ALASKA WORKERS' COMPENSATION BOARD

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

LAURA MULGREW, Employee, Claimant, v. CITY & BOROUGH OF JUNEAU, Self-Insured Employer, Defendant	)	FINAL DECISION AND ORDER AWCB Case No. 201802000 AWCB Decision No. 21-0020 Filed with AWCB Juneau, Alaska on March 2, 2021

Laura Mulgrew's (Employee) May 28, 2020 claim was heard on January 26, 2021 in Juneau, Alaska, a date selected on November 25, 2020. A November 10, 2020 affidavit of readiness for hearing gave rise to this hearing. Attorney Robert Bredesen appeared in-person and represented Employee, who appeared in-person and testified. Attorney Colby Smith appeared telephonically and represented City & Borough of Juneau (Employer). The record remained open to receive Employee's supplemental attorney's fees and costs affidavit and Employer's response and closed on February 5, 2021.

ISSUES

Employee contends physical and massage therapy enables her to continue working and relieves chronic debilitating pain. She contends the substantial compliance doctrine applies to AS 23.30.095(c) and 8 AAC 45.082 because they are "affirmative" rather than "prohibitive." Employee contends her medical provider substantially complied with the treatment plan requirements under AS 23.30.095(c). She contends Employer was not prejudiced by her medical provider's failure to provide the treatment plan within 14 days after treatment exceeding the

frequency limitations began and to require strict compliance would produce a harsh result. Employee contends AS 23.30.095(a) provides broad authority to authorize ongoing future medical treatment, including ongoing physical and massage therapy in excess of the treatment frequency standards. She contends ongoing physical and massage therapy is reasonable and necessary to enable her to continue working and relieve chronic debilitating pain. Employee requests orders awarding past medical bills for physical and massage therapy and authorizing further physical and massage therapy in excess of the treatment frequency guidelines.

Employer contends past physical and massage therapy was not reasonable or necessary. It contends Employee was able to and continued to work without it. Employer contends Employee's medical provider exceeded the frequency limitations under AS 23.30.095(c) and failed to comply to provide a treatment plan within 14 days after treatment commenced. It contends ongoing physical and massage therapy is not reasonable or necessary. Employer requests an order denying past and continuing physical and massage therapy.

1) **Is Employee entitled to past and continuing physical and massage therapy?**

Employee contends she is entitled to attorney's fees and costs. She requests an award of attorney's fees and costs.

Employer contends Employee is not entitled to past or continuing physical and massage therapy. It requests an order denying attorney's fees and costs.

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

FINDINGS OF FACT

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

1) On October 17, 2017, Employee reported right ankle pain after a student kicked her and she rolled her ankle. (Frank Mesdag, D.P.M., chart note, October 17, 2017).

2) On December 28, 2017, Employee was released to return to work with no restrictions. (Mesdag, Physician's Report, December 28, 2017).

3) On February 6, 2018, Employer reported a student repeatedly stomped on Employee's right foot on February 2, 2018. (First Report of Occupational Injury or Illness, February 6, 2018).

4) On February 9, 2018, Employee said her right foot and ankle pain never went away after the October 2017 injury. She reported the same student stomped on her right foot on February 2, 2018, and she had throbbing right foot pain. Employee's right foot was swollen and she had moderate synovitis along the lateral aspect of her right ankle when compared to the left. She was put in a Cam Walker. (William Martin, III, M.D., chart note, February 9, 2018).

5) On March 6, 2018, Employee reported continued but improved right foot pain. Her foot was moderately swollen and she around her right foot and ankle. Dr. Martin ordered a right foot MRI. (Martin chart note, March 6, 2018).

6) On March 7, 2018, a right foot MRI showed a chronic plantar plate tear at the second metatarsophalangeal joint with hypertrophic scarring and shallow stripping of the plantar lateral capsule from the phalangeal base and adjacent mild subcutaneous and phalangeal base edema, medial subluxation of the phalangeal base form capsular insufficiency, diffuse scarring with thickening of the medial collateral ligament at the first metatarsophalangeal join, varus angulation at the first metatarsal, mild arthrosis at the first metatarsophalangeal joint with marginal chondral thinning and spurring, and hammertoe deformities from the second through the fifth toes. (MRI report, March 7, 2018).

7) On March 13, 2018, Dr. Martin diagnosed a chronic plantar plate tear involving the second metatarsophalangeal joint with hypertrophic scarring and shallow stripping of the plantar lateral capsule which correlated well with where Employee's pain was located. Dr. Martin added Hapads to her shoes on top of her orthotics and recommended she wear stiff soled shoes. (Martin chart note, March 13, 2018).

8) On April 12, 2018, Dr. Martin performed a corticosteroid injection into Employee's plantar aspect of her right second metatarsophalangeal joint. (Martin chart note, April 12, 2018).

9) On August 21, 2018, Dr. Martin referred Employee to Eric Heit, M.D., for a plantar plate surgery. (Martin chart note, August 21, 2018).

