ALASKA WORKERS' COMPENSATION BOARD

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

LONNIE S. BENNETT, Employee, Claimant, v. KETCHIKAN PULP COMPANY, Employer, and NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 199828479 AWCB Decision No. 21-0043 Filed with AWCB Juneau, Alaska on May 21, 2021

Lonnie S. Bennett's (Employee) April 20, 2020 claim was heard on April 20, 2021, in Juneau, Alaska, a date selected on January 20, 2021. A December 28, 2020 affidavit of readiness for hearing gave rise to this hearing. Attorney Robert Rehbock appeared telephonically and represented Employee. Attorney Michelle Meshke appeared and represented Ketchikan Pulp Company and National Union Fire Insurance Company of Pittsburgh (Employer). Witnesses included Employee and Carrie Kay and Lee Wheatley, who testified on behalf of Employer. The record initially closed at the hearing's conclusion on April 20, 2021, reopened on April 21, 2021 to receive Employer's objection to Employee's attorney's fees and costs affidavit and closed on April 21, 2021.

ISSUES

Employee contends the work injury is a substantial factor in his need for a mobility scooter. He contends Employer failed to rebut the presumption because its employer medical evaluation's (EME) report failed to exclude employment as a factor and disregarded his subjective complaints. Employee contends the All-Terrain Hopper is reasonable and necessary based upon his physician's recommendation for a mobility scooter due to his physical limitations. He contends the All-Terrain Hopper is the only mobility scooter meeting the extreme environment conditions in Ketchikan, Alaska. He requests an order directing Employer to provide the All-Terrain Hopper. Alternatively, Employee requests an order directing Employer to provide the Afiscooter-S4 for a trial run and retaining jurisdiction should it fail to meet the requirements.

Employer contends the work injury is not a substantial factor in Employee's need for a mobility scooter; rather his age, genetics, obesity, smoking, general poor heath, deconditioning and psychosocial factors are substantial factors. It contends the All-Terrain Hopper is not reasonable and necessary because he seeks it for recreational purposes. Employer contends the All-Terrain Hoppers is not necessary for any medical purpose or process of recovery and it does not enable him to do activities of daily life. It contends Employee has a vehicle and Americans with Disabilities Act (ADA) compliant public transportation is available. Alternatively, Employer contends the All-Terrain Hopper is not reasonable because a less expensive scooter is available which would meet Employee's needs.

1) **Is Employee entitled to a mobility scooter?**

Employee contends he is entitled to the mobility scooter and interest on its cost.

Employer contends Employee is not entitled to the mobility scooter and thus not entitled to interest on its cost.

2) **Is Employee entitled to interest?**

Employee contends his attorney's efforts are responsible for obtaining the mobility scooter. Therefore, he seeks $450 to $500 per hour in actual attorney's fees and costs.

Employer contends Employee is not entitled to a mobility scooter and thus not entitled to attorney's fees and costs and requests an order denying attorney's fees and costs; it requests an order denying attorney's fees and costs. Alternatively, Employer contends time spent solely on the All-Terrain Hopper, from April 20, 2020 through September 30, 2020, should be deducted if the All-Terrain Hopper is not awarded. It contends $450 to $500 per hour is not a reasonable fee because $450 is the highest hour rate awarded and this case was not complex; rather it contends $425 would be reasonable based upon Employee's attorney's experience. Employer contends the $185 hourly rate for paralegal fees should be reduced to $165 as it increased without explanation. It requests an order reducing attorney's fees and paralegal fees.

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

FINDINGS OF FACT

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

1) On February 21, 1997, Employee filled out a "Patient Information Sheet" and indicated he injured his back on February 17, 1997, when cleaning up a "debarker" and raking "hogfuel" in a waste conveyor. (Patient Information Sheet, February 21, 1997).

2) On February 28, 1997, Employee said lifting a piece of wood that weighed more than 100 pounds at work the prior day increased his lower back pain. R. Clark Davis, D.C., restricted Employee from working and lifting and advised him to avoid sitting. (Davis chart note, February 28, 1997).

3) On March 5, 1997, Dr. Davis continued restricting Employee from working. (Davis Physician's Report, March 5, 1997).

4) On March 21, 1997, Dr. Davis referred Employee to Wilson Medical Center. (Davis Physician's Report, March 21, 1997). While Employee's low back condition was improving, it did not tolerate regular work. Dr. Davis restricted Employee from sitting over 30 minutes without a break, bending at the waist, lifting over fifteen pounds, repetitive lifting, pulling on heavy hoses or lines and jarring his back. (Clark letter, March 21, 1997).

5) On March 25, 1997, Dr. Davis said Employee first injured his back at work on February 17, 1997, and his condition improved with chiropractic treatment until he lifted an object weighing more than 100 pounds around February 28, 1997. His condition improved significantly again but

regressed while driving a car on March 21, 1997. Dr. Davis referred Employee to Wilson Clinic. (Clark referral, March 25, 1997).

6) On March 25, 1997, Employee reported he initially injured his back around February 17, 1997, and it got better. He reinjured the back again on February 28, 1997, and it began improving again. Employee strained his back getting in or out of a car on March 21, 1997, and he continued to experience low back pain in the lumbosacral region to midline and slightly to right of midline. Occasionally the pain radiated in to his right thigh and he noticed some posterior right thigh numbness. Employee was relatively deconditioned, overweight and a heavy smoker. He had mild tenderness over the vertebral bodies in the lower lumbar level and some paraspinous muscle tenderness and spasm and tenderness over the right sacroiliac joint to palpitation. David Hoeft, M.D., diagnosed an acute back strain with repeated re-injuries and mild radicular symptoms. (Hoeft chart note, March 25, 1997).

7) On September 18, 1998, Employee complained of gradually increasing back, shoulder and elbow pain when lifting, pulling or doing other heavy labor at work during 14 to 16 hour days. He was tender to palpitation over both sacroiliac joints in the lower back and paraspinous muscles. Dr. Hoeft assessed diffuse musculoskeletal pain exacerbated and caused by work, including low back strain. He prescribed naproxen and recommended Employee "cut back a little" and let his body heal. (Hoeft chart note, September 18, 1998).

8) On December 21, 1998, Shawn Hadley, M.D., evaluated Employee for an EME and diagnosed chronic low back pain syndrome with probable lumbar degenerative disc disease. Dr. Hadley noted Employee had ongoing low back complaints with reported high pain levels and some indication of symptom magnification. She concluded the medical records did not support the level of reported difficulty with his back. (Hadley EME report, December 21, 1998).

9) On February 18, 1999, Employee reported he injured his low back and left shoulder on September 18, 1998, pulling bark out of debarker while working for Employer. (First Report of Occupational Injury or Illness, February 18, 1999).

10) On February 10, 1999, Dr. Hoeft wrote a letter stating Employee was reporting a new occurrence or exacerbation of low back pain that was related to an on-the-job injury. (Hoeft letter, February 10, 1999).

11) On June 9, 1999, Dr. Hadley evaluated Employee for another EME and a lumbar spine magnetic resonance imaging (MRI) was performed. Employee stated his low back pain

progressively worsened over the past several years and noted decreased ability to lift, walk or climb stairs. He estimated he could walk five minutes before having increased back pain. Dr. Hadley stated the new MRI showed evidence of multilevel lumbar disc degeneration with congenital narrowing of the spinal canal, with some spinal stenosis, particularly at the L4-5 level, and facet hypertrophy at L3-4 and L4-5 causing lateral recess narrowing. She diagnosed low back pain with possible pseudo claudication affecting the lower extremities, although the clinical neurological examination was non-localizing other than an absent right ankle reflex. Dr. Hadley stated there is no indication of a September 1998 low back work injury in the medical record. She concluded Employee's symptoms were a progression of age-related changes superimposed upon his underlying congenital condition. Lumbar epidural steroid injections were a possible treatment for his low back pain complaints. (Hadley EME report, June 9, 1999).

