

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

SARAH WINTER,)	
)	
Employee,)	
Claimant,)	
)	FINAL DECISION AND ORDER
v.)	
)	AWCB Case No. 201906774
UNITED PARCEL SERVICE, INC.,)	
)	AWCB Decision No. 21-0076
Employer,)	
and)	Filed with AWCB Anchorage, Alaska
)	On August 13, 2021.
LIBERTY MUTUAL INSURANCE)	
CORPORATION,)	
)	
Insurer,)	
Defendants.)	

Employee Sarah Winter's January 23, 2020 workers compensation claim was heard in Anchorage, Alaska, on June 16, 2021, a date selected on May 25, 2021. Employee's February 17, 2021 hearing request gave rise to this hearing. Attorney Tasha Porcello appeared and represented Employee. Attorney Aaron Sandone appeared and represented United Parcel Service, Inc. (UPS), and Liberty Mutual Insurance Corporation (Employer). Employee appeared and testified. Witnesses included Ralph Purcell, M.D., who appeared and testified for Employer. The record was held open for Employee's supplemental affidavit of attorney fees and costs, as well as Employer's response. The record closed on June 21, 2021.

ISSUES

Employee contends her work for Employer was the substantial cause of her left hip disability and need for medical treatment and her claim for benefits related to her left hip are compensable

under the Alaska Workers' Compensation Act (Act). She contends she is entitled to medical and related benefits, past temporary total disability (TTD), permanent partial impairment (PPI), reimbursement to her health insurance, interest and attorney fees and costs.

Employer contends Employee's disability and need for medical treatment after November 17, 2019 are due to a pre-existing degenerative condition rendered symptomatic by her age and degenerative pathology, not her work injury and she is not entitled to any additional benefits.

1) Is work the substantial cause of Employee's left hip disability and need for medical treatment?

Employee contends she is entitled to medical and related benefits, including payment of her health insurer's lien, reimbursement for out-of-pocket expenses, and interest?

Employer contends as the cause of Employee's left hip disability and need for medical treatment after November 17, 2019 are not related to her work injury, she is not entitled to any of the requested benefits.

2) Is Employee entitled to medical and related benefits?

Employee contends she was unable to return to her job of injury until June 17, 2020. Although she was released to first sedentary work, then light duty, with crutches, Employer did not offer her any light duty work after June 26, 2019.

Employer contends any entitlement to indemnity benefits after November 17, 2019 is not related to her work injury.

3) Is Employee entitled to TTD benefits?

Employee contends she is entitled to PPI benefits based on the two percent whole person PPI rating performed on April 1, 2020.

Employer contends Employee's work injury is not the cause of any PPI rating Employee may have

4) Is Employee entitled to PPI benefits?

Employee contends she is entitled to actual attorney fees and costs itemized on her attorney Tasha Porcello's attorney fee affidavit and supplemental attorney fee affidavit.

Employer contends Employee is not entitled to any additional benefits, including attorney fees and costs. Employer did not file an objection to Employee's attorney fees and costs affidavits.

5) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On May 21, 2019, while delivering packages as a UPS driver, Employee injured her left hip while running from dogs. (First report of injury, May 24, 2019.)

2) On May 21, 2019, physician assistant (PA) Shane Udelhoven at Urgent Care of Soldotna evaluated Employee less than an hour after her injury. PA Udelhoven noted Employee's history of injuring her left hip when running as hard as she could from two large dogs after she had delivered a package. Employee complained of anterior, posterior, medial and lateral, deep left hip pain at ten over ten on a 0-10 pain scale. Physical examination of the left hip revealed tenderness of the iliac crest, the sacroiliac joint, and the greater trochanter, as well as tenderness of the hip flexor muscles and limited active range of motion. Left hip X-rays were normal, with no fracture or dislocation. Employee was advised to avoid aggravating activities and to use crutches, and prescribed pain medication. PA Udelhoven ordered left hip magnetic resonance imaging (MRI) and released Employee to light duty with the requirement she use crutches. (Clinic note and MRI order, May 21, 2021.)

3) On May 22, 2019, Employee underwent a left hip MRI, which showed a focal left hip superior anterior labral tear, mild left hip joint osteoarthritis, with no fracture or dislocation and no evidence of avascular necrosis; and tendinosis and low-grade partial-thickness tear involving the left distal gluteus medius and minimus tendons.

4) On June 4, 2019, Employee continued to report left hip pain, which had been continuous since her work injury. She was restricted to light duty at work and was using crutches. Nurse practitioner (NP) Jeffrey Lanfear referred Employee to orthopedic surgeon Douglas Prevost,

M.D., for labral tear management. Employee was advised to maintain use of crutches and restricted to light duty at work. (Lanfear clinic note, June 4, 2021.)

5) On June 20, 2019, Dr. Prevost noted Employee had had problems with left hip stiffness and pain since the May 21, 2019 work injury, when she developed left hip pain after running as fast as she could from two dogs. Employee denied any hip pain prior to May 21, 2019. Her pain was worse when she stood after sitting for an extended period, such as driving, and it was easier for her to get out of the driver's side of the car than the passenger side. The pain was alleviated when lying on her back. She has had difficulty sleeping at night due to the pain, and she was unable to sleep on her left side. She had been using crutches since May 21, 2019. She had not been able to return to work as a UPS driver since the injury occurred. Employee had an antalgic type gait favoring her left hip. On physical examination, the right hip revealed good, painless range of motion. The left hip revealed pain with forward flexion, external rotation, and abduction. The pain was located primarily in the groin and she rated it as 3-4/10. Dr. Prevost reviewed the May 21, 2019 pelvis and left hip x-rays. He diagnosed left hip femoroacetabular impingement secondary to cam and pincer impingement, left hip labral tear, and early degenerative joint disease, left hip. Dr. Prevost prescribed physical therapy, scheduled a left hip steroid injection and discussed hip arthroscopy. Employee was to follow up in six weeks. (Clinic note, June 20, 2019.)

