ALASKA WORKERS' COMPENSATION BOARD

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

MARINA LaBLANC, Employee, Claimant, v. AK INGA'S GALLEY, LLC, Employer, and TRAVELERS PROPERTY CASAULTY COMPANY OF AMERICA, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201613835 AWCB Decision No. 20-0098 Filed with AWCB Juneau, Alaska On October 23, 2020

Marina LaBlanc's (Employee) July 12, 2019 claim was heard on August 18, 2020 in Juneau, Alaska, a date selected on June 24, 2020. A June 24, 2020 prehearing conference gave rise to this hearing. Attorney Robert Bredesen appeared and represented Employee, who appeared and testified. Attorney Krista Schwarting appeared and represented AK Inga's Galley, LLC and its insurer (Employer). The record remained open to obtain R. David Bauer's, M.D., deposition testimony, written closing arguments, Employee's supplemental fee affidavit and Employer's response. The record closed on September 18, 2020.

ISSUES

Employee contends the work injury is the substantial cause of her need for past and continuing lower back medical treatment. She contends she experiences persistent low back pain due to the work injury which significantly restricts her ability to perform activities of daily living.

Employee contends acupuncture allows her to continue in her current job and to engage in activities of daily living. She requests an order awarding past and continuing medical benefits, including acupuncture, regular follow-up visits and related transportation costs.

Employer contends Employee's preexisting lumbar spine degeneration is the substantial cause of her current need for medical treatment. Alternatively, it contends acupuncture is not reasonable or necessary medical treatment because Employee's physician, who referred her for acupuncture, deferred to an orthopedist on treatment issues, no orthopedist recommended acupuncture and there is no scientific evidence it reduces Employee's chronic pain or enables her to continue working. Employer requests an order denying medical and transportation costs.

1) Is Employee entitled to past and continuing medical benefits and related transportation costs?

Employee contends she is entitled to interest because she proved her claim for medical benefits. She requests an order awarding interest.

Employer contends Employee is not entitled to interest because she failed to prove her claim for medical benefits. It requests an order denying interest.

2) Is Employee entitled to interest?

Employee contends she is entitled to attorney's fees and costs because she proved her claim. She requests an order awarding attorney's fees and costs.

Employer contends Employee is not entitled to attorney's fees and costs because she did not prove her claim. It requests an order denying attorney's fees and costs.

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

FINDINGS OF FACT

All *LaBlanc v. AK Inga's Gallery LLC*, AWCB Decision No. 19-0106 (October 11, 2019) (*LaBlanc I)* factual findings and conclusions are incorporated herein by reference. The following

facts and factual conclusions are reiterated from *LaBlanc I* or are established by a preponderance of the evidence:

1) On September 19, 2005, Employee reported pain in her left hip, radiating down the left lateral aspect of her thigh to the knee since playing kick ball the week before. She had low back pain and leg discomfort during her last pregnancy 14 years earlier and it resolved after delivery. Employee was diagnosed with somatic dysfunction to the sacrum. (Mark Tuccillo, D.O. chart note, September 19, 2005).

2) On September 5, 2016, Employee reported she injured her lower back while working for Employer when she slipped and fell. (*Id*.).

3) On December 8, 2016, Employee complained of bilateral lower rib pain upon breathing after falling in September. She had seen chiropractor after the fall and noticed pain after the second session. The pain got bad after sitting at her sewing machine and she had difficulty finding a comfortable position to sleep. (Cortney Hess, M.D., chart note, December 8, 2016).

4) On December 15, 2016, Employee underwent physical therapy to address three months of bilateral lower rib and flank pain and mid-low back pain. She woke up during the night in pain and she could not perform her seamstress work because of the pain. (Physical therapy note, December 15, 2016).

5) On January 19, 2017, Employee had continuing low back and flank pain. It improved with physical therapy but got much worse after a session, which included gentle strengthening. She could only sew 20 minutes before having extreme pain. The pain worsened in the middle of her left buttock and down the lateral and anterior thigh into her calf and foot with intermittent numbness. Dr. Hess referred Employee for magnetic resonance imaging (MRI). (Hess chart note, January 19, 2017).