10) On November 28, 2018, Dr. Heit performed a plantar plate repair of the second metatarsophalangeal joint and a hammertoe correction with flexor digitorum longus tendon transfer of the right second toe. (Heit operative report, November 28, 2018).

11) On December 6, 2018, a right lower extremity ultrasound revealed a deep vein thrombosis. (Ultrasound report, December 6, 2018).

12) On February 11, 2019, Dr. Heit recommended physical therapy for Employee's right foot and ankle pain secondary to a second metatarsophalangeal joint plantar plate repair and hammertoe correction surgery on November 28, 2018. (Heit therapy referral, February 11, 2019).

13) On May 20, 2019, Robert Waltz, M.D, an orthopedic surgeon, examined Employee for an Employer's Medical Evaluation (EME) and observed a slight subtle antalgic gain with decreased stance phase on the right compared to the left, her second toe had an approximately 20 degree slightly lateral deviated deformity and it touched her third toe without overlap, a neutral alignment of her great toe without residual hallux valgus deformity, and slight asymmetric swelling in the right ankle and forefoot compared to the left. Her second toe demonstrated metatarsophalangeal joint motion of neutral flexion to 30 degrees extension; intact active flexion and extension; her second toe proximal interphalangeal joint was completely ankylosed without any motion and her second toe distal interphalangeal joint demonstrated zero degrees of extension to 20 degrees of flexion. Employee reported her right foot throbbed and swelled at the end of the day; her foot and toes were achy and stiff, she could not sit or stand as long as she could prior to the injury, limitations with squatting, gardening and home improvement projects. Dr. Waltz diagnosed a preexisting right foot second toe plantar plate rupture permanently aggravated by the work injury, a work-related right foot contusion and crush injury, a preexisting right foot hammertoe deformity from the second through fifth digits permanently aggravated by the work injury and a work-related right lower extremity deep vein thrombosis related to the surgical treatment of the second toe plantar plate and flexor digitorum longus transfer. He recommended ongoing physical therapy to improve her overall gait and her second toe function and manual therapy, ankle range of motion therapy and strengthening of her right lower extremity two times per week for eight weeks. (Waltz EME report, May 20, 2019).

14) On November 18, 2019, Dr. Heit recommended physical therapy for Employee's chronic right foot and ankle pain two times per week for eight weeks. (Heit therapy referral, November 18, 2019).

15) On December 6, 2019, Dr. Waltz examined Employee for a second EME and observed her second toe had an approximately 20 degree slightly lateral deviated deformity and it touched her third two without overlap, a 10 degree hallux valgus great toe deformity and no residual right

foot swelling or skin discoloration. She also had decreased range of motion on the right plantar flexion when compared to the left in all toes: her second toe demonstrated metatarsophalangeal joint motion of neutral flexion to 30 degrees extension; her second toe proximal interphalangeal joint was completely ankylosed with zero motion and her second toe distal interphalangeal joint demonstrated zero degrees of extension to 20 degrees of flexion. Employee reported her right foot was moderately swollen and very stiff in the past week, walking on flat surfaces was moderately painful, going up or down stairs was very painful and she did not need support or assistance to get around most of the time in the past week. Dr. Waltz diagnosed a preexisting right foot second two plantar plate rupture permanently aggravated by the work injury, a work-related right foot contusion and crush injury, a preexisting right foot hammertoe deformity from the second through fifth digits permanently aggravated by the work injury and a work-related right lower extremity deep vein thrombosis related to the surgical treatment of the second toe plantar plate and flexor digitorum longus transfer. Dr. Waltz opined the work injury resolved and no further medical care was needed. Further physical and massage therapy was no longer reasonably effective and necessary for the process of recovery because Employee "maximized her overall treatment from physical therapy, as her previous right foot and ankle swelling ha[d] resolved, her motion ha[d] improved, and most significantly her overall function ha[d] improved. In my opinion, she is at maximum medical improvement. The previous medical treatment recommended by Dr. Heit was "an acceptable medical option." Dr. Waltz assessed a two percent whole person permanent partial impairment rating for the work injury. When asked if Employee's ongoing need for medical treatment was palliative, he said, "Any ongoing need for treatment would be considered palliative at this time." Dr. Waltz was asked if the palliative care enabled Employee to continue in her work at the time of treatment, enabled her to participate in an approved plan or relieved chronic debilitating pain, and he responded,

> Her palliative care does enable her to continue to work. However, in my opinion, she has reached its maximum benefit, as she is now basically pain free with ambulation, has excellent function, improvement in strength, and has reached maximum improvement in range of motion, as evidenced by no significant change in toe motion between my examination today and the examination of May 21, 2019. (Waltz EME report, December 6, 2019).

16) On January 7, 2020, Lindsey Sullivan, DPT, performed manual therapy on Employee's right ankle, foot and calf. She also instructed Employee in performance of a home exercise plan and discharged Employee from clinical physical therapy to a home program. (Sullivan chart note, January 7, 2020).

