee neither sustained impairment nor needed further medical treatment. (Medical Summary, Teed report, January 8, 2018).

28) On May 26, 2016, Dr. Gay said Employee had nearly resolved leg pain but persistent left lower back pain that was fairly severe despite NSAIDs, opioid medications, PT and activity modification. Hydrocodone was refilled. (Medical Summary, Gay report, January 8, 2018).

29) On July 27, 2016, Employee saw Dr. Gay and reported increased pain in the lower back and having difficulty walking. The pain was radiating down the leg again. Dr. Gay performed a lumbar ESI and refilled Hydrocodone. (Medical Summary, Gay report, March 7, 2018).

30) On August 9, 2016, Employee reported he had 40 percent relief for four days, then pain returned and radiated from back into left hip, groin and testicle. (Medical Summary, Gay report, March 7, 2018).

31) On August 16, 2016, Dr. Gay performed a repeat lumbar ESI and refilled Hydrocodone. (Medical Summary, Gay report, March 7, 2018).

32) On September 14, 2016, Employee reported significant improvement in his pain. (Medical Summary, Gay report, March 7, 2018).

33) On October 11, 2016, Employee reported left lower back pain that is mild, intermittent, and controllable with Tramadol. (Medical Summary, Gay report, March 7, 2018).

34) On December 8, 2016, Dr. Gay performed a third lumbar ESI and refilled Hydrocodone. (Medical Summary, Gay report, March 7, 2018).

35) On December 28, 2016, Dr. Gay prescribed Percoce in place of Hydrocodone. (Medical Summary, Gay report, March 7, 2018).

36) On December 29, 2016, Dr. Gay performed a fourth lumbar ESI and noted conservative measures have been exhausted. (Medical Summary, Gay report, March 7, 2018).

37) On January 24, 2017, Dr. Gay performed a fifth lumbar ESI. (Medical Summary, Physician's Consent Surgery Informed Consent, March 7, 2018).

38) On January 27, 2017, Employee reported his left testicle was "agitated." (Medical Summary, Follow-up Visit Intake Paperwork, March 7, 2018).

39) On February 22, 2017, Employee reported he had slipped and twisted on the left side resulting in increased pain. (Medical Summary, Gay report, March 7, 2018).

40) On February 23, 2017, Employee reported his pain "got worse." (Medical Summary, Follow-up Visit Intake Paperwork, March 7, 2018).

41) On March 1, 2017, Dr. Gay performed a left sacroiliac joint injection. (Medical Summary, Gay report, March 7, 2018).

42) On March 28, 2017, Dr. Gay concluded Employee had limited use for ongoing injections given the transient and incomplete duration of relief and referred him for neurosurgery. (Medical Summary, Gay report, March 7, 2018).

43) On March 29, 2017, an MRI showed a progressed large disc extrusion at L4-5 resulting in severe central spinal canal, bilateral recess, and right neural foraminal stenoses, and a mild disc disease at L5-S1 causing a mild bilateral neural foraminal stenosis. (Medical Summary, Christopher Reed, M.D., report, February 5, 2018).

44) On June 6, 2017, Susanne Fix, M.D., orthopedic surgeon, performed bilateral laminotomies, mesial facetectomies, and foraminotomies, and a partial discectomy at L4-5. Operative findings were a large central and rightward subligamentous disc extrusion. (Medical Summary, Discharge Summary, February 5, 2018).

45) On June 29, 2017, Employee reported significantly reduced pain. Employee tapered pain medication. (Medical Summary, Gay report, March 7, 2018).

46) On August 16, 2017, Employee saw Dr. Gay and reported lower back and left groin pain. Dr. Gay diagnosed testicular microlithiasis and referred Employee to a urologist. (Medical Summary, Gay report, March 7, 2018).

47) On October 4, 2017, Andre Godet, M.D., urologist, diagnosed testicular microlithiasis, retractile testis, and testicular pain. Dr. Godet noted Employee had a high riding testicle, which may benefit from orchiopexy to eliminate chronic epididymal irritation. (Medical Summary, Godet report, April 6, 2018).

48) On December 5, 2017, Dr. Godet performed a left inguinal orchiopexy. (Medical Summary, Operative Report, April 6, 2018).

49) On June 20, 2017, Employee claimed TTD, PPI, medical and transportation costs, attorney fees and costs, and interest. (Workers' Compensation Claim, June 20, 2017).