6) On June 20, 2019, Employee underwent fluoroscopically-guided left hip intraarticular corticosteroid injection. (Jared Kirkham, M.D., procedure report, June 20, 2019.)

7) On June 24, 2019, Employee began physical therapy on referral from Dr. Prevost. Physical therapist Nathaniel Trok noted she had symptoms consistent with imaging findings, including labral pathology due to groin pain and also signs of labral impingement. There was significant weakness in the gluteal musculature leading to decreased stability and capsular tension with joint mobility assessment. PT Trok anticipated Employee would progress slowly due to the partial tearing to the gluteal musculature to prevent further injury. Employee would benefit from skilled therapy to allow for return to occupational and recreational activity without limitations due to pain. The plan was to progress Employee with gluteal strengthening exercise and a hip mobility program to aide in reducing pain and compressive forces. Initially she was to have two physical therapy sessions per week for six weeks. (PT clinic note, June 24, 2019.)

8) On July 16, 2019, Employee's reported her left hip pain was 0/10, but was really hurting the day before due to sleeping in a recreational vehicle (RV). Her right hip was hurting more that day, rated at 2/10. (PT clinic note, July 16, 2019.)

9) On July 23, 2019, Employee reported having a good day, with no complaints of left hip pain. She stated she did have left hip soreness 26 percent to 50 percent of the time. She was assessed as having good potential to achieve her treatment goals. (PT clinic note, July 23, 2019.)

10) On July 25, 2019, Employee reported her pain level had decreased since her last visit, with reduced discomfort with ambulation and when aiding with fish processing. She was assessed as nearing her established goals. (PT clinic note, July 25, 2019.)

11) On August 1, 2019, Employee followed up with Dr. Prevost's physician assistant Brian Harker. She had received a left hip steroid injection on June 20, 2019, which resulted in a 75 percent improvement in her pain, although this relief was not long-lasting. Employee reported it took quite a while for her to receive any relief from her June 20, 2019 left hip steroid injection. However, she felt her left hip was somewhat better and she was no longer using crutches. She felt she could not return to work as she could not tolerate driving and lifting. Exam of the left hip revealed free and easy range of motion without significant impingement signs. The work-related left hip injury with MRI evidence of femoroacetabular impingement and superior labral tear were judged to be responding to conservative treatment. (PA Harker clinic note, August 1, 2019.)

12) On August 1, 2019, Employee also followed up with Dr. Prevost and left hip arthroscopy was again discussed. Non-operative treatment options for femoroacetabular impingement and a labral tear were again discussed, including intermittent use of anti-inflammatory medications and narcotic pain medication, activity restrictions, use of external support, weight reduction, avoidance of problematic activities, and physical therapy. Employee also complained of right hip pain, and an examination revealed a positive impingement sign. A right hip steroid injection was planned to assess for pain relief. Employee was to follow up in six weeks. (Dr. Prevost clinic note, August 1, 2019.)

13) On August 1, 2019, Dr. Prevost released Employee to light duty work as of August 12, 2019, with no lifting over 10 pounds and no repetitive lifting over five pounds. (Work release, August 1, 2019.)

14) August 8, 2019 through September 3, 2019, Employee continued her physical therapy. She was increasing walking and home activities to aid in returning to work. By the August 15, 2019 physical therapy session, she reported bilateral hip soreness, right hip greater than left hip, after lifting boxes and taking a long walk as part of her home exercise program. By the September 3, 2019 session, she also reported increased bilateral hip pain, with the left hip pain rated at 3/10 and the right hip 6/10. (PT clinic notes, August 8, 2019 through September 3, 2019.)

15) On September 5, 2019, Employee's physical therapy was discontinued due to lack of progression. She had shown no significant improvement in activity tolerance, strength or range of motion over the last treatment period and had seen minimal improvement with tolerance to work related activities such as driving, extended ambulation and lifting. She wanted to look into other interventions and had an appointment with Dr. Prevost to discuss her options. (Physical therapy clinic note, September 5, 2019.)

16) On September 10, 2019, Employee again stated she had a 75 percent improvement in her left hip pain after the June 20, 2019 steroid injection, but the relief was not long lasting. On physical examination her left hip revealed left groin tenderness on forward flexion, internal and external rotation, abduction, and adduction. There was a positive impingement sign. She had tried a 12 week course of physical therapy. She had not worked at her job of injury since May 21, 2019. She was still hesitant to pursue surgery, but was starting to lean in that direction. Dr. Prevost continued to restrict her to light duty office work until November 1, 2019. (Clinic note, September 10, 2019.)