17) On January 30, 2020, Employer denied physical therapy on April 9 and 10, 2019 due to late billing. (Controversion Notice, January 30, 2020).

18) On February 10, 2020, Dr. Waltz stated "[Employee] is able to work her usual and customary job as a teacher without the palliative care. It would be reasonable for her to need replacement of custom orthotics at a rate of no more frequently than once every 12 months. No further palliative care is necessary, to include no further physical therapy or active medical treatment." (Waltz EME addendum, February 10, 2020).

19) On April 2, 2020, Employer denied temporary total disability (TTD) and temporary partial disability (TPD) benefits from December 6, 2019 and ongoing, permanent partial impairment (PPI) benefits in excess of two percent, and palliative care, including physical and massage therapy based upon Dr. Waltz's EME report. (Controversion Notice, April 2, 2020).

20) On April 3, 2020, Dr. Heit responded to a letter with questions from Employer's attorney. He stated he concurred with Dr. Waltz's opinion that Employee's right ankle reached medical stability on December 6, 2019, and that she was capable of worker her year-long customary job as a teacher without palliative care as she returned to work full-time and he did "not feel any other palliative care would be more curative at this point." Dr. Heit opined ongoing physical therapy and massage therapy are no longer reasonable and necessary for recovery because she achieved maximal medical improvement for her condition although the therapy might help her feel better temporarily. (Heit letter, April 3, 2020).

21) On April 24, 2020, Arctic Chiropractic provided a list stating Employee had 95 therapy appointments from February 18, 2019 through January 7, 2020. (Letter, April 24, 2020). Employer paid for those visits except physical therapy on April 9 and 10, 2019 due to late billing. (Record).

22) On May 11, 2020, Gustavo Garcia, M.D., observed Employee's right foot was very mildly swollen and was exquisitely tender to palpitation on the dorsum of the foot at the base of the second digit at approximately the metatarsophalangeal joint level. She reported metatarsal pads helped pain symptoms. Employee was not yet interested in obtaining a steroid injection into the

second metatarsophalangeal joint. Dr. Garcia recommended against surgical intervention due to a history of failed surgery and several deep vein thromboses related to surgery. He explained Employee could return for a steroid injection into the second metatarsophalangeal joint as needed. Dr. Garcia prescribed physical and message therapy as Employee believed it helped her pain symptoms. (Garcia chart note, May 11, 2020). He also filled out a referral form for physical therapy for right foot pain at a frequency to be determined by the physical therapist and under "Additional Instructions" he wrote "range of motion and strengthening." (Garcia referral, May 11, 2020).

23) On May 28, 2020, Employee sought medical and transportation costs and attorney's fees and costs. (Claim for Workers' Compensation Benefits, May 28, 2020). Employee also filed Dr. Garcia's May 11, 2020 chart note and referral. (Medical Summary, May 28, 2020).

24) On June 2, 2020, Employee reported a "fair amount of pain" requiring her to alternate between sitting and standing throughout the day, her foot was always swollen and her toes did not "actively" move. When descending stairs in her house, she has to put her toe over the edge of the stair because it could not bend. Employee had very limited standing and walking tolerance, stair negotiation and ability to walk on uneven surfaces. She demonstrated gait abnormalities, hip instability and weakness and deficits in lower extremity alignment and foot and ankle range of motion and strength. Shannon Zorsch, DT, recommended skilled physical therapy to address the impairments and to improve Employee's function and quality of life. She provided Employee access to Medbridge and instructed her to begin with Gastroc and Soleus stretching two times per day until her next appointment. Therapist Zorsch planned for Employee "to be seen" one to two times per week for six to eight weeks. "Plan" boxes were checked for: therapeutic exercise, neuromuscular re-education, therapeutic activities, manual training, stability and motor control training, functional retraining, gait training and home exercise plan instruction. The goals of the plan were for Employee to be able to (1) independently perform a home exercise plan, (2) complete 20 double leg calf raises and 10 single leg calf raises to demonstrate increased strength and normalize push off with gait, (3) improve right ankle range of motion to normal limits to improve ability to navigate stairs without pain, (4) complete single leg stands for twenty second on her right lower extremity without upper extremity support and with minimal swaying to improve ankle and hip stability, (5) decrease knee valgus and normalize gait pattern to decrease right foot pain, (6) ascend and descend full flight of stairs with minimal

upper extremity support and good control, and (7) ambulate one mile with pain no greater than 3/10 to allow her to walk for exercise. (Zorsch therapy note, June 3, 2020).

25) On June 3, 5, 10, 12, 16, 19, 26, 30 and July 1, 7, 8, 14, 15, 21 and 22, 2020, Employee had physical and massage therapy appointments with Juneau Bone and Joint. (Therapy notes, 3, 5, 10, 12, 16, 19, 26, 30 and July 1, 7, 8, 14, 15, 21 and 22, 2020).

