

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

TUDOR BOGART,)
)
 Employee,)
 Claimant,)
)
 v.) FINAL DECISION AND ORDER
)
) AWCB Case No. 201613235
 ALASKA INDEPENDENT COACH)
 TOURS, LLC,) AWCB Decision No. 20-0002
)
 Employer,) Filed with AWCB Juneau, Alaska
 and) On January 28, 2020
)
 ALASKA NATIONAL INSURANCE,)
)
 Insurer,)
)
 Defendants.)

Tudor Bogart's (Employee) December 20, 2017 claim and April 10, 2018 amended claim were heard on December 17, 2019 in Juneau, Alaska, a date selected on September 17, 2019. An August 23, 2019 affidavit of readiness for hearing gave rise to this hearing. Attorney Andrew Wilson appeared and represented Employee, who appeared and testified. Attorney Vicki Paddock appeared and represented Alaska Independent Coach Tours, LLC, and Alaska National Insurance (Employer). The record remained open until December 31, 2019, for Employee to file a supplemental attorney's fees and cost affidavit and for Employer to file a response.

ISSUES

Employee contends he sustained a work-related left foot and ankle injury which required surgery. He contends the work injury caused his need for right knee medical treatment because he could not bear any weight on his left foot and ankle after the surgery which required him to

put his weight on his right lower extremity. Employee contends increased weight bearing permanently aggravated his preexisting osteoarthritis. He requests an order granting his claim.

Employer contends Employee's preexisting osteoarthritis is the substantial cause of his need for right knee medical treatment. It requests an order denying Employee's claim.

1) Is Employee entitled to right knee medical benefits?

Employee contends his attorney provided services that resulted in obtaining medical benefits, and he should be awarded attorney's fees and costs.

Employer contends Employee should not prevail on his claim, and consequently, is not entitled to attorney's fees and costs.

2) Is Employee entitled to attorney's fees and costs?

FINDINGS OF FACT

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

- 1) On August 18, 2016, Employee tripped or slipped down stairs in a bus he drove for Employer and injured his left foot. (First Report of Occupational Injury or Illness, August 18, 2016).
- 2) On August 30, 2016, Employee stated he injured his left foot on August 18, 2016, when he stepped off the bus he drove. He used ice and ibuprofen but his left foot pain had not gotten better. X-rays revealed a possible bony abnormality around the cuboid bone. An magnetic resonance imaging (MRI) was recommended for a better diagnostic view. Employee was given a walking boot. (Scott M. Moran, FNP, progress note, August 30, 2016).
- 3) On March 9, 2017, Sharon Dreeben, M.D., performed a peroneus longus and peroneus brevis repair, flexor hallucis longus debridement, partial os trigonum, popliteal block and intraoperative radiographs. (Dreeben operative note, March 9, 2017).
- 4) On March 23, 2017, Employee had mild edema in his right knee with tenderness and limited range of motion. He had right knee surgery in 1967 and experienced no pain afterwards. Since

the work injury, Employee was putting more pressure on his right knee and his knee pain increased. He was placed in a fracture walker. (Dreeben progress note, March 23, 2017).

5) On May 5, 2017, Employee slowly transitioned out of the knee scooter and became full weight-bearing in a controlled ankle motion (CAM) boot as his left ankle range of motion and strength improved. (Dreeben progress note, May 5, 2017).

6) On June 9, 2017, Employee had mild right knee edema with tenderness and limited range of motion. He had a prior right knee surgery in 1967 with no pain afterwards. Since Employee has been putting more pressure on his right knee, his right knee pain increased. Dr. Dreeben said Employee must remain in his fracture walker but he could stand for four hours in an eight hour day. (Dreeben progress note, June 9, 2017).

7) On June 22, 2017, Employee's right knee x-ray revealed moderate right lateral tibiofemoral compartment osteoarthritis, mild right tibiofemoral compartment osteoarthritis, minimal medial tibiofemoral joint space narrowing, spurring at the tibial spines, no evidence of an acute fracture and small effusion. (X-ray report, June 22, 2017). David Levinsohn, M.D., reviewed the x-ray and examined Employee's right knee. It was mildly swollen and the lateral joint line was tender. Employee's right knee became painful after the left foot and ankle surgery which he believed to be a result of overcompensating for his left lower extremity. His symptoms were less severe now than they were for one and a half months after the surgery because his weight was more evenly distributed since could bear weight on his left lower extremity. Employee reported his right knee would occasionally swell with increased activity after the 1967 right knee lateral meniscus removal. Dr. Levinsohn diagnosed severe right lateral compartment osteoarthritis and aggravation of the preexisting disease process, which started in 1967 with a complete lateral meniscectomy. He opined it was a work-related injury. Dr. Levinsohn performed a right knee cortisone injection and recommended physical therapy (PT) and over-the-counter nonsteroidal anti-inflammatories. (Levinsohn chart note, June 22, 2017).