17) On October 8, 2019, orthopedic surgeon Dr. Purcell examined Employee in an employer's medical examination (EME). Dr. Purcell reviewed the medical records and performed a history and physical examination. Employee described left hip pain along the anterior and posterior aspects of both hips as well as burning along the proximal, medial aspect of the left leg in the anterior pain diagram. She rated the pain as a 9/10. The left hip pain was constant whereas the right hip pain was compensatory and constant over the prior two months. Left hip range of motion was within the normal range, although right hip external rotation was limited to 45 degrees, 60 degrees being normal. External and internal left hip rotation elicited subjective anterolateral left hip pain complaints. Right hip internal rotation and external rotation elicited subjective anterolateral groin pain complaints. Dr. Purcell's impressions were:

1. Resolved strain of left hip musculature.

2. Mild left hip arthritis, as of May 22, 2019.
3. Moderate tendinosis and low-grade partial-thickness tear, left distal gluteus, medius and minimis tendons at their insertion on the greater trochanter, as of May 22, 2019.
4. Questionable superior, anterior left hip labral tear, as of May 22, 2019.
5. Left hip femoroacetabular impingement of both the CAM and pincer variety.
6. Mild CAM femoroacetabular impingement, right hip, as of May 22, 2019.
7. Bilateral coxa profunda deformities at the level of the hips.
8. Minimal arthritis right hip, as of May 2019.
9. Degenerative disease lumbar spine.

He opined the left hip musculature strain was secondary to the May 21, 2019 work injury, but the work injury caused no other orthopedic diagnoses. If there was a labral tear, which he opined was not certain from the MRI of the left hip, it was caused by the femoroacetabular impingement, not the work injury. He said there was no reasonable mechanism associated with the alleged work place incident to create a labral tear in a hip joint. There was no evidence the tear in the gluteus musculature was related to the workplace injury either. Dr. Purcell found no objective evidence surgical intervention is needed, nor for which work is the substantial cause. The only pathology secondary to the work injury was a temporary, soft tissue injury, a left hip muscle strain. The remaining left hip pathology is degenerative, not posttraumatic. Dr. Purcell said the work injury is not a cause, let alone the substantial cause, of Employee's current condition, need for medical treatment, or an aggravation of a pre-existing condition. Any ongoing need for medical treatment is secondary to degeneration and degenerative pathology rather than the work injury. The medical treatment received for the first six weeks after the accident was a medically reasonable options. Dr. Purcell found Employee reached medical stability and had no permanent partial impairment related to the work injury. (EME report, October 8, 2019).

18) On October 30, 2019, Dr. Purcell clarified his October 8, 2019 opinions. He said Employee's mild left hip arthritis was a pre-existing condition, as were the tendinosis and low-grade partial thickness tear of the left distal gluteus medius and minimus tendons. (EME addendum, October 30, 2019).

19) On November 25, 2019, Employer controverted all benefits after October 30, 2019, based on Dr. Purcell's October 8, 2019 EME report and October 30, 2019 addendum.. (Controversion, November 25, 2019).

20) On November 14, 2019, Dr. Prevost reviewed Employee's explanation of the May 21, 2019 work injury, that is, she was working for UPS on May 21, 2019, when she was chased by two dogs. As soon as she starting running, she felt pain in her left hip and has had problems ever since. She denied any pivoting or twisting activities or any falls, but noted an onset of pain when she initiated running. She had not had any problems related to her hip prior to the work injury. Her subsequent work-up revealed evidence for a labral tear along with femoral acetabular impingement secondary to cam and pincer impingement. There were no records of left hip problems prior to May 21, 2019. Employee's radiographs showed evidence for deep hip sockets and non-spherical femoral heads on both the left and right sides, which do increase the risk for hip impingement and labral pathology. However, as her left hip symptoms only began on the date of injury, Dr. Prevost stated it was his opinion a substantial cause for her ongoing left hip symptoms and need for treatment is directly related to the May 21, 2019 work injury. (Prevost clinic note, November 14, 2019).

21) On January 2, 2020, Dr. Prevost ordered post-surgery physical therapy for two to three times a week for twelve total visits. (PT order, January 2, 2020.)

22) On January 2, 2020, Employee was restricted from any work for two weeks following the left hip arthroscopy scheduled for January 6, 2020. Depending on her recovery rate, she would be released to sedentary work on January 20, 2020. (PA Zachary Hartmann, clinic note, January 2, 2020.)

23) On January 6, 2020, Dr. Prevost performed surgery on Employee's left hip. The indication for the surgery was the left hip pain Employee had suffered since her May 21, 2019 work injury. Due to the persistence of her pain and its chronic debilitating nature, despite extensive nonsurgical treatment, surgery was indicated. There was a large labral tear extending from the 9 o'clock position to the 2 o'clock position, and the labrum was not well anchored to the acetabular rim, as well as chondromalacia along the acetabular rim from the 9 o'clock to the 2 o'clock position. There was both CAM and pincer impingement, which Dr. Prevost corrected through osteochondroplasty of the femoral head and neck as well as acetabular rim osteoplasty. The labrum was then also repaired down to the acetabular rim. The chondral labral junction, the

stability of the labrum, and the seal of the hip were all restored. (Operative report, January 6, 2020.)

24) On January 13, 2020, Employee began her post-surgery physical therapy and was also prescribed a home exercise program. She participated in in-person physical therapy twice a week from January 13, 2020 to February 12, 2020. (Advanced Physical Therapy clinic notes, January 13, 2020 through February 12, 2020.)

25) On February 12, 2020, Dr. Prevost prescribed physical therapy for Employee's left hip for once a week for six weeks. (Prevost physical therapy order, February 12, 2020.)

26) From February 25, 2020 through March 2, 2020 Employee continued to participate in physical therapy about once per week. (Physical therapy clinic notes, February 25, 2020 through March 5, 2020.)

27) On February 18, 2020, Employee followed up with Dr. Prevost after her January 6, 2020 left hip surgery. Her gait was nonantalgic. Her hip range of motion was good without significant pain. Employee needed to work aggressively to regain range of motion and function. She was expected to reach maximum medical improvement in approximately six weeks. (Clinic note, February 18, 2021.)