50) On August 1, 2017, Employer denied Employee's June 20, 2017 claim based on Dr. Teed's May 19, 2016 opinion. (Answer; Controversion Notice, August 1, 2017).

51) On January 18, 2018, Christopher Gay, M.D., reiterated Employee's September 27, 2015 injury was the substantial cause of Employee's condition and need for treatment. (Medical Summary, January 22, 2018).

52) On June 18, 2018, SIME Bruce McCormack, M.D., saw Employee for an SIME. He diagnosed (1) L4-5 central subligamentous disc herniation caused by the October 1, 2015 injury, and (2) high riding testicle, a preexisting defect aggravated by the October 1, 2015 injury. Employee reported pain was a 2/10 on average. Dr. McCormack noted Employee likely had symptomatic disc disease but did not see a doctor, use prescription pain medication, or limit work or recreational activities; he had chronic degenerative changes at two levels on MRI taken in October 2015. However, the October 1, 2015 injury caused a large central disc rupture. Employee began taking narcotics and underwent disc surgery, which also aggravated his preexisting testicular condition. Also, Dr. McCormack said Employee had orchiopexy within six months of disc surgery because being sedentary, gaining weight, and using narcotics probably caused epididymal inflammation. Dr. McCormack opined Employee was totally disabled from May 2017 to October 2017. From October 2017, he was capable of medium work with a lifting limitation of 40 pounds. Employee reached medical stability as of June 6, 2018. Dr. McCormack gave an eight percent PPI rating for a herniated lumbar disc with resolved radiculopathy, which was 100 percent attributed to the October 1, 2015 injury. He also gave a three percent PPI rating for testicular, epididymal, spermatic cord disease, of which 50 percent was attributed to non-industrial causation. Dr. McCormack disagreed with Dr. Teed's opinion the October 1, 2015 injury did not materially contribute to Employee's need for treatment or disability. He also said Employee's November 2011 car accident was unrelated to the L4-5 disc herniation identified in October 2015 MRI. Lastly, Dr. McCormack said "all care except 50 postop therapies was reasonable. Twenty to thirty therapies would be more typical. He should have been referred to a surgeon much sooner." (McCormack report, July 9, 2018).

53) On May 24, 2019, Dr. Teed conducted a records review EME. He stated Employee "was experiencing pain prior to the claimed injury date yet he could not describe a specific injury, nor did he ever describe a significant change in his symptoms from his September 29, 2015, evaluation and afterwards. Objective findings were only that noted radiographically, which are all preexisting

arthritic findings, unrelated." Also, Dr. Teed relied on the Bradford-Hill's criteria of causation, which is a clinical model used in epidemiology, to conclude lack of resolution of Employee's complaints over time was inconsistent with an acute injury. An acute injury would be expected to show evidence of progressive resolution given time with the claimed causative factor removed. Dr. Teed asserted ESIs and even low back surgery have not resolved Employee's symptoms and complaints; an unrelated orchiopexy gave Employee some relief. He concluded inconsistencies between Employee's medical records and his history suggest functional overlay. Further, Dr. Teed indicated disc protrusions are commonly found in degenerative spines and even asymptomatic individuals and studies have shown (1) no correlation between work/career types and degeneration of the spine; and (2) 80 percent of onset of low back pain has no inciting event or mechanism of injury. In short, he said there is no correlation with Employee's onset of back pain and the October 12, 2015 MRI findings. (Medical Summary, Teed report, September 20, 2019).

54) On August 30, 2019, Dr. McCormack testified the October 12, 2015 MRI showed a very large disk herniation causing severe stenosis; it would fit an abrupt clinical change in Employee's status. Dr. McCormack said Dr. Teed's reading of the MRI, "disk, height loss, posterior bulging and mild bilateral foraminal narrowing," was not accurate. At First Care, Employee did not report a specific injury but stated "he was lifting tires and then the following day was sore." This was enough to provide causation due to severe pathology. Also, Employee had symptomatic back pain prior to the September 27, 2015 injury; however, he was not in any kind of treatment, was not seeing doctors, and was working changing tires. In short, Employee's preexisting degeneration was a factor but not a predominant causation. Dr. McCormack said Employee would have not had orchiopexy at the time he had it absent the back injury and surgery. Epididymitis is often present in patients after back surgery due to use of narcotics and steroids and being sedentary. Employee had an anatomic disposition for this as well. It would be quite possible Employee would have required orchiopexy at some point in the future, but the timing of it was consistent with an industrial aggravation of a preexisting condition. Dr. McCormack clarified of the three percent PPI rating, one percent pertains to the impairment related to urological condition before the work injury. Lastly, Dr. McCormack said Employee's future back pain and flare-ups will not be because of the work injury or the treatment that he had related to the work injury. The work injury precipitated an acute central disc herniation, and Employee was treated. He had back pain before