6) On February 15, 2017, a lumbar spine MRI revealed a four millimeter left foraminal/extraforaminal protrusion of the L3-4 intervertebral disc with high-intensity zone resulting from mild-to-moderate left neural foraminal narrowing with moderate posterolateral displacement of the extraforaminal left L3 nerve and a mild L4-5 intervertebral annular disc bulge. (MRI report, February 15, 2017). Employee said she had left posterior hip pain after the work injury and in November, started to experience cramping in her right thigh. She developed numbness in her left lateral hip when she laid down and her legs felt more fatigued. Physical therapy helped somewhat and chiropractic care resulted in bilateral pain. John Bursell, M.D.,

recommended an L3-4 transforaminal epidural steroid injection (ESI) for left lumbar radiculitis secondary to the left L3-4 disc protrusion with posterior displacement of her left L3 nerve root. He also diagnosed left greater trochanteric bursitis and performed an injection. (Bursell chart note, February 15, 2017).

7) On March 2, 2017, Dr. Bauer, an orthopedist, examined Employee for an employer's medical evaluation (EME) and diagnosed a work-related lumbar spine strain and contusion, degenerative changes in her lumbar spine neither aggravated nor accelerated by the work injury, and pain in her left hip unrelated to the work injury. He opined Employee's lower back, left lower extremity and left hip pain was caused by degenerative disc disease. Dr. Bauer determined she had symptom magnification due to widespread tenderness, a non-physiologic motor examination and diminished range of motion without an objective physiological source. He concluded no invasive medical treatment for her hip or an ESI was needed but recommended a home exercise program and over-the-counter analgesics and anti-inflammatory medications. Dr. Bauer opined Employee reached medical stability before December 8, 2016, and no further medical treatment was necessary to enable her to continue in her employment or to relieve chronic debilitating pain. (*LaBlanc I*).

8) On March 10, 2017, Dr. Hess evaluated Employee and referred her to physical therapy for a home exercise program. She opined Employee's condition was improving. (*Id*.).

9) On March 30, 2017, Dr. Hess recommended continued physical therapy, acupuncture and other conservative treatment; if Employee's condition did not improve, she recommended an ESI. (*Id*.).

10) On June 29, 2017, Employee reported a corticosteroid injection into her left greater trochanteric bursa resulted in two months of left lateral hip pain relief. Dr. Bursell recommended selective spinal injection therapy with a left L3-4 transforaminal ESI and physical therapy:

> I am in disagreement with Dr. Bauer's impression and conclusions with regards to [Employee's] symptoms. Frankly, I don't understand how an MD trained in Orthopedic Surgery could dismiss the clear correlation between this patient's history and MRI findings when coming to his conclusions. It is my opinion that her current symptoms of low back pain with left hip and thigh pain are work related.

If the recommended treatment was ineffective, she may require surgical intervention. (*Id*.).

11) On November 16, 2017, Floyd Pohlman, M.D., an orthopedic surgeon, examined Employee for an second independent medical evaluation (SIME) and diagnosed a left L3-4 herniated intervertebral disc and bilateral trochanteric bursitis, worse on the left. He found no evidence of a pre-existing condition and opined the work injury was the substantial cause of her need for low back medical treatment. Dr. Pohlman believed the ESI by Dr. Bursell was reasonably necessary. If the ESI was unsuccessful, Employee may require surgical removal of the herniated disc for permanent relief. He did not think chiropractic care, massage or other "passive therapies" were necessary "at this time" and did not think a pain management specialist was indicated unless the treatment recommended by Dr. Bursell did not relieve the problem. (*Id*.).

12) At deposition on January 26, 2018, Dr. Pohlman testified he found no evidence of symptom magnification. He found Employee's 2005 back pain when pregnant insignificant because it is common to have back pain when pregnant and she had no additional history of back pain until the work injury. Dr. Pohlman opined Employee's MRI showed a ruptured disc impinging upon a nerve root and the disc showed degenerative changes, which is consistent with her symptoms; and if she did not have those MRI findings, he would agree with Dr. Bauer. He highly doubted the disc was ruptured prior to the work injury because she would have had back pain or at least leg pain and she would not have been able to do things she was doing before the work injury. Dr. Pohlman recommended an ESI and then waiting to "see what happened." He expected the ESI to cure or improve Employee's back symptoms. Dr. Pohlman's recommendation for possible disc removal is dependent on her response to the ESI. Physical therapy may help Employee after the ESI. Employee cannot perform prolonged standing, sitting and lifting. (*Id*.).