26) On July 21, 2020, Dr. Garcia responded to a June 22, 2020 letter from Employer's attorney. He stated he agreed Employee reached medical stability on December 6, 2019, and she was capable of working her year-long customary job as a teacher without palliative care. When asked if he agreed with Drs. Waltz's and Heit's opinion that further ongoing physical therapy and massage therapy was no longer reasonable and necessary for recovery, Dr. Garcia responded, "Patient reports that massage therapy and physical therapy seems to help with her symptoms. She may benefit from this in the future for symptomatic relief however it will never cure her problem." (Garcia response, July 21, 2020).

27) On July 28, 2020, Employee still had very limited standing and walking tolerance, stair negotiation and ability to walk on uneven surfaces. She hoped to improve function and quality of life by reducing ankle and foot pain and range of motion improvement with physical and massage therapy and "OB exercises." Jenna O'Fontanella, L. M.T., planned to continue with message therapy once a week in conjunction with physical therapy weekly for two more sessions and then biweekly for two more sessions. "Plan" boxes were checked for: therapeutic exercise, neuromuscular re-education, home exercise plan instruction and edema control. The goals of the plan were to (1) teach Employee self-care techniques to enable her to resolve soft tissue and joint dysfunction throughout her ankle and to address swelling and inflammation, (2) improve comfort and balanced range of motion in the ankle using isometrics and OB exercises for joint mobility and movement, (3) increase flexibility and comfort in the arches of the foot, (4) increase movement in each of the general segments of the foot, the specific tender points in the metatarsals and planar surface, (5) increase comfort and movement in each of the joints of the foot in order to create more comfort in walking and everyday exercises, (6) decrease discomfort in specific indicator points on the foot, (7) address inflammatory responses and index in the body effecting swelling in the foot and ankle, (8) address imbalances in the pelvis, abdominal region, diaphragm and bilateral hips and lower extremities to achieve balance in both feet and ankles. (O'Fontanella therapy note, July 28, 2020).

28) On August 4, 5 and 19, 2020, Employee had physical and massage therapy appointments with Juneau Bone and Joint. (Therapy notes, August 4, 5 and 19, 2020).

29) On August 18, 2020, Employee wrote a letter "To Whom It May Concern" stating:

> I am a mother of 4 children ranging in the ages of 15 through 20. We enjoy family time such as hiking, walking our dogs, riding bikes, eating together and taking trips.
>
> Last March, I began to have concerns that I might never be able to go on walks with my son in an amusement park as we have done every summer for many years. This fear increased when I tried to go for a walk to a campsite to visit with my children that are camping. This walk was a close walk to the parking lot with a flat surface (one that did not require a hike in). I developed significant foot pain and difficulty establishing my balance as I walked that led me to trip and fall. This scared my family.
>
> The recent physical therapy and massage therapy have significantly improved my symptoms. I experience less pain and can stand longer, while requiring less rest. It has also improved my ability to simply move my foot and feel an increase in to balance. I think that perhaps the improvement might have something to do with the current physical therapy is more focused upon strength and balance, whereas the therapy with Arctic Chiropractic seemed more focused upon manual manipulation with some balance activity.
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> The recent treatment has significantly improved my ability to perform activities of daily living. My home as a stairway with 14 steps. Before, I would go downstairs once in the morning, and then go up at the end of the day to go to bed. This meant I had to ask others to bring food to me. Now I can go up and down the stairs a few times per day, so I can now do laundry, for example. Also, before I would have difficulty getting dressed and had to sit on the bed. Now I can stand and get dressed normally. For another example, I used to have difficulty shopping, meaning that I was limping and had to lean on a cart, due to foot pain and a reduction in balance. Now I can walk more, and even have a goal of being able to walk a mile within a week or two. For another example, before I avoided showering because I had to stand on one foot and felt unsafe. Now I can stand more normally, and even try sometimes to stand on just my right foot.
>
> This improvement also improves my ability to perform my job, to some extent. Back at the school I needed to walk around more, outside, and I do not think I would have been able to do that without the recent therapy. Due to COVID-19, my bedroom (which is upstairs) is my home office and my work is more sedentary. My foot pain essentially trapped me in the bedroom during the day. Since the recent therapy, though, I can now go downstairs to take a break, get something to drink, and so on. (Employee letter, August 18, 2020).

30) On September 7, 2020, Therapist Zorsch discharged Employee from therapy to independent performance of a home exercise plan as she felt she reached a plateau with formal therapy. Employee achieved most goals because she was able to (1) independently complete her home exercise plan, (2) complete 20 double leg calf raises and 10 single leg calf raises but her right calf raises were about half the range of motion compared to the left and she reported tightness of the top her foot and pain in the second toe, (3) navigate stairs with minimal pain when descending due to toe stiffness causing her to put toes off the edge of steps when descending, (4) complete single leg stands for thirty seconds on her right lower extremity without upper extremity support, (5) demonstrate decreased knee valgus, (6) ascend and descend full flight of stairs with reciprocal pattern and no handrail but she occasionally had decreased control when descending if her foot was tired or sore, and (7) ambulate 1.5 miles the weekend prior on a flat surface without pain in her right foot or ankle. (Zorsch therapy note, September 7, 2020).