the work injury and will have back pain after the work injury. (Deposition of Bruce M. McCormack, MD, September 20, 2019).

55) At hearing, Dr. Teed testified Employee's October 1, 2015 injury was not the substantial cause of his need for medical treatment or disability because it was just a flare-up - "a natural progressive degenerative condition that causes episodes of pain regardless of activity." He said Employee's October 1, 2015 injury resulted from a gradual and progressive worsening of a preexisting condition. Dr. Teed emphasized the October 12, 2015 MRI showed no acute findings - no edema, no acute tears of tissues, no evidence of inflammatory healing reaction. It only showed chronic preexisting arthritic changes. Further, Dr. Teed disagreed with Dr. McCormack with regard to the severity of Employee's disc protrusion. He said it could have been present for a while. Dr. Teed said it was not symptomatic when he evaluated Employee on May 19, 2016; Employee did not have any neurologic finding that would correlate with the disc protrusion. All Employee had was a subjective complaint of pain, and he did not need lumbar surgery. Dr. Teed stressed there is no correlation between degenerative disc disease and injury; a desiccated disc is not more susceptible to injury than a healthy disc. He also said an arthritic spine is not more susceptible to an aggravation of symptoms than a healthy spine. As for orchiopexy, Dr. Teed said Employee had a preexisting high riding testicle which was unrelated. (Teed).

56) At hearing, Dr. McCormack testified the October 12, 2015 MRI showed Employee had a "contained disc herniation" in which the nucleus would be contained within the annulus. Unlike a non-contained disc herniation in which the body would reabsorb the nucleus, the displaced fragment was not reabsorbed by the body and occupied 75 to 80 percent of the nerve channel. In short, the MRI showed a large disc herniation that would cause a lot of "problems" if Employee kept changing tires. It did not result in a paralysis but would have irritated nerves in day-to-day activities. Thus, it would be hard to believe Employee had the condition shown on MRI for months or years. Dr. McCormack disagreed with Dr. Teed and said a degenerative disc is more prone to injury than a healthy disc. A degenerative spine makes a person more susceptible to injury or increase in symptoms. Dr. McCormack admitted he did not know Employee did not change tires until the winter tire changeover which started a few weeks before September 27, 2015. Dr. McCormack assumed Employee worked several months changing tires before he injured his back. Even so, Dr. McCormack stated he would not change his medical opinion. (McCormack).

57) Dr. Teed performed the last lumbar discectomy in 2003 or 2004, and lumbar fusion during his training in 1993-1997. Dr. Teed testified he did not know his 2018 income or his earnings doing EMEs. (Teed).

58) Dr. McCormack testified he has performed approximately 10,000 lumbar surgeries over the course of his career. He has seen many male patients developing epididymitis during the course of having back surgery. (McCormack).

59) At hearing, Employer stated it would stipulate to the TTD calculation Employee submitted in his September 17, 2019 brief if his injury were to be found compensable. Employee's calculation shows a TTD rate of $57.74 per day for 166 days and a total time loss TTD of $4,343.88. (Record; Employee's Hearing Brief, September 17, 2019).

60) At hearing, Employer stated whether the work injury took place in September or October 2015, was a "red herring" issue despite Dr. Teed's reliance on it, at least partly, in forming his May 19, 2016 opinion. Employer will not dispute Employee's alleged work injury date. (Record; Medical Summary, Teed report, January 8, 2018).

61) It is not uncommon to find workers' compensation cases in which the work injury date cannot be exactly ascertained. (Experience; observation).

62) In this decision, the September 27, 2015 work injury will be deemed the same as the October 1, 2015 work injury, and vice versa. (Inference; judgment).

63) There is no Employee medical record from September 2012 through August 2015. (Observation).

64) Between Employee's visit to a hospital as a child and September 27, 2015, there is no medical record regarding Employee's urologic condition.