13) On February 21, 2018, Employee reported left lateral hip pain, described as soreness and a sense of inflammation, and lower back pain with posterior left thigh pain and no lower extremity sensory loss or motor weakness. A lumbar MRI revealed an unchanged small L3-4 caudal left foraminal protrusion with an underlying bright annular fissure and unchanged L4-5 mild bilateral facet arthropathy. Dr. Bursell recommended a left L3-4 transforaminal ESI to treat her left lower extremity radicular pain symptoms. (Bursell chart note, February 21, 2018; MRI report, February 21, 2018).

14) On February 22, 2018, Dr. Bursell performed a left L3-4 transforaminal ESI and left greater trochanteric bursa injection. (Bursell operative report, February 22, 2018).

15) On April 2, 2018, the parties filed a compromise and release (C&R) settlement agreement resolving all benefits except medical and transportation benefits. (*LaBlanc I*).

16) On April 18, 2019, Dr. Bauer evaluated Employee for an EME and diagnosed a straining contusion to her lower back substantially caused by the work injury and degenerative changes in her lumbar spine were that neither aggravated nor accelerated by the work injury. He stated Employee reached medical stability on August 15, 2018, and her preexisting lumbar spine degeneration is the substantial cause of her current need for treatment. Dr. Bauer opined acupuncture, chiropractic, "passive therapy" and massage are not reasonable or necessary medical treatment because they are not within the realm of acceptable medical treatment for her chronic condition and they will not give lasting relief. Acupuncture and chiropractic care were not recommended for palliative care because there was no evidence they would improve her ability to continue working or reduce her pain, but occasional over-the-counter ibuprofen was indicated for her degenerative lumbar disease. Dr. Bauer concluded her current symptoms were caused by the progression of her degenerative disease consistent with age. (Bauer EME report, April 18, 2019).

17) On April 23, 2018, Dr. Bursell performed a left L3-4 transforaminal ESI for left lumbar radiculopathy. (Bursell operative report, April 23, 2018).

18) On May 7, 2019, Employer denied injections, surgical treatment, prescription pain and anti-inflammatory medications, acupuncture, chiropractic and massage, physical and occupational therapy and further diagnostic studies. (Controversion Notice, May 7, 2019)

19) On May 24, 2019, Employee reported the left greater trochanteric bursa corticosteroid injections resulted in approximately two months of pain relief. The second left L3-4 transforaminal ESI resulted in about one and a half months of pain relief. Employee complained of intermittent left calf cramping and tingling while walking. She used acupuncture and over-the-counter medications for pain control. Dr. Bursell did not find evidence of lumbosacral radiculopathy. He provided a right greater trochanteric bursa injection and recommended physical therapy and progressing her exercise program to include stabilization exercises and "back school" education. (*LaBlanc I.*).

20) On June 20, 2019, Employer denied any acupuncture bills "for which the HCFA-coded bills and corresponding medical records were not received within 180 days of the service being rendered" under AS 23.30.097(h). (Controversion Notice, June 20, 2019).

21) On June 27, 2019, Dr. Hess wrote a letter stating,

> This letter is in regards to [Employee] and her need for acupuncture to treat chronic back pain. [Employee] has been responding to this therapy and I feel it is important for her care. She has tried and failed physical therapy, chiropractic services, medication and injections. Acupuncture is the only therapy that has been successful in provid[ing] her pain relief. . . . (*LaBlanc I*).

22) On July 9, 2018, Dr. Bursell provided a left L3-4 transforaminal ESI for left lumbar radiculopathy. (Bursell operative note, July 9, 2018).

23) On July 12, 2019, Employee filed a claim seeking medical costs, transportation costs, interest and attorney's fees and costs. (*Id*.).

24) On July 12, 2019, Employee requested an SIME for disputes regarding compensability and medical treatment between Employee's physicians, Drs. Bursell and Hess, and Employer's physician, Dr. Bauer. She attached Dr. Bursell's June 29, 2017 and May 24, 2019 chart notes and Dr. Hess' June 27, 2019 letter. (*Id*.).

25) On July 17, 2019, Employee visited Jennifer Hyer, M.D., for acupuncture and she described the main area of her pain as her low back into her tailbone. Employee's pain increased if she stood or sat too long and she was sore all of the time. She tried injections, chiropractic care, cannabidiol oil and a sauna but said the only treatment that had truly helped was acupuncture and her last treatment was four months earlier. (Hyer chart note, July 17, 2019).

26) On July 31, 2019, Kaitlin DuRoss, PT, referred Employee back to her physician due to poor improvement in symptoms with physical therapy. (DuRoss physical therapy note, July 31, 2019).