12) On March 28, 2000, Employee reported he hurt his back in September 1998 while working as a bark operator. He had back pain and pain going down both legs and buttocks with some leg numbness. Employee was diffusely tender from the thoracolumbar junction to the lumbosacral spine on palpitation. His March 24, 1999 x-rays were normal and the June 8, 1999 MRI showed some L5-S1 disc bulging with a possible left sided disc herniation. Kenneth Leung, M.D., noted Employee had many symptoms but the MRI findings were minimal, although it was not a good quality scan. He recommended another MRI. (Leung chart note, March 28, 2000). Dr. Leung reviewed a new lumbar MRI scan completed that afternoon and it showed a disc that seemed to be "abnormal and degenerating" with a small left-sided L5-S1 disc herniation. He opined Employee was not a surgical candidate. (Leung chart note, March 28, 2000).

13) On April 27, 2000, Employee reported he was injured at work on February 17, 1997, while raking bark when he twisted wrong and felt low back pain and muscle spasms. He treated with a chiropractor without any results and with physical therapy. Employee returned to work despite on-going low back pain. Three epidural steroid injections failed to control his pain. Dr. Leung had opined he was not amenable to surgical intervention. Employee complained of pain in his posterolateral hip region and low back and paraspinal muscle spasms and stated his legs fell asleep periodically while walking and sitting. He felt depressed over his inability to return to work and loss of ability to perform his usual activities, such as fishing and hunting. John Bursell, M.D., assessed low back pain following a work-related injury and depression. He recommended physical

therapy and an exercise program, prescribed Celebrex and Paxil, referred Employee to a dietitian for weight loss and instructed him to quit smoking. (Bursell chart note, April 27, 2000).

14) On June 12, 2000, Employee's attorney entered his appearance. (Entry of Appearance, June 12, 2000).

15) On September 11, 2000, James Champoux, M.D., and Jacquelyn Weiss, M.D., examined Employee for an EME and they diagnosed chronic low back pain, lumbosacral strain without accompanying objective abnormalities and chronic left shoulder tendinitis. Drs. Champoux and Weiss stated there was no injury attributed to Employee's work at Gateway Forest Products as the complaints predated his employment and were not aggravated by his employment. They opined Employee was not disabled and would be able to operate a barker machine. Employee was "felt to be medically fixed and stable in that further treatment was not likely to be curative." No additional treatment was recommended but Employee should exercise regularly, lose weight and stop smoking. (Champoux and Weiss EME report, September 11, 2000).

16) On September 29, 2000, Employee told Dr. Bursell his back and hip pain was too severe to return to work and participate in daily family activities. He tried walking and riding a bicycle but could not make it very far; sometimes not to the end of his own driveway. Dr. Bursell recommended continuing Paxil and physical therapy, prescribed Vioxx for inflammation and Zyban to stop smoking, and referred Employee for a second opinion regarding surgical options. (Bursell chart note, September 29, 2000).

17) On October 17, 2000, Dr. Bursell wrote a letter stating the date of Employee's back injury was February 1997, and it did not appear that Employee's back injury was caused or aggravated by his work with Gateway Forest Products. (Bursell letter, October 17, 2000).

18) On November 17, 2000, Employee reported an episode of lower back pain in the last month where it flared after physical therapy and he had to spend a week on the floor. He was back to baseline pain but was limited in vocational and avocational activities as even walking short distances was quite painful. Employee was smoking again because he stopped the Zyban due to sleepiness and disturbing dreams. Dr. Bursell recommended continuing current pain medications and physical therapy. (Bursell chart note, November 17, 2000).

19) On January 11, 2001, Timothy DuMonteir, M.D., examined Employee and reviewed his imaging scans. He opined the March 2000 MRI showed minor degenerative changes in his discs, with some minor bulging, but no significant nerve compression or displacement and mild modic

end plate changes at "L2 on 3." However, there was no significant instability that would warrant surgical treatment. Dr. DuMonteir diagnosed chronic low back pain and encouraged Employee to seek treatment in a structured pain clinic to help organize his life and his medications to become more functional with his daily activities and advised him to eliminate narcotic use, quit smoking and exercise as tolerated to maintain his condition. (DuMonteir chart note, January 11, 2001).

20) On February 23, 2001, Employee reported no significant change in low back pain symptoms and he was still very limited in activities. He was able to walk some, but could lift very little as even carrying a bag of groceries was difficult. OxyContin helped dull the pain symptoms but they were still present; increased Paxil helped his depression. (Bursell chart note, February 23, 2001).

21) On March 9, 2001, Dr. Bursell responded to a letter from Employer. He opined Employee was not medically stable and would not be medically stable until he completed a pain management program for his chronic back and shoulder symptoms. Dr. Bursell stated:

> [Employee] is clearly depressed as a result of his work injury and inability to continue with his usual work activities. . . . [Employee] has responded somewhat to antidepressant medication and this has improved his condition somewhat regarding depression, although he is obviously not back to his normal mood state. . . I would have to respond that this is secondary to the combination of his lumbar spine and shoulder injury, and, even more so, to the disability resulting from those injuries.

He disagreed Drs. Champoux and Weiss because Employee had not been able to return to work and was not able to participate in many of his usual "avocational activities" and he clearly suffered from chronic pain. He would not be surprised if Employee's work with Gateway Forest Products aggravated his symptoms because it required sitting, which can be quite aggravating to a low back injury, and cleaning debris off equipment, which required a fair amount of climbing, lifting, bending and twisting. Dr. Bursell stated the EME report significantly understated the work activities. (Bursell letter, March 9, 2001).

22) On June 22, 2001, a compromise and release agreement (C&R) was approved which settled benefits for an injury while working for Employer and Gateway Forest Products, Inc. Employee waived his entitlement to all benefits under the Act for an injury on or about November 6, 1999, while employed with Gateway Forest Products in exchange for $23,000. He also waived entitlement to all benefits under the Act except future medical benefits for an injury on September 18, 1998, with Employer in exchange for $33,000. (C&R, June 22, 2001).

23) On February 20, 2003, Dr. Bursell wrote a letter to Employee's attorney stating Paxil was prescribed to treat Employee's depression, which arose as a result of his chronic low back pain and subsequent disability. (Bursell letter, February 20, 2003).

24) On March 20, 2003, Employee reported he tried to exercise but he was only able to walk about one mile per week. His pain level intensified greatly, with bilateral leg numbness and tingling, and he only left the house for medical appointments. Dr. Bursell recommended an MRI. (Bursell chart note, March 20, 2003).

25) On July 25, 2003, Employee's low back pain was unchanged and very limiting as he did not "do much other than stay at home." He cut down on smoking from three packs per day to six cigarettes per day. Employee wanted to try methadone for the pain because he did not like the drugged out feeling he got from other pain medications. (Bursell chart note, July 25, 2003).

26) On November 20, 2003, Employee complained of severe low back pain with stabbing pain to both knees that came and went up to six times per day and lasted about 30 to 45 seconds. He felt depressed about it and only got out of the house to see the doctor. Employee did not like the way Paxil made him feel and wanted to try another medication. Dr. Bursell prescribed Prozac for depression and a muscle relaxant. (Bursell chart note, November 20, 2003).