65) On September 26, 2019, Employee asked for $67,915 in attorney fees and $6,256.28 in costs, totaling $74,171.28. (Supplemental Affidavit of Attorney's Fees and Costs, September 26, 2019).

66) Employee's September 17, 2019 brief is a 17-page document, which consists of one caption page, one signature page, one background page, eight pages of copied and pasted medical records, and six pages of hearing issues, expected hearing testimony, and requests. It does not contain legal citations or arguments. Except for the two pages showing TTD and medical expenses, the rest was not helpful. (Employee's Hearing Brief, September 17, 2019; observation).

67) Patterson billed $12,835 for 30.20 hours spent in preparation of Employee's September 17, 2019 brief as follows:

DATE	HOURS BILLED	HOURLY RATE	TOTAL
9/4/19	3.80	$425	$1,615
9/6/19	2.40	$425	$1,020
9/6/19	0.80	$425	$340
9/11/19	1.50	$425	$637.50
9/12/19	3.10	$425	$1,317.50
9/13/19	2.70	$425	$1,147.50
9/14/19	3.10	$425	$1,317.50
9/16/19	7.00	$425	$2,975
9/17/19	5.80	$425	$2,465
Total	30.20		$12,835

(Supplemental Affidavit of Attorney's Fees and Costs, September 26, 2019).

68) Based on the nature, length, and complexity of Employee's September 17, 2019 brief, eight hours is reasonable. Therefore, $3,400 is the reasonable fee for Employee's September 17, 2019 brief. (Experience; Observation; Judgment).

69) Employee sought $54,937.36 in medical cost reimbursement to a private insurer, and $5,333.45 in out-of-pocket medical expenses. Employer objected to payment of more than 30 postop physical therapy sessions. (Employee's Hearing Brief, September 17, 2019; Employer Hearing Brief, September 17, 2019; record).

70) Employee sought $260 of per diem, $65 per day times four days, for Dr. McCormack deposition trip. (Supplemental Affidavit of Attorney's Fees and Costs, September 26, 2019).

71) Employee sought an additional $892.50 in fees for the time Patterson spent on filing Employee's October 11, 2019 reply. (Affidavit of Attorney's Fees and Costs, October 11, 2019).

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 . . . employers. . . .
> > . . . .

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

DeYonge v. NANA/Marriott, 1 P.3d 90, 97 (Alaska 2000), held "a temporary increase in symptoms aggravating the disability" constitutes an injury under the Act. In *Morrison v. Alaska Interstate Construction, Inc*., 440 P.3d 224 (Alaska 2019), the Alaska Supreme Court found the legislature did not abrogate *DeYonge* when it amended the coverage statute in 2005. 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). 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).

> **AS 23.30.095(a). 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. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has a right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
>
> **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 any claim for compensation under the workers' compensation statute. *Id.* The presumption involves a three-step analysis. To attach the presumption, an employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Credibility is not examined at the first step. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

Once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc*., 973 P.2d 603 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence.

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 the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000).

In *Bockness v. Brown Jug, Inc.*, 980 P.2d. 445, (Alaska, 1999), the Supreme Court held by providing that employers are responsible only for providing that medical care and those services

"which the nature of the injury or the process of recovery requires," the Act indicates that the board's proper function includes determining whether the care paid for by employers is reasonable and necessary.

> **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 23.30.135. 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 by 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. . . .

> **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. . . .

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id*. at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting

from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id*. at 973, 975.

In *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), the Alaska Supreme Court held "attorney's fees in workers' compensation cases should be fully compensatory and reasonable," so injured workers have "competent counsel available to them." Nonetheless, when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed.

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director. . . .
> . . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due.
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

Land and Marine Rental Co. v. Rawls, 686 P.2d 1187 (Alaska 1984), the Supreme Court held a workers' compensation award, or any part thereof, shall accrue lawful interest from the date it should have been paid. Interest and penalty are mandatory. AS 23.30.155(a), (e), (p).

> **AS 23.30.185. Compensation for temporary total disability**. In case of disability total in character but temporary in quality, 80 percent of the injured employee's

spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

AS 23.30.190. Compensation for permanent partial impairment; rating guides. (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .

. . . .

(c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. If the combination of a prior impairment rating and a rating under (a) of this section would result in the employee being considered permanently totally disabled, the prior rating does not negate a finding of permanent total disability.