27) On August 1, 2019, Employer answered Employee's July 12, 2019 petition for an SIME. (Answer, August 1, 2019).

28) On August 2, 2019, Employer denied injections, any surgical treatment, prescription pain and anti-inflammatory medications, acupuncture, chiropractic and massage treatment and physical and occupational therapy and further diagnostic studies, relying on Dr. Bauer's April 19, 2019 EME report to contend the medical treatments were not reasonable or necessary. (*LaBlanc I*).

29) At deposition on August 28, 2019, Dr. Bauer testified Employee's pain complaints do not follow the radicular distribution of the L3 or L4 nerve root, which would be into the anterior thigh. She had referred axial back pain. When he examined Employee, he did not find radicular

complaints because she was having pains in her back and buttock and not in her thigh. Her lower back complaints are not uncommon in individuals her age. There is a tremendous amount of controversy in medicine about acupuncture; while there is anecdotal experience acupuncture alleviates pain, Dr. Bauer does not recommend it because there is no scientific evidence of its efficacy beyond the use of placebo and the evidence-based guidelines do not recommend it. There is no scientific evidence it would reduce Employee's chronic pain or enable her to continue working. Acupuncture is not medically reasonable or necessary for Employee. When Dr. Bauer refers to scientific evidence, he is referring to the American College of Occupational and Environmental Medicine (ACOEM) Guideline and the Official Disability Guidelines (ODG). There is no recommendation in the scientific literature either for or against acupuncture. In 30 years of treating people, he has never seen someone cured or consistently more active because of acupuncture. Dr. Bauer did not discuss the effect of acupuncture with Employee. He relied on the medical record and referenced those guidelines when making medical opinions. Dr. Bauer opined acupuncture did not meet the definition for palliative care and the recommended fusion surgery was not indicated because she had no evidence of instability, spondylolisthesis, tumor or significant trauma, such as a fracture. He opined the fall Employee experienced onto her buttock and the floor is not something that would lead to any permanent change to the structure of her back. She had degenerative changes in her lower back and there was no aggravation or acceleration by the work injury. Employee sustained a straining contusion to her lower back. Dr. Bauer concluded her current condition was caused by aging and degeneration. He was not sure of the physiological basis of her subjective complaints and if there was a physiologic basis, it was not related to the work injury. Employee's subjective pain complaints have persisted for years and she said it restricts her ability to work a full day and activities of daily living so it would meet the definition of chronic debilitating pain. However, there is no physiologic reason she cannot work on a full-time basis at the light or medium physical demand level. Dr. Hess did not appear to be looking for objective findings in her medical records and Dr. Bursell's May 24, 2019 examination was normal. Trauma is not required for disc herniation; a nationwide study on disc herniation showed specific events as simple as getting out of bed or getting up from a chair started the subjective complaints. Dr. Bauer opined Employee does not have a ruptured disc, which is a term an amateur would use. Employee is not a candidate for a microdiscectomy because she does not have nerve root compression causing radicular pain.

While the hip pain she reported is common for strain injuries, there is no physiologic model showing the inflammation continues in the muscles or in the joints beyond the 90 day period. There was no evidence Employee had been able to increase her activity when she had acupuncture and no reason to expect it would because there is no scientific evidence. (*Id*.).

30) On September 6, 2019, Employee reported the last acupuncture treatment helped her for about a month and then the pain crept back up. She did not sleep much the previous night due to low back and bilateral hip pain. Dr. Hyer provided acupuncture. (Hyer chart note, September 6, 2019).

31) On October 11, 2019, *LaBlanc I* denied Employee's request for an SIME. (*LaBlanc I*).

32) On December 28, 2019, Employee complained of low back pain and numbness down the anterolateral aspect of her left thigh down to her knee for the prior six weeks. Her precipitating event was bending over and lifting with poor technique. Walking was better than standing and sitting was problematic. Employee saw a massage therapist three times but still had discomfort. Dr. Tuccillo prescribed prednisone. (Tuccillo clinical chart note, December 28, 2019)

33) On January 4, 2020, Employee complained of ongoing left leg and lower back discomfort with a pinching sensation and cramps in her left thigh and pain in her left lower back and hip region. Use of Icy Hot and a TENS unit provided some relief but she experienced the most relief with acupuncture. Employee had two acupuncture sessions recently and had two months of relief where she was able to function. She occasionally takes ibuprofen for the pain but does not want to be on medications long term. Dr. Hess referred Employee to Dr. Bursell and recommended she continue acupuncture because it clearly improved her symptoms and provided sustained relief. (Hess clinical office note, January 4, 2020).