27) On January 22, 2004, Employee said he still had low back pain, including a stabbing pain going down both lower extremities. He was tripping more with his right leg. Employee was exercising with an exercise machine for about 12 minutes per day and was trying to increase the duration. He did not start Prozac. (Bursell chart note, January 22, 2004).

28) On February 19, 2004, Dr. Bursell reviewed Employee's recent lower spine MRI and found only evidence of degenerative changes. He recommended Employee get on an exercise program and stop smoking. (Bursell chart note, February 19, 2004).

29) On May 21, 2004, Employee reported his back went out the night before for no apparent reason. It was hard for him to get around and he walked with a single point cane. Employee said it happened periodically and over time his back pain decreased to baseline. Dr. Bursell observed Employee had a difficult time getting on and off the examination table and he was quite tender to palpitation, primarily over the right lower lumbar paraspinal musculature. He performed trigger point injections. (Bursell chart note, May 21, 2004).

30) On June 24, 2004, Employee had been working on weight loss and loss ten pounds on the Adkins diet. His exercise was limited because his low back pain flared up to the point that he

could not walk until recently. Trigger point injections did not work. (Bursell chart note, June 24, 2004).

31) On September 4, 2005, Employee reported he had less low back pain since radiofrequency ablation (RFA) procedures and he was able to increase his activity level. He felt the best mentally that he had in five years. (Bursell chart note, September 24, 2005).

32) On October 20, 2005, Employee said he made it to two physical therapy appointments and had been going to the pool every other day until he got the flu. He was smoking 10 cigarettes per day and planned on quitting. (Bursell chart note, October 20, 2005).

33) On February 24, 2006, Employee reported he gained 30 pounds after his mother died. He noted his low back pain was more manageable with physical therapy and he could walk five to six minutes before he stopped to support himself. Before the RFA procedure and recent course of physical therapy, his walking was limited to less than a minute and 30 feet. (Bursell chart note, February 24, 2006).

34) On March 23, 2006, Employee said he had lost 12.5 pounds and made significant gains in reduced back pain and improved function with physical therapy and his own exercise program. (Bursell chart note, March 23, 2006).

35) On April 27, 2006, Employee said his low back went out after he was seen a month prior and that pain flare had nearly resolved. He worked with physical therapy and was starting to make progress again. Employee said he could only walk 50 steps before he needed to stop due to low back pain symptoms. (Bursell chart note, April 27, 2006).

36) On August 25, 2006, Employee was angry because his back pain made him unable to do the things he would to do. He used a one month pain prescription in two weeks due to the pain he experienced. Employee was waiting on approval of the RFA procedure. Dr. Bursell referred Employee for pain management. (Bursell chart note, August 25, 2006).

37) On September 28, 2006, Employee said he had a heart attack since last seen and had a stent placed. He was given morphine which allowed him to start moving again. While Employee still had low back and posterior hip pain he was walking one mile per day. (Bursell chart note, September 28, 2006).

38) On February 23, 2007, Employee was about three-and-a-half months out from a bilateral L5-S1 facet denervation and reported it was effective in treating part of his low back pain. His back pain was about 50 percent of the pre-treatment level. (Bursell February 23, 2007).

39) On March 23, 2007, Employee said he was walking slowly and painfully at least two miles per day. He had cut his smoking down to two cigarettes per day. (Bursell chart note, March 23, 2007).
40) On August 2, 2007, Employee said a lumbar facet denervation provided a month prior reduced his low back pain by 80 percent. He was swimming three times a week, and walking but needed to stop after one block due to low back and hip pain. (Bursell chart note, August 2, 2007).
41) On February 22, 2008, Employee reported increasing low back pain and was waiting for approval of facet denervation. (Bursell chart note, February 22, 2008).
42) On April 17, 2008, Employee had been doing well after a bilateral L5-S1 facet denervation and bilateral sacroiliac joint injections a month prior but he reached forward to pick something up and it felt like he pulled a muscle in his back. (Bursell chart note, April 17, 2008).
43) On June 19, 2008, Employee reported his back pain increased significantly after he coughed two weeks earlier. He had been making good progress and lost almost 20 pounds. Dr. Bursell provided trigger point injections. (Bursell chart note, June 19, 2008).
44) On August 22, 2009, Douglas Bald, M.D., examined Employee for an EME and diagnosed preexisting multilevel degenerative lumbar disc disease, chronic mechanical lower back pain without evidence of radiculopathy, unrelated exogenous obesity and coronary artery disease. He opined Employee was significantly disabled as a result of a combination of medical and orthopedic issues. The medical treatment he received had been reasonable. Employee's overall level of physical fitness was significantly hampered by his weight as well as his history of coronary artery disease likely at least partially linked to smoking. Dr. Bald believed the work activities around September 18, 1998 constituted a substantial factor in his persistent lower back pain complaints. (Bald EME report, August 22, 2009).
45) On January 21, 2010, Employee said 60 percent of his low back pain returned three months after bilateral L5-S1 facet denervation and bilateral sacroiliac joint injections. He had been able to increase his activity and exercise more with pain relief. (Bursell chart note, January 21, 2010).
46) On August 26, 2010, Employee reported bilateral L5-S1 facet denervation and sacroiliac joint injections provided on May 13, 2010, resulted in significant pain relief and he was able to stop taking pain medication for some time. He used pain medication only intermittently to help pain control and to improve function. (Bursell chart note, August 26, 2010).
47) On February 24, 2011, Employee had been working on losing weight but had difficulty keeping weight off and stopping smoking. His back pain symptoms increased over time and he had

intermittent severe pain flares. Employee thought he needed a personal care assistant due to more problems with low back pain limitations. (Bursell chart note, February 24, 2011).

48) On April 21, 2011, Employee reported intermittent low back spasm which were severe enough he felt he needed to go the emergency room. He requested a personal care attendant to assist him in the community for shopping and when he exercised. A recent MRI showed increased L1-2, L2-3 and L3-4 disc bulging, and a left-sided L4-5 disc protrusion with stenosis. (Bursell chart note, April 21, 2011).

49) On June 17, 2011, Dr. Bald examined Employee for an EME and diagnosed preexisting multilevel lumbar spine degenerative disc disease with disc space narrowing and foraminal stenosis and chronic mechanical low back pain without radiculopathy. He opined Employee's work activities on or around September 18, 1998, continued to be a substantial factor in his current and ongoing low back condition. Employee's preexisting multilevel degenerative disc disease also constituted a substantial factor in his low back condition. He recommended Employee stop smoking, lose weight and exercise. (Bald EME report, June 17, 2011).

50) On April 16, 2012, Employee had an episode of significantly increase low back pain with upper back pain a few weeks prior when he twisted. He attempted to increase activity but was limited due to back pain. (Bursell chart note, April 16, 2012).

51) On March 19, 2013, Employee reported increased low back pain with muscle spasms after bilateral sacroiliac injections and bilateral L5-S1 facet denervation using RFA on November 1, 2012. He went to the emergency room a week earlier for upper lumbar pain and abdominal muscle spasms. (Bursell chart note, March 19, 2013).

52) On October 15, 2013, Employee said July 18, 2013 bilateral sacroiliac joint injections did not help his low back pain symptoms. His walking was limited to 15 feet and he only felt pain relief when not moving. (Bursell chart note, October 15, 2013).

53) On January 7, 2014, Employee reported no reduction in low back pain following the November 21, 2013 bilateral L5-S1 facet denervation using RFA. He had to decrease his activity level due to low back pain and had been gaining weight; Employee also complained of hip pain. (Bursell chart note, January 7, 2014).