31) On September 24, 2020, Dr. Garcia responded to questions from Employee:

> In my opinion [Employee] reached medical stability regarding her foot condition. She has chronic degenerative changes to her foot that can cause long-term pain symptoms, however overall her foot condition is stable. I do believe that the patient can benefit from continued massage therapy and physical therapy to the foot which can help alleviate her pain symptoms, however these treatments will never be curative. [Employee] is capable of working her yearlong customary job as a teacher, however, I do believe that her chronic foot pain symptoms can affect her ability to perform certain aspects of her job. Job limitations or restrictions, such as limited standing or chair climbing should be considered. In my opinion, [Employee] is capable of performing activities of daily living. However, Once [sic] again her chronic foot condition can prevent her from participating in more rigorous activities such as prolonged standing, hiking, stair climbing, or other stressful foot weight bearing activities.
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> At this point, I have commented on [Employee's] condition to the best of my abilities. No further orthopedic care is recommended and she is now discharged from my care. . . . (Garcia letter, September 24, 2020).

32) On November 10, 2020, Employee filed the therapy notes from June 2, 2020 through September 7, 2020 and served them upon Employer. (Medical Summary, November 10, 2020).

33) On January 21, 2021, Employee requested $8,564.79 in attorney's fees and costs, including $8,550.00 in fees for 19.00 hours expended from February 4, 2019 to 4:00 p.m. on January 19, 2021, and $14.79 in costs. (Affidavit of Counsel, January 21, 2021).

34) At hearing, Employee testified she accepted a job as a "behavioral" special education teacher in 2002 and she remained in the position until her work injury. In 2018, she requested and accepted a position as a "resource" special education teacher, which emphasizes academics, due in part to her work injury. In March 2020, Employee returned to a behavioral special education position. However, COVID-19 changed her job to online learning shortly after returning to work. Employee returned to the class room in the fall of 2020. Currently she works at the school every day, has three to four students in person two days per week due to COVID-19 and she has been able to watch students on the playground at school, though she is more aware of uneven ground. Employee thought there was going to be complications with continuing physical and massage therapy after Dr. Waltz's December 2019 EME report. She discussed her concerns with Therapist Sullivan and was provided a home exercise plan, which was not successful. Employee did not speak with or visit Dr. Heit before he responded to questions in the April 2020 letter. Prior to physical and massage therapy at Juneau Bone and Joint, she walked down stairs at home one foot at a time, leaned on furniture or walls to get dressed and could not walk a mile. After physical therapy, Employee could alternate her feet like normal while going down stairs, stand on one foot at a time to get dressed and could walk over a mile. She hopes to secure a physician in the future to assess and treat her foot as needed for pain or problems. Employee's right foot is always tight, if she sits too long it becomes sensitive, painful and stiff. She moves her foot around a bit before getting up to "jump start it." When Employee's foot hurts and she needs to go down the stairs, she puts the ball of her foot over the edge of the stair. Her daughter massages her foot at the end of the day. Employee believes she will need additional therapy in the future. She believes she can do her job once it returns to normal from COVID-19 but she is concerned about physical interactions with students. Employee believes she will need further therapy when her foot becomes aggravated to enable her to go down stairs and to shower and dress. (Employee).

35) On January 28, 2021, Employee requested an additional $10,614.93 in attorney's fees and costs, including $9,810.00 in fees for 21.80 hours expended from January 19, 2021 through January 28, 2021 and $804.93 in costs. (Affidavit of Counsel, January 28, 2021).

PRINCIPLES OF LAW

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

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

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

AS 23.30.095(c) was amended by Chapter 79, SLA 1988 and became effective on July 1, 1988.

> **AS 23.30.095. Medical treatments, services, and examination's.** (a) The employer shall furnish medical . . . treatment . . . medicine . . . for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. It shall be additionally provided that, if continued treatment or care or both beyond the two year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . . .
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> (c) A claim for medical or surgical treatment, or treatment requiring continuing and multiple treatments of a similar nature, is not valid and enforceable against the employer unless, within 14 days following treatment, the physician or health care provider giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee. When a claim is made for a course of treatment requiring continuing and multiple treatments of a similar nature, in addition to the notice, the physician or health care provider shall furnish a written treatment plan if the course of treatment will require more frequent outpatient visits than the standard treatment frequency for the nature and degree of the injury and the type of treatments. The treatment plan shall be furnished to the employee and the employer within 14 days after treatment begins. The treatment plan must include objectives, modalities, frequency of treatments, and reasons for the frequency of treatments. If the treatment plan is not furnished as required under this subsection, neither the employer nor the employee may be required to pay for treatments that exceed the

> frequency standard. The board shall adopt regulations establishing standards for frequency of treatment.
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> (o) Notwithstanding (a) of this section, an employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection. . . .