34) On February 4, 2020, Dr. Hyer performed acupuncture. Employee had been struggling with left sided bursitis and a pinched nerve. She responded to a week of anti-inflammatory medication and was no longer numb. Employee's main concern was her low back pain. Acupuncture helped her low back pain and allowed her to avoid ibuprofen but her sleep was not good. (Hyer chart note, February 4, 2020).

35) On February 19, 2020, Dr. Hyer provided Employee another acupuncture session. Employee said her pain level was a five or six out of ten. The acupuncture knocked it down and decreased nerve pinching pain in her legs. Employee was walking more lately but still struggling with sleep. (Hyer chart note, February 19, 2020).

36) At deposition on March 11, 2020, Dr. Hess testified she is a family physician and first saw Employee in December 2016 when she complained of low back, rib and flank pain. She recommended acupuncture because Employee tried it and found it provided the most lasting relief and it helped avoid medications that have a lot of side effects and problems. A colleague performs acupuncture and Dr. Hess refers ten patients a year or so. She continues to prescribe acupuncture if a patient has decrease in pain and increase in function. Dr. Hess is not familiar with disability guidelines or evidence-based medicine guidelines and did not consider them when she recommended acupuncture. She continued to recommend acupuncture for Employee and referred her to Dr. Bursell because her pain continued and she wanted to check to see if there was any treatments that might be helpful for her. Prior to the work injury, Employee could sew eight to ten hours a day without pain. Her low back pain affects her ability to sleep through the night and engage in housework. Dr. Hess believed acupuncture was necessary for Employee to perform activities of daily living and work as a seamstress. She deferred to the acupuncture provider to determine the frequency of treatment. (Hess Deposition, March 11, 2020).

37) On August 11, 2020, Employee requested $27,460 in attorney's fees and costs for 65.80 hours expended from May 21, 2019 through August 11, 2020. For hours expended prior to January 1, 2020, Employee's attorney sought $400 per hour. He expended 0.3 hours for the July 12, 2019 request for an SIME, 0.3 hours to review Employer's answer, 4.6 hours on September 17, 2019 to write the hearing brief and review Employer's hearing brief on the request for an SIME, and 7.2 hours from September 23, 2019 through September 24, 2019 to prepare for, travel to, attend and travel back for the hearing on the request for an SIME. In total Employee sought $4,820 to pursue the request for an SIME. Beginning January 1, 2020, Employee's attorney charged $450 per hour. He contended another highly experienced attorney, Michael Jensen, was recently awarded $450 per hour and he is similarly experienced. Employee's attorney stated he had over 20 years of experience as an attorney, mostly involved in workers' compensation cases in Alaska, opinion work in Longshore matters and some personal injury matters related to workplace injuries. As a solo practitioner, he is only able to take on a limited number of cases and cases which require depositions, settlement negotiations and hearings will limit his ability to take on other cases. Employee's attorney expended $4,797.20 in costs, including $804.62 on September 24, 2019 for a hotel, return flight, Uber and airport parking to attend the hearing for

LaBlanc I ($132.33 + $635.10 + $21.19 + $16.00 = $804.62). (Affidavit of Counsel, August 11, 2020).

38) On August 12, 2020, Employee's attorney filed his resume. (Notice of Intent to Rely, August 12, 2020).

39) At hearing on August 18, 2020, Employee testified that prior to working for Employer, she worked with special needs kids in an afternoon program, doing laundry for cruise ships, off and on at as a sales clerk for a local store in Petersburg and seamstress work year-round. Her work as a seamstress fluctuated, some months she had a lot of work and would recover furniture and make boat covers, and some months work was slower and she mostly did mending. Employee worked in the summer doing "prep work" and cooking and as a sales clerk, about six hours a day, six days a week for Employer. On the day of the injury, she was cleaning. Employee walked over to the stove with a bucket of water when she slipped and fell, dropping the bucket and getting stuck underneath the stove. Her coworkers helped her up and boss gave her ride home; and the next day she could not get out of bed. Four visits for chiropractic care made her back pain worse so she made an appointment with Dr. Hess. Employee has not had a pain free day since the work injury. The first injection did not help much but the second one gave more relief, as she experienced less leg cramps. The third one lasted the longest for pain relief. Employee had been unable to sit or stand for long periods before the injection. Dr. Bursell explained she could not have too many injections because it could do more harm than good. Employee's friend suggested she check out acupuncture because it worked for her friend. She has had two different acupuncture providers; Jasmine Jones was the first provider. She noticed she was able to sit for longer and did not wake up as often with leg cramps at night after receiving acupuncture. Employee started out going twice a week, then went to every other week. The pain relief lasted for a couple months. She switched acupuncture providers because she was unable to continue to pay Ms. Jones and there were issues with Dr. Jones' billings with the insurer. The second provider, Dr. Hyer, was affiliated with the hospital. It is difficult to get into Dr. Hyer so Employee had a period during which she was unable to get acupuncture. She is able to function during the day and sleep at night with acupuncture. Employee considered surgery but she does not want to cut her back open. She is able to work longer seamstress hours with acupuncture, increasing from four hours to six to eight hours per day. Employee was not able to use a vacuum without acupuncture. Her son modified her work tables by raising them two