28) On February 18, 2020, Dr. Prevost released Employee to light duty office work as of February 24, 2020 through March 31, 2020. She was released to full duty as of April 1, 2020. (Work release, February 18, 2020.)

29) On April 1, 2020, orthopedic surgeon Larry Levine, M.D., on referral from Dr. Prevost, performed Employee's permanent partial impairment (PPI) rating via telemedicine due to the pandemic. Dr. Levine did not include any left hip degenerative changes in his PPI rating. Since the PPI rating was performed via telemedicine, and there was no opportunity to perform a physical exam, range of motion (ROM), atrophy and strength were not evaluated. Dr. Levine rated Employee as having a four percent left lower extremity impairment, which converts to a two percent whole person impairment. (Dr. Levine PPI rating, April 1, 2020.)

30) On April 8, 2020, Dr. Prevost released Employee to light duty office work starting April 13, 2020. (Work release, April 8, 2020.)

31) On June 4, 2020, Dr. Prevost saw Employee for her six month status post left hip arthroscopy evaluation. Employee reported being 75 percent better. She reported her left hip pain as being at

most 3/10 and at best 1/10 and she did not limp. She was sleeping well at night. (Clinic note, June 4, 2020.)

32) On June 4, 2020, Dr. Prevost released Employee to full duty as of June 17, 2020. (Work release, June 4, 2020.)

33) On September 15, 2020, Dr. Purcell reviewed Employee's medical records dated from November 13, 2019 through June 4, 2020. Dr. Purcell again opined the most likely etiology of Employee's symptoms, disability and/or need for treatment for her left hip was the pre-existing, degenerative pathology of the CAM and pincer impingement at the left hip, coupled with the bilateral coxa profunda femoral head deformities. He stated the information available at this time does not separate out a macerated labral tear associated with chronic impingement from a tear consistent with trauma or the long standing femoroacetabular impingement. Although it is possible the labral tear was traumatic in nature, there is no reasonable or appropriate mechanism for it to have occurred secondary to the referenced workplace incident, as there was no pivoting or sudden change of direction while Employee was running. Dr. Purcell's impression was that despite all the pre-existing pathology, the work injury was not the likely cause of any aggravation, acceleration or combination with the pre-existing conditions such that the result would be disability and need of treatment. He did not believe there was a temporary or permanent change in the pre-existing condition of the left hip as a consequence of the work injury. Dr. Purcell maintained the degenerative pathology in the left hip joint was the substantial cause of the symptoms, disability and/or need for treatment relative to her left hip. (Purcell EME addendum report, September 15, 2020.)

34) Dr. Purcell agreed with Dr. Prevost regarding his assessment of Employee's ability to return to work, but beyond the first six weeks, Dr. Purcell felt Employee's inability to return to the job at the time of injury was not due to the work injury. (*Id.*)

35) Putting aside causation, Dr. Purcell agreed with Dr. Levine's April 1, 2020 assessment of a two percent whole person PPI for Employee's left hip, although a telephonic PPI rating was not ideal and he had no records indicating her current functional status. Dr. Purcell opined Employee may not have reached maximal medical improvement by the date the PPI rating was assessed. (*Id.*)

36) Dr. Purcell requested Dr. Prevost's January 6, 2020 operative report as well as an opportunity to review the medical records from her primary physician, as this would be the only way to be

sure there were no pre-existing complaints or findings on examination referable to the left hip. He also requested a telemedicine evaluation of Employee. (*Id.*)

37) On October 21, 2020, Dr. Purcell reviewed Employee's medical records, and performed a telemedicine history and physical examination. Employee reported no current symptoms in her left hip, which now felt the way it did before the May 21, 2019 work injury. She had undergone left hip surgery on January 6, 2020, and participated in physical therapy twice a week for four weeks, then a home exercise program after the pandemic struck. She had returned to work on June 16, 2020. On physical examination there was normal range of motion of both hips, and no pain, clicking or locking in either hip. Dr. Purcell's diagnoses were: (1) status post left hip musculature strain; (2) mild left hip arthritis; (3) moderate tendinosis and low-grade partial-thickness tear of the left distal gluteus medius and minimus tendons at their insertions on the greater trochanter; (4) status post left hip labral tear; (5) left hip femoroacetabular impingement of both the CAM and pincer varieties, noted on x-rays date May 21, 2019; (6) mild right hip cam femoroacetabular impingement, noted on May 21, 2019 right hip x-rays of the right hip; (7) bilateral coxa profunda deformities (deep hip sockets) and bilateral non-spherical femoral heads; (8) minimal right hip arthritis; and (9) status post femoroacetabular de-impingement surgery. Dr. Purcell opined work was the substantial cause of only the left hip muscle strain. All other orthopedic diagnoses were degenerative in nature and not caused by the May 21, 2019 work injury. Therefore, although the January 6, 2020 surgery was reasonable and necessary, in Dr. Purcell's opinion, it had no relationship to the May 21, 2019 work injury. Employee had reached medical stability six weeks after the May 21, 2019 work injury, if not before, and had no PPI. Even if one accepted the labral tear and femoroacetabular pathology and surgery as work related, Employee had made a full recovery and had had a full return of function, and therefore had no PPI. Dr. Purcell agreed with Dr. Prevost concerning the date Employee was able to return to work, although he disagreed with the etiology of the disability. (EME report, October 21, 2019.)

