ALASKA WORKERS' COMPENSATION BOARD

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

COLETTE COHEN-BARCE, Employee, Claimant, v. MICHAEL J. VANSTROM d/b/a ALASKA ELITE OUTFITTERS, Uninsured Employer, and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201916026 AWCB Decision No. 21-0010 Filed with AWCB Anchorage, Alaska on February 8, 2021.

Colette Cohen-Barce's workers' compensation claims were heard in Anchorage, Alaska on December 9, 2020, a date selected on November 20, 2020. The hearing was held via Zoom. A June 16, 2020 hearing request gave rise to this hearing. Attorney Justin Eppler appeared and represented Colette Cohen-Barce (Employee). Claims Administer McKenna Wentworth appeared and represented Wilton Adjustment Service, the adjustor for the Alaska Workers' Compensation Benefits Guaranty Fund (Fund). Michael J. Vanstrom, uninsured employer, appeared and represented Alaska Elite Outfitters. Witnesses for Employee included Colette Cohen-Barce and Aurialle Cohen, Employee's daughter, both of whom testified telephonically, and Stacee Frost Kleinsmith, Franchisee, Home Instead, a homecare company, who testified in

person. Board member Robert Weel notified the parties he may have to leave the hearing prior to its conclusion but that he could listen to the recording for the remaining testimony and arguments. The parties stipulated to Member Weel's continued participation. The record was left open until December 21, 2020, for parties' briefing on whether the time and expense incurred by Aurialle Cohen caring for and making medical decisions for Employee as an attendant caregiver and agent under a medical power of attorney are compensable and for additional evidence. The record closed on December 21, 2020, but was reopened for receipt of the following: 1) the Fund's late-filed December 24, 2020 supplemental brief; 2) Employee's December 30, 2020 petition to strike the Fund's late-filed December 24, 2020 supplement brief; 3) the Fund's December 31, 2020 opposition to Employee's December 21, 2020 supplemental brief; 4) the Fund's December 31, 2020 reply to Employee's petition to strike; 5) Employee's January 7, 2021 reply to the Fund's opposition to her supplemental hearing brief and answer to her petition to strike; and 6) Employee's January 7, 2021 attorney fee affidavit. The record closed on January 7, 2021.

ISSUES

Employee contends her burn injuries incurred on September 1, 2019 arose out of and in the course of her employment with Employer. Employee contends she is entitled to medical and transportation costs, including the cost of a personal care attendant, as well as temporary total disability benefits while medically unstable, and reemployment benefits.

The Fund does not dispute Employee's burn injuries arose out of and in the course of her employment with Employer or that Employee's claim is compensable. The Fund does contend personal care attendant services while Employee was hospitalized are not reasonable or necessary medical treatment. It also contends it cannot be ordered to pay penalties awarded against Employer.

Employer admitted Employee was an employee for Employer at a remote site at the time of the injury. Employer also admitted it was not insured at the time of the injury. Employer contended Employee was off duty at the time of the injury and the equipment that caused the injury did not belong to Employer.

1) **Did Employee's burn injuries arise out of and in the course of her employment with Employer? If so, to what benefits is she entitled?**

Employee contends Employer should be responsible for paying the full medical bills as documented by the providers, not just the Medicaid lien.

The Fund contends Employer should only be responsible for reimbursing Medicaid's lien on the bills from Alaska Native Medical Center (ANMC) and Harborview Medical Center (HMC) and any other medical bills not submitted within the 180 day time limit under AS 23.30.097(h).

2) **Is Employer responsible for the hospital bills from ANMC and HMC Center or for reimbursement of the Medicaid lien?**

Employee contends there should be a finding of unfair and frivolous controversion against Employer.

Neither the Fund nor the Employer expressed an opinion on this issue but it is presumed Employer disputes it should be found to have frivolously or unfairly controverted Employee's benefits.

3) **Did Employer unfairly and frivolously controvert benefits?**

Employee contends the Fund's supplemental briefing due on December 21, 2019, but filed late on December 24, 2020, should be struck from the record and not considered as not only was the Fund's supplemental briefing filed late, but it addresses issues outside of the Board's request for supplemental briefing. Employee contends it would be prejudicial to her as she did not have an equal opportunity to consider the Fund's supplemental brief before filing her brief.

The Fund contends its supplemental brief was filed late due to a clerical calendaring mistake and as Employee did not provide any evidence or argument demonstrating actual prejudice, the Fund's supplemental brief should be considered.

4) **Should the Fund's late filed supplemental briefing be considered?**

Employee contends she has successfully litigated her claims and is thus entitled to attorney fees and costs.

The Fund did not oppose Employee's attorney fees and costs. Employer did not object to or express an opinion on this issue.

5) Is Employee entitled to attorney's fees and costs and, if so, how much?

FINDINGS OF FACT

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

1) On September 1, 2019, while working for Employer, Employee suffered a burn injury when a propane heater and tank exploded in her living quarters at the Beaver Creek hunting camp. The parties stipulated Employer was uninsured when Employee was injured. (Record.)

2) Employee worked for Employer for the 2019 hunting and fishing season as a camp cook and also did cleanup and helped around the camp. She started work in June, 2019 on the Nushagak River at Paradise Nushagak Camp and worked there until the latter part of July. She went home for two weeks, and then went back and worked all through August. Then she was moved to Beaver Creek Camp, a hunting camp on the Mulchatna River, a five hour trip by a jet boat; transportation was provided by Employer. This trip took two days to arrive at Beaver Creek Camp as they had trouble with the jet boat. Employee arrived about August 26, 2019 to clean up the camp and prepare for the guides and guests, who were to arrive on September 1, 2019. There were two other employees at the Beaver Creek Camp preparing for the arrival of the guides and guests. There was also one client who had been on a bear hunt and was leaving. (Employee's 8/25/2020 deposition.)

3) Employer did not prohibit Employee from bringing personal items to the camp. (*Id*. at 12.)

4) Employee worked for Employer continually through August when she returned to Paradise Nushagak Camp from her two weeks off at the end of July 2019. She was in his employ the entire time, except for those two weeks off. (*Id*. at 13.)

5) Employee was paid $100.00 per day by check from Employer, plus tips from the clients. Her agreement with Employer was that she would be paid more if there were a lot of people. (*Id*.)

6) On September 1, 2019, at about 7 or 8 in the evening, after having worked since 5 in the morning, Employee went to the place where she lived at the camp, which was a corner in one of the cabins where she had a cot, to wait for the guides and guests to arrive, which could have been as late as midnight. As she felt cold, she picked up her heater and attempted to attach a one pound propane bottle to it. She suddenly felt ice cold over her hand and arm, which was the propane. The last thing she remembered was a flash, then her hair was on fire and she tried to pat the fire out and screamed. The new guide was on the other side of the cabin and asked her what he should do. She asked him to get the first aid kit, but there was no first aid kit. So she instructed him to bring her towels soaked in cold water. Employee does not remember very much after that. The new guide brought her Ibuprofen and a bottle of whiskey to manage the pain. (*Id*. at 14-17.)

7) Employee did not take any alcohol with her to the Beaver Creek Camp and she did not drink any alcohol or take any drugs prior to the burn injury. (*Id*. at 17, 28.)

8) Employee stayed in her corner on her cot until she was air lifted out of Beaver Creek Camp two days after the accident. This two day delay was caused because the satellite phone given to the employees by Employer did not work and they were unable to call for help. (*Id*. at 17-18.)

9) Employer never asked Employee to carry her own insurance, obtain her own business license or pay her own taxes. (*Id*. at 32.)

10) On September 3, 2019, Employee was life flighted to ANMC and admitted for care. She had burns to 34 percent of her body and bilateral arms circumferentially, including the posterior surface of the hand and digits, the chest to above the nipple line, and the back. The burns resulted from a propane tank explosion. She was taken to the operating room (OR) for debridement and dressing of her burn wounds, and then admitted to the intensive care unit (ICU) after discharge from the OR. During her stay at ANMC, Employee was taken daily from September 3, 2019 to September 10, 2019, to the OR for wound treatment. However, it was determined on September 11, 2019, Employee's burn wounds were not healing. There was wound conversion to full thickness over the breasts bilaterally, abdomen, and scattered areas on her chest, and shoulders. In other areas there were deep partial thickness burns. The wound conversion was attributed to the delay in presentation for care. It was noted Employee received care from behavioral health, occupational therapy and physical therapy during her stay at ANMC. Elisha Brownson, M.D., anticipated the need for grafting and a long course of wound

care. She recommended specialty burn care at HMC in Seattle. Dr. Brownson talked with Employee and Employee's daughter concerning her recommendations and need for a transfer to HMC. (ANMC discharge summary, 9/11/19).

11) On September 11, 2019, Employee was transferred via air ambulance to HMC, to receive complex wound management. She underwent further assessment and treatment of her burn wounds. She was noted to have full thickness burns on her anterior chest and abdomen and partial thickness burns on her arms bilaterally, back and neck, with skin buds and bleeding. (HMC, Discharge Summary, 9/26/2019).

12) On September 19, 2019, Employee was seen by physical therapy for a review of her home exercise program and therapy recommendations as well as anti-contracture positioning and compression. Employee was noted to have grossly functional range of motion throughout, but with significant banding to bilateral axillae with overhead reaching, left elbow tightness and visible skin pull to left neck with combined motions. She was at significant risk of soft tissue contracture due to the depth and locations of burns and would require ongoing therapy to progress to functional mobility, self-care tasks, range of motion and positioning needs as well as home exercise education and training. (Physical therapist Kristine Parker, note, 9/19/19 HMC medical records.)