inches higher allowing her to stand when using her sewing machines without bending. Employee contacted Medicaid to see if it would cover medical treatment with Dr. Bursell. She was able to see Dr. Bursell a few weeks ago; he ordered an MRI and she got another injection. It took a week for Employee to start feeling relief from the injection because she had to travel back home right afterwards. Dr. Bursell recommended she spend the night but Medicaid would not pay for it. (Employee).

40) At hearing on August 18, 2020, the record was left open to obtain Dr. Bauer's deposition, written closing arguments, Employee's supplemental attorney's fees and costs affidavit and Employer's response. (Record).

41) On September 1, 2020, the parties attended a prehearing conference Employer requested because Dr. Bauer had a medical emergency and was unable to be deposed. The parties agreed to file closing arguments on September 4, 2020. Employee's supplemental fee affidavit was due September 4, 2020 and Employer's response was due September 8, 2020. (Prehearing Conference Summary, September 1, 2020).

42) On September 4, 2020, Employee requested an additional $6,300 in attorney's fees for 14 hours spent from August 11, 2020 through September 4, 2020. (Affidavit of Robert Bredesen, September 4, 2020).

43) On September 4, 2020, Employer objected to the hourly rate claimed by Employee's attorney because it was higher than he had previously received. It contended Employee's attorney is not entitled to entries related to the July 12, 2020 request for an SIME because *LaBlanc I* denied it. (Employer's Closing Argument, September 4, 2020).

44) Acupuncture is a regular and familiar treatment in Alaska workers' compensation cases. (Experience, judgment, observations).

45) Regardless of the type of medical treatment, a physician must discuss and consider its effect on the patient in order to assess whether it is reasonable and necessary treatment. (*Id*.)

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. . . .
>
> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical . . . treatment . . . medicine . . . 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 the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . . .
>
> (o) Notwithstanding (a) of this section, an employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection. . . .

When the board reviews a claim for medical treatment made within two years of an undisputed work-related injury, its review is limited to whether the treatment sought is reasonable and necessary. *Philip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727 (Alaska 1999). *Hibdon* addressed the issues of reasonable of medical treatment:

> The question of reasonableness is 'a complex fact judgment involving a multitude of variables.' However, where the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable. (Citations omitted). (*Id*. at 732).

When reviewing a claim for continued treatment beyond two years from the date of injury, the Board has discretion to authorize "indicated" medical treatment "as the process of recovery may require." *Id*. With this discretion, the Board has latitude to choose from reasonable alternatives rather than limited review of the treatment sought. *Id*.

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

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

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce "some" "minimal" relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*,

693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer,* 807 P.2d 471, 473-74 (Alaska 1991), quoting *Smallwood* at 316. To rebut the presumption, an employer must present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment or (2) work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of her case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

> **AS 23.30.122. 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 finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). When doctors' opinions 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. . . . 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 *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the court stated the AS 23.30.120 presumption does not apply to attorney fee amounts or reasonableness. It further held the board must consider all factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee and either make findings related to each factor or explain why that factor is not relevant. *Rusch* held attorney fee reasonableness is not a factual finding but is a discretionary exercise.

In *Childs v. Copper Valley Electric Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), the Alaska Supreme Court cited AS 23.30.145 and distinguished it from Civil Rule 82, noting AS 23.30.145 provides "attorney's fees in workers' compensation cases should be fully compensatory and reasonable, in order that injured workers have competent counsel available to them." Fees incurred on lost, minor issues will not be reduced if the employee prevails on primary issues. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011).