38) On June 16, 2021, Employee testified at hearing. She also testified by deposition on February 4, 2021. Employee testified she had worked at UPS for about 16 years at the time of her injury. She was a full-time driver. Her work involved loading packages, including heavy boxes, into her truck, delivering them and picking them up. (Employee deposition and hearing testimony.)

39) Employee had delivered packages previously to the same address where her work injury occurred, and knew there were two large, 150 pound, aggressive mastiff dogs at the home. When she had delivered packages to the same address previously, the dogs' owner had put them in her car because she knew they were aggressive. When Employee delivered packages to this home prior to May 21, 2019, she had seen the dogs lunge at the home's doors when the doors were closed. (*Id.*)

40) On May 21, 2019, Employee parked her truck on the road and walked up to the house along the approximately 1000 foot long driveway. The driveway is not paved, but is dirt and rock. When she went to place the package on the steps, she saw the front door was open. She then put the package down and walked quietly away. All of a sudden she heard the homeowners' dogs barking. She also heard the homeowner screaming at her dogs. Once the dogs starting barking, she bolted out of there down the driveway. (*Id.*)

41) As she was running, she felt a pop in her left hip and immediate pain. She started crying because she did not know what she had done, but did not want to stop because she did not know where the two dogs were. She did not know what would have happened if she had stopped. She was very afraid they would attack her. She did not look at the ground as she ran; she was looking at her truck to see how fast she could get there. She got back to her truck as fast as she could. It was difficult for her to climb three steps on the passenger side to get back into the truck, but knew once she was in her truck she could shut the door and the dogs would not be able to get ahold of her. Once in the truck and before she closed the door, she saw the homeowners' smaller dog, a bull dog sitting there looking at her. She did not put her head out the door to see where the other dogs were, but shut the door and drove to her next stop. She thought perhaps she could just work it off. However, she could barely get to the next house and back to her truck. She was in tears she was in so much pain. (*Id.*)

42) As soon as she got back in her truck she called her supervisor to tell him she could not continue her route and needed to go to the emergency room. Her supervisor directed her to go to Urgent Care, as she would probably be seen sooner. At Urgent Care it was explained to her the May 21, 2019 left hip x-rays showed a labral tear, a pulled groin, and pulled tendons in her buttocks. She was given pain medication and crutches, which she used for four to six weeks. A left hip MRI was ordered for the next day. (*Id.*)

43) Employee then was referred to Dr. Prevost, whom she saw on June 20, 2019. Dr. Prevost told her to stay off the left hip and prescribed physical therapy. She received a left hip steroid injection on June 20, 2019, which reduced the pain in the left hip for a few weeks. (*Id.*)

44) She participated in physical therapy for about 12 weeks after the work injury, but the physical therapy was not working and in fact her right hip started to hurt as it had to compensate for the left, since she was using her right leg more than her left. She had stopped using the crutches when she started physical therapy, so she used her right leg more than her left. When she started physical therapy, other than during her actual physical therapy sessions and her home exercise program, she was not very active. However, towards the end of her physical therapy sessions, she was more active both in physical therapy and at home, with more walking. This was when her left hip started hurting more again. (*Id.*)

45) After physical therapy was discontinued and after discussion with Dr. Prevost, Employee decided to go ahead with surgery for her left hip, as it was the only way to repair the labral tear. The surgery was scheduled for December 4, 2019. On Friday, November 22, 2019, she notified the adjuster she would have to have surgery on her left hip, as it was not getting any better. But the adjuster notified her on November 25, 2019 the surgery was cancelled and all benefits were also denied. (*Id.*)

46) In January 2020, Employee did have left hip surgery, paid for by her health insurance although she had to pay the deductibles and copays. After she recovered from the left hip surgery, she has felt great and has had no pain in her left or right hips since. She returned to her delivery driver job on June 16, 2020. (*Id.*)

47) Although she was released to work light duty, with weight and other movement restrictions, Employer did not have light duty work for her after June 26, 2019. She was finally released to full duty on June 17, 2020. (*Id.*)

48) Prior to the May 21, 2019 work injury she had never had any problems with either of her hips. (Employee's hearing testimony, and February 4, 2021 deposition testimony.)

49) Employee is credible. (Experience, judgment, observations, and inferences from all of the above.)

50) On June 16, 2021, Dr. Purcell testified at hearing concerning his impressions based on his October 8, 2019 in-person evaluation, September 15, 2020 record review, and October 21, 2020 telemedicine evaluation of Employee. His impression is she strained her left hip and her work

injury was nothing more than a soft tissue injury. She had multiple pre-existing congenital and degenerative issues, but she did sustain a muscle tendon strain across her left hip. It was this strain which resulted in the acute pain she described when she was about to reach her truck. (Hearing record.)