13) On September 20, 2019, she was taken to the OR for excision to her right upper extremity and bilateral breasts with split thickness pie crust autografts as well as intraoperative manipulation and stretching of her right arm and hand and complex wound care to non-operative sites. (*Id*.)

14) On September 22, 2019 patient was noted to have difficulties with delirium overnight and also was suffering from anxiety and posttraumatic stress disorder (PTSD). (*Id*.)

15) On September 23, 2019 patient's burn wounds showed healthy grafts and continued healing of other wounds. It was noted Employee was meeting her goals for discharge on September 26, 2019. (*Id*.)

16) On September 25, 2019, Employee would be ready for discharge per the Burn Team if she was stable off oxygen and both she and her daughter learned Employee's wound care prior to discharge. (Social Work note, HMC medical records, 9/25/19.)

17) On September 26, 2019, Timothy William, M.D., said Employee would need physical assistance after discharge and as she continued to heal. Employee could not do any heavy lifting

or strenuous exertional activity. Also, she had uncorrected vision impairment following her injury and required wound dressings for which she would require assistance to maintain. Dr. William requested medical escort for Employee as she was transported home. (Dr. William's 9/26/19 note, Employee's HMC medical records.)

18) Employee's daughter provided care, including wound care, for Employee everyday while Employee stayed at her friends' house for the first six weeks after she returned to Alaska. Her daughter also ran errands for her, got her prescriptions, and bought food. After Employee moved into her own home, her daughter provided care for there, including shoveling snow and bringing the wood in. (Employee's 8/25/20 Deposition, at 35.)

19) Employee's daughter went back to work full-time the day after they came back from Seattle. Her daughter is paying all the bills, Employee's bills as well as her own. (*Id*., at 35-37.)

20) Employee's daughter still is providing care to Employee as she cannot really use her right arm. (*Id*. at 36).

21) On October 3, 2019, Employee was seen by Dr. Brownson for follow-up of her burn injury after discharge home from HMC. Dr. Brownson noted Employee's initial presentation to care at ANMC on September 3, 2019 was about 48 hours after the injury occurred and Employee had not received any evaluation or burn resuscitation during that time. Employee was accompanied by her daughter, and they reported they were independent with wound care and although Employee's pain was improving, she still required narcotic pain medicine. She was still having trouble with pruritus and still required a diuretic and ACE wraps to her legs. She was ambulating well. She complained of tightness in bilateral axilla, but had full range of motion. Her right upper extremity had 100 percent skin graft take and except for one small area of acute burn wound that was open, all other areas were well healed. The left upper extremity was 100 percent epithelized. She had full range of motion in both upper extremities for shoulder abduction/adduction and elbow flexion/extension. (Chart Note, Dr. Brownson, October 3, 2019).

22) On October 9, 2019, Employee established care with Kelli Vicek, Advanced Nurse Practitioner (ANP) at Peninsula Community Health Services Alaska (PCHS) in Kenai, Alaska. NP Vicek reviewed Employee's diagnoses of post-traumatic stress disorder (PTSD) and burns involving 30-39 percent of body surface, with 0-19 percent third degree burns. NP Vicek also reviewed Employee's medications, which included the pain medications Oxycodone HCL, Gabapentin, Ibuprofen and Acetaminophen, the diuretic Furosemide, Melatonin, a sleep aid, a

multivitamin and polyethylene glycol. NP Vicek prescribed the antibiotic Doxycyline and Prazosin, a sleep aid for patients suffering from PTSD. She referred Employee to see NP Nicole See for evaluation and treatment of PTSD, as the recent burn had brought back trauma from previous physical abuse and Employee was suffering from nightmares. Employee's upper chest was noted to have an open area with serosanguinous drainage, and a culture was done. A spreading rash was also noted, indicating a possible skin infection. (Clinic notes, 10/9/19).

23) On October 23, 2019, Employee had a contracture of the right hand and was to see occupational therapy the next day. The rash on her chest had resolved. The October 9, 2019 culture had shown candida and was successfully treated with Diflucan. A skin donor site on the right lateral thigh had a few open blisters, and NP Vicek planned to contact Dr. Brownson, to determine if this would delay healing. Employee reported sleeping better and not having nightmares since starting the medication Prazosin. (Clinic notes, 10/23/19.)

24) On October 25, 2019, NP Vicek evaluated Employee for skin donor site blistering on the right lateral thigh. Wound cultures were done and a referral was made to Central Peninsula Hospital wound care. (Clinic notes, 10/25/19).

25) On November 8, 2019, NP Vicek noted the open blisters on the right thigh skin donor site were not infected. Employee was to continue occupational therapy for contractures. (Clinic notes, 11/8/2019.)

26) On November 15, 2019, Employee filed her report of injury (ROI). She stated she suffered a flash burn on September 1, 2019, while attempting to connect a refilled propane bottle to a heater while working for Employer at a remote hunting camp on the Mulchatnak River. She stated she was "life-flighted" to the ANMC in Anchorage on September 3, 2019, then "life-flighted" to HMC on September 12, 2019. (ROI, 11/15/19).

27) On November 15, 2019, Employee filed her workers' compensation claim (WCC) against Employer and the Fund, because Employer was uninsured. She had suffered propane flash burns to 30 to 35 percent of her upper body while working for Employer "miles up" the Mulchatna River. She claimed temporary total disability (TTD). (WCC, 11/15/19.)

28) On November 19, 2019, Employee filed the Peninsula Community Health Services - Medical billing statement for medical services provided from October 9, 2019 through October 6, 2020, totaling $5,540.00 and paid by Medicaid. (Employee's notice of filing, 11/19/20.)

29) On December 20, 2019, Employer entered into a settlement agreement with the State of Alaska, Division of Workers' Compensation Investigation Unit for his failure to insure for workers' compensation liability. Employer admitted he failed to insure for workers' compensation liability while utilizing employee labor. He admitted he is liable for any occupational injuries that occur during any time he was uninsured. He also admitted Employee was injured on or about September 1, 2019, while at Employer's remote camp located near the Nushagak and Mulchatna rivers. However, Employer disputed Employee's September 1, 2019 injury was work-related. (Settlement Agreement Penalty for Failure to Insure in Alaska Workers' Compensation Board case No. 700007594, 12/20/19)

30) Employee applied for unemployment at the end of March 2020 and received unemployment benefits until the first part of July 2020. The unemployment stopped when her contractures became a problem and she was no longer eligible to work. The contractures are in her right arm and hand. She has no ability to use scissors or grasp or hold on to anything. (*Id*. at 23.)

31) On June 16, 2020, Employee filed her request for a hearing. (Affidavit of readiness for hearing. (6/16/20.)

32) On July 15, 2020, Employee filed her amended claim for TTD, permanent total disability (PTD), permanent partial impairment (PPI), compensation rate adjustment, unfair and frivolous controversion, attorney's fees and costs, transportation costs, medical costs, penalty for late paid compensation, and interest. (Claim, 7/15/20.)

33) On July 24, 2020, Employee filed her Employer's notice of 90 consecutive days of time loss. (Notice, 7/24/20.)

34) On July 24, 2020, Employer was notified of his obligation to pay for medical and indemnity benefits due for Employee's work injury. (Demand letter, 7/24/2020.)

35) On August 7, 2020, family nurse practitioner (FNP) Kelli Landrum, stated Employee was continuing to have medical problems related to her burn injuries and had missed over 90 consecutive days of work, continued to be out of work and was unable to return to work at that time due to her injures. It was unknown if she would be able to return to her previous job duties as she was still under treatment with burn specialists. She further opined Employee's therapy was delayed and limited due to the Covid-19 pandemic, and this treatment delay may have resulted in permanent muscle contractures. (FNP Landrum's letter, 8/7/20).

36) On August 7, 2020, FNP Landrum diagnosed burns, moderately severe depression, and PTSD. Employee's pain was rated at a 7 on a 1-10 scale, with 10 being the highest pain level. Employee was to continue counseling with Michelle L. and also see NP Nicole See for evaluation of depression. Her Duloxetine, an antidepressant and nerve pain medication, was increased to from 30 mg to 60 mg daily. Employee was counseled on the importance of physical activity to improve her physical functioning and emotional health. (Clinic notes, 8/7/20).

37) On August 10, 2020, Dr. Brownson, a general surgeon with burn specialty training at ANMC, noted she had been involved in Employee's burn care since shortly after her injury on September 1, 2019. She had last seen Employee on July 16, 2020. Employee had been unable to return to work since her injury, and she had hypertrophic scarring related to her burn injuries, including right wrist burn scar contractures. Although Employee had expressed interest in returning to work in some capacity, it was not clear what her long-term function would be. Employee has impairments related to right wrist mobility and pain and weakness associated with long stretches of activity with her right upper extremity. Dr. Brownson opined Employee is unable to return to her job at the time of her burn injury. (Dr. Brownson's 8/10/20 letter).

38) On August 13, 2020, the Fund controverted all benefits stating Employee's WCC lacked sufficient grounds to establish all the elements to collect against the Fund. (Controversion, 8/13/20.)

39) Medicaid has paid for Employee's medical care and as of September 29, 2020, the Medicaid lien was $102,888.57. (Notice of Medicaid Lien, and Claim of Lien, State of Alaska Department of Law, 9/29/2020).

40) On October 9, 2020, Employee submitted copies of two bills from ANMC, one for $227.00 for an April 11, 2020 patient visit and one for a co-pay of $32.60 for a July 16, 2020 patient visit. (Employee's notice of filing, 10/9/20.)