8) On June 24, 2017, Employee had PT for his right knee and said he noticed right knee deficits, including "difficulty swimming and slight weakness." (Natasha Jankowsky, DPT, Physical therapy note, June 24, 2017).

9) On August 10, 2017, Employee reported the June 22, 2017 injection was helpful. He said the frequency of right knee pain increased in the past week, his right knee was fatiguing quicker and

going from sitting to standing became increasingly painful. He was somewhat reluctant to proceed with a total right knee replacement. (Levinsohn chart note, August 10, 2017).

10) On September 9, 2017, Keith Holley, M.D, an orthopedist, examined Employee for an employer's medical evaluation (EME). He opined the work injury caused a temporary symptomatic aggravation of Employee's preexisting right knee osteoarthritis due to increased weight-bearing after his left ankle and foot surgery but the work injury did not accelerate or permanently worsen his preexisting right knee osteoarthritis. Employee's preexisting right knee osteoarthritis was related to the 1967 right knee lateral meniscectomy. The temporary aggravation of Employee's right knee osteoarthritis resolved and returned to baseline and he reached medical stability. His right knee remained "quite symptomatic" and would "require further treatment for the right knee arthritis" including a total knee replacement. The substantial cause of Employee's need for the total right knee replacement was his preexisting osteoarthritis. The total knee placement is reasonable and necessary for the preexisting osteoarthritis. (Holley EME Report, September 9, 2017).

11) On September 21, 2017, Employee was not ready for a right knee replacement. Dr. Levinsohn recommended six additional PT visits. (Levinsohn chart note September 21, 2017).

12) On October 31, 2017, Employee reported bilateral knee pain that began last spring. He decreased his walking from five miles to half a mile after the left foot and ankle surgery. David Fabi, M.D., diagnosed right knee patellofemoral and lateral compartments osteoarthritis. He thought Employee was a good candidate for a partial knee replacement. Employee elected to try viscosupplementation injections. (Fabi chart note, October 31, 2017).

13) On December 14, 2017, Employee said his right knee caught occasionally and he must brace himself on the railing to descend stairs. His right knee had decreased range of motion and lateral joint line pain. Employee agreed to proceed with the total right knee replacement. (Levinsohn chart note, December 14, 2017).

14) On December 20, 2017, Employee sought temporary total disability (TTD), temporary partial disability (TPD) and permanent partial impairment (PPI) benefits and medical costs for his right knee. After left foot surgery, he could not put weight on his left foot. After several days using his right leg, his right knee started swelling and became increasingly painful. Employee needed right knee surgery. (Claim for Workers' Compensation Benefits, December 20, 2017).

15) On January 18, 2018, Employer denied TTD, TPD and PPI benefits and unreasonable, unnecessary or non-work related medical costs. It denied right knee medical benefits based upon Dr. Holley's EME report. (Controversion Notice, January 18, 2018).

16) On February 13, 2018, Employee's attorney entered his appearance. (Entry of Appearance, February 13, 2018).

17) On April 10, 2018, Employee filed an amended claim and sought TTD and PPI benefits, a compensation rate adjustment, medical and transportation costs, interest and attorney's fees and costs. (Amended Workers' Compensation Claim, April 10, 2018).

18) On May 15, 2018, William Curran, M.D., examined Employee for a second independent medical evaluation (SIME). He diagnosed tricompartmental right knee osteoarthritis accelerated by the work injury. Dr. Curran stated the left ankle and foot surgery followed by a period of non-or-partial left lower extremity weight-bearing made Employee place more weight on his preexisting tricompartmental arthritic right knee which caused his knee to become symptomatic and need treatment. He opined the work injury permanently changed Employee's preexisting right knee condition and was the substantial cause of his need for right knee surgery. Dr. Curran noted Employee had no prior right knee complaints and was not receiving right knee medical care at the time of the work injury. (Curran SIME Report, May 15, 2018).