51) Her pre-existing conditions were coxa profunda, which is an enlargement of the femoral head, a developmental issue. She also was diagnosed with femoroacetabular impingement of two types. One is a pincer type, which is an overgrowth of the socket of the acetabulum. The other is a CAM deformity, which is an overgrowth of the femoral neck so that it is wider than it should be. Both of these are degenerative in nature. The labrum is made up of rubbery cartilage. This is the tissue that gets caught between the bone spurs in the socket and the bone spurs in the femoral neck, which causes the labral tear. If it were not for the degenerative conditions in her left hip, she would not have had the labral tear. The work injury did not cause, aggravate, or cause to become symptomatic the labral tear. (*Id.*)

52) There are mechanisms which can cause labral tears, normally a twisting motion to the hip, such as a pivot, a fall or a sudden motion. Just running, even on an uneven surface, does not cause labral tears, Employee did not describe a mechanism that could cause a labral tear. (*Id.*)

53) Dr. Purcell opined it is significant the physical therapy records that show Employee no longer complained of left hip pain around the middle of July 2019, as it demonstrates the source of this pain was the left hip strain, which had resolved by six weeks. (*Id.*)

54) Employee submitted evidence of her out-of-pocket medical care expenses totaling: (1) \$478.48 for Alpine Anesthesia; (2) \$688.20 for Advanced Physical Therapy, plus \$400.00 via Cornerstone Credit for Advanced Physical Therapy, for a grand total of \$1088.20 to Advanced Physical Therapy; (3) \$446.76 for Creekside Surgery Center; (4) \$414.06 for Anchorage Fracture and Orthopedic Clinic, and (5) \$11.66 for Health North Family Medicine. The total amount paid by Employee for out-of-pocket medical treatment costs is \$2,439.16. (Receipts and checks, Notices of Intent to Rely, February 17, 2020 through June 15, 2021.)

55) Employee also filed proof of her out-of-pocket expenses for medical treatment costs including medications for \$35.38, medical hardware for \$50.33, the cost of meals while away from home for medical treatment in the amount of \$245.77 for December 31, 2019, January 1, 2020, and February 17 and 19, 2020, for the time she was in Anchorage for medical treatment. (Receipts and checks, Notice of Intent to Rely, February 17, 2021.)

56) Employee filed her transportation log for medical treatment related travel from June 19, 2019 through September 10, 2019 for a total of 1,038.8 miles, travel from January 13, 2020 through March 25, 2020 for a total of 535.4 miles, and for travel for June 2020, for a total of 506 miles. (Travel logs, June 2019 through March 2020.)

57) The reimbursement rate for transportation for medical appointments in 2019 was \$0.58 per mile and for 2020 was \$0.575 per mile. The reimbursement rate for meals and incidental expenses in 2019 and 2020 was \$60 per day. (Alaska Department of Labor and Workforce Development Division of Workers Compensation Bulletins 19-01 and 20-01.)

58) The interest rate for 2019 was 6 percent; for 2020 it was 5.25 percent; and for 2021 it is 3.25 percent. 8 AAC 45.142(a); AS 09.30.070(a).

59) Employee's compensation rate is \$1,211.00. (Record.)

60) Employee's private health insurance company is AK teamsters-ER Welfare Trust. Employee submitted explanation of benefits (EOB) from AK teamsters-ER Welfare Trust for Employee's medical treatment from January 6, 2020 through June 4, 2020, which showed a total of \$33,434.27. (AK Teamsters-ER Welfare Trust, EOB's, for dates of service from January 6, 2020 through June 4, 2020. Employee's NOI, August 7, 2020.)

61) Employee's attorney submitted her June 11, 2021 attorney fee affidavit documenting 11.2 hours at \$400 per hour and 12.9 hours at \$410 per hour for a total of \$31,667 in attorney fees. \$134.10 in costs was also documented. (Attorney fee affidavit, June 11, 2021.)

62) Employee's attorney submitted her June 16, 2021 supplemental attorney fee affidavit documenting an additional 21.8 hours of work after June 12, 2021 and requesting \$410 per hour for a total of \$8,938, plus costs of \$15.90. (Attorney fee affidavit, June 16, 2021.)

PRINCIPLES OF LAW

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

AS 23.30.010. Coverage. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or

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

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

(1) the claim comes within the provisions of this chapter

....

Under AS 23.30.120, benefits sought by an injured worker are presumed to be compensable, and the burden of producing substantial evidence to the contrary is placed on the employer. *Miller v. ITT Arctic Services*, 577 P.2d 1044 (Alaska 1978). 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 v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991).

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); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). 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. ; *Smallwood*. 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) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). “Substantial evidence” is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-612 (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 it is determined the employer has produced substantial 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. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011) (reversed on other grounds); *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016)). At this last step of the analysis, evidence is weighed, inferences are drawn and credibility considered. To prevail, the claimant must “induce a belief” in the fact-finders’ minds the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

A fundamental principle in workers’ compensation law is the “eggshell skull doctrine,” which states an employer must take an employee “as he finds him.” *Fox v. Alascom, Inc.*, 718 P.2d 977, 982 (Alaska 1986), citing *S.L.W. v. Alaska Workmen’s Compensation Board*, 490 P.2d 42,

44 (Alaska 1971); *Wilson v. Erickson*, All P.2d 998, 1000 (Alaska 1970). A pre-existing condition does not disqualify a claim if the employment aggravated, accelerated or combined with the pre-existing condition to produce the disability or need for medical treatment for which compensation is sought. Under the Act, there is no distinction between the aggravation of symptoms and the aggravation of the underlying condition. *DeYonge v. NANA/Marriott*, 1 P.3d 90, 96 (Alaska 2000); *Peek v. SKW/Clinton*, 855 P.2d 415, 416 (Alaska 1993).

In *City and Borough of Juneau v. Olsen*, AWCAC Decision No. 11-0185 (August 21, 2013), the commission explained the application of “the substantial cause” in cases where a work injury “aggravates or accelerates” or “combines” with a preexisting condition. When an employee asserts a work injury caused the aggravation or acceleration of a preexisting condition, the board must evaluate the relative contribution of both the preexisting condition and the work injury. To establish causation, the employee must show the work injury played a greater role in the disability or need for medical treatment than did the preexisting condition. *Olsen*, 17-18. When an employee asserts his disability or need for medical treatment arose as a result of a combination of his work injury and a preexisting condition, the employee must establish two additional facts to prevail, first, that the disability or need for treatment would not have happened “but for” the work injury, and second that reasonable persons would regard the work injury as the substantial cause of the disability or need for medical treatment. *Olsen*, 18-19.