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

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

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

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

Under AS 23.30.120(a), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the

presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce "some" "minimal" relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

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

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully

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

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

The board's credibility finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision No. 087 (August 25, 2008).

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

AS 23.30.395. Definitions. . . .

(9) "chronic debilitating pain" means pain that is of more than six months duration and that is of sufficient severity that it significantly restricts the employee's ability to perform the activities of daily living;
. . . .

(29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition;

8 AAC 45.082. Medical treatment. . . .

(f) If an injury occurs on or after July 1, 1988, and requires continuing and multiple treatments of a similar nature, the standards for payment for frequency of outpatient treatment for the injury will be as follows. Except as provided in (h) of this section, payment for a course of treatment for the injury may not exceed more than three treatments per week for the first month, two treatments per week for the second and third months, one treatment per week for the fourth and fifth months, and one treatment per month for the sixth through twelfth months. Upon request, and in accordance with AS 23.30.095(c), the board will, in its discretion, approve payment for more frequent treatments.

(g) The board will, in its discretion, require the employer to pay for treatments that exceed the frequency standards in (f) of this section only if the board finds that

(1) the written treatment plan was given to the employer and employee within 14 days after treatments began;

(2) the treatments improved or are likely to improve the employee's conditions; and

(3) a preponderance of the medical evidence supports a conclusion that the board's frequency standards are unreasonable considering the nature of the employee's injury.

(h) An employee or employer may choose to pay for a course of treatments that exceeds the frequency standards in (f) of this section even though payment is not required by the board or by AS 23.30.095.

> . . . .
>
> (*l*) In this section,
>
> > (1) "month" means a four-week period, the first of which commences on the first day of treatment;

In *Chiropractors for Justice v. State of Alaska*, 895 P.2d 962 (Alaska 1995), the Alaska Supreme Court upheld the frequency limitation in statute and regulation. It held the statute and regulation bear a reasonable relationship to a legitimate governmental "objective of "ensur[ing] the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers." *Id*. at 966.

In *Hale v. Anchorage School District*, 922 P.2d 268 (Alaska 1996), the Alaska Supreme Court explained how the treatment plan regulation works:

> Once it began a course of treatment of daily physical therapy, the fourteen-day notification period of AS 23.30.095(c) commenced. Regardless of when Hale's treating physician determined that Hale would need long-term physical therapy, Physical Therapists was required to submit a conforming treatment plan within fourteen days after October 7, the date it began physical therapy in excess of the standard treatment frequency (footnote omitted). (*Hale* at 270).

In *Grove v. Alaska Constructors & Erectors*, 948 P.2d 454 (Alaska 1997), the medical provider did not provide the treatment plan within 14 days of treatment. The board held it had no discretion to allow more frequent treatment because the medical provider did not comply with the statute. The employee appealed and argued the employer could not invoke the statutory treatment limitations because it initially denied the employee was entitled to benefits. The Court found the employer's original decision to controvert the claim was not relevant to the application of the frequency standards. It is clear the medical provider must take steps if the statutory frequency of treatment is exceeded. *Grove* held the board cannot allow more frequent treatments without the submission of a treatment plan following the procedures set forth in 8 AAC 45.082(g).

In *Burke v. Houston NANA*, LLC, 222 P.3d 851 (Alaska 2010), the medical provider failed to provide a treatment plan within 14 days of beginning treatment of multiple and continuing treatments of a similar nature and failed to include the frequency of treatments. The employee contended the employer should be estopped from arguing the frequency limitations because it did not explicitly raise it in its controversion. The Court rejected the argument because it would place the burden on the employer to object to the frequency, which was rejected in *Grove*, as the statute placed the burden on the medical provider to provide a conforming treatment plan if it wanted to be paid for treatment exceeding the frequency standards.

In *Kim v. Alyeska Seafoods, Inc.,* 197 P.3d 193, 196 (Alaska 2008), the Alaska Supreme Court held that because AS 23.30.110(c) is a procedural statute, its application is directory rather than mandatory, and substantial compliance is acceptable absent significant prejudice to the other party. A statute is considered directory if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create "guidelines for the orderly conduct of public business"; and (3) "serious, practical consequences would result if it were considered mandatory." *Kim* at 197 citing *South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage*, 172 P.3d at 772 (Alaska 2007).