54) On April 14, 2014, Employee said bilateral greater trochanteric bursa steroid injections performed in January helped his hip pain. He was able to walk 40-50 feet with pain relief lasting five to six weeks. (Bursell chart note, April 14, 2014).

55) On December 16, 2015, Employee complained of low back and bilateral hip pain and said the last bilateral L5-S1 facet neurotomy on May 15, 2014, resulted in significant pain relief lasting 100 days. (Bursell chart note, December 16, 2015).

56) On November 30, 2016, Employee said his low back pain symptoms having returned after the bilateral L5-S1 facet neurotomies in June 2016 and bilateral sacroiliac joint injections. (Bursell chart note, November 30, 2016).

57) On May 31, 2017, Employee reported his low back pain symptoms returned after bilateral L5-S1 facet neurotomies with bilateral sacroiliac joint injections in December 2016. (Bursell chart note, May 31, 2017).

58) On January 16, 2018, Employee rated his low back pain as "8/10" and described it as sharp, shooting and tingling. He was only able to walk about 20 feet before he needed to sit down. Employee had some mood symptoms but denied major depression. He smoked a pack a day, had diabetes and had cardiac stents placed in the past. James Babington, M.D., thought Employee would benefit from cognitive behavioral therapy for low mood and he recommended Cymbalta and a regular exercise program. (Babington medical report, January 16, 2018).

59) On June 5, 2019, Dr. Bursell stated Employee would benefit from a mobility scooter that can be used at home and in the community because he is unable to participate in the community due to limited mobility as he is unable to ambulate greater than 20 steps and has a history of frequent falls. "The tires must be large and sturdy enough to navigate outdoors in winter (heavy wet snow) and summer" and "must have a long-life battery" for trips into town requiring the ability to travel over two miles. Employee was depressed and felt like he had no activities worth looking forward to. Dr. Bursell opined he would benefit from being out of the home and in the community weekly and from a behavior therapy or support group. (Bursell Physical Environment and Safety Assessment for [Employee], June 5, 2019).

60) On January 7, 2020, Dr. Bursell responded to questions sent to him by the claims adjuster on November 22, 2019. He said the work injury is a substantial factor in Employee's need for the mobility scooter because his ambulation was limited due to chronic lower back pain from the work injury. Dr. Bursell opined the mobility scooter is necessary to allow community mobility. (Bursell response, January 7, 2020).

61) On April 20, 2020, Employee sought temporary total disability (TTD) and permanent partial impairment (PPI) benefits, a compensation rate adjustment, medical and transportation costs,

interest, attorney's fees and costs. Under "Reason for filing claim," he stated, "[I need] a medical scoot that will work. All Terrain Hopper USA Arizona Company Heavy Duty all-wheel drive and water proof with joy stick controls, with independent suspension and oversize tires to address limitations." (Workers' Compensation Claim, April 20, 2020).

62) On May 11, 2020, Employer denied the All-Terrain Hopper, interest and attorney's fees and costs contending it was not reasonable or necessary and a reasonable alternative would fit Employee's medical needs as prescribed. It also denied TTD and PPI benefits, a compensation rate adjustment and interest based upon the June 22, 2001 C&R. (Controversion Notice, May 11, 2020; Answer, May 11, 2020).

63) On May 14, 2020, Employee filed an estimated $26,965.00 cost for the All-Terrain Hopper. (Notice of Intent to Rely, May 14, 2020).

64) On May 27, 2020, Employee orally amended his claim to remove TTD and PPI benefits and the compensation rate adjustment. (Prehearing Conference Summary, May 27, 2020).

65) On May 27, 2020, Employee sought attorney's fees and costs. (Workers' Compensation Claim, May 27, 2020).

66) On May 29, 2020, Employee filed another estimate for the All-Terrain Hopper totaling $28,360, along with a written statement that it is the only medical transportation device which meets the extreme environment of Ketchikan, Alaska. It has a waterproof motor and battery box to protect it from rain, monster wheels to provide clearance over rocks, curbs, mud and muskeg, 200AH batteries with 15 amp charger, a manual rotating seat, removable overhead roll bar, and winch to get unstuck in various terrain, like the beach, pavement and hiking trails. (Notice of Intent to Rely, May 29, 2020).

67) On June 15, 2020, Employer denied the All-Terrain Hopper, interest and attorney's fees and costs contending it was not reasonable or necessary and a reasonable alternative will fit Employee's medical needs as prescribed. (Controversion Notice, June 15, 2020; Answer, June 15, 2020).

68) On June 25, 2020, Employee continued to have significant functional limitations due to chronic lower back pain with sacroiliac joint instability and pain. He reported the Afiscooter-C4 scooter Employer provided did not work because it tipped over and he fell out of the scooter multiple times. Employee lived on a steep hill and wanted to be able to take the mobility device out on beach trails. He believed the All-Terrain Hopper was ideal for his situation. Dr. Bursell accessed

the website for the device and stated it appeared it would provide good mobility in the community and along relatively flat local trails and beaches. He recommended a physical therapy mobility assessment regarding equipment for community mobility and referred Employee to Kelly Chick. (Bursell chart note, June 25, 2020).

69) On July 24, 2020, Kelly Chick Comstock responded to a letter with questions from Employer's attorney and said the Afiscooter-C4 was not a reasonable and necessary option to suit Employee's activities of daily living because it may not be sufficient to handle the steep inclines and uneven terrain in the immediate area around his home but the Afiscooter-S4 mobility scooter was a reasonable and necessary option. Ms. Comstock attached a letter stating:

> [Employee] has a 20-year history of chronic, debilitating, and longstanding LBP [lower back pain] complaints ever since a work injury rendered him disabled, and since then he has never been able to recover his pre-morbid active outdoor Alaskan lifestyle of hunting and fishing. His LBP ranges from "10-60 out of 10" in standing, rapidly increased per [Employee] over a period of seconds. He also has chronic shoulder pain. During his skilled PT evaluation, he was able to ambulate only 50' using a cane (he did not bring his walker) and distance was limited by pronounced shortness of breath onset and need for rest. His overall health status has declined because of debility and pain, per his own assessment, rendering him to become admittedly an overweight cigarette smoker. He has been issued durable medical equipment in the past to assist his mobility, beginning with a rolling walker, than a seated walker, but his tolerance of ambulation has reportedly continued to decline over time to short household distances. He also found that he became unable to successfully pick up the walker high enough to place it into the back of his car. He was finally issued a motorized locomotion device for outdoors, but video shown to PT demonstrated that it was clearly deficient in being able to handle uneven terrain, even in his driveway, and the vehicle was returned. [Employee] reports he was feeling mostly hopeless about his condition and loss of function/mobility after this, until being introduced to potential of an all-terrain 4-wheel power chair.
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> His preferred and most desirable option is an Extended Train Hopper 4ZS. His insurance carrier has also presented him the options of either an Afiscooter-C4 or an Afiscooter-S4.
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> He expresses that his dream of return to more normal functions remains, and he would like to engage again "as a productive member of the community." He adds, "I don't want to go out (die) useless in a chair. Instead, he says, "I want to go back to living my life closer to the way I lived it before my accident." This would require having access to the type of transport/locomotive equipment which would allow him to safely access the outdoors in any kind of inclement weather, and something that could handle inclines, extreme weather, and uneven terrain common to most environments in Alaska.