19) On August 16, 2018, Dr. Curran testified he reviewed Employee's June 2017 right knee radiographs and diagnosed moderate to severe arthritis involving all three compartments which existed before the work injury. (Curran Deposition at 16-17). He was unable to identify any acute changes in Employee's right knee because he did not have radiographs in close proximity of the work injury. (*Id.* at 18). Employee's moderate to severe osteoarthritis was not caused by the work injury. (*Id.* at 20). The work injury took an asymptomatic or minimally symptomatic right knee and made it symptomatic to the point he required x-rays, injections, an MRI and a surgical recommendation. (*Id.*). Employee's osteoarthritic process began in 1967 when his lateral meniscus was removed because surgery removed a shock absorber on the outside of the knee which had a propensity of bone-on-bone contact. (*Id.* at 28). The difficulty swimming and slight weakness that Employee described on June 24, 2017, could be indications or symptoms of osteoarthritis. (*Id.* at 29-30). The work injury is the substantial cause of Employee's need for right knee medical treatment. (*Id.* at 32). Dr. Curran opined that but for the work injury he would not have had right knee symptoms to the extent he currently had. (*Id.* at 34-35). If

Employee's knee did not have osteoarthritis he would not have expected him to have the same disability and need for treatment. (*Id.* at 35). The left ankle and foot surgery and subsequent increased if not total weight-bearing on Employee's right lower extremity caused his need for treatment. (*Id.* at 36). Dr. Curran would not recommend a total knee replacement for a normal knee with pain. (*Id.* at 37). The recommendation for treatment is because of the tricompartmental osteoarthritis, the symptom complex that goes along with it and Employee's failure to respond to non-operative treatment. (*Id.* at 38). The increased weight-bearing did not cause the tricompartmental osteoarthritis. (*Id.* at 39).

20) On February 26, 2019, Employee's right knee x-ray revealed severe lateral compartment osteoarthritis and small joint effusion. (X-ray report, February 26, 2019). He reported he had progressive knee pain since the 1967 lateral meniscectomy and "a few sports-related injuries since." Employee used to walk five miles a day before injuring his left foot but was not currently able to and his right knee was more painful. He was referred for a total right knee arthroplasty while he decided whether he needed left foot surgery. (Kari Lyn Griffin-Harte, ARNP, Progress Notes, February 25, 2019)

21) On April 8, 2019, Employer filed a medical summary with six pages of physical therapy notes from Harborview Medical. (Medical summary, April 8, 2019).

22) On August 9, 2019, the parties filed a compromise and release settlement agreement (C&R) in which Employee waived entitlement to reemployment benefits, past, present and future disability benefits, PPI benefits, a compensation rate adjustment, transportation costs and penalties and interest thereon "arising from or necessitated" by the work injury in exchange for \$57,000. It did not waive any right to future medical benefits. An additional \$24,343.82 was awarded in attorney's fees and costs "in settlement of all claims for attorney's fees and costs that could be asserted by the employee and/or his attorney for legal services related to the claims and benefits waived by the employee through this agreement. Except as provided herein, each party shall bear its own costs in connection with this claim." Employee did not waive any right to future medical benefits and Employer agreed to lift its controversion of left ankle medical and related transportation benefits. (C&R, August 9, 2019).

23) On October 30, 2019, Dr. Holley testified there was a direct causal relationship between the prior right knee injury and 1967 surgery to Employee's development of right knee arthritis in 2017. (Holley Deposition at 14). The work injury did not accelerate or permanently worsen his

right knee because he did not see objective criteria, like a fracture or marked increase in the amount of cartilage or bone loss that was not present before. (*Id.* at 17-18). Dr. Holley recommended right knee replacement surgery because Employee's right knee was quite symptomatic. (*Id.* at 19-20). The work injury did not contribute in any way to his need for right knee replacement because the arthritis was preexisting and symptomatic and was not worsened by the work injury. (*Id.* at 26). Even if Employee experienced an increase in knee pain while recovering from left ankle and foot surgery, it was temporary. (*Id.*). The natural history of arthritis is to progressively worsen and he would have eventually needed the treatment for knee arthritis regardless of the work injury. (*Id.*). The work injury did not accelerate Employee's arthritis when it was symptomatically aggravated while he was non-weight-bearing because he did not see any evidence his arthritis was accelerated. (*Id.* at 28). Patients frequently draw a correlation between increase in symptoms and an external cause but that is not always proof of causality. (*Id.* at 28). Sometimes patients will have minimal or little pain from arthritis then have a minor incident or a period of increased activity that causes the arthritis to become more symptomatic. (*Id.* at 28-29). But the condition was already there and the symptoms just increased due to the activity level. (*Id.* at 29). That is what he believes happened in Employee's case. (*Id.*). The lessening in severity of Employee's symptoms after he was weight-bearing is consistent with arthritis because waxing and waning symptoms are associated with arthritis. (*Id.* at 31). The work injury is a contributing cause to Employee's pain but not to his arthritis. (*Id.* at 34-35). Employee's right knee hurt in the past off and on as reflected in his difficulties with his knee and the work injury caused some increase in pain due to the underlying arthritis. (*Id.* at 39-40). Treatment for arthritis is typically directed at symptoms so if a patient is not symptomatic there is usually not much treatment but there can be intermittent examinations and x-rays to watch the progression. (*Id.* at 41). There is no good way to remove arthritis symptoms without replacing the knee because the treatments that can diminish or eliminate symptoms do so on a temporary basis and are not curative. (*Id.*). The improvement in Employee's knee symptoms after he became weight-bearing is evidence the aggravation was temporary. (*Id.* at 45). The right knee replacement was recommended for pain and the arthritis because it treats the arthritis and provides pain relief. (*Id.* at 47-48). If there was no osteoarthritis but Employee still experienced pain, he would not recommend surgery. (*Id.* at 48).