8 AAC 45.082. Medical treatment.

. . . .

(d) Medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and a completed report in accordance with 8 AAC 45.086(a). Unless the employer controverts the prescription charges or transportation expenses, an employer shall reimburse an employee's prescription charges or transportation expenses for medical treatment no later than 30 days after the employer received the medical provider's completed report in accordance with 8 AAC 45.086(a), a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and an itemization of the prescription numbers or an itemization of the dates of travel, destination, and transportation expenses for each date of travel. If the employer controverts (1) a medical bill or if the medical bill is not paid in full as billed, the employer shall notify the employee and medical provider in writing the reasons for not paying all or a part of the bill or the reason for delay in payment no later than 30 days after receipt of the bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and completed report in accordance with 8 AAC 45.086(a); (2) a prescription or transportation expense reimbursement request in full, the employer shall notify the employee in writing the reason for not paying all or a part of the request or the reason for delay within the time allowed in this section in which to make payment; if the employer makes a partial payment, the employer shall also itemize in writing the prescription or transportation expense requests not paid.

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

(b) Transportation expenses include (1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment; (2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and (3) ambulance service or other special means of transportation if substantiated by competent medical evidence or by agreement of the parties.

(c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.

(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.

(e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. . . .

8 AAC 45.180. Costs and attorney's fees. . . .
. . . .

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

> affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.
> . . . .

ANALYSIS

1) Was the oral order excluding Exhibit 14 on Employee's September 6, 2019 Exhibit List correct?

Employee sought to introduce Exhibit 14 on Employee's September 6, 2019 Exhibit List, which is an SIME report of an unrelated claimant, Tanya Anderson, by Dr. Zwerin, which provides his negative comments on Dr. Teed's EME opinion. Employee contended medical facts in Anderson's case were similar to those in Employee's case; therefore Exhibit 14 would be relevant to cross-examine Dr. Teed who relied on the controversial Bradford-Hill criteria in Anderson's case to establish no causal relationship between Anderson's work injury and her subsequent medical condition. Employee made an offer of proof that Anderson authorized use of her SIME report and contended she would be a necessary witness for rebuttal or to authenticate Exhibit 14.

An oral order excluded Exhibit 14 based on relevance and HIPAA rules. However, HIPAA is inapplicable in this case. Regardless, because Exhibit 14 (1) was not properly redacted to hide Anderson's personal information, (2) dealt with one doctor's opinion against another in an unrelated case, and (3) was highly prejudicial without probative value in Employee's case, the oral order was correctly issued. AS 23.30.135.

2) Is Employee entitled to TTD benefits?

There is conflicting medical evidence addressing compensability, which raises factual questions to which the presumption analysis applies. AS 23.30.120; *Meek*. Without regard to weight or credibility, Employee raised the presumption on his TTD claim with medical opinions from Drs. Gay and McCormack. *Tolbert*; *Wolfer*. Each physician provided a medical opinion stating Employee sustained a work injury and was disabled.

Disregarding weight or credibility, Employer rebutted the presumption with Dr. Teed's opinion Employee's September 27, 2015 injury was not the substantial cause of his need for medical treatment or disability. *Kramer*; *Tolbert*. Therefore, Employee must prove his TTD claim by a preponderance of the evidence. *Saxton*; *Steffey*.

There is no dispute Employee had preexisting back and testicular conditions. Employee admits he has had lower back pain since he was 17 years old. Working as a cashier at Fred Myers in 2008, he developed back pain that radiated to the front of his groin. Also, he has been involved in three car accidents, which aggravated his pain. Employee was born with a high riding left testicle.

However, on March 28, 2012, Employee reported having "no pain at the moment" and being able to "lift heavy weights without extra pain." On March 29, 2012, Dr. Luther concluded Employee reached "maximal medical improvement" and instructed him to return for symptomatic relief as needed. It should be noted Employee began changing tires in 2014. He did not seek any medical assistance for his back pain until September 29, 2015. There is no medical record showing Employee had any back issue from March 29, 2012 through September 29, 2015. Also, there was no medical record for his testicular issue from birth to after the work injury, except for Employee's own account of his hospital visit as a child.