> The two options which appear most likely to meet this motorized mobility needs are either the Extended Train Hopper 4ZS All-terrain option, or the Afiscooter-S4 mobility scooter. The only one which would allow him to transport his seated walker with him (which he uses sparingly) is the Extended Train Hopper 4Zs. The most economical option to meet his motorized mobility needs and provide very reasonable and broad outdoor accessibility is the Afiscooter-S4. (Comstock response and letter, July 24, 2020).

70) On September 16, 2020, Jared Kirkham, M.D., evaluated Employee via telemedicine for an EME. He diagnosed a lumbar sprain or strain injury caused by a February 17, 1997 work injury which resolved with no permanent partial impairment. Dr. Kirkham noted Employee consistently stated his pain never improved. There was no mention of a specific work injury in the September 18, 1998 clinic note and a lumbar spine MRI from June 8, 1999 did not reveal any acute findings, only degenerative changes due to age and genetics. The medical records consistently documented subjective pain which was out of proportion to objective findings, including physical exam and imaging findings. Employee's job required him to sit in a piece of heavy equipment and operate foot pedals and levers with his hands and the most strenuous activity he had was to go out and rake and clean off debris. Dr. Kirkham cited to the American Medical Association (AMA) Guides to the Evaluation of Disease and Injury Causation which stated there is "insufficient scientific evidence to conclusively establish that any occupational or ergonomic risk factor is actually a medical cause of working age adult low back pain" and "the single best predictor for chronic disabling low back pain is psychiatric comorbidity." He concluded Employee's work activities were an inconsequential factor and are not a substantial factor contributing to his low back pain. Dr. Kirkham opined non-work related factors, including Employee's age, genetics, obesity, smoking, general poor heath, deconditioning and especially psychosocial factors are substantial factors contributing to his ongoing pain and disability. In his view, physical therapy would be reasonable treatment for Employee's low back pain "as well as trials of interventional procedures." Dr. Kirkham does not believe bilateral sacroiliac joint injections recommended by Dr. Bursell would be particularly helpful because the October 15, 2013 chart note indicated they were not helpful before. He recommended Employee participate in a comprehensive multidisciplinary pain management program, including intensive work with a psychologist, psychiatrist, social worker, nutritionist, addiction medicine specialist, personal trainer and physical therapist experienced with treating chronic pain. Dr. Kirkham thought Employee would benefit from some type of scooter to

assist with traveling longer distances due to his poor heath, deconditioning and reduced functional capacity. In Dr. Kirkham's opinion, the Afiscooter-C4 would not suit his needs based upon the terrain in Ketchikan, Employee's reduced functional capacity and difficulty with ambulation, and desire to travel longer distances on uneven terrain. The Afiscooter-S4 mobility scooter is reasonable and necessary as it suits Employee's activities of daily living and motorized mobility needs. Dr. Kirkham considered the All-Terrain Hopper a luxury item which could potentially allow Employee access to more varied and interesting terrain. However, in his opinion Employee's need for a power mobility device is not related to work activities; rather his age, genetics, obesity, smoking, general poor heath, deconditioning and especially psychosocial factors are substantial factors. (Kirkham EME report, September 16, 2020).

71) On September 30, 2020, Employer denied medical and transportation benefits relying on Dr. Kirkham's September 26, 2020 EME report to contend the work injuries are not a substantial factor in causing, aggravating or accelerating Employee's left shoulder or low back pain. Employer contended Employee's need for the power mobility device, is due to his body habitus, poor health, tobacco use, deconditioning and psychosocial factors and his work-related activities are a very minor, if not completely inconsequential factor in his ongoing low back pain and need for medical treatment. (Controversion Notice, September 30, 2020).

72) On October 10, 2020, Employer filed an invoice for an Afiscooter-S4 totaling $4,507. (Notice of Intent to Rely, October 10, 2020).

73) On December 14, 2020, Dr. Bursell testified at deposition he has treated Employee for low back pain since the 1990s. (Bursell Deposition at 4-5). The work injuries are a substantial factor in Employee's need for medical treatment. (*Id*. at 6). Employee's mobility is limited due to his back and Dr. Bursell felt it was appropriate for Employee to seek a mobility device. (*Id*. at 6-7). He recommended radiofrequency nerve ablation of Employee's facet joints every six to twelve months as needed. (*Id*. at 15). Dr. Bursell prescribed a mobility scooter for "community mobility" but did not recommend a specific scooter as he typically leaves that up to a physical therapist. (*Id*. at 17). He described Employee as "deconditioned" and generally out of shape with poor cardiovascular condition and generalized muscle weakness. (*Id*. at 20). When Dr. Bursell was asked if he agreed with Dr. Kirkham's opinion, he stated,

> Now that's going to be really hard to sort out because it has been there how many years now? Twenty-some years that this has been going on. And over that time

> there has been -- you know, there's also degenerative changes that occur, there's been deconditioning. As far as I could tell, it was because he couldn't participate in exercise and so sorting out how much is directly and indirectly related to the injury versus what is just degenerative change of the spine over time because of aging, is difficult to sort out as far as the disability and pain component. But I think that -- he's right in that all those factors do play a role. (*Id*. at 23).

He was not able to review all of Employee's medical records prior to the deposition but believes the work injury remains a substantial factor. (*Id*. at 23-24). The work injury started the whole process and Employee's body habitus, decondition, tobacco use and psychosocial factors are all intertwined. (*Id*. at 24-25).

74) On March 30, 2021, Employee filed videos of him driving an Afiscooter-C4 around his neighborhood. The scooter was unable to get up a hill and had difficulties turning around on uneven terrain in Employee's driveway. (Notice of Intent to Rely, March 30, 2021).

75) On April 5, 2021, Kelly Chick Comstock testified at deposition that she is a physical therapist. (Comstock Deposition at 3). Employee's main reason for needing an assistive device to help him get around was his back pain and shortness of breath on minimal exertion. (*Id*. at 4-5). Employee showed her videos of a scooter-type device that he was trying to drive around his driveway and she did not think it was a good choice. (*Id*. at 7). Employee came in with pictures of the All-Terrain Hopper and said he wanted the tow hitch option and it was definitely top-of-the-line. (*Id*.). He mainly needs to be on something with a stable base that would accommodate some level of shock absorption and be able to handle getting around. (*Id*. at 7-8). Employee lives on a hill with an uneven driveway and needs to be able to get down to the bike path. (*Id*. at 8). The All-Terrain Hopper is more suitable for the streets around Ketchikan than the scooter Employee tried out and returned. (*Id*. at 9). Ms. Comstock thought the initial scooter was horrible and a "complete mess" for his basic needs. (*Id*. at 10). Ms. Comstock thought an "in-between model" which has a larger tire wheel base and tire and enough impact absorption would be ideal for Employee. (*Id*. at 12). It would also be ideal for some kind of an attachment so Employee could bring his walker if he needed it. (*Id*. at 13). When asked whether the All-Terrain Hopper was more for recreational purposes, Ms. Comstock answered:

> For -- yes, because I mean, I think that there is -- if you had -- if you had somebody that was demonstrating the kind of lifestyle that he's described he wants to have and had evidence that he could actually pull that off, it would be an easier recommendation.

> Because he has so many health issues, I think it's really a question of -- I think some of it, you know, the psychology is that he's just, you know, reaching for something to try to get his old life back. I think that's the challenge for him because it kind of presents as all or nothing.
>
> And so will he use something that's lesser even if it could give him a start? You know, that's the question in my mind around -- around this. And if he gets this terrain hopper, will he even use it? That's the -- that's the question in my mind as a therapist, you know, in terms of recommending something. . . .