24) On November 29, 2019, Employer withdrew its January 18, 2018 controversion of left ankle medical benefits. Employer agreed medical benefits related to the left ankle injury would be paid but reserved its right to reassert defenses later. (Notice of Withdrawal of Controversion, November 29, 2019).

25) On December 12, 2019, Employee filed an affidavit of attorney's fees and costs, which itemized 38.56 hours of attorney time totaling \$11,512.50 and \$2,297.01 in costs, including \$948.48 for travel airfare, hotel and car expenses for Employee's attorney to attend the hearing and \$1,004.18 for travel airfare and hotel expenses for Employee to attend the hearing. He also requested paralegal fees for an itemized 18.95 hours of paralegal time totaling \$2,831.25. (Affidavit of Fees and Costs, December 12, 2019).

26) Employee testified he tore his right lateral meniscus playing volleyball on asphalt when he was a senior in high school. He went through physical therapy and it seemed to be okay. Employee joined a college wrestling team the next fall after he graduated high school and found out his right knee was not okay. He had right knee surgery the winter of 1967. Employee joined the Navy in 1969 and served two-and-a-half years as a photographer. He completed boot camp in 1969 and did not have any problems with his right knee. Employee swam through high school and his primary stroke was the breaststroke. After the right knee surgery, he could never do the whip kick required for the breaststroke because it was painful. Employee learned to avoid activities involving intense knee impact; for example, he stopped playing basketball because it involved too much jumping. He learned to favor his left lower extremity during physical therapy and continued that throughout his life. Employee gave up running long distances which was life changing because he used to run long distances with his younger sister. He had to limit activities involving squatting, like playing catcher with his son, because his right knee was painful. Employee's tendons and muscles around his knee would become tired, sore and achy. He learned how to take care of his right knee for the first eight years after the surgery and after that his knee was stable. Employee avoided activities that irritated his right knee and modified activities, like walking or biking instead of running and using the flutter kick instead of the whip kick. His knee would start aching and he would rest and it would be better in a couple hours. Employee could hike long distances and walk for a couple hours. He was walking five or more miles per day the summer before the work injury. If he walked extremely steep terrain, like Mount Roberts, his right knee and muscles would get sore like he described earlier. Employee

did not receive medical treatment or prescription medications for his right knee after the 1967 surgery until the work injury. Occasionally, he would take Tylenol or aspirin for his right knee. Employee missed a step or slipped when getting out of the bus he drove while working for Employer, fell and landed on his left foot. One of the other bus drivers caught him and kept him from falling on his face. He felt immediate sharp pain in his left foot when he landed on it but kept working. Employee's foot kept hurting more and more and it was harder to get in and out of the bus. His boss sent him home to put his foot up. Five days later his foot still hurt so he got medical treatment. Employee's right knee started hurting and began swelling up four or five days after his left foot and ankle surgery. His right knee was swollen, had a deep ache and bothered him more than his foot in March 2017, when he saw Dr. Dreeben. Employee's right knee constantly hurt and was a seven or eight out of ten on a pain scale. He took pain medication, applied heat and ice, more for his knee than for his foot. Prior to the work injury, Employee did not have any problems with his knee and was able to do activities he wanted. He used to take long walks and short hikes after work almost every day, in addition to the walking he did for work. Employee had to consider whether to have right knee surgery while in physical therapy for his left foot. His left foot to this day has pain whenever he puts weight on it. There is still a tear in one of his left ankle and foot tendons and Dr. Griffin recommended an additional left foot and ankle surgery. Employee's right knee has a deep ache which has not gone away since he used the knee walker after the left ankle and foot surgery. His right knee swelling has significantly gone down. Employee's right knee still constantly aches although it is less intense at a four out of ten. He would like to be able to walk distances, five to ten miles, without having to stop to rest and elevate. Employee would like to be able to climb stairs without using a banister. He would like to resolve his constant knee ache. The farthest he has walked since the left foot surgery was eight tenths of a mile and he had to stop and rest his right knee half way. When he turned around and headed back, he had to stop two more times to rest his right knee. Employee could barely walk fifty feet the next day due to right knee pain. Before the foot and ankle surgery, he did not have right knee issues or constant pain. After the foot and ankle surgery, Employee had constant knee pain. He used to walk five or more miles a day and now he cannot walk a mile and he must stop and rest several times. Employee has not had the right knee replacement surgery Dr. Levinsohn recommended. He hesitated to get the knee surgery at first because he was still going through left foot physical therapy and his foot was still causing