41) On October 21, 2020, Dr. Brownson opined as follows in response to questions asked by Employee's attorney (questions and answers not direct quotes):

1. Question: Is it your opinion when Employee was discharged from HMC she would have required in-home care (e.g. bathing, bandaging changes, meal preparation, dressing, cleaning, laundry, etc.) to assist her with activities of daily living on a full time basis as a result of the burn injuries, and if so, for approximately how long?

Answer: Ms. Cohen-Barce was discharged from HMC with the following active issues: a) daily wound care for acute burn wounds, skin grafts, and donor sites; b) corneal abrasions requiring ocular lubricant; c) acute kidney injury and profuse total body edema requiring diuresis; d) physical and occupational therapy needs for range of motion exercises; e) pain control; f) psychosocial support due to anxiety and acute stress related to burn injuries; g) nutritional support with supplements. On transition to home, care is needed to help patient with these needs. I believe she would have required full-time assistance at home. I saw her in clinic on October 3, 2019 and she still required high level assistance. Although recovery is variable with this large site of burn injury, family assistance would be needed for at least one month after return to home.

2. Question: Due to the remote location where Employee's work injury took place, and Employer's inability to arrange for immediate transportation, it took approximately 48 hours for Employee to arrive from the work site to ANMC for medical treatment. During the delay Employee had no access to first aid, bandages, medicine, sterile medical supplies or medical facilities. Her only relief from the pain after the injury was the alcoholic beverages made available to her for pain relief, and she admits to using alcohol for relief from her pain. Employee denied under oath in her deposition she drank any alcohol that day prior to her injury. On admission to ANMC, the toxicology reports noted she had a blood alcohol level in her system, which she does not deny. Is there any way for a medical provider or toxicologist to determine within a medical degree of probability if Employee was intoxicated prior to the burn injury, when the testing for blood alcohol was done some 40 hours after the injury occurred?

   Answer: Due to the delay in Employee's presentation for care, there is no way to tell on initial blood work what her blood alcohol level was at the time of injury. Because her injury had occurred more than forty hours prior to presentation, the initial lab work cannot determine how long she had been drinking alcohol.

3. Question: Medical stability is defined as the date after which further objectively measurable improvement from the effects of the work injury is not reasonably expected to result from additional medical care or treatment. Is Employee medically stable? If she is not medically stable, what future medical and/or counseling treatment does she require or do you anticipate she will require regarding her recovery from this injury, both physically and emotionally?

   Answer: Employee remains in long-term burn recovery. For patients with a large burn injury, it is our practice to follow them for at least two years after injury, and longer if there are persistent needs for treatment for hypertrophic scarring, as in Employee's case. She will continue to undergo

> reconstructive procedures for her hypertrophic scarring. She will continue to be under my care for at least another year and possibly longer.

Dr. Brownson indicated Employee needed high level assistance full time for at least the first month after discharge from the hospital, and less as her condition improved. (Mr. Eppler's letter to Dr. Brownson, 10/21/20; Dr. Brownson's answers, 10/30/20).

42) On October 27, 2020, Michele Scott, licensed profession counselor (LPC) noted Employee was currently in psychotherapy for PTSD caused by her work injury which resulted in severe burns, intensive care unit (ICU) hospitalization and recovery. LPC Scott recommended Employee's therapy continue for one hour per week via Zoom with no discharge date determined. (Letter of Michele S. Scott, Licensed Professional Counselor (LPC), Masters in Counseling (MAC), 10/27/20.)

43) Dr. Brownson stated that because Employee's burn injuries were severe, she had to be transferred to the specialty burn center at HMC from ANMC on September 11, 2019. Employee's presentation to care was delayed by the remote location of her injury. As Employee was unable to immediately undergo proper burn resuscitation and wound care, her burn wounds progressed to deeper wounds, which required grafting. The complications from her burn injuries were likely related to her delay in care. (Dr. Brownson' email to Employee's attorney, 10/30/20).

44) On December 4, 2020, Employee's attorney filed his affidavit of attorney's fees and costs, which totaled $28,874.75 for 53.89 hours of attorney work and 43 hours of paralegal work, plus $168.75 for copying charges. He charges $385.00 per hour for his services and $185.00 per hour for paralegal services. (Affidavit of attorney's fees and costs, 12/4/20; Paralegal fees and costs affidavit, 12/4/2020..)

45) Employee's attorney stated he declined approximately ten probate cases and workers' compensation cases in part due to his commitment to Employee's case. (*Id*.)

46) Employee's attorney has been practicing law since November 2012. (*Id*.)

47) On December 4, 2020, Employee's attorney filed his paralegal's fees and costs documenting 43 hours of paralegal work charged at $185.00 per hour and total $7,955.00 for work performed on Employee's behalf. ()

48) Employer admitted Employee worked for him at the remote Beaver Creek Camp at time of the injury on September 1, 2019. However, he believed she was done working for the day at the

time of the injury and it was not his heater that "blew up." He also stated the heater was not to be used indoors. He did state he felt terrible about what had happened to Employee and had thought as a subcontractor he did not have to purchase workers' compensation insurance. He does purchase it now. Employer stated he had no further defenses to Employee's claims. (Hearing record, 12/9/20.)

49) On December 9, 2020, Employee testified she started working for Employer in early June 2019. Employer arranged and paid for the transportation to the work sites. There were no restrictions other than weight on what Employee could bring to the work sites. (Hearing record, 12/9/20.)

50) In late August Employee was moved upriver to the Beaver Creek Camp, which was a pretty rugged camp with a bunch of little cabins, no running water, a propane stove and outhouses. (*Id*.)

51) Employee testified there was no heat source in any of the cabins. On the night of September 1, 2019, while waiting for the next batch of hunters to come in to the camp site, she went to her living quarters in one of the cabins. The time they were coming was uncertain and could have been as late as midnight. Her job was to make sure they were made comfortable after they arrived. When they did arrive, she would have prepared food and beverages for them and made sure they had everything they needed. (*Id*.)

52) When she felt chilly in her living quarters, she decided to turn the heater on. She remembers when she put the propane bottle on, she felt coolness on her arm and hand, and she dropped it. Then she just remembers screaming because of the flash burn. (*Id*.)

53) The propane heater belonged to Employee and she brought it with her to the camp. The propane bottle she used, which was a Coleman one pounder, was supplied by Employer and was at the campsite. She had asked previously why the propane bottles were in the freezer down in Ekwok, and was told it was because it made them easier to refill. (*Id*.)

54) Employee later learned the Coleman one pound propane bottles are not supposed to be refilled. (*Id*.)

55) Employer paid her $100 a day by check at the end of each "set," that is, for the king salmon season, then the silver salmon. She was also paid tips, which were paid by the clients. Employer did not deduct or withhold any taxes from the checks. (*Id*.)

56) Employee's injury took place in the evening on September 1, 2019 and she was not life-flighted out until late September 3, 2019. The delay was due to the other employees being unable to contact Employer. (*Id*.)

57) Employee testified the pain she suffered from her burn injuries was devastating. In addition, her vision was not clear as she had suffered a burn on her cornea. (*Id*.)

58) Employee testified Exhibit B to her December 4, 2020 hearing brief were the pictures taken of her on her admission to ANMC. (*Id*.)

59) Employee was at ANMC about 9 days, as the treatment she needed was beyond what ANMC could provide, as she needed skin grafting. She was then transferred to Harborview Medical Center in Seattle. Dr. Brownson had told Employee's daughter there was a chance she would not survive, as only about 20 percent of patients of her physical size and her extent of burns do survive. (*Id*.)

60) Employee's daughter came to ANMC after the personnel at the ANMC ER called her. Employee refused treatment until her daughter could serve as her power of attorney. Employee was not that coherent at that time. Employee's daughter immediately made arrangements to go to Anchorage. (*Id*.)

61) Employee's daughter had to arrange and pay for her own transportation to Seattle, as the life flight which took Employee to Seattle left without her daughter. (*Id*.)

62) The entire time Employee was in both hospitals her daughter served as her power of attorney and decision maker. (*Id*.)

63) Employee was a patient at HMC from September 11, 2019 until September 26, 2019, when she was discharged home. (*Id*.)

64) ANMC's bill for medical care provided Employee for treatment of her work injury through July 16, 2020 was $260,917.46. (ANMC Billing Statement, August 10, 2020.)

65) HMC's bill for medical care provided Employee due to her work injury was $152,287.19. The bill provided is not a complete bill with each services itemized. (HMC Billing Statement, 10/21/2019.)

66) The medical records from ANMC and HMC reflect Employee's burn injuries and need for medical treatment were related to her employment. Bills and corresponding medical reports were not filed with the Employer or the Fund within 180 days after the dates of service. (Record.)

67) After discharge from HMC, patient stayed with friends for six weeks, as she could not stay in her home due to uncovered insulation in the walls and ceilings that presented an infection risk due to her extensive burns. (*Id*.)

68) Employee recalls they hired a contractor to cover the insulation so she could stay in her own home. The bill was about $600.00 to do this work. (*Id*.)

69) After discharge from the hospital, Employee's daughter cleaned Employee's wounds and changed Employee's extensive dressings daily, sometimes twice daily, as well as rewrapping her ace bandages on her legs. Her dressings were on her arms, hands, back, chest, belly and face, as well as the skin graft donor site on her leg. (*Id*.)

70) Employee verified she and her daughter together prepared the "Schedule for Colette," showing the hours of personal care attendant services provided to her. (*Id*.)

71) Employee will continue to need personal care attendant assistance from her daughter into the future, and Dr. Brownson continues to recommend this. For instance, Employee relies on a woodstove for heat, and her daughter has to cut and haul the wood. (*Id*.)