She confirmed the power mobility device would be used outside Employee's home and said:

> And the question I have for that is, where is he going to store it, and then how is he going to get it to the recreational site. You know, he would need a truck with a -- and maybe he can afford that, you know, get a truck and get a flatbed and then drive it up and down.
>
> You know, that would be ultimately what's required for him to -- to utilize that type of a -- you know, for the terrain vehicle that he's -- and probably if he wants to get out on any road with -- you know, out at some of the -- you know, some of the local roads we have, you know, for him to be able to access those he really needs a flatbed to drive that up onto an then to take it.
>
> Otherwise, you are looking at a scenario where he does come out of his driveway, goes down this very steep hill and goes on a bike path.
>
> So you know, trying to understand, you know, the feasibility for both of those scenarios is really – is really important. If he's somebody that's actually getting out to, you know a recreational site life Refuge Cove here or Ward Lake, if he's doing that and we can help facilitate that by giving him -- once he's there, giving him things to go and do, I'm, like, all on board for that.
>
> If that's not somebody's current lifestyle, then it is outside the home, like right outside the home like in the driveway. . . . (*Id*. at 23-24).

Ms. Comstock stated she felt the Afiscooter-S4 was a fair in-between for what Employee asked for compared to the Afiscooter-C4. (*Id*. at 26). She thought it was "a bit of a reach" for Employee to tow things or to be out in the woods on his own with the All-Terrain Hopper. (*Id*. at 30).

76) On Apri1 14, 2021, Dr. Kirkham testified at deposition he diagnosed a lumbar sprain or strain injury from the February 17, 1997 work injury. (Kirkham Deposition at 5). The term lumbar sprain or strain is used when an MRI fails to show any structure was injured to indicate "we are

not exactly sure what was injured, but we are pretty confident that it's not something more serious". (*Id*. at 5). Sprain and strain injuries heal on the order of days to perhaps weeks, which is based upon the expected time course for biological tissue healing. (*Id*. at 6). Dr. Kirkham concluded there was no injury on September 18, 1998 because the clinic note failed to mention an injury and a lumbar spine MRI afterwards showed changes consistent with age but no evidence of other more serious injury, like to a disc. (*Id*.). Other than subjective findings such as tenderness to palpitation, there were no objective findings, such as changes in reflexes, strength or atrophy. (*Id*. at 7). The June 8, 1999 MRI showed changes consistent with age but nothing suggested any significant acute injury. (*Id*. at 8).

77) On April 15, 2021, Employee filed an affidavit documenting $1,832.62 in costs and $21,872.02 in attorney's fees and paralegal fees for 33.96 attorney's hours and 31.90 paralegal hours. Employee's attorney's hourly rate was $450 from April 2020 through December 14, 2020, and then it increased to $500. The paralegal hourly rate was $165 from April 2020 through December 28, 2020, and then it increased to $185. Employee expended an additional $3.80 in costs, 7.33 paralegal hours at a cost of $1,196.33 and 7.39 hours of attorney's hours at a cost of $3,318.75 through September 30, 2020. (Affidavit of Fees and Costs, April 15, 2021).

78) On April 20, 2021, Employee testified at hearing he cannot walk more than 20 steps and has frequently fallen in the community. Employer provided an upright walker but it is not good with rocks and cracks and it collapses; he does not trust it because it collapsed and he fell and bruised his head. He wants to be able to have more quality of life by being able to go fishing or walking at the beach with his family, go shopping, use sidewalks and be out in the community. Employee owns a truck and can drive to the store but not all stores have mobility scooters. He started smoking in 1972; he had a heart attack and has diabetes. Employee believes he needs a scooter with a water proof motor, all-wheel drive and heavy duty wheels because of the environment in Ketchikan. He also needs to be able to take his walker. Employee included a tow package on the All-Terrain Hopper to pull a trailer carrying groceries and other purchased items. He researched scooters and found the All-Terrain Hopper. Employee is willing to try a scooter compatible with the environment in Ketchikan. Employee would store the mobility scooter in his basement. (Employee).

79) On April 20, 2021, Carrie Kay testified at hearing she took over Employee's case in April 2019. She was not aware of the terrain around Employee's house when the Afiscooter-C4 was

provided to Employee. Ms. Kay had to search to find a vendor willing to ship a scooter to Alaska. Employee told her the Afiscooter-C4 was not safe because there were fairly steep hills and uneven terrain around his house. She said it cost more to return the Afiscooter-C4 than to purchase and ship it. In March 2020, Employee provided information on the All-Terrain Hopper. Ms. Kay came up with the Afiscooter-S4 because the specs said it could handle 20 percent grade and it had a sealed motor to address rain concerns. (Ms. Kay).

80) On April 20, 2021, Lee Wheatley from Afiscooter testified at hearing the Afiscooter-S4 is made for outdoor use. It has a 1,400 watt motor and its batteries may be upgraded to 100 amp hours, which normally provides 28-38 miles range depending on the terrain and how it is driven. The Afiscooter-S4 performs well in wet environments and can be stored outside under a cover. Mr. Wheatley has personally driven the Afiscooter-S4 on a 21 degree slope and on beaches in Florida. The Afiscooter-S4 has attachments for a cane or walker holder. The All-Terrain Hopper is essentially an ATV and he does not consider it a medical grade mobility device. (Mr. Wheatley).

81) On April 21, 2021, Employer opposed Employee's attorney's fee affidavit. It contended $425 was a reasonable fee based upon *Rusch v. S.E.A.R.H.C.*, AWCB Decision No 16-0131 (December 21, 2016) which noted the highest award for fees at that time was $400 per hour. (Opposition to Employee Attorney's Fee Affidavit, April 21, 2021).

82) Employee's attorney was awarded attorney's fees at an hourly rate of $450 in *Olson v. Tyee Airlines, Inc.*, AWCB Decision No. 18-0045 (May 15, 2018).

83) It required a high degree of legal skill for Employee's attorney to represent Employee. (Experience, judgment and observations).

PRINCIPLES OF LAW

The board may base its decisions on not only direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

> **AS 23.30.010 Coverage.** Compensation is payable under this chapter in respect of disability or death of an employee.

At the time of Employee's work injury, decisional law interpreted AS 23.30.010 to require payment of benefits when employment was "a substantial factor" in causing the disability or need for medical treatment. *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590 (Alaska 1979). Employment is "a substantial factor" in bringing about the disability or need for medical care where "but for" the work injury, a claimant would not have suffered disability at the time he did, in the way he did, or to the degree he did, and reasonable people would regard it as the cause and attach responsibility to it. *Rogers & Babler* at 532-33.

> **AS 23.30.095 Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. 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.

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*. The "process of recovery" language includes awards of medical benefits for purely palliative care where it is established such care promotes the employee's recovery from individual attacks caused by a chronic condition. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 666 (Alaska 1991).

In *Hodges v. Alaska Constructors, Inc*. 957 P.2d 957 (Alaska 1998), the Court held the employee's purchase and installation of an elegantly landscaped, gazebo-covered, outdoor hot tub which cost $15,000 and a king sized therapeutic bed which cost $2,950 inappropriate based on evidence that alternatives meeting the employee's medical needs were less expensive, costing $4,500 and $2,000 respectively. In *Bryce Warnke- Green v. Pro West Contractors, LLC*, AWCAC Decision No. 235 (June 26, 2017), the Alaska Workers' Compensation Appeals Commission held any increased cost associated with the purchase of a modifiable motor vehicle and any necessary modifications are encompassed in "apparatus" under AS 23.30.095(a) and are compensable medical benefits.