Dr. Teed stated Employee's October 1, 2015 injury was not the substantial cause of his need for medical treatment or disability because Employee described "an on-the-job injury with increased lower back pain on October 1, 2015, but [he] was seen just days prior on September 29, 2015, at FirstCare Medical Center for increased lower back pain after a car accident; description of the pain was that of chronic lower back pain with flare-up, pain diagram consistent with [his] complaints." At hearing, Employer correctly stated the discrepancy of the work injury date, September 27, 2015, or October 1, 2015, was a "red herring" issue. The dates are only a few days apart and could have been mixed up. *Rogers & Babler*. In fact, many workers' compensation cases use an estimated injury date due to various uncertainties such as passage of time, incident versus treatment dates, etc. *Id*. Also, Employee did not show at FirstCare after a car accident. The last time he was involved in a car accident was on November 15, 2011. At First Care, Employee did not report a specific injury but stated "he was lifting tires and then the following day was sore." Dr. Teed did

not explain why he determined Employee's description of the pain was that of chronic lower back pain with flare-up. *Steffey*.

Further, all other medical professionals who reviewed the October 12, 2015 MRI noted a large disc herniation with a severe central canal stenosis at L4-5. Oddly, Dr. Teed did not. Dr. McCormack said Dr. Teed's MRI reading, "disk, height loss, posterior bulging and mild bilateral foraminal narrowing," was not accurate. Dr. McCormack said the October 12, 2015 MRI showed an abrupt clinical change in Employee's status and was sufficient to provide causation. *Saxton*.

In contrast, Dr. Teed testified Employee's October 1, 2015 injury was just a flare-up, "a natural progressive degenerative condition that causes episodes of pain regardless of activity." He emphasized the October 12, 2015 MRI showed no acute findings - no edema, no acute tears of tissues, no evidence of inflammatory healing reaction. Dr. McCormack testified the MRI showed Employee had a "contained disc herniation" in which the nucleus is contained within the annulus. Unlike a non-contained disc herniation in which the body resorbs the nucleus and shows healing reactions, the displaced fragment was not resorbed by the body and occupied 75 to 80 percent of the nerve channel. Therefore, it was not possible to determine when the herniation took place. Dr. McCormack, however, said the MRI showed a large disc herniation that would cause a lot of "problems" if Employee kept changing tires. It did not result in a paralysis but would cause nerve irritation in day-today activities. Thus, Dr. McCormack concluded the disc herniation was acute. Dr. McCormack's opinion is given the greater weight. AS 23.30.122; *Smith*.

Dr. Teed also relied on the Bradford-Hill's criteria of causation, which is a clinical model used in epidemiology, not orthopedics or urology, to conclude lack of resolution of Employee's complaints over time was inconsistent with an acute injury. An acute injury would be expected to show evidence of progressive resolution given time once the claimed causative factor is removed. Dr. Teed incorrectly asserted low back surgery did not resolve Employee's symptoms and complaints. In fact, Employee reported significant relief after back surgery and orchiopexy. Further, Dr. Teed said disc protrusions are commonly found in degenerative spines and studies have shown 80 percent of onset of low back pain has no inciting event or mechanism of injury.

Assuming that is the case, he did not address why Employee belongs to the 80 percent and not the 20 percent. *Saxton*; *Steffey*.

Further, Dr. Teed said Employee's disc protrusion could have been present for a while. He testified it was not symptomatic when he evaluated Employee: all Employee had was a subjective complaint of pain, and he did not need lumbar surgery. Drs. Gay, Fix and McCormack disagreed. Dr. Teed stressed there is no correlation between degenerative disc disease and injury; a desiccated disc is not more susceptible to injury than a healthy disc. He also said an arthritic spine is not more susceptible to an aggravation of symptoms than a healthy spine. In contrast, Dr. McCormack said a degenerative disc is more prone to injury than a healthy disc. A degenerative spine makes a person more susceptible to injury or increase in symptoms. Dr. McCormack's opinion is given the greater weight because it logically makes more sense - a desiccated material is more susceptible to cracks. AS 23.30.122; *Smith*; *Rogers & Babler*.