72) On October 30, 2020, Employee had to have surgery on the skin-grafted area on her right arm by Dr. Brownson to "untangle a bundle of nerves," as she was unable to use her right hand. She is to see Dr. Brownson again next week due to complications from that surgery. (*Id*.)

73) Employee still requires occupational therapy twice a week for ultrasound treatments to her skin grafts to help reduce the nerve impairment in the grafts as well as strength training. She still requires counseling to treat her PTSD. She also sees a nurse practitioner for her medical care. (*Id*.)

74) None of Employee's health care providers have stated she is medically stable. (*Id*.)

75) Employer has not paid for any costs or expenses due to her burn injuries. (*Id*.)

76) Employee brought a Coleman heater to the fish and hunting camps as she was informed these camps did not have heat. She had used the same heater in the prior camp since June 2019. The propane bottles were filled by one of the employees at the camp. (*Id*.)

77) Employee has not worked for any employer since her injury, nor has she been placed on light duty. (*Id*.)

78) Employee still requires a personal care attendant to provide assistance with all the physical work around the house, as she cannot lift more than 10 pounds. She is now very sensitive to heat and cold. (*Id*.)

79) Employee received unemployment benefits from April 2020 to July 2020. (*Id*.)

80) Employee's daughter received instruction on how to care for Employee's burns while she was hospitalized at HMC. (*Id*.).

81) Employee has an unpaid bill from Medivac Alaska, LLC for ground transportation in the amount of $2,278.00. (*Id*.)

82) Employee is credible. (Experience, judgment, observations, and inference from all the above).

83) Aurialle Cohen testified she is Employee's daughter and she lives in a trailer on her mother's property. (Hearing record, 12/9/20.)

84) Ms. Cohen first heard about Employee's injuries on September 3, 2019 about 5pm when the personnel at ANMC emergency department called her to tell her Employee had suffered burn injuries and was in critical condition. They invited her to go to ANMC as quickly as possible. They also requested permission to treat Employee for her injuries, including surgery, cleaning and debridement of the burn wounds as well as evaluation of the severity of the burn wounds. Ms. Cohen gave her permission to the requested treatment. (*Id*.)

85) Ms. Cohen did receive a call from Mr. Vanstrom on the afternoon of the next day, at which time he inquired about Employee's condition, whether she was still alive and whether she had insurance. Ms. Cohen told him Employee would be filing a workers' compensation claim, as Employee was at work when the injury took place. Mr. Vanstrom then told her she could not do that, as he did not have workers' compensation insurance. (*Id*.)

86) While Employee was at ANMC, Ms. Cohen spent between 15 and 20 hours a day by her bedside. She helped her with everything from toileting when the nurses were otherwise occupied to getting enough nutrition, as Employee's hands were both bandaged and she could not move her fingers. Also, Employee had trouble keeping food down due to the anesthesia she received during her surgeries for treatment of her wounds. She contacted Employee's lawyer to start the process for being appointed power of attorney and filled out paperwork for the hospital regarding Employee's treatment in the event she stopped breathing or became unconscious. She basically did everything for Employee while she was in the hospital the nurses could not do or were not available to do. She also rewrapped Employee's bandages if they became loose. (*Id*.)

87) Ms. Cohen testified she missed about 17 days of work while Employee was in the hospital at ANMC and HMC. She was employed at the Tree House restaurant in Nikiski, Alaska at the

time and still is employed there. Her rate of pay is $10 per hour, plus tips, and she makes between $50 and $100 per day in tips, depending on how busy the restaurant is. (*Id*.)

88) Ms. Cohen was unable to accompany Employee on the medical flight to Seattle as the flight left before it was originally scheduled to leave and she had not returned to Anchorage from Nikiski where she had gone to arrange for the care of her animals while she was in Seattle with Employee at HMC. As a result, she had to use Alaska Airlines miles, to purchase her own ticket. (*Id*.)

89) The Alaska Airlines Confirmation Letter for travel from Anchorage to Seattle for Aurialle Cohen on September 12, 2019 shows the ticket was purchased for 60,000 Alaska Airlines miles plus $20.60 cash. (Ticket confirmation letter, 9/12/19, Employee's 12/21/20 notice of filing.)

90) Ms. Cohen's role while Employee was at HMC did not change from when she was at ANMC. In fact, Employee was even more debilitated than she had been when at ANMC. Employee's fingers and hands were still bandaged and in addition she had gained about 60 pounds of fluid, which was a side effect of her large burn injuries. Most of the fluid was in her legs, so she was even more debilitated in her ability to move. The nurses at HMC taught her to "butterfly" wrap the bandages, which she was familiar with due to her previous work in wildlife rehabilitation. (*Id*.)

91) When Employee was released from Harborview, her daughter was fully responsible for her. The hospital personnel called them a taxi, which took them to the airport. Employee required a wheelchair as she could barely stand or walk. (*Id*.)

92) Employee's and her own flight from Seattle to Kenai was arranged by HMC and paid for by Medicaid. (*Id*.)

93) Ms. Cohen testified it was decided at HMC before Employee was discharged that she would be Employee's personal care attendant. At HMC she was taught how to care for her mother's burn wounds, included wound cleaning, bandaging, application of ointments, gauzes, or anything topical. She was also taught how to prevent infection by wearing gloves, masks, and disposing of medical supplies. (*Id*.)

94) Ms. Cohen submitted a mileage reimbursement form for reimbursement for driving her mother to medical appointments, giving the mileage for trips from July 15, 2020 through October 30, 2020 for a total of 2,059.80 miles. (Employee's notice of filing, 11/19/20.)

95) Ms. Cohen also provided separate documentation of mileage for transporting her mother to a medical appointment in Anchorage for a roundtrip of 336 miles on October 2, 2019, plus her own travel to Anchorage and back to Nikiski for a total of two roundtrips from September 3, 2019 to September 7, 2019 while her mother was hospitalized at ANMC. Those trips totaled 672 miles, for a grand total of 1,008 miles in 2019. (Employee's notice of filing, 12/21/20.)

96) The reimbursement rate for transportation for medical appointments in 2019 was $0.58 per mile and for 2020 was $0.575 per mile. (Alaska Department of Labor and Workforce Development Division of Workers Compensation Bulletins 19-01 and 20.01.)

97) Ms. Cohen is credible. (Experience, judgment, observations and inferences from all of the above).

98) Ms. Stacee Frost Kleinsmith, owner and operator of Home Instead, a homecare agency in Anchorage, Alaska, stated her agency provides care for predominately the frail elderly who need assistance with activities of daily living and instrumental activities of daily living. Home Instead has been operating for about 15 years. Ms. Kleinsmith has a Bachelor of Science and a Master's degree in Business Administration, both from Penn State University. While she was in college, she also served as a caregiver to her elderly grandparents for twelve years. She opened her Anchorage Home Instead franchise in 2006. (*Id*.)

99) Approximately 20 percent of Home Instead clients are postoperative patients or patients insured under workers' compensation. Her agency bills workers' compensation insurers for clients insured under workers' compensation. (*Id*.)

100) Ms. Kleinsmith had reviewed Dr. Brownson's October 21, 2020 answers to Employee's questions concerning the care Employee required after discharge from the hospital and Employee's schedule of care provided by her daughter from September 27, 2019 through December 26, 2019. (*Id*.)

101) Employee's care schedule showed Employee received two hours per day of wound care plus 20 hours per day of home care from October 25, 2019 through November 8, 2019, plus another two hours for a medical appointment on November 8, 2019. From November 9, 2019 through November 21, 2019, she received two hours wound care and 10 hours of home care, plus 4.5 hours of PCA care for medical appointments on November 21, 2019. On November 22, 2019, Employee received two hours of wound care and two hours PCA services in moving to her own home. From November 23, 2010 through December 5, 2019, Employee received two hours

of wound care plus two hours of home care. On December 5, Employee also received four hours of PCA care for medical appointments. From December 6, 2019 through December 12, 2019 she received two hours of wound care and two hours of PCA care daily. On December 10, 2019 she also received three hours of PCA care for a medical appointment. From December 13, 2019 through January 2, 2021, she received two hours per day of wound care and two hours per day of PCA care. On December 26, 2019 she also received two hours of PCA care for a medical appointment. The total number of hours provided to Employee in PCA services and wound care, from September 27, 2019 through January 2, 2020 was 1,337.5 hours, which at $18.00 per hour comes to $24,075.00. The care schedule also included a notation Employee's daughter continued to assist Employee with wound care for one hour per day as well as PCA services in chopping and carrying wood for her wood stove and snow shoveling starting in January 2020 and continuing through the winter. (Care schedule, 9/27/19 through 12/26/19.)

102) Based on her review of these documents, Ms. Kleinsmith stated Employee needed significant assistance initially on discharge home from the hospital, both with wound care and activities of daily living and that she would need 24 hour care during that time. The care she required would decrease over time as she recovered. (Hearing record, 12/9/19.)

103) Ms. Kleinsmith testified the dates and description of the type of care provided to Employee after discharge from the hospital reflected in the care schedule are consistent with the amount and type of care recommended by Dr. Brownson. (*Id*.)

104) Ms. Kleinsmith testified her company would charge $35.00 an hour for the type of care Employee received. (*Id*.)

105) Ms. Kleinsmith testified she charged $50.00 per hour for preparing for her testimony at today's hearing and she had spent a little less than one hour preparing, plus the time to attend and testify at hearing. (*Id*,)

106) Ms. Kleinsmith testified her agency provided nonmedical or custodial care to their clients. If higher skilled care, such as nursing care, is needed, it is provided by a home health company. Her employees have access to resources if they have questions about a client's care and there are staff to do quality checks on the care delivered. Home Instead also has a nurse on staff to serve as a staff resource. Home Instead also has overhead costs such as business licenses and workers' compensation insurance. The employees are paid from $15 to $18 per hour. Her staff assists with grocery shopping, meal preparation, bathing, toileting, and cleaning. They would also assist

with "instrumental activities of living" such as chopping and stacking wood and building and maintaining a fire to heat a home. (*Id*.)