In *Tinker v. Veco, Inc.*, 913 P.2d 488 (1996), a worker with a long-standing diabetic foot condition suffered frostbite and a blister on his right foot while at work. His right foot became infected, as did his left foot. He returned to work, and injured his left ankle when he slipped on ice. He was diagnosed with Charcot arthropathy, and underwent surgery on both feet. He returned to work again, but was evacuated after becoming ill with food poisoning. His left leg was later amputated below the knee, and he filed workers’ compensation claims. The board held the employee had failed to timely notify the Employer of the frostbite injury and rejected that claim. The Supreme Court determined the employee’s failure to give timely notice of the frostbite injury was excusable. The Court remanded to the board for further consideration, noting: “Tinker’s diabetes would not have barred his compensation claim, so long as the injury he received on the job aggravated, accelerated, or combined with his medical condition in a

manner that resulted in the loss of the leg.” *Id.*, footnote 2.

DeYonge held a temporary, symptomatic worsening constitutes an injury. 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. 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.

In *Morrison v. Alaska Interstate Construction, Inc.*, 440 P.3d 224 (Alaska 2019), the Alaska Supreme Court for the first time construed AS 23.30.010(a) and its relationship to the *DeYonge* doctrine and the “last injurious exposure rule.” *Morrison* found the legislature did not abrogate the *DeYonge* rule when it amended the coverage statute in 2005. It held the Commission’s inquiry improperly focused on what qualifies as an injury, “which is not how the legislature chose to reduce the number of potentially compensable claims.” *Id.* at 233. Interpreting AS 23.30.010(a), *Morrison* held the board decides whether “the employment” was “the legal cause,” *i.e.*, “a cause important enough to bear legal responsibility for the medical treatment needed for the injury,” by looking at the “causes of the injury or symptoms” rather than considering the injury type. *Id.* at 233-234; emphasis in original.

Morrison held AS 23.30.010(a) is not complex and requires the board to consider different causes “of the benefit sought” and the extent to which each contributed to the need for the specific benefit. The board must then identify one cause as “the substantial cause,” meaning, the cause which “is the most important or material cause related to that benefit.” Based on legislative history, *Morrison* found the legislature did not intend to require that the substantial cause be a “51% or greater cause, or even the primary cause, of the disability or need for medical treatment.” The comparison made is “among the causes identified, not in isolation or in comparison to an abstract idea.” It is a “flexible” and “fact dependent” determination. (*Id.* at 237-238). *Morrison* held the board has the right and responsibility to interpret evidence and draw its own inferences. (*Id.* at 239). Finding no error, *Morrison* reversed the Commission and remanded the case with instructions to reinstate the board’s award. (*Id.* at 240).

Traugott v. ARCTEC Alaska, 468 P.3d 499 (Alaska 2020) held the new causation standard in AS 23.30.010 required the board to identify factors contributing to the disability and need for medical treatment and decide which among them was the most material or important one. *Id.* at 514. *Traugott* held “the statute permits the board to determine which cause among all those identified is the most important or material cause of the current disability and need for medical treatment, even if an expert does not regard it as having more than 50% responsibility for the condition.” *Id.* at 511, citing *Morrison*. The board, and not a medical expert, is required to consider the possible cause of an employee’s disability and need for medical treatment and determine which of the possible causes is the most important in causing the disability and need for medical care. And the board, not a medical expert, is charged with determining legal responsibility. The board as the fact finder has the authority to interpret an expert’s opinion and decide what weight to give it. (*Id.* at 514).

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.

.....

AS 23.30.097. Fees for medical treatment and services.

(a) All fees and other charges for medical treatment or service are subject to regulation by the board consistent with this section.

.....

(f) An employee may not be required to pay a fee or charge for medical treatment of service provided under this chapter.

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness’s testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary

conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

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

(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.

....

8 AAC 45.180. Costs and attorney's fees.

....

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. . . . An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed. . . .

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee

awards when they prevail on a claim. *Id.* at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id.* at 973, 975.

Rusch v. Southeast Alaska Regional Health Consortium, 453 P.3d 784 (Alaska 2019), held the AS 23.30.120 presumption does not apply to attorney fee amounts or reasonableness. It further held the board must consider all factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee and either make findings related to each factor or explain why that factor is not relevant. *Rusch* held attorney fee reasonableness is not a factual finding but is a discretionary exercise.

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

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

AS 23.30.155. Payment of compensation.

....

(o) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.

AS 23.30.395. Definitions.

....

(16) “disability” means incapacity because of injury to earn the wages which the

employee was receiving at the time of injury in the same or any other employment;

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in . . . AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

(b) The employer shall pay the interest

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

.....

(3) on late-paid medical benefits to

(A) the employee, or if deceased, to the employee's beneficiary or estate, if the employee has paid the provider or the medical benefits.

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

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

ANALYSIS

1) Was work the substantial cause of Employee's left hip disability and need for medical treatment?