Lastly, unlike Dr. Teed who said Employee had a preexisting high riding testicle and it was unrelated to the work injury, Dr. McCormack explained why Employee would have not had orchiopexy at the time he had it absent the back injury and surgery. He said epididymitis is often present in patients after back surgery due to use of narcotics and steroids and being sedentary. Employee had an anatomic disposition for this as well. It would be quite possible Employee would have required orchiopexy at some point in the future, but the timing was consistent with an industrial aggravation of a preexisting condition. Unlike Dr. Teed who performed the last lumbar discectomy in 2004, and lumbar fusion during his training in 1997, Dr. McCormack has performed approximately 10,000 lumbar surgeries over the course of his career. Dr. McCormack's opinion is given the greater weight because he has vast, current first-hand knowledge. AS 23.30.122; *Smith*.

Overall, Dr. McCormack's opinions are given the greatest weight as he considered the known and the unknown to logically reach his conclusions. AS 23.30.122; *Smith*. Employee's September 27, 2019, injury caused a temporary increase in symptoms causing his disability. *DeYonge*. Employee had preexisting condition before the work injury; however, Employee's aggravated lumbar disc protrusion was the substantial cause of his need for medical treatment and disability. AS

23.30.010(a). Whether Employee's lumbar disc protrusion was 51 percent or greater or even the primary cause of the need for medical care is irrelevant. *Morrison*. Employee's preexisting conditions may have played a role in his need for medical care; yet that is also irrelevant. *Id*. Therefore, Employee is entitled to $4,343.88 in TTD benefits. AS 23.30.010(a); AS 23.30.185.

3) Is Employee entitled to PPI benefits?

This decision found Employee's September 27, 2015 injury is compensable based on a preponderance of evidence. *Saxton*. Dr. McCormack gave him an eight percent PPI rating for his industrial back injury. He initially gave a three percent rating for Employee's testicular injury, but in his August 30, 2019 deposition, Dr. McCormack clarified of the three percent PPI rating, one percent pertained to the impairment related to the preexisting, non-industrial urological condition. AS 23.30.190(c). Thus, he gave a two percent rating for Employee's industrial testicular injury. Thus, the total PPI rating is 10 percent.

Employer presented no contrary medical evidence suggesting Dr. McCormack's ratings were improper. *Id*. Employee is entitled to $17,700 in PPI benefits based on the 10 percent rating. AS 23.30.010(a); AS 23.30.190(a).

4) Is Employee entitled to medical and transportation costs?

Employee does not presently seek a specific medical treatment. In *Summers*, the Court held an employee is entitled to a prospective determination of compensability; it did not address an order for specific ongoing benefits. This decision establishes Employee suffered a compensable injury; thus, under AS 23.30.095(a), Employer must provide medical treatment "which the nature of the injury or the process of recovery requires." In *Bockness*, the Supreme Court explained that meant "reasonable and necessary" medical care. However it should be noted Dr. McCormack said Employee was treated for his work injuries, reached medical stability, and they resolved. However, due to his preexisting degenerative conditions, he had pain before the work injury and will have back pain after the resolution of the work injury. Thus, Employee's future back pain and flare-ups will not be related to the work injury.

In any event, whether a particular treatment is reasonable and necessary depends in part on timing. Whether or when Employee will need medical procedures or treatments is unknown. Without specific recommendations from his treating physicians, an order for future medical treatment can do no more than require Employer to pay reasonable and necessary future medical costs, which the Act already requires it to do. Therefore, this decision finds Employee is entitled to all reasonable and necessary medical care related to this compensable injury to the extent Employee properly files and serves appropriate medical records and billing statements. AS 23.30.095(a); 8 AAC 45.082(d). Employee is also entitled to medical travel expenses for the work injury to the extent he provides appropriate documentation. 8 AAC 45.084.

Employee sought $54,937.36 in medical cost reimbursement to a private insurer, and $5,333.45 in out-of-pocket medical expenses. Employer objected to payment of more than 30 postop physical therapy sessions based on Dr. McCormack's statement that "all care except 50 postop therapies was reasonable. Twenty to thirty therapies would be more typical." However, Dr. McCormack also said Employee "should have been referred to a surgeon much sooner." In other words, Employee would have not needed those extra therapies had he had surgery sooner. *Rogers & Babler*. As there is no further evidence regarding past medical costs, Employer is ordered to pay $54,937.36 in medical cost reimbursement and $5,333.45 in out-of-pocket medical expenses.

5) Is Employee entitled to interest, attorney fees or costs?

Interest is mandatory. AS 23.30.155(p). Employee is entitled to accrued interest on unpaid TTD and PPI benefits. AS 23.30.155(p); 8 AAC 45.142(a); *Rawls*. Employer is directed to calculate interest in accordance to the Act and regulations.