107) Home Instead is capable of providing supplemental staffing in the hospital and has done so in the past. (*Id*.)

108) Ms. Kleinsmith testified, based on her understanding of Dr. Brownson's October 30, 2019 opinion Employee would require high level assistance for a month after her discharge from the hospital, Employee require full time assistance for at least one month after discharge, but less as her recovery progressed. (*Id*.)

109) Employee's attorney spent an additional 10.7 hours preparing for hearing and preparing his client for hearing and time at the hearing since the time of his December 3, 2020 attorney fee affidavit for a total of $3,927.00, plus the cost of having Ms. Kleinsmith prepare for and testify at hearing, which totals $75.00. (Hearing record, 12/9/20.)

110) Employer admitted he had no further defenses to Employee's workers' compensation claim.

111) The Fund does not dispute the following:

1. Employee's injuries arose out of and in the course of employment.
2. Employee was an employee of Employer at the time of injury.
3. The care Employee has received in the hospital and by medical providers were and remain reasonable and necessary.
4. Employee's daughter should be reimbursed for her travel from Anchorage to Seattle.
5. Employee is under active care of a medical provider and is not yet medically stable.
6. Employee is entitled to a compensation rate of $266.00 per week and entitled to receive TTD from the time of injury to the present.

112) The Fund maintains the following:

1. The Employee is not entitled to payment for the time her daughter spent in the hospital with Employee either for PCA services or for her services as power of attorney for Employee.
2. Employer should be ordered to pay the Medicaid lien, not the medical providers, as under AS 23.30.097(h) the providers have not submitted to either Employer or the Fund within 180 days of either the date of injury or the date they knew the injury was work-related.

3. Neither the Employer nor Ms. Cohen-Barce should be liable for any bills that have not been submitted within 180 days.
4. Employee is not entitled to payment of TTD for the period during which she received unemployment between April and July, 2020.
5. Employee should only be entitled to minimum wage for PCA services.
6. Board should dismiss the claim for reimbursement of the contractor's work in preparing Employee's house for her return as Employee has still not received a bill.
7. The Fund does not oppose the Employee's attorney's fees.

113) On December 21, 2020 Employee filed her supplemental attorney fees and paralegal costs affidavits, which included the 10.7 hours addressed in Employee's attorney presented at hearing, but also added an additional hour of attorney work on December 9, 2020. The remainder of the fees were for 3.95 hours of paralegal work at $185.00 per hour, and 6.7 hours of attorney fees at $385.00 per hour for a total of $3,310.25 for December 14, 2020 through December 21, 2020. (Attorney fee affidavit and paralegal cost affidavit, 12/21/20.)

114) On January 7, 2021, Employee filed her second supplemental attorney fee affidavit detailing her attorney's work performed from December 22, 2020 through January 7, 2021 for a total of 10.4 hours at the rate of $385.00 per hour for a total of $4,004.00. (Attorney fee affidavit, 1/7/2021.)

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

> (1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

The board may base its decision on not only 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) . . . compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee's need for medical treatment arose out of and in the

course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment.

AS 23.30.020. Chapter part of contract of hire. This chapter constitutes part of every contract of hire, express or implied, and every contract of hire shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner provided in this chapter for all personal injuries sustained.

AS 23.30.030. Required policy provisions. A policy of a company insuring the payment of compensation under this chapter is considered to contain the provisions set out in this section.

. . . .

(2) The policy is made subject to . . . this chapter and its provisions relative to the liability of the insured employer to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . the acceptance of the liability by the insured employer, the adjustment, trial, and adjudication of claims for the physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . compensation . . . and the liability of the insurer to pay the same are considered a part of this policy contract.

. . . .

(4) The insurer will promptly pay to the person entitled to them the benefits conferred by this chapter, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available . . . and all installments of compensation . . . awarded . . . under this chapter. . . . The policy is a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation . . . and is enforceable in the name of that person. . . .

AS 23.30.041. Rehabilitation and reemployment of injured workers.

. . . .

(c) An employee and employer may stipulate to the employee's eligibility for reemployment benefits at any time….If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day….If the employee is totally unable to return to the employee's employment at the time of injury for 90 days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. . . .

AS 23.30.045. Employer's liability for compensation.

(a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180--23.30.215.

. . .

(b) Compensation is payable irrespective of fault as a cause for the injury ....

AS 23.30.075. Employer's Liability to Pay.
(a) An employer under this chapter, unless exempted, shall either insure and keep insured for the employer's liability under this chapter in an insurance company or association duly authorized to transact the business of workers' compensation insurance in this state, or shall furnish the division satisfactory proof of the employer's ability to pay directly the compensation provided for. If an employer elects to pay directly, the board may, in its discretion, require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

. . . .

AS 23.30.082. Workers' compensation benefits guaranty fund.

. . .

(c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter.

(d) If the fund pays benefits to an employee under this section, the fund shall be subrogated to all of the rights of the employee to the amount paid, and the

> employee shall assign all right, title, and interest in that portion of the employee's workers' compensation claim and any recovery under AS 23.30.015 to the fund. Money collected by the division on the claim or recovery shall be deposited in the fund.

The Fund is not liable for payment of compensation or benefits until three conditions are satisfied: 1) the employer fails to pay compensation or benefits, 2) a claim for payment by the Fund is filed, and 3) the employer has no defenses that the Fund can assert. *Workers' Comp. Benefits Guaranty Fund v. West*, AWCAC Decision No. 145 at 19 (Jan. 20, 2011). Although the Fund may be liable for interest and attorney fees, it is not liable for penalties assessed against the employer. *Id.* at 15-16.

> **AS 23.30.095(a). Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has a right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
>
> **AS 23.30.097. Fees for medical treatment and services**. (a) All fees and other charges for medical treatment or service are subject to regulation by the board consistent with this section. . . .
>
> (h) A provider of medical treatment or services may receive payment for medical treatment and services under this chapter only if the bill for services is received by the employer within 180 days after the later of
>
> (1) the date of service; or
>
> (2) the date that the provider knew of the claim and knew that the claim related to employment.
>
> . . . .
>
> **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 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. *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).

Under the "remote site doctrine," everyday activities that are normally considered non-work-related are deemed a part of a remote site employee's job for workers' compensation purposes because the requirement of living at the remote site limits the employee's activity choices. *Doyon Universal Services v. Allen*, 999 P.2d. 764, 769 (Alaska 2000).

> Because of the unique situation that remote worksites present, we have adopted a particularly expansive view of "work-connectedness," which we have articulated in the now-familiar "remote site" doctrine. The crux of this doctrine is that everyday activities that are normally considered non-work-related are deemed a part of a remote site employee's job for workers' compensation purposes because the requirement of living at the remote site limits the employee's activity choices . . . . [B]ecause a worker at a remote site is required, as a condition of employment, to eat, sleep and socialize on the work premises, activities normally divorced from his work become part of the working conditions to which the worker is subjected… *Id.* at 768-69 (footnotes omitted.)

The court noted the expansive view of "work-connectedness" which is articulated "in the now-familiar 'remote-site' doctrine." *Id*. at 768. The court stated that activities which are normally not work-related become work-related when occurring at remote sites where the requirement of living at the remote site limits the employee's activity choices. The court has included recreational activities in those choice limitations. *See Anderson v. Employers Liability Assurance Corp*., 498 P.2d 288, 290 (Alaska 1972).

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

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

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

> **AS 23.30.145. Attorney Fees**. (a). Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . . In determining the amount of fees, the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

Wise Mechanical Contractors v. Bignell, 718 P.2d 971, 974 n. 7 (Alaska 1986), applied factors from the Alaska Code of Professional Responsibility to determine a "reasonable fee" including:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.

> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.

Bignell further noted:

> If an attorney who represents claimants makes nothing on his unsuccessful cases and no more than a normal hourly fee in his successful cases, he is in a poor business. He would be better off moving to the defense side of the compensation hearing room where attorneys receive an hourly fee, win or lose. . . . (*Id*. at 975).

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Cortay v. Silver Bay Logging,* 787 P.2d 103 (Alaska 1990).

URESCO Construction Materials, Inc. v. Porteleki, AWCAC Decision No. 152 (May 11, 2011) stated in respect to an attorney fee award at the board level:

> We review the board's decision to not deduct for the time spent on the unsuccessful unfair or frivolous controversion claim for an abuse of discretion. "The board is in a far better position than the commission to evaluate . . . whether a party successfully prosecuted a claim, and any other consideration bearing on the attorney fee issue" (footnote omitted). Here, the board acted within its discretion in evaluating the fee award and adequately explained its reasoning for deciding the time spent on the unsuccessful controversion claim was *de minimis*, and substantial evidence supports the *de minimis* finding. Thus, on remand, if the board decides in favor of Porteleki on the medical benefits claim, the board need not reduce the fee award for the time spent litigating the unsuccessful unfair controversion claim (*Id*. at 8).

Patton v. Crowley Holdings. Inc., AWCB Decision No. 19-0131, December 12, 2019, found the hourly billing rate of $350.00 was within the average range for claimant's attorneys representing injured workers.

> **AS 23.30.155. Payment of compensation.**
> (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . ..
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation

> then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
>
> (f) If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment. The additional amount shall be paid at the same time as, but in addition to, the compensation, unless review of the compensation order making the award as provided under AS 23.30.008 and an interlocutory injunction staying payments is allowed by the court. The additional amount shall be paid directly to the recipient to whom the unpaid compensation was to be paid.
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (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.