In *Adamson v. Municipality of Anchorage*, 333 P.3d 5 (Alaska 2014), the Alaska Supreme Court held the employee only need to show substantial compliance with the medical-examination requirements in AS 23.30.121 and 8 AAC 45.093. The employer argued AS 23.30.121 was substantive rather than procedural and strict compliance was required. The Court noted it did not limit substantial compliance to procedural statutes and in footnote 26 stated,

> We also are not persuaded by the [employer's] argument that our cases discussing compliance with statutory requirements for continuing and multiple treatments under AS 23.30.095(c) required [the employee] to strictly comply with regulatory requirements. *E.g., Burke v. Houston NANA, L.L.C.,* 222 P.3d 851 (Alaska 2010). We did not evaluate in those cases whether strict or substantial compliance was the applicable standard. *Id.* at 859–60; *Bockness v. Brown Jug, Inc.,* 980 P.2d 462, 468–69 (Alaska 1999); *Grove v. Alaska Constr. & Erectors,* 948 P.2d 454, 457–58 (Alaska 1997).

The Court did not consider the substantive-procedural distinction critical. The issue regarding substantial compliance arose due to the tension between the legislative's intent to apply to the presumption in the statute to claims made before or after the effective date the statute and the board's regulation created in 2011, which defined language which appears in the statute, "qualifying medical examination." It adopted the substantial compliance doctrine to "carry out the legislative intent and give meaning to all parts of a statute without producing harsh and unrealistic results" because requiring the employee to comply with requirement that did not exist when he was hired or exposed to toxins earlier in his career as a firefighter would circumvent the legislative intent that the employee's prior exposure could trigger the presumption. *Adamson* at 13. In applying the substantial compliance doctrine, Court considered the purpose served by the statutory requirements because substantial compliance involves conduct which falls short of strict compliance, but which affords the public the same protection that strict compliance would offer. *Id* at 14.

ANALYSIS

1) Is Employee entitled to past and continuing physical and massage therapy?

a) Past physical and massage therapy

Employee contends past physical and massage therapy, from June 2, 2020 through September 7, 2020, enabled her to work and engage in activities of daily living. AS 23.30.095(o); AS 23.30.395(9). Employer contends the past physical and massage therapy was not reasonable nor necessary and did not enable Employee to work. *Id*. These disputes raise questions to which the presumption of compensability applies. AS 23.30.095(o); AS 23.30.120(a); *Meek*.

Without weighing credibility, Employee raises the presumption with her testimony and Dr. Garcia's May 11, 2020 recommendation for physical therapy. *Smallwood*; *Wolfer*; *Resler*. Without assessing credibility or weight, Employer rebutted the presumption with Dr. Waltz's opinion that additional physical and massage therapy was not reasonable or necessary. *Huit*; *Kramer*; *Tolbert*; *Norcon*.

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

Dr. Waltz opined no further physical and massage therapy was reasonable or necessary because Employee reached "maximum benefit" since she was ambulating basically pain free and she was able to work her job without further palliative care in the December 6, 2019 report and February 10, 2020 addendum. Dr. Heit's April 2020 opinion is given less weight because he had not spoken with Employee or examined her prior to providing his opinion. AS 23.30.122; *Smith*; *Moore*. Unfortunately, Dr. Garcia's opinions are given less weight than Dr. Waltz's because he failed to address whether physical and massage therapy would enable her to return to work and whether Employee's pain was severe enough to significantly restrict her ability to perform activities of daily living. *Id*. Dr. Garcia's May 11, 2020 chart note and referral recommended physical therapy because Employee believed it reduced her pain but failed to specify whether it interfered significantly with activities of daily living or whether the therapy would enable Employee to work. His September 24, 2020 letter acknowledged her work injury has caused long-term pain symptoms which physical and massage therapy alleviate but stated she was capable of performing activities of daily living. Employee failed to prove by a preponderance of the evidence the past physical and massage therapy was reasonable and necessary to enable her to work or relieve chronic debilitating pain. *Koons*; *Saxton*. Therefore, Employee's claim will be denied.

Employer also contended the past physical and massage therapy in dispute exceeded the frequency limitations and Employee's medical provider failed to provide a conforming treatment

plan. Regulation 8 AAC 45.082(f) sets frequency standards: No more than three treatments per week for the first month; two treatments per week for the second and third months; one treatment per week for the fourth and fifth months; and one treatment per month for the sixth through twelfth months. The regulation suggests in routine cases "continuing and multiple treatments of a similar nature" will cease by the twelfth "month's" end. (*Id*.). "Month" is defined as a "four-week period, the first of which commences on the first day of treatment." 8 AAC 45.082(*l*)(1). Employee was injured on February 2, 2018, the 12 months after the injury ended on March 10, 2018 (February 2, 2019 + (4 weeks per one month X 12 months) = March 10, 2018). The physical and massage therapy from June 2, 2020 through September 7, 2020 exceeded the frequency standards because it occurred after March 10, 2018.