Employee requests attorney fees and costs. AS 23.30.145(a); 8 AAC 45.180. Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(a); *Childs*. This is a complex case with voluminous medical records. *Rogers & Babler*. Employee prevails on his TTD and PPI claims; this decision awards him $4,343.88 in TTD and 10 percent PPI worth $17,700 plus interest. Employer controverted Employee's claim, which allows this decision to award actual attorney fees under AS 23.30.145(a). Employee has to comply with 8 AAC 45.180(b), which requires an

attorney requesting fees in excess of statutory fees to file an affidavit "itemizing the hours expended as well as the extent and character of the work performed." This decision will address the following issues Employer raised:

a) Hourly rate

Patterson represented about 1000 workers' compensation claimants before the Alaska Supreme Court, the Alaska Workers' Compensation Appeals Board, and the Alaska Workers' Compensation Board. In contrast to Meshke's guaranteed rate, Patterson's rate is contingent upon a successful outcome of his efforts. *Bignell*. Patterson successfully prosecuted Employee's claim, and his fees should be fully compensatory and reasonable. *Childs*. Therefore, based on Patterson's competence and experience, this decision grants him an hourly rate of $425.

b) Block billing

Block-billing is generally discouraged because it is hard to determine whether specific tasks were related to issues prevailed upon or not. AS 23.30.145(a); *Childs*; *Rogers & Babler*. Some entries in Patterson's affidavits might be characterized as block-billing, but in general, each entry addresses work on a specific issue or closely related issues. Therefore, attorney fees will not be reduced on that basis.

c) Per diem

Both parties agreed the per diem should have been for three days. Therefore, $65 will be reduced on that basis.

d) Billing time

Employee's September 17, 2019 brief is a 17-page document filled with copied and pasted medical records, of which only six pages were actually authored by Patterson. It did not contain legal citations or arguments. Patterson billed $12,835 for 30.20 hours spent in preparation of Employee's September 17, 2019 brief. This is unreasonable and excessive. *Rogers & Babler*. Based on the nature, length, and complexity of Employee's brief, eight hours is reasonable. Therefore, $3,400 ($425 x 8 = $3,400) is the reasonable fee for Employee's September 17, 2019 brief. *Id*. Therefore, $9,435 ($12,835 - $3,400 = $9,435) will be reduced on that basis.

Lastly, Employee's October 11, 2019 reply resulted from Employer's contention several attorney fees and cost entries were unreasonable. As analyzed above, some were, and some were not. Employee requested an additional $892.50 for Patterson's time spent on this post-hearing fee dispute. However, as Employer prevailed significantly, Employee is not entitled to the amount he requested. AS 23.30.145(a); *Childs*.

In short, $9,500 ($9,435 + $65 = $9,500) will be deducted from $74,171.28 in fees and costs Employee requested. Thus, Employee is entitled to $58,415 in fees and $6,256.28 in costs, totaling $64,671.28.

CONCLUSIONS OF LAW

1) Employee's work for Employer is the substantial cause of his need for medical care.
2) Employee is entitled to TTD benefits.
3) Employee is entitled to PPI benefits.
4) Employee is entitled to medical and transportation costs.
5) Employee is entitled to interest, attorney fees and costs.

ORDER

1) Employer shall pay $4,343.88 in TTD benefits.
2) Employer shall pay $17,700 in PPI benefits.
3) Employer shall pay reasonable and necessary future medical costs and related medical travel expenses for the work injury.
4) Employer shall reimburse $54,937.36 in medical costs to Employee's private insurer.
5) Employer shall pay Employee $5,333.45 in out-of-pocket medical expenses.
6) Employer shall pay interest on unpaid TTD and PPI benefits pursuant to 8 AAC 45.142(a).
7) Employer shall pay $58,415 in attorney fees and $6,256.28 in costs.

Dated in Anchorage, Alaska on November 12, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M Yeo, Designated Chair

/s/
Kimberly Ziegler, Member

/s/
Nancy Shaw, 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 JAMIE ROSALES, employee / claimant v. INLET WORLDWIDE OIL, INC, employer; AMERICAN ZURICH INSURANCE CO, insurer / defendants; Case No. 201604532; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on November 12, 2019.

/s/
Charlotte Corriveau, Office Assistant