The Alaska Supreme Court has taken a broad reading of the term "controverted," and has held a "controversion in fact" can occur when an employer does not file a formal notice of controversy.

Alaska Interstate v. Houston, 586 P.2d 618 (Alaska 1978). A controversion-in-fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation, *Shirley v. Underwater Construction, Inc.*, 884 P.2d 156; 159 (Alaska 1994). . Resistance before the filing of a claim cannot serve as a basis for a controversion-in-fact. *Harnish Group, Inc. v. Moore*, 160 P.3d 146; 152 (Alaska 2007). For there to be a controversion in fact, an employer must take some action in opposition to a claim after it is filed. *Id*.

The Supreme Court addressed the penalty provision of AS 23.30.155(e) in *Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37, 42 (Alaska 1974) (footnotes omitted) (*overruled on other grounds by Cooper v. Argonaut Ins. Companies*, 556 P.2d 525 (Alaska 1976)):

> Penalty provisions are provided for in some states as a deterrent against delays in compensation payments. Generally, in deciding whether or not a penalty should be imposed, the issue of good faith arises. In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed. The cases do not discuss the assessment of penalties in terms of negligent versus intentional misconduct, but it appears that in either case the injured employee should be entitled to imposition of the statutory penalty, if bad faith is shown.
>
> AS 23.30.155 does not draw a distinction between willful and negligent failure to make compensation payments, and thus either type of failure should come within its ambit. Stafford could, therefore, recover for willful and intentional misconduct by Westchester in failing to make payments, pursuant to the penalty provided for in AS 23.30.155.

In *Moretz v. O'Neill Investigations*, 783 P.2d 764, 765 (Alaska 1989), the Court addressed interest in workers' compensation cases:

> The applicable rule is that "a workers' compensation award, or any part thereof, shall accrue lawful interest . . . from the date it should have been paid." *Land & Marine Co. v. Rawls,* 686 P.2d 1187, 1192(Alaska 1984). In *Rawls,* we noted that . . . "the economic fact that money awarded for any reason is worth less the later it is received" cannot be overlooked. *Id.* Judgment creditors, including workers' compensation claimants, are entitled to the time value of the compensation for their injuries. *Id.*

AS 23.30.185. Compensation for temporary total disability. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

AS 23.30.187. Effect of unemployment benefits. Compensation is not payable to an employee under AS 23.30.180 or 23.30.185 for a week in which the employee receives unemployment benefits.

AS 23.30.395. Definitions. In this chapter,

. . . .

(2) "arising out of and in the course of employment" includes employer-required or supplied travel to and from a remote job site; activities performed at the direction or under the control of the employer; and employer-sanctioned activities at employer-provided facilities; but excludes recreational league activities sponsored by the employer, unless participation is required as a condition of employment, and activities of a personal nature away from employer-provided facilities….

. . . .

(16) 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

. . . .

(26) 'medical and related benefits' includes, but is not limited to, physicians' fees, nurses' charges, hospital services, hospital supplies, medicine and prosthetic devices, physical rehabilitation, and treatment for the fitting and training for use of such devices as may reasonably be required, that arises out of or is necessitated by an injury, and transportation charges to the nearest point where adequate medical facilities are available;

. . . .

(28) 'medical stability' means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence. . . .

. . . .

8 AAC.45.050. Pleadings.

. . . .

(g) Stipulations.

. . . .

(2) Stipulations between parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.
(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves party from the terms of the stipulation. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.
. . . .

8 AAC 45.120. Evidence.. . . .
. . . .

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its own motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda.. . . .

8 AAC 45.142. Interest. . . .
. . . .

(b) The employer shall pay the interest

(1) on late-paid time-loss compensation to the employee. . . .
. . . .

(3) on late-paid medical benefits to
. . . .

(B) to an insurer, trust, organization, or government agency, if the insurer, trust, organization, or government agency has paid the provider of the medical benefits; or

(C) to the provider if the medical benefits have not been paid.

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 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. . . .

> **8 ACC 45.182. Controversion.**. . . .
> . . . .
>
> (c) After hearing a party's claim alleging an insurer frivolously or unfairly controverted compensation due, the board will file a decision and order determining whether an insurer or self-insured employer frivolously or unfairly controverted compensation due. Under this subsection,
>
> (1) if the board determines an insurer frivolously or unfairly controverted compensation due, the board will provide a copy of the decision and order at the time of filing to the director for action under AS 23.30.155 (o); or
>
> (2) if the board determines a self-insured employer frivolously or unfairly controverted compensation due, the board will, at the time of its decision and order are filed, provide a copy of the decision and order to the commissioner's designee for consideration in the self-insured employer's renewal application for self-insurance.

ANALYSIS

1) Did Employee's burn injuries arise out of and in the course of her employment with Employer?

To determine compensability, the three step presumption analysis must be applied to Employee's claim. AS 23.30.120; *Meek.* The preliminary link requires only "some" or "minimal" relevant evidence. *McGahuey*. In determining whether the presumption is met, credibility is not considered nor is the evidence weighed against competing evidence. *Resler*.

Employee is able to attach the presumption of compensability. Her deposition and hearing testimony she was working for Employer at the remote site Beaver Creek Camp when she attempted to use her propane heater in her living quarters and suffered extensive burn injuries establishes a "preliminary link" between her injury and the employment. Wolfer; *Tolbert*. This issue is not a complex medical dispute, so Employee's statements are sufficient to provide the preliminary link between the injury and the employment. *Wolfer*.

Once the presumption of compensability has been raised, Employer must rebut the presumption at the second stage by presenting substantial evidence demonstrating a cause other than employment played a greater role in causing the disability or need for medical treatment. *Huit*. Substantial evidence is relevant evidence which a reasonable person would accept as adequate to support a conclusion. *Tolbert*. Again, credibility is not considered nor is the evidence weighed

at this step. *Resler*. Furthermore, Employer's evidence is viewed in isolation. *Norcon*. The Fund stipulated Employee's burn injuries arose out of and in the course of her employment with Employer. Employer maintained Employee was not actually working at the time of injury, and the heater and propane bottle did not belong to him. Employer later admitted he had no further defenses to Employee's claim her burn injuries were work-related. His testimony is not substantial evidence and does not rebut the presumption. *Tolbert*.

However, even if Employer had presented substantial evidence rebutting the presumption Employee's burn injuries arose out of and in the course of her employment with Employer, Employee proved her claim by a preponderance of the evidence. Employee's credible testimony establishes her injury arose out of and in the course of her employment. AS 23.30.122. On September 1, 2019, Employee had been working at the Beaver Creek Camp remote site since about August 26, 2019, cleaning up the camp, cooking and otherwise preparing for the guides and clients who were to arrive sometime in the evening on September 1, 2019. After working all day since 5:00 am on September 1st, at around 7:00 pm Employee returned to her Employer provided living quarters in an unheated cabin to await the arrival of incoming guides and clients. Their arrival time was uncertain, but could have been as late as midnight. It was cold and she attempted to light her propane heater, which she had been using without problems previously while working for Employer. The propane bottle she used was provided by Employer and had been refilled. When she attempted to attach the propane bottle to the heater, she felt cold on her right hand and arm. She then screamed in pain as she suffered flash burns to around 35 percent of her body surface area. Employee's testimony is credible. *Id*. Employer admitted he had no further defenses beyond his belief Employee was not working at the time of her injury and the propane heater and propane bottle did not belong to him. His defenses fail under the remote site doctrine. *Doyon*.

Employee was required as a condition of her employment to reside on the work premises. Employee's injuries occurred while she was "on call" awaiting the arrival of the hunting parties. Even if she had been off duty, using a propane heater to warm up her unheated living quarters for her personal comfort on Employer's premises, would still be considered to be work-related. Further, the activities she carried out for her personal comfort on the premises is work-related.

Doyon. Employee credibly testified she had not consumed alcohol or drugs prior to the work injury. *Id*. Employer offered no evidence to discredit or weigh against Employee's testimony and it is responsible for Employee's injuries, regardless of fault. *Id*.

Employee has proven by a preponderance of the evidence her work injury arose out of and in the course of her employment with Employer. The work injury is the substantial cause of Employee's disability and need for medical treatment.

Under the remote site doctrine, Employer is responsible for injuries to Employee. *Doyon*. Since by his own admission both at hearing and in his December 20, 2019 settlement agreement with the Division of Worker's Compensation in AWCB case number 700007594, Employer was uninsured for workers' compensation liability at the time of Employee's injury, he is directly responsible for payment for all costs associated with Employee's injury payable under the Alaska Workers' Compensation Act (Act). AS 23.30.020; AS 23.30.075(a).

2) If Employee's work for Employer was the substantial cause of Employee's disability and need for medical treatment, to what benefits is Employee entitled?

Medical costs and related benefits

Because Employee's work injury was the substantial cause of her disability and need for medical treatment, Employer must pay the reasonable and necessary costs, including medical, surgical and other attendance or treatment, such as PCA services, and transportation costs and medicine for the period the process of recovery from her burn injury requires. AS 23.30.095(a).

The Fund does not dispute Employee is entitled to medically reasonable and necessary past, current and future medical benefits and transportation costs, including Employee's daughter Aurialle Cohen's transportation costs to travel to Seattle to accompany her mother at HMC, and the reimbursement for mileage for transporting Employee to her work-related medical appointments for which documentation has been provided. The Fund requested the costs of covering the exposed insulation in Employee's home, which was done due to the infection risk to Employee's burn injuries, be dismissed as a claim as no bill had been provided as of the date of

the hearing. This decision and order allows Employee 7 days from the date of this Decision to provide that bill for reimbursement.