him problems. Employee wanted a second opinion before proceeding, which turned out to be the EME, and benefits were controverted. He tried to use his Medicare supplemental insurance plan and saw Dr. Fabi, an orthopedic knee surgeon. Dr. Fabi recommended a partial or full knee replacement. Employee was still dealing with his left foot and he needed to get his left foot straightened out before his right knee. He needed an MRI but could not get it covered with Dr. Griffin so he went to the Veteran’s Administration (VA). But Employee had an unstable living situation because he was couch surfing. The VA said it would schedule right knee surgery once he got a stable housing situation. He received several knee injections while waiting for stable housing. Employee’s brother purchased a second house in Washington and he moved in and became the caretaker for the house. He sought care for his right knee in Washington after he moved. Employee had emergency cervical laminectomy and he experienced paralysis issues in his left upper extremity for which he still receives physical therapy. He had an EMG last Friday to see if there was significant improvement in nerve transmission for his bicep, deltoid, and infraspinatus nerves. Employee had significant improvement in the infraspinatus nerve but none in his bicep and deltoid nerves. He has been referred for evaluation for a nerve transfer surgery. Employee uses prescription medications for his neck and left arm and shoulder which affects his right knee pain. He takes 1,000 units of acetaminophen three times a day for his neck and left arm and shoulder and he uses Voltaren cream and lidocaine cream which were prescribed for his neck and left arm and shoulder on his right knee as well. Employee also takes Pregalin for his neck, shoulder and arm. He wants to get the right knee surgery but a nerve transfer surgery could postpone it. (Employee).

27) On December 26, 2019, Employee filed a supplemental affidavit of fees and costs which itemized 30.64 hours of attorney time totaling \$9,187.50, 1.51 hours of paralegal time totaling \$225, and \$137.89 in costs, including \$136.14 for travel expense meals and parking for Employee’s attorney to attend the hearing. (Supplemental Affidavit of Fees and Costs, December 26, 2019).

28) On December 31, 2019, Employer objected to Employee’s attorney’s fees and costs. It objected to the following entries for legal services it contends are related to claims and benefits waived by the August 9, 2019 C&R:

| Date | Activity | Time Billed | Fees Billed |
|------------------|----------------------------|-------------|-------------|
| January 24, 2019 | Teleconference with client | 1.50 | \$450.00 |

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|------------------|--|------|------------|
| January 24, 2019 | Staff discussion and direction; review release and staff instruction | 0.25 | \$75.00 |
| March 4, 2019 | Conference with client | 2.50 | \$750.00 |
| March 14, 2019 | Email correspondence | 0.13 | \$37.50 |
| March 20, 2019 | Staff direction email | 0.13 | \$37.50 |
| March 27, 2019 | Email correspondence | 0.13 | \$37.50 |
| April 11, 2019 | Medical summary review and annotation | 0.13 | \$37.50 |
| May 6, 2019 | Deadlines review; file review and case management; email correspondence | 0.25 | \$75.00 |
| May 13, 2019 | File review and staff direction; email correspondence | 0.38 | \$112.50 |
| May 22, 2019 | Teleconference with client; file review and meeting preparations | 0.63 | \$187.50 |
| June 10, 2019 | Email correspondence | 0.13 | \$37.50 |
| June 18, 2019 | Staff discussion and direction; email correspondence | 0.25 | \$75.00 |
| July 11, 2019 | Email correspondence; teleconference with client; C&R review and discussion of medical claim repercussions | 2.00 | \$600.00 |
| July 23, 2019 | Telephone call with client | 0.25 | \$75.00 |
| August 6, 2019 | Review file and staff direction | 0.13 | \$37.50 |
| August 8, 2019 | Review C&R; staff discussion and direction | 0.13 | \$37.50 |
| | Totals | 8.92 | \$2,662.50 |