> **AS 23.30.155. Payment of compensation.** . . .
>
> (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.

> **AS 23.30.395. Definitions. . . .**
>
> (9) "chronic debilitating pain" means pain that is of more than six months duration and that is of sufficient severity that it significantly restricts the employee's ability to perform the activities of daily living. . . .
>
> (29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition;
>
> **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) Is Employee entitled to past and continuing medical benefits and related transportation costs?

Employee contends the work injury was the substantial cause of her past and current need for lower back medical treatment. AS 23.30.095(a). She contends acupuncture allows her to continue in her current job and to engage in activities of daily living. AS 23.30.095(o). Employer contends Employee's preexisting lumbar spine degeneration is the substantial cause of her past and current need for medical treatment. These factual disputes raise questions to which the presumption of compensability applies. AS 23.30.095(a), (o); AS 23.30.120(a); *Meek*.

Without weighing credibility, Employee raises the presumption the work injury is the substantial cause of her need for medical treatment through her testimony and through Drs. Pohlman, Bursell and Hess. *Smallwood*; *Resler*. Employee testified she did not have back pain before the work injury and since the work injury she has experienced back pain every day. She said acupuncture helps her be able to work longer and do activities of daily living, like cleaning. Drs. Pohlman, Bursell and Hess stated her pain was caused by her work injury with Employer.

Without assessing credibility or weight, Employer rebutted the presumption of compensability with Dr. Bauer's opinion Employee's preexisting lumbar spine degeneration is the substantial cause of her need for medical treatment. *Huit*; *Kramer*; *Tolbert*; *Norcon*.

Because Employer rebutted the presumption, Employee must prove by a preponderance of the evidence the work injury was the substantial cause of her past and current need for low back

medical treatment and acupuncture was reasonable and necessary palliative care. There is no medical evidence Employee had preexisting back pain since childbirth. Employee's testimony she did not have back pain prior to the work injury and since the work injury she has daily back pain is credible. AS 23.30.122; *Smith*. Her pain did not resolve with chiropractic care and Dr. Bursell diagnosed left lumbar radiculitis secondary to the left L3-4 disc protrusion with posterior displacement of her left L3 nerve root in a February 2017 MRI. Employee underwent physical therapy and ESIs while still complaining of pain radiating down her left thigh, which is reflected in medical records on January 19, 2017, February 25, 2017, February 21, 2018, December 28, 2019 and January 4, 2020. Dr. Pohlman agreed with Dr. Bursell's diagnosis and recommendation for ESIs. Both physicians opined Employee's pain complaints were consistent with her disc herniation. These opinions are given greatest weight. AS 23.30.122; *Smith*; *Moore*.

Dr. Bauer opined Employee's pain complaints were not consistent with the L3-4 herniation because it required pain radiating into her thigh and she did not report it to him during his examination. His opinion is given less weight than Drs. Bursell's and Pohlman's because the medical record is clear that Employee has experienced anterior thigh pain. AS 23.30.122; *Smith*; *Moore*. The preponderance of the lay and medical evidence is the work injury was the substantial cause of Employee's past and current need for low back medical treatment. *Saxton*.

Palliative care" is care or treatment rendered to reduce or moderate temporarily pain caused by an otherwise stable medical condition. AS 23.30.395(29). The Act sets goals for Employer's liability for palliative care. The care must be reasonable and necessary to enable Employee to continue employment or relieve her chronic debilitating pain. AS 23.30.095(o). "Chronic debilitating pain" is pain lasting more than six months and is severe enough to significantly restrict Employee's ability to perform the activities of daily living. AS 23.30.395(9). It requires a physician certification that the care meets the requirements.

Dr. Bauer testified Employee had chronic debilitating pain based on her subjective reports of pain and pain relief after acupuncture. However, he testified acupuncture was not reasonable or necessary medical treatment and did not fall within the realm of medically accepted treatment

options because (1) it is not included in the ODG and ACOEM treatment guidelines and (2) there is no scientific evidence, only anecdotal evidence, it reduces chronic back pain or would enable Employee to continue working. Nevertheless, he also testified there is a tremendous amount of controversy regarding acupuncture and there was no recommendation in the scientific literature either for or against it. The Alaska Workers' Compensation Act does not require treatment to fall under the ODG or ACOEM treatment guidelines to fall within the realm of medically accepted treatment. *Hibdon*. Acupuncture is a regular and familiar treatment in Alaska workers' compensation cases. *Rogers & Babler*.