Personal Care Attendant While Hospitalized

Employee contends she is entitled to payment for PCA services provided by her daughter while she was hospitalized at ANMC and HMC. She contends the services her daughter provided by serving as Employee's power of attorney to make medical decisions while she was in the hospital were essential to her care and are payable pursuant to the "other attendance" clause in AS 23.30.095. The Fund contends there are no provisions under the Act for payment of a family member for services as power of attorney, which are not medical services. This creates a factual dispute to which the presumption of compensability applies. AS 23.30.120. Employee did not provide any evidence from a medical provider the services of a PCA or the services of a power of attorney in attendance at the hospital were medically reasonable and necessary. She is therefore unable to raise the presumption of compensability. However, if Employee's testimony was accepted to raise the presumption, Employer is able to rebut the presumption through the Fund's representation there is no medical opinion PCA services or her daughter' s presence to serve as Employee's medical power of attorney were needed while Employee was in the hospital. Dr. Brownson did not opine PCA services were needed until Employee was discharged from the hospital. Therefore, the presumption drops out and Employee must prove her claim by a preponderance of the evidence. Employee fails to meet her burden of persuasion on the medical necessity of PCA services or her daughter's presence to serve as Employee's medical power of attorney while Employee was in the hospital. There is no medical evidence such "attendance" was needed while Employee was hospitalized. Employee's claim for payment for PCA services and her daughter serving as power of attorney while Employee was hospitalized will be denied. *Tolbert*.

Personal Care Attendant After Discharge Home

Employee also contends she is entitled to PCA services provided to her after discharge from the hospital. Employer and the Fund do not contest Employee's need for post-discharge PCA services. Therefore, because there is no factual dispute, the presumption of compensability need not be applied. *Sokolowski*. Based on Dr. Smith's September 26, 2019 letter stating Employee

needed a personal care attendant to accompany her on her flight home, Dr. Brownson's October 21, 2020 opinion Employee would require in-home care at a high level of assistance for activities of daily living as well as wound care on a full time basis for at least one month after her return home, and Ms. Kleinsmith's testimony she interpreted Dr. Brownson's recommendations to mean Employee would require full time PCA services for one month, and less over time as she recovered, Employee is entitled to payment for a full time PCA for at least one month after her discharge to home. Based on Employee's testimony, for the first six weeks, the couple with whom she lived provided PCA services while her daughter was at work. After the first month of full time PCA services through January 2, 2020, Employee is entitled to payment for PCA services documented in the "Schedule for Colette" totaling 1,537.5 hours. After January 2, 2020 Employee is entitled to payment for PCA services which are medically reasonable and necessary as her condition requires. Employee has documented her need for at least one hour of wound care a day plus the cutting of wood and shoveling of snow through the winter, but other than for wound care, there is no documentation of the number of hours during the winter or after the winter was over. Furthermore, at hearing Employee testified she had lost much of the use of her right hand due to contractures. She still requires transportation to medical appointments and requires PCA services for this transportation. She is entitled to PCA services, but she must provide documentation of those hours in as much detail as was provided in "Schedule for Colette," for PCA hours through January 2, 2020 and continuing until those services are no longer needed. The detail required for the documentation is the date of PCA services, the number of hours, and the nature of service, e.g., "wound care," "medical appointment," or "grocery shopping."

PCA Rate of Pay

The rate Employee's PCA should be paid to provide PCA services is a factual issue to which the statutory presumption of compensability applies. *Id*. AS 23.30.120. Employee contends the rate of pay for the PCA services provided to her should be $35.00 per hour. The Fund contends Employee should only be paid the minimum wage for the PCA services she requires, as that is the amount Employee's daughter testified she would expect to be paid. Employee raises the raises the presumption PCA services should be paid at the rate of $35.00 per hour with Ms. Kleinsmith's testimony her agency Home Instead charges $35.00 per hour for providing PCA

services. Ms. Kleinsmith's testimony also rebuts the presumption. Home Instead pays its PCA employees from $14.00 to $18.00 per hour. The difference between $35.00 per hour and the amount paid the PCA employees covers Home Instead's business and overhead expenses.

Employee is unable to prove by a preponderance of the evidence PCA services should be paid $35.00 per hour. Employee's argument she is entitled to be paid at $35.00 an hour, the same rate Home Instead charges for its PCA services, is not given great weight. Based on Ms. Kleinsmith's testimony, Home Instead's charge of $35.00 per hour includes the many expenses of running a business and providing resources for its PCAs. Employee's PCA has none of these business expenses. Employee's PCA was trained for and provides wound care and bandaging, which are health care services, and Employee is entitled to the prevailing rate of $18.00 per hour for the medically necessary PCA services, not the $35.00 an hour she would pay if she contracted with a company such as Home Instead to provide those services. AS 23.30.095.

Disability Benefits

TTD is payable when an injured worker is totally unable to earn the wages he or she was earning at the time of injury because of the work injury. AS 23.30.185. Dr. Brownson determined Employee is unable to perform her job at the time of injury and has not released her to return to work. Employer and the Fund do not raise defenses to Employee's entitlement to TTD benefits. Employee is entitled to TTD. Dr. Brownson and LPC Scott opine Employee is not yet medically stable. Employee's entitlement to TTD benefits continues until she is medically stable. *Id*.; AS.23.30.395(28).

The Fund contends Employee is not entitled to TTD while she was receiving unemployment benefits, which Employee does not dispute. Based on Employee's testimony, she received unemployment benefits from April 2020 to July 2020. During this period, Employee is not entitled to TTD benefits. AS 23.30.187.

Employee is entitled to TTD payments benefits from September 1, 2019 and ongoing until she is medically stable, except for the period during which she received unemployment benefits from

April, 2020 until July, 2020. Employee and the Fund agreed Employee is entitled to a compensation rate of $266.00 per week. 8 AAC 45.050(f)(2),(3).

Reemployment Benefit Evaluation

If a work injury disables an employee from returning to her job at the time of injury for 90 consecutive days the reemployment benefits administrator (RBA) is required to order an eligibility evaluation. AS 23.30.041(c). FNP Landrum's August 8, 2020 letter confirmed Employee ad been totally unable to return to her employment at the time of her injury for 90 consecutive days as a result of her injury. Likewise, Dr. Brownson's August 10, 2020 letter, confirmed Employee is unable to return to her job at the time of her injury. Therefore Employee is entitled to a reemployment benefit eligibility evaluation. *Id.*

3) Is Employer responsible for the hospital bills from ANMC and HMC and other past medical bills not submitted within 180 days, or for reimbursement of any Medicaid lien?

A medical provider may receive payment for medical treatment provided to an injured worker only if the bill and corresponding medical report are provided to and received by the employer within 180 days after the service date. AS 23.30.097(d) and (h). The Fund contends medical providers should be barred from receiving payment for services provided to Employee because the bills were not provided to Employer within 180 days after the dates of service or the date the providers knew the injury occurred while Employee was working. The Fund argues instead, Employer and the Fund, if Employer fails to timely pay, should be ordered to reimburse Medicaid.

The medical records for both ANMC and HMC contain references to Employee's injury occurring while working at a remote site. Neither provided the bills and reports for medical services provided Employee to the Fund within 180 days of the dates of service. When an employer is insured and an employee is seriously injured and unable to provide notice required under the Act, the insured employer files the required injury report with the board and notifies the workers' compensation insurance carrier. AS 23.30.095(c); *Rogers and Babler*. Likewise, when an employer is insured, medical providers are familiar with the process and timelines of

AS 23.30.097 and the claim is properly adjusted. In the instant matter, because Employer was uninsured, the Act's timelines and procedures were not adhered to and the claim was not adjusted. Consequently, Medicaid has paid for all work-related medical treatment thus far, except PCA services. The providers' bills can only be paid under the fee schedule if the bills were received by the Employer within 180 days of the service dates. AS 23.30.097(h). It is against public policy to permit Employer to escape its responsibility to provide medical care to Employee; therefore, Employer will be ordered to reimburse Medicaid's lien. However, from this order's date and continuing into the future, Employer will be required to controvert or pay Employee's medical benefits pursuant to AS 23.30.095 and AS 23.30.097. The Fund's adjuster will be ordered to notify the providers of their obligation to submit their bills in accord with AS 23.30.001 and AS 23.30.097.

4) Interest and Penalties

Interest

An employer is required to pay interest on compensation that is not paid when due. AS 23.30.155(p); *Moretz*. Employee is entitled to interest on TTD benefits for the period from September 1, 2019 to April 1, 2020 and from July 1, 2020 and ongoing for any TTD benefits not paid when due. *Id.*; 8 AAC 45.142(a). Medical benefits have been paid by Medicaid. Employer shall pay interest on any payment made by Medicaid for all past medical treatment provided for Employee's work related injuries. AS 23.30.155(p); 8 AAC 45.142(b)(3)(B) .

Penalty

Employers are required to pay an additional amount equal to 25 percent of all unpaid compensation installments that are not paid when due. AS 23.30.155(e); *Stafford*. Employee is entitled to TTD from the date of injury until April 1, 2020 and from July 1, 2020 and ongoing until medically stable. Employee is entitled to a penalty on that TTD. AS 23.30.155(e). Payment of medical bills is due within 30 days of the date Employer had both the bill and the medical report. AS 23.30.097(d). However, providers did not supply bills and medical reports to Employer and Medicaid covered the expense of Employee's medical treatment. If Employer does not reimburse Medicaid within 14 days after this decision is issued, Employer will be liable

to pay Medicaid an additional 25 percent of the amounts owed. Although Employer is obligated to pay any penalties awarded, that obligation does not extend to the Fund. *West.*

5) Should the board find Employer's controversion frivolous or unfair?