Upon request, and in accordance with AS 23.30.095(c), more frequent treatments and treatments exceeding twelve "months" may be approved. However, "continuing and multiple treatments of a similar nature" may only be approved if: (1) the written treatment plan was given to Employer and Employee within 14 days after treatments began; (2) the treatments improved or are likely to improve Employee's condition; and (3) a preponderance of medical evidence supports a conclusion that the frequency standards are unreasonable given Employee's injury. 8 AAC 45.082(g). If a conforming written treatment plan is not furnished as required, neither the employer nor the employee may be required to pay for excess treatments. AS 23.30.095(c); 8 AAC 45.082(g); *Hale*; *Grove*.

Employee contends the therapy notes she filed on November 10, 2020 contained conforming written treatment plans. However, none contain all four required "objectives, modalities, frequency of treatments, and reasons for the frequency of treatments." AS 23.30.095(c). The medical provider was required to provide the treatment plan to Employer and Employee by June 16, 2020, as treatment began on June 2, 2020 (June 2, 2020 + 14 days = June 16, 2020). The medical provider provided the therapy notes to Employee on November 10, 2020, and Employee filed them and served them on Employer. The medical provider failed to provide Employer and Employee the written treatment plan within 14 days after treatment began. *Rogers & Babler*.

Employee contends the substantial compliance doctrine applies to AS 23.30.095(c) and 8 AAC 45.082 because it is affirmative, as in *Kim*, and her medical provider substantially complied with the treatment plan requirements under AS 23.30.095(c). AS 23.30.095(c) is imposes a procedural prerequisite on medical providers because it states the medical provider "shall furnish a written treatment plan" to the employer and employee within 14 days after treatment begins if the course of treatment exceeds the frequency standards. AS 23.30.095(c) also states, "If the treatment plan is not furnished as required under this subsection, neither the employer nor the employee may be required to pay for the treatments that exceed the frequency standard." This language plainly disallows issuance of an order requiring the employer or the employee to pay for treatment exceeding the frequency standard if the medical provider fails to furnish a complying written treatment plan to the employee and employer within 14 days after treatment begins.

Employee contends strict compliance would have harsh results and Employer is not prejudiced by applying substantial compliance because benefits were controverted. Unlike *Adamson*, where the legislature intended the statute to apply retroactively, the frequency standards in AS 23.30.095(c) were enacted to cover from the effective date forward. Strict compliance is not harsh because the standards have been in effect for over 30 years, before the Alaska based medical provider began treatment. Furthermore, applying the substantial compliance doctrine to allow medical providers for injured workers with controverted benefits to provide multiple and continuing treatments of a similar nature in excess of treatment standards without furnishing the required treatment plan contravenes the legislative intent to ensure the quick, efficient, fair and predictable delivery of benefits to injured workers as a reasonable cost to employers. AS 23.30.001(1); *Chiropractors for Justice*. Therefore, substantial compliance will not be applied to the written treatment plan requirements under AS 23.30.095(c). Employee's claim will be denied for her medical provider's failure to furnish a complying treatment plan.

b) Ongoing physical and massage therapy

Employee believes her ongoing pain symptoms may become aggravated and requests an order awarding ongoing physical and massage therapy. Employer contends ongoing physical and

massage therapy is not reasonable and necessary. These disputes raise questions to which the presumption of compensability applies. AS 23.30.095(a), (o); AS 23.30.120(a); *Meek*.

Employee testified she still experiences pain and stiffness in her right foot and she believes it may worsen in the future. On September 23, 2020, Dr. Garcia stated he believed continued physical and massage therapy would alleviate her pain symptoms. Without assessing credibility, Employee raises the presumption with her testimony and Dr. Garcia's opinion. *Smallwood*; *Wolfer*; *Resler*. Without assessing credibility or weight, Employer rebutted the presumption with Dr. Waltz's opinion that additional physical and massage therapy was not reasonable or necessary. *Huit*; *Kramer*; *Tolbert*; *Norcon*.

Dr. Garcia's September 24, 2020 opinion stated Employee was able to perform activities of daily living and she testified she can perform activities of daily living, like walking down stairs, dressing and walking. She has been able to work her job after the physical and massage therapy ended in September 2020. Employee failed to prove by a preponderance of the evidence ongoing physical and massage therapy was reasonable and necessary to enable her to work or relieve chronic debilitating pain. AS 23.30.095(o); *Koons*; *Saxton*. Therefore, Employee's claim for ongoing physical and massage therapy will be denied.

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

Employee did not prevail on her claim for past or continuing physical or massage therapy; she is not entitled to attorney's fees on this issue. AS 23.30.145.

CONCLUSIONS OF LAW

1) Employee is not entitled to past and continuing physical and massage therapy.
2) Employee is not entitled to attorney's fees and costs.

ORDER

1) Employee's May 28, 2020 claim is denied.

Dated in Juneau, Alaska on March 2, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Christina Gilbert, Member

/s/
Bradley Austin, Member

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 LAURA MULGREW, employee / claimant v. CITY & BOROUGH OF JUNEAU, self-insured employer / defendants; Case No. 201802000; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on March 2, 2021.

/s/
Krystal Gray, Workers' Compensation Tech