Employer objected to the following entries for travel time on December 17 and 18, 2019, as unreasonable:

| Date | Activity | Time Billed | Fees Billed |
|-------------------|--------------------------------|-------------|-------------|
| December 15, 2019 | Travel (discounted by 2 hours) | 6.00 | \$1,800.00 |
| December 17, 2019 | Travel (discounted by 3 hours) | 6.00 | \$1,800.00 |
| December 18, 2019 | Travel | 3.75 | \$1,125.00 |
| | Totals | 15.75 | \$4,725.00 |

It objected to lodging costs because the supplemental fee affidavit shows Employee and his attorney arrived in Juneau on December 15, 2019, two days before the hearing. Employer contended more than one night's hotel stay was not necessary or reasonable and receipts were not produced. It contended four hours was reasonable for travel between Anchorage and Juneau. Employer attached emails as exhibits supporting its objections including:

- a) On January 22, 2019, Employer’s attorney emailed Employee’s attorney to follow up on the status of the C&R. (Email, January 22, 2019).
- b) On February 25, 2019, Employer’s attorney emailed Employee’s attorney to follow up about the C&R which had been sent to Employee’s attorney two months earlier. (Email, February 25, 2019).
- c) On March 14, 2019, Employee’s attorney emailed Employer’s attorney asking for a Microsoft Word copy of the C&R to make and track changes his client sought. (Email, March 14, 2019). Employer’s attorney replied with a Microsoft Word copy of the C&R. (Email, March 14, 2019).
- d) On March 27, 2019, Employee’s attorney emailed Employer’s attorney a draft C&R with changes. Employee agreed to sign a release and hoped to move through the Medicare Set-Aside process “relatively seamlessly.” (Email, March 27, 2019).
- e) On April 5, 2019, Employer’s attorney emailed Employee’s attorney about the draft C&R commenting on an April 11, 2018 MRI and a sentence, “To the best of my knowledge, the facts have been accurately stated in this Compromise and Agreement.” (Email, April 5, 2019).
- f) On May 22, 2019, Employee’s attorney emailed Employer’s attorney with another draft C&R with requested changes. (Email, May 22, 2019).
- g) On July 11, 2019, Employee’s attorney emailed Employer’s attorney with final suggested changes to the draft C&R. (Email, July 11, 2019).
- h) On July 22, 2019, Employer’s attorney emailed Employee’s attorney with an objection to a requested change to the future transportation costs. (Email, July 22, 2019).
- i) On July 23, 2019, Employee’s attorney emailed Employer’s attorney stating he verified the transportation cost agreement. (Email, July 23, 2019).
- j) On August 6, 2019, Employee’s attorney’s office emailed Employer’s attorney with the signed C&R. (Email, August 6, 2019).

(Employer’s Objection to Affidavit and Supplemental Affidavit of Counsel Re Attorney Fees and Costs, December 31, 2019).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, 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) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the

course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

In *Morrison v. Alaska Interstate Construction, Inc.*, 440 P.3d 224 (Alaska 2019), the Supreme Court addressed the interaction of the 2005 adoption of “the substantial cause” and the Court’s prior holding that an increase in symptoms can constitute a compensable injury. Morrison had injured his knee in 2004; that injury caused osteoarthritis. However, he was symptom-free and required no treatment until a second injury in 2014, after which his symptoms increased and he needed medical treatment. The Court held increase in symptoms could still be a compensable injury if work was the substantial cause of the increase in symptoms.

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. . . . 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). To rebut the presumption, an employer must present substantial evidence that either (1) a something other than work was the substantial cause of the disability or need for medical treatment or (2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603 (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. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379 (Alaska 1991). 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).

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). When doctors disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 (August 25, 2008).

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

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.

Rusch v. SEARHC, 453 P.3d 784 (Alaska 2019) held the presumption of compensability did not apply to reasonableness of attorney fees.

8 AAC 45.180. Costs and attorney's fees.

. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:

. . . .

(13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;

(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk

....

(D) files an affidavit itemizing the services performed and the time spent in performing each service;

....

ANALYSIS

1) Is Employee entitled to right knee medical benefits?

Employee contends the work injury is the substantial cause of his need for right knee medical treatment. AS 23.30.010(a); AS 23.30.095(a). Employer contends Employee's preexisting condition is the substantial cause of his need for right knee medical treatment. These contentions create factual disputes to which the presumption of compensability analysis applies. AS 23.30.120(a); *Meek*. Without regard to weight or credibility, Employee raised the presumption for right knee medical treatment with medical opinions from Drs. Levinsohn and Curran. *Tolbert; Wolfer*. Both physicians opined the work injury caused Employee's need for right knee treatment.