It has been a well-established rule in workers' compensation that a preexisting disease or infirmity does not disqualify a claim if employment aggravated, accelerated, or combined with disease or infirmity to produce death or disability. *Thornton v. Alaska Workers' Compensation Board*, 411 P.2d 209 (Alaska 1966); *Saling* at 596.

In *DeYonge v. NANA/Marriott*, 1 P.3d 90 (Alaska 2000), the Alaska Supreme Court reiterated that preexisting conditions do not disqualify a claim under the work-connection requirement if the employment injury aggravated, accelerated or combined with the preexisting infirmity to produce the disability for which compensation is sought. The court stated so long as the work injury worsened the injured person's symptoms, the increased symptoms constitute an aggravation, "even when the job does not actually worsen the underlying condition." *Id*. at 96.

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

Benefits sought by an injured worker are presumed compensable. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Id*. To attach the presumption of compensability, an employee must establish "some preliminary link" between the disability and employment, or between a work-related injury and the existence of the disability; the claimant need only present "some evidence that the claim arose out of, or in the course of, employment before the presumption arises." *Burgess Constr. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). The evidence necessary to raise the presumption of compensability varies. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Smallwood* at 316. In less complex cases, lay evidence may be sufficiently probative to establish the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Credibility is not weighed at this stage of the analysis. *Id*. at 869-70 (Alaska 1985).

Once the preliminary link is established, the employer has the burden to overcome the raised presumption by producing substantial evidence the injury is not work-related. *Smallwood* at 316. "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). To rebut the presumption, the employer's evidence must either:

> (1) Provide an alternative explanation that, if accepted, would exclude work related factors as a substantial cause of the disability; or
>
> (2) Directly eliminate any reasonable possibility that employment was a factor in causing the disability. *Grainger v. Alaska Workers' Comp. Bd.*, 805 P.2d 976, 977 (Alaska 1991).

The presumption of compensability may be rebutted by presenting a qualified expert who testifies that, in his or her opinion, the claimant's work was probably not a substantial cause of the disability." *Big K Grocery v. Gibson*, 836 P.2d 941, 942 (Alaska 1992). At this second step of the analysis, the employer's evidence is viewed in isolation, without regard to any evidence presented by the claimant. 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. *Wolfer* at 871.

If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his claim by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379 (Alaska 1991). 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). At this last step of the analysis, evidence is weighed, inferences are drawn from the evidence and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685, 691 (Alaska 2000).

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

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

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

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the

contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id*. at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id*. at 973, 975. Fees for time spent on minor issues will not be reduced if the employee prevails on the primary issues at hearing. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 09-0179 (May 11, 2011) at 14-16.

Rusch & Dockter v. SEARHC, 453 P.3d 784, 803 (Alaska 2019), held an award of attorney fees will only be reversed if it is "manifestly unreasonable" -- this differs from the "substantial evidence" test used for review of factual determinations. The Alaska Supreme Court explained "[a] determination of reasonableness requires consideration and application of various factors that may involve factual determinations, but the reasonableness of the final award is not in itself a factual finding." *Id*. It also held the board must consider the following non-exclusive factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining reasonableness of a fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, 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; and
>
> (8) whether the fee is fixed or contingent.

Interest accrues at the statutory rate as provided under AS 45.45.010 from the date a benefit should have been paid. *Land & Marine Rental v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984). Awards of prejudgment interest recognize the time value of money, and they give "a necessary incentive to employers to ... release money due." *Childs v. Copper Valley Elec. Ass'n,* 860 P.2d 1184, 1191 (Alaska 1984). Medical benefits are "compensation" for purposes of awarding prejudgment interest. *Moretz v. O'Neill Investigations,* 783 P.2d 764, 765-66 (Alaska 1989).

ANALYSIS

1) Is Employee entitled to a mobility scooter?

The parties dispute whether the work injury is a substantial factor in Employee's need for a mobility scooter and whether the All-Terrain Hopper is reasonable and necessary for the process of recovery. The presumption of compensability applies to these disputes. AS 23.30.010; AS 23.30.095(a); AS 23.30.120(a)(1); *Meek*; *Saling*; *Carter*; *Hibdon.*

Employee raised the presumption the work injury is a substantial factor in his need for a mobility scooter with Dr. Bursell's June 5, 2019 and January 7, 2020 opinions recommending a mobility scooter due to low back pain caused by the work injury limited Employee's ambulation and that he would benefit from being in the community. *Smallwood*; *Wolfer*.

Employer rebutted the presumption with Dr. Kirkham's opinion that age, genetics, obesity, smoking, general poor health, deconditioning and psychosocial factors were substantial factors in Employee's need for a mobility scooter and the work injury was an inconsequential factor. *Smallwood*; *Tolbert*; *Grainger*; *Gibson*; *Wolfer*.

The burden of proof shifts back to Employee who must prove his claim by a preponderance of the evidence. *Saxton.* Dr. Kirkham emphasized Employee's subjective pain complaints were out of proportion to the objective findings in the imaging and examination records although he noted Employee's pain complaints were consistent. He concluded work was not a substantial factor in Employee's need for a mobility scooter because there were no objective findings supporting his subjective pain complaints. Dr. Bursell opined the work injury was a substantial factor in

Employee's need for a mobility scooter but acknowledged at deposition he did not review Employee's entire medical record. However, Dr. Bursell has been treating Employee's work injury over 20 years and he attributed the cause of Employee's low back pain to the work injury since March 9, 2001, and the cause of Employee's need a mobility scooter to low back pain caused by the work injury. He recognized Employee's age, genetics, obesity, smoking, general poor heath, deconditioning and psychosocial issues are factors in his need for a mobility scooter but opined it was difficult to separate those factors from the work injury because the work injury increased his pain symptoms, his pain symptoms limited his physical activities and the decrease in physical activities increased his deconditioning and depression. Furthermore, Dr. Bald's August 2, 2009 and June 17, 2011 EME reports agreed with Dr. Bursell's assessment that the work injury and the non-work related factors, degenerative disc disease, heart disease, weight and smoking, were all substantial factors in his lower back pain and need for treatment.

Increases in subjective pain symptoms may constitute an aggravation of or combination with a preexisting condition. *Thornton*; *Saling*; *DeYonge*. Employee had preexisting degenerative disc disease, smoked and was overweight and deconditioned before he was injured at work but he was able to work. The work injury increased his low back pain which limited his ability to hike, fish, complete family activities and work. Employee's low back symptoms worsened over time and his ability to ambulate decreased. The medical records on September 29, 2000, February 24, 2006, April 27, 2006, September 28, 2006, March 23, 2007, April 14, 2014 and January 16, 2018, demonstrate when Employee's low back pain worsened his physical activities decreased. He became depressed due to chronic low back pain because he was unable to participate in his usual avocational and vocational activities. Employee's work injury worsened his preexisting degenerative disc disease and worsened his low back pain symptoms. *DeYonge*; *Rogers & Babler*.

Dr. Kirkham's opinion will be given less weight because he attached low significance to Employee's pain symptoms even though his pain complaints were consistent and worsened due to the work injury. AS 23.30.122; *Smith*; *Moore*. His opinion relies on studies that do not directly eliminate any reasonable possibility that Employee's work injury was a substantial factor in his need for a mobility scooter. The first study he cited found insufficient scientific evidence to prove any occupational or ergonomic risk factor is a medical cause of adult low back pain. The cited

study did not expressly state work could not cause Employee's low back pain. The second study found "psychiatric comorbidity" was the best predictor for chronic, disabling low back pain. The medical records demonstrates the pain and physical limitations caused by the work injury negatively affected Employee's psychiatric health. Therefore, Dr. Kirkham's opinion will be given less weight. AS 23.30.122; *Smith*; *Moore*.