Dr. Hess recommended acupuncture because Employee reported she was able to work longer and her pain was reduced for two months after two sessions. Dr. Hess testified she continues to prescribe acupuncture if a patient has a decrease in pain and an increase in function. Employee credibly testified acupuncture allows her to work two to four hours longer per day as a seamstress and temporarily reduces her chronic debilitating pain. AS 23.30.122; *Smith*. While Dr. Hess may be a family physician and not an orthopedist like Dr. Bauer, her opinion is reasonable and credible. *Id*. She relied on Dr. Bursell's opinion that Employee's subjective pain complaints correlated to her L3-4 disc herniation and Employee's reports of pain relief and increased ability to work after acupuncture. Dr. Hess's referral of Employee back to Dr. Bursell to assess treatment options does not reduce the credibility of her opinion regarding acupuncture. Regardless of the type of medical treatment, a physician must discuss and consider its effect on the patient in order to assess whether it is reasonable and necessary treatment. *Rogers & Babler*. Dr. Bauer's opinion is given less weight than Dr. Hess's because he testified he did not discuss the effect of acupuncture with Employee. AS 23.30.122; *Smith*; *Moore*.

Based on Employee's credible testimony and the medical record, she has proven by a preponderance of the evidence that acupuncture is reasonable and necessary medical treatment which enables her to work longer and relieves her chronic debilitating pain. AS 23.30.095(o). Her claim for past and continuing medical benefits and related transportation costs will be granted.

2) Is Employee entitled to interest?

Because Employee prevailed on her claim for medical benefits and transportation costs, she is entitled to mandatory interest. AS 23.30.155(p); 8 AAC 45.142(a); *Rawls*.

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

Employee requests attorney fees and costs. AS 23.30.145; 8 AAC 45.180. Attorney's 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*. Employee prevails on her medical and transportation costs and interest claims. Employer controverted medical benefits and related transportation costs, which permits this decision to award actual attorney's fees under AS 23.30.145(a). Employee must file an affidavit itemizing the hours expended as well as the extent and character of the work performed. 8 AAC 45.180(b). *Rusch* requires the eight factors in Alaska Rule of Professional Conduct 1.5(a) be considered when determining a reasonable fee. The case dealt with causation and compensability of palliative medical benefits, which depends on complicated legal concepts. Employee's attorney has practiced law for more than 20 years, most of it involving workers' compensation cases. He stated the work for Employee in this case limited his ability to take on additional cases and he cited Michael Jensen, an Alaska attorney with similar experience, had been awarded $450 per hour. Employee's attorney did not identify any time limitation imposed by his client or the circumstances, nor did he explain how the length of the professional relationship would affect the fee. Employee prevails on her medical and transportation costs and interest claims, which are of substantial value. Given Employee's attorney's experience and the contingent nature of employee attorney work, the hourly rate of $400 and then $450 beginning January 1, 2020 is appropriate.

Employee seeks $33,940 in legal fees ($6,300 + $27,640 = $33,940) and $4,797 in costs. Employee's attorney expended 12.2 hours and $4,820 in fees pursuing the July 12, 2019 request for an SIME, which she lost in *LaBlanc I*. The July 12, 2019 request for an SIME was not a minor issue in this case and fees and hours expended on it will be deducted. *Rogers & Babler*; *Porteleki*. Considering the benefits obtained and the time expended, Employee is entitled to $29,120 in fees ($33,940 - $4,820 = $29,120) and $3,992.38 in costs ($4,797 - $804.62 =

$3,992.39) in costs because which is a reasonable and fully compensatory amount. AS 23.30.145(a); *Bignell*; *Childs*.

CONCLUSIONS OF LAW

1) Employee is entitled to past and continuing medical benefits and related transportation costs.
2) Employee is entitled to interest.
3) Employee is entitled to attorney's fees and costs.

ORDER

1) Employee's July 12, 2019 claim is granted.
2) Employer shall pay medical and related transportation costs for the work injury in accordance with the Act.
3) Employer shall pay interest pursuant to 8 AAC 45.142(a).
4) Employer shall pay $29,120 in attorney fees and $3,992.39 in costs.

Dated in Juneau, Alaska on October 23, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Bradley Austin, 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 MARINA LaBLANC, employee / claimant v. AK INGA'S GALLEY, LLC, employer; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, insurer / defendants; Case No. 201613835; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified US Mail on October 23, 2020.

/s/
Krystal Gray, Workers' Compensation Technician