Without regard to weight or credibility, Employer rebutted the presumption with Dr. Holley's opinion the work injury was not the substantial cause, rather the preexisting osteoarthritis was the substantial cause of his need for right knee treatment. *Kramer; Tolbert; Huit*. Therefore, Employee must prove his medical claim by a preponderance of the evidence. *Saxton; Steffey*.

Dr. Curran opined the work injury was the substantial cause of Employee's need for right knee treatment because it increased weight-bearing on his right lower extremity which accelerated his right knee osteoarthritis. He concluded the increased weight-bearing permanently aggravated Employee's preexisting right knee osteoarthritis and was the substantial cause of his need for right knee surgery. Dr. Holley opined Employee's preexisting osteoarthritis is the substantial

cause of his need for right knee treatment and the work injury caused only a temporary aggravation which returned to baseline.

The parties agree Employee developed preexisting right knee osteoarthritis after a 1967 right knee lateral meniscus removal and the work injury did not cause the osteoarthritis. The June 22, 2017 medical record indicates his right knee occasionally swelled with increased activity after the 1967 surgery. Employee credibly testified he modified his exercise activities after the 1967 surgery but did not seek medical treatment for his right knee prior to the work injury. AS 23.30.122; *Smith*. Prior to the work injury and its required foot and ankle surgery, he went through Navy boot camp and served without any reported issues with his right knee; he walked over five miles a day with little right knee symptomology unless he walked extremely steep terrain, which over-the-counter medication successfully addressed. *Id.* After the increased weight-bearing on Employee's lower right extremity, he developed swelling and significant right knee pain. While his right knee swelling and pain symptoms improved after he was able to bear weight on his left lower extremity, his pain remained elevated and his walking tolerance remained significantly diminished and neither his pain nor his walking tolerance returned to pre-weight-bearing levels. *Id.*

An increase in symptoms can be compensable if work was the substantial cause of the increase in symptoms. *Morrison*. Both Drs. Holley and Curran stated if Employee had osteoarthritis without pain symptoms, a knee replacement surgery would not be necessary; and both opined only a right knee replacement can ameliorate Employee's right knee pain. Dr. Holley stated treatment for arthritis is directed at symptoms and symptoms cannot be resolved without replacing the knee. Dr. Holley observed Employee's right knee remained "quite symptomatic" which is consistent with Employee's credible testimony and Dr. Holley attributed the need for treatment to his preexisting osteoarthritis. Employee's credible testimony and the medical record proves his knee was minimally symptomatic prior to the work injury but remained quite symptomatic afterwards. He went from being able to walk more than five miles per day with minimal symptomology prior to the work injury to being unable to walk a mile due to right knee pain. Dr. Holley's testimony attributed the increase in right knee symptomology he observed to normal waxing and waning and the natural progressive worsening of arthritis. However,

Employee experienced a significant increase in symptoms when he increased weight-bearing on his right knee after his left foot and ankle surgery which necessitated treatment. Prior to the increased weight-bearing, his minimal pain symptomology did not require medical treatment. Employee's right knee pain did not decrease and walking tolerance never improved and he requires a knee replacement. Dr. Holley's opinion Employee's right knee aggravation "returned to baseline" contradicts his own observation and Employee's credible testimony which lessens the weight of his opinion. AS 23.30.122; *Smith; Moore*. Dr. Curran's opinion is given the most weight because he considered Employee's prior minimal right knee symptoms and his increase in right knee symptoms which never returned to pre-weight-bearing level and because his opinion is consistent with his conclusion that Employee would not require medical treatment without significant pain symptomology. AS 23.30.122; *Smith; Moore*. The preponderance of the evidence shows the work injury caused Employee's need for right knee medical treatment, including the pending right knee replacement. *Koons; Saxton; Steffey*. Employee is entitled to right knee medical benefits.

2) Is Employee entitled to attorney's fees and costs?

Employee requests attorney's fees and costs but did not specify under which subsection he claims attorney's fees. AS 23.30.145. Employer controverted right knee medical benefits sought by Employee. Employee prevailed on his claim for right knee medical benefits. *Bignell*. Therefore, Employee is entitled to attorney's fees under AS 23.30.145(a). Employee requests \$20,700 in attorney fees and \$3,056.25 in paralegal fees and \$2,434.90 in costs. An award in excess of the statutory minimum fee requires consideration of the nature, length and complexity of the services performed, transportation charges and benefits resulting from the services to the compensation beneficiaries. AS 23.30.145(a).