Employee contends she is entitled to a finding of unfair and frivolous controversion against Employer. However, an unfair and frivolous controversion applies to an insurer or a self-insured employer. AS 23.30.155(o); 8 AAC 45.182(d). There are no provisions under the Act for a finding of unfair and frivolous controversion against an uninsured Employer. Therefore, Employee's request for a finding of unfair and frivolous controversion is denied.

6) Should the board strike the Fund's late filed supplemental brief?

At hearing, the record was left open until December 21, 2020, for Employee's and the Fund's supplemental briefing on whether Employee was entitled to be paid for PCA services and services as a power of attorney while Employee was hospitalized. AS 23.30.135. Employee filed her supplemental brief on December 21, 2020, but the Fund filed its supplemental brief late on December 24, 2020. Employee then filed a petition to strike the Fund's late filed brief as it was prejudicial to her both because the Fund had the opportunity to consider her supplemental brief, which was timely filed and because it addressed issues beyond the scope of the issue on which the board had requested supplemental briefing.

The Fund admits its supplemental brief was filed late due to a clerical calendaring error, but contends it should not be struck because Employee did not provide any evidence or argument of actual prejudice due to the late filed brief.

As a clerical calendaring error is not good cause for a late filed brief, Employee's petition to strike the Fund's late filed supplemental brief shall be granted. Whenever prior to filing its brief a party has the advantage of reviewing the opposing party's brief, it has the advantage of responding to the opposing party's arguments and can deprive the opposing party of due process.

Rogers & Babler. However, even if the Fund's supplemental briefing had been considered, it would not have altered this decision and order.

7) Is Employee entitled to an award of attorney's fees and costs and if so, how much?

Employee requests attorney fees and costs. Attorney fees and costs 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); 8 AAC 45.180. Employee has prevailed on her claims and obtained benefits. Employer has paid none of the benefits to which Employee is entitled under the Act, which constitutes a controversion in fact because he never filed a formal controversion. *Houston*; *Shirley*. Further, Employer's failure to insure stipulation asserted Employee's claim was not compensable and is a post claim action opposing compensability. *Harnish*. The Fund initially controverted all benefits. Employer's and the Fund's controversions permit an award of actual attorney fees. (*Id.*)

The Fund stated it did not oppose an attorney fee award. Employer did not express an opinion.

In addition to reviewing the work done, *Rusch* requires the eight factors in Alaska Rule of Professional Conduct 1.5(a) be considered in determining a reasonable fee.

> 1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly:

Employee's briefs were very thorough and the arguments were well supported by legal precedent and evidence. The issues involved were complex and some were novel. Overall, it required a high degree of legal skill to perform the legal services required to successfully represent this client. Employee's attorney presented cogent, well-reasoned arguments.

> 2. The likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer:

Employee's attorney stated he declined approximately ten probate cases and workers' compensation cases in part due to his commitment to Employee's case.

3. The fee customarily charged in the locality for similar services:

Employee's attorney, who has been practicing law since November 2012, requests $385.00 per hour. The standard hourly rate for plaintiff attorneys in workers' compensation cases is $350.00 per hour and that rate has been awarded to a lawyer who had just started practicing a year prior. *Patton*.

4. The amount involved and the results obtained:

Employee prevails on her claim for compensability of her work injuries, including medical and transportation costs, indemnity benefits, a reemployment eligibility evaluation and penalty and interest claims, which are of substantial value. Reimbursement of the Medicaid lien alone is over $100,000.00.

5. The time limitations imposed by the client or by the circumstances:

Employee's attorney did not identify any unusual time limitation imposed by the client or the circumstances, although of course the time spent on Employee's case precludes using that time on another case. Cases involving uninsured employers and the Fund are more cumbersome and time consuming because they are not adjusted as an insured work injury would be. *Rogers & Babler.*

6. The nature and length of the professional relationship with the client;

Employee's attorney has represented her since June, 2020. This factor may favor either an increased fee or a decreased fee, depending on the facts of a particular case. In this case neither party has explained how the length of the professional relationship would affect the fee. Mr. Eppler was able to accomplish a great deal of work and prepare the case for hearing more rapidly than most cases. *Id.* Under this case's circumstances, the relatively short relationship with Employee supports an increased fee.

7. The experience, reputation and ability of the lawyer or lawyers performing the services:

Employee's attorney graduated from Oklahoma City University Law School in May 2012 where he obtained a JD/MBA concurrently. He has practiced law since November 2012, first in

Colorado, where he represented clients in family law, contested guardianships and conservatorships, estate litigation and estate planning. After moving to Alaska in February of 2015, he continued to practice in those same areas as well as other areas of the law. The contested guardianship and conservatorship cases involve assessing the disability of respondents utilizing medical records and expert witnesses. In addition, he has represented injured workers in workers' compensation for two years, including advising or assisting injured workers to assist them in navigating the workers' compensation system where no entry of appearance was filed. Thus, Employee's attorney is an experienced workers' compensation attorney and has significant experience in other areas including litigation.

8. Whether the fee is fixed or contingent:

Virtually all fees for employee attorneys in workers' compensation are contingent. The contingent nature of the work is considered in determining an appropriate hourly rate.

Employee is entitled to payment of reasonable attorney fees and costs of $28,874.50 as detailed in her attorney's December 4, 2020 attorney fee and paralegal fee affidavits. In addition, she is entitled to payment for the 10.7 hours in time spent in preparing for and appearing at the hearing, for a total of $4,119.50 and the costs of $75.00 for her witness Ms. Kleinsmith, as well as the additional hour after the hearing communicating with Employee and the Fund's representative detailed in her attorney's December 21, 2020 supplemental attorney's fees affidavit. These two amounts total $33,069.00 and include fees and costs for work on December 9, 2020.

Since Employee did not prevail on the issue of payment for PCA services or payment for her daughter serving as a power of attorney while she was hospitalized, she is not entitled to the additional attorney fees of $3,310.25 detailed in her December 21, 2020 supplemental attorney fees affidavit.

However, since Employee did prevail on her petition to strike the Fund's late-filed supplemental brief, she is entitled to the attorney fees of $4,004,00 for 10.4 hours at $385.00 per hour detailed in her second supplemental attorney fee affidavit. *Porteleki*.

Employee is entitled to a total of $37,073.00 in attorney fees and costs. In light of the benefits obtained and the time expended, this is a reasonable, fully compensatory amount. *Bignell*; *Cortay*.

CONCLUSIONS OF LAW

1) Employee's burn injuries arose out of and in the course of her employment with Employer. She is entitled to medical benefits, time loss benefits, penalty, interest and a reemployment eligibility evaluation.
2) Employer is responsible for the costs of Employee's medical bills, including the hospital bills from ANMC and HMC, and must reimburse Medicaid's lien.
3) Employer did not frivolously or unfairly controvert benefits.
4) The Fund's late filed supplemental brief will not be considered.
5) Employee is entitled to attorney fees and costs of $37,073.00

ORDER

1) Employee's September 1, 2019 injury arose out of and in the course of her employment with Employer and is covered under the Act.
2) Employer was uninsured at the time of Employee's injury.
3) Employer shall pay past and future medical costs related to Employee's work injury, including but not limited to, the costs of transportation for medical purposes, home health care, a personal care attendant, counseling and prescriptions, according to the Act's fee schedule.
4) Employer shall pay Employee TTD benefits from September 1, 2019 and ongoing, except for the period from April 1, 2020 to July 1, 2020, during which she received unemployment benefits.
5) Employer shall pay Employee for PCA services at the rate of $18.00 per hour in accordance with the 1,337.50 hours listed on "Schedule for Colette" through January 2, 2020 for a total of $24,075.00.
6) Employer shall pay Employee's daughter Aurialle Cohen for medical care related transportation costs in 2019 of $584.64 and in July through October of 2020 of $1,184.39.

7) Employer shall reimburse Employee's daughter Aurialle Cohen for the costs of her transportation from Anchorage to Seattle to HMC by purchasing for her 60,000 Alaska Airline miles and paying her $20.40.

8) Within 7 days of this order, Employee shall provide an accounting of how many hours of PCA services she has been provided starting January 3, 2020 so that she may be reimbursed.

9) Within 7 days of this order, Employee shall provide the bill for the repairs made to her home to make it safe for her to move back so that she can be reimbursed accordingly.

10) Employer shall pay Employee for medically necessary PCA services after January 2, 2020 and ongoing, based on those services supported by medical opinions and the accounting she provides.

11) Employer shall pay Medicaid's lien and interest for past medical costs related to Employee's work injury.

12) Employer shall pay Employee interest on any late paid benefits.

13) Employer shall pay penalties on any late paid benefits.

14) Employer shall pay attorney fees and costs to the Law Office of Justin S. Eppler, LLC., in the amount of $37,073.00.

15) The Fund is not liable to pay any benefits awarded in this decision unless Employer defaults on paying the compensation for 30 days after it is due and a supplementary order of default is issued.

Dated in Anchorage, Alaska on February 8, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Judith A DeMarsh, Designated Chair

/s/_____
Bronson Frye, Member

/s/_____
Robert Weel, 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 COLETTE COHEN-BARCE, employee / claimant v. MICHAEL J VANSTROM DBA ALASKA ELITE OUTF, employer; BENEFITS GUARANTY FUND, insurer / defendants; Case No. 201916026; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on February 8, 2021.

/s/
Nenita Farmer, Office Assistant