Based upon Dr. Bursell's opinion, the work injury is a substantial factor in Employee's need for a mobility scooter as but for the work injury, he would not need mobility assistance and reasonable people would regard it as the cause and attach responsibility. *Saling*; *Rogers & Babler*. The preponderance of the evidence is that the work injury is a substantial factor in his need for a mobility scooter. *Koons*; *Saxton*; *Steffey*. The facts and above analysis also support the finding that a mobility scooter is "necessary."

The next issue is which mobility scooter is "reasonable." Employee raised the presumption the All-Terrain Hopper is necessary and reasonable for the process of recovery with his testimony he is not able to walk more than 20 feet without stopping due to low back pain, Dr. Bursell's June 25, 2020 opinion it would provide good mobility, Ms. Comstock's opinion regarding the Afiscooter-C4 and the videos which prove the Afiscooter-C4 was not able to handle steep and uneven terrain. *Smallwood*; *Wolfer*.

Employer rebutted the presumption the All-Terrain Hopper is reasonable and necessary with Mr.Wheatley's testimony a less expensive alternative, the Afiscooter-S4, would be able to handle the uneven and steep terrain and inclement weather in Ketchikan, Alaska. *Smallwood*; *Tolbert*; *Grainger*; *Gibson*; *Wolfer*; *Hodges*; *Warnke-Green*.

Dr. Kirkham and Ms. Comstock agreed the Afiscooter-S4 would meet Employee's mobility needs. Mr. Wheatley credibly testified the Afiscooter-S4 would be able to handle uneven terrain, steep slopes and inclement weather. The Afiscooter-S4 is significantly less expensive than the All-Terrain Hopper -- $4,507 versus $28,360; the Afiscooter-S4 is reasonable because it is adequate to meet Employee's needs at a much lower cost. Employee is entitled to the Afiscooter-S4 and Employer will be ordered to provide it.

2) Is Employee entitled to interest?

Employee seeks interest on costs for the mobility scooter. Interest is paid to compensate for the time value of benefits that were not paid when due and benefits accrue interest from the date they should have been paid. *Moretz*; *Rawls*. Employee was prescribed a mobility scooter on June 5, 2019 and Employer provided the Afiscooter-C4. By July 24, 2020, Ms. Comstock determined the Afiscooter-C4 was not reasonable for Employee's needs and recommended the Afiscooter-S4. Employee was deprived of the mobility scooter prescribed on July 24, 2020, as he could not pay for it out of pocket and Employer benefitted from the use of the money it would have paid for it. *Childs*. Employee was awarded a mobility scooter. Therefore, Employee is entitled to interest on the cost of the mobility scooter Employer failed to provide from July 24, 2020 to the present.

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

Employee seeks actual attorney fees but does not specify whether he is seeking them under AS 23.30.145(a) or (b). On June 15, 2020, Employer first denied the All-Terrain Hopper because it contended it was not reasonable or necessary. However, in the September 30, 2020 controversion notice it contended the work injury was not a substantial factor in Employee's need for a mobility scooter based upon Dr. Kirkham's EME report. Employee successfully litigated his claim because he prevailed on whether the work injury was a substantial factor in his need for a mobility scooter; and he was found entitled to the Afiscooter-S4. Therefore, Employee is entitled to reasonable fees and costs under AS 23.30.145(a) as this was a controverted claim.

Employer contended Employee should not be awarded attorney's fees, paralegal fees or costs for time spent pursing the claim prior to September 30, 2020, when it contended the work injury was not a substantial factor in Employee's need for a mobility scooter. The primary issue was whether the work injury was a substantial factor in his need for a mobility scooter. During the time spent before September 30, 2020, Employee filed the claim set for hearing and obtained evidence supporting it, which supported Employee's success on the primary issue. Additionally, fees for time spent on a minor issue will not be reduced. *Porteleki*. Employee's attorney's fees, paralegal

fees and costs will not be reduced for time spent on the claim prior to Employer's September 30, 2020 controversion notice.

Employer objected to the hourly attorney fee rate, contending Employee's attorney should be awarded an hourly rate of $425 and not the $450 and $500 listed on the fee affidavit. *Rusch* requires examination of the factors in Alaska Rule of Professional Conduct 1.5(a) 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 claim was factually complicated, his brief was well supported by the law and evidence and was helpful. It required a high degree of legal skill to represent Employee. *Rogers & Babler*.

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

Employee's attorney did not state the work for Employee precluded him from other employment, but the time he spent representing Employee could not be spent representing another client. *Rogers & Babler*.

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

Employer cited to *Rusch v. S.E.A.R.H.C.*, AWCB Decision No 16-0131 (December 21, 2016) to contend Employee's attorney was entitled to an hourly fee of $425. However, Employee was awarded attorney's fees at an hourly rate of $450 almost three years ago in *Olson v. Tyee Airlines, Inc.*, AWCB Decision No. 18-0045 (May 15, 2018). Employee's attorney's fee increased but no explanation was provided.

> 4. The amount involved and the results obtained:

Employee's work injury was found to be a substantial factor in his need for a mobility scooter and he was found entitled to the Afiscooter-S4. This is of great benefit to Employee for the reasons discussed in the above analysis. *Rogers & Babler*.

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

Employee's attorney did not identify any time limitation imposed by the client or the circumstances in his affidavit.

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

Employee's attorney represented him since June 12, 2000. This factor could favor either an increased fee or a decreased fee, depending on the fact of a particular case. Neither party explained how the length of the professional relationship would affect the fee.

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

Employee's attorney is experienced, has represented injured employees in workers' compensation cases for years and has a good reputation as an attorney. *Rogers & Babler*.

8. Whether the fee is fixed or contingent:

Nearly all fees for employee attorneys in workers' compensation are contingent. The contingent nature of the work is considered in determining an appropriate hourly rate. *Bignell*. After consideration of all of the required factors, $450 per hour remains a reasonable and fully compensatory hourly attorney's fee rate. Therefore, Employee's request for attorney fees will be granted and Employer will be ordered to pay $15,828 in attorney fees (33.96 hours x $450 / hour = $15,828).

Employer also objected to the hourly paralegal fee increase from $165 to $185. Employee provided no explanation for the increase in paralegal hourly fees. Employer agreed $165 per hour is a reasonable hourly paralegal fee rate. Therefore, Employee's request for a paralegal fees will be granted and Employer will be ordered to pay $5,263.50 in paralegal fees (31.90 hours x $165 per hour = $5,263.50).

CONCLUSIONS OF LAW

1) Employee is entitled to a mobility scooter.

2) Employee is entitled to interest.

3) Employee is entitled to attorney's fees and costs.

ORDER

1) Employee's April 20, 2020 claim is granted.

2) Employer is ordered to provide Employee the Afiscooter-S4.

3) Employer is ordered to pay interest on the Afiscooter-S4.

4) Employer is ordered to pay $15,828 in attorney's fees, $5,263.50 in paralegal costs and $1,832.62 in other costs.

Dated in Juneau, Alaska on May 21, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

Unavailable for signature
Christine Gilbert, Member

/s/
Bradley Austin, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the

reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of LONNIE S BENNETT, employee / claimant v. KETCHIKAN PULP COMPANY, employer; NATIONAL UNION FIRE INS CO OF PITTSBURGH, insurer / defendants; Case No. 199828479; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified US Mail on May 21, 2021.

/s/_____
Krystal Gray, Workers' Compensation Tech