Employer objected to specific claimed hours. It objected to 16 entries for attorney's fees as it contends the hours sought are related to claims and benefits waived by the August 9, 2019 C&R and provided several emails to support its contention. The presumption of compensability does not apply to reasonableness of attorney's fees; Employee bears the burden of producing evidence to support the claim. *Rusch*. It is reasonable for Employee to seek fees for time spent on right knee medical benefits while the C&R was being prepared. The March 14, 2019 emails, March

27, 2019 email and July 11, 2019 emails are substantial evidence time Employee claimed on those dates was spent on claims and benefits waived by the August 9, 2019 C&R. *Rogers & Babler*. Employee completed several tasks on July 11, 2019, without specifying how much was spent on each task, making it difficult to determine how much time was spent on right knee medical benefits; one hour is reasonable for time spent on right knee medical benefits. The full fees for entries dated March 14 and 27, 2019 will be denied and one hour of fees on July 11, 2019 will be denied. The claimed attorney's fees will be reduced by \$375.00 for time spent on claims and benefits waived by the August 9, 2019 C&R ($\$37.50 + \$37.50 + \$300.00 = \375.00).

Employer objected to six hours claimed for travel for Employee's attorney between Anchorage and Juneau, on December 15, 2019 and December 17, 2019, and 3.75 hours on December 18, 2019, contending the travel time claimed was unreasonable. Reasonable travel costs Employee incurred to attend his hearing are awardable. 8 AAC 45.180(f)(13). No evidence was provided demonstrating four hours is reasonable travel time and the time Employee claimed was unreasonable. Employer's objection is meritless as it is merely an argument.

Employer also objected to lodging costs. It contends it was unreasonable for Employee and his attorney to arrive in Juneau on December 15, 2019, two days before the hearing, and to incur lodging costs for two night's stay and Employee failed to provide receipts for lodging costs to determine whether the amount requested was reasonable. Employer contends only one overnight stay for December 16, 2019, is a reasonable and necessary lodging expense. Reasonable travel costs Employee incurred to attend his hearing are awardable. 8 AAC 45.180(f)(13). Two nights of lodging are not inherently unreasonable and no evidence was provided demonstrating why two nights of lodging are unreasonable. Employer's objection is meritless as it is merely argument.

Employee failed to file the required affidavit from the paralegal who worked on this case for paralegal hours included in the supplemental fee affidavit. 8 AAC 45.180(f)(14)(D). These paralegal costs will be denied. Employee will be awarded \$20,325.00 in fees ($\$20,700 - \$375.00 = \$20,325.00$) and \$5,266.15 in costs ($\$3,056.26 - \$225.00 + \$2,434.90 = \$5,266.15$).

CONCLUSIONS OF LAW

- 1) Employee is entitled to right knee medical benefits.
- 2) Employee is entitled to attorney's fees and costs.

ORDER

- 1) Employee's December 20, 2017 claim and April 10, 2018 amended claim are granted.
- 2) Employer is ordered to pay Employee's right knee medical costs for treatment of the work injury.
- 3) Employer is ordered to pay Employee's attorney's fees of \$20,325.00 and costs of \$5,266.15

Dated in Juneau, Alaska on January 28, 2020.

ALASKA WORKERS' COMPENSATION BOARD

 /s/
Kathryn M Setzer, Designated Chair

 /s/
Bradley Austin, Member

CHARLES COLLINS, BOARD MEMBER, DISSENTING

The dissent respectfully disagrees with the majority's opinion on whether Employee is entitled to medical costs and attorney's fees and costs because the preponderance of the evidence is the work injury is not the substantial cause of his need for right knee medical treatment. Drs. Holley and Curran opined the work injury did not cause Employee's osteoarthritis and if he had knee pain without osteoarthritis, he would not need a total knee replacement. After the 1967 surgery, Employee changed his entire way of life to compensate for right knee pain by discontinuing running and a swimmer's kick, activities he previously enjoyed, and by retraining his left non-dominant leg to be dominant. Prior to the work injury, Employee's right knee would swell when it was overused and he used rest and over-the-counter medications to treat it. This alteration of normal right leg use and pain symptomology is evidence he experienced similar pain symptomology before the work injury. The preponderance of the evidence shows Employee's

preexisting osteoarthritis is substantial cause of Employee's need for right knee treatment.
Koons; Saxton; Steffey.

/s/
Charles Collins, 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

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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 TUDOR BOGART, employee / claimant v. ALASKA INDEPENDENT COACH TOURS, LLC, employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 201613235; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties on January 28, 2020.

/s/
Dani Byers, Workers' Compensation Officer II