The substantial cause of Employee's disability and need for medical treatment is a factual issue subject to the presumption analysis. *Meek; Sokolowski*. Relevant to the presumption analysis in this case is the "eggshell doctrine," under which the employer takes an employee as he finds him. It is unknown whether Employee's left hip labral tear pre-existed the May 21, 2019 work injury. In any case her left hip pain and other symptoms, disability and need for medical treatment may be compensable if the left hip work injury aggravated, accelerated, or combined with the pre-existing condition leading to Employee's disability and need for medical treatment. *Fox; DeYonge; Olsen; Morrison*. If however the pre-existing pathologies are ultimately found to be the substantial cause of the disability or need for medical treatment, then Employer will

prevail. AS 23.30.010(a); *Olsen*; *Morrison*.

At the first step of the analysis, Employee must show a preliminary link between her left hip symptoms and disability and her employment. *McGahuey*; *Smith*; *Cheeks*. At this stage neither credibility nor the weight of the evidence is considered. *Resler*. Employee successfully raises the presumption through her testimony describing the work injury in which she suddenly felt excruciating pain in her left hip while running from two large, aggressive dogs after delivering a package to a customer. Employee said she had never had left hip pain prior to running away from two mastiffs while working. *Wolfer*. Dr. Prevost's opinion the left hip symptoms, disability and need for medical treatment were caused by the work injury also raises the presumption. *Smallwood*.

Because Employee raised the presumption, Employer must rebut it and may do so with substantial evidence that either: (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability; or (2) directly eliminates any reasonable possibility employment was a factor in causing the disability. *Tolbert*; *Huit*. Substantial evidence is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller*. Again, neither credibility nor the weight of the evidence is considered at the second step. Employer rebutted the presumption with Dr. Purcell's opinion Employee's left hip CAM and pincer impingements were the substantial cause of her left hip disability and need for medical treatment beyond the first six weeks after the May 21, 2019 work injury. Dr. Purcell maintained the work injury caused only a muscle strain, which had resolved by six weeks after the work injury, if not before.

As Employer rebutted the position, the analysis proceeds to the third step, where Employee must prove by a preponderance of the evidence employment was the substantial cause of her disability and need for medical treatment. In making this determination, credibility is considered, the evidence weighed, and the relative contribution of other causes is considered. *Norcon*; *Olsen*.

Employee's treating physician Dr. Prevost's causation opinions are given the most weight. Dr. Prevost treated Employee's left hip injury from June 20, 2019, performed her surgery in January 2020, and provided her post-surgery care until her final evaluation on June 4, 2020. On

November 14, 2019, Dr. Prevost reviewed Employee's description of how her work injury occurred. He acknowledged Employee's deep hip sockets and non-spherical femoral heads bilaterally do increase her risk for hip impingement and labral pathology. He noted Employee denied any pivoting or twisting activities or any falls, but did not find this precluded the labral tear having happened during the work injury, particularly as she had not had any symptoms prior to the work injury. Dr. Prevost determined a substantial cause for her ongoing left hip symptoms and need for treatment was directly related to the May 21, 2019 work injury. Considerable weight is also given to his opinions as once the labral tear was repaired on January 6, 2020, and Employee had recovered from the surgery, she has had no further pain in either her left or right hip and was able to return to her job as a UPS driver on June 17, 2020.

Dr. Purcell's opinions insisting Employee could not have sustained a labral tear in her left hip while running, terrified, from two large dogs, detracts from his credibility. No one witnessed the event, but Employee credibly testified the ground of the driveway was dirt and rock. She was running in a panic, fearing serious body harm, and was not looking at the ground but instead focusing on the truck and its distance from her. Even if running alone were not capable of producing a labral tear, it was not until Employee was "bolting" in fear to escape two large dogs she knew to be unruly and potentially dangerous that she felt pain in her left hip, which was immediately diagnosed as a labral tear from imaging taken shortly after her running escape. Dr. Purcell's opinion the decrease in Employee's left hip pain starting in mid-July 2019 after physical therapy was proof Employee sustained only a muscle strain resulting from her work injury is given little weight. This opinion does not take into account Employee was responding not only to the physical therapy but also the left hip steroid injection. On June 20, 2019, Employee had received a left hip steroid injection, which she testified reduced her symptoms by 75 percent for a few weeks.

In addition, Dr. Purcell's opinion that the May 21, 2019 work injury could not have aggravated, accelerated or caused to become symptomatic a previously existing labral tear is not credible and given no weight. The medical records and Employee's credible testimony demonstrate Employee had not had any prior problems with her left hip. AS 23.30.122. If there was a labral tear pre-existing the May 21, 2019 work injury caused by Employee's pre-existing CAM and

pincer impingements, it was not symptomatic. If the work injury did not cause the labral tear, it did cause any pre-existing tear to either worsen and become symptomatic, or simply become symptomatic. Whether the work injury caused the labral tear or only caused it to worsen or to become symptomatic, it is a compensable injury. *DeYonge; Peek; Morrison; Traugott*. So long as the work injury worsened Employee's symptoms, the increased symptoms constitute an aggravation, even when the work injury does not actually worsen the underlying condition. *Id.*

The relative contribution of different causes of the disability and need for medical treatment must be evaluated. Employee's preexisting CAM and pincer impingements, and whether that included a preexisting left labral tear or not, are factors that must be considered to determine if they contributed to Employee's disability and need for medical treatment. The CAM and pincer impingements were preexisting degenerative conditions that caused no pain or symptoms prior to Employee's "bolt" from the mastiffs. The preexisting degenerative conditions were not the substantial cause of Employee's disability or need for medical treatment. But for the dash from the dogs, Employee could have remained asymptomatic and never needed treatment or time off work. Based on Dr. Prevost's opinions, which are given great weight, as well as the panel's knowledge and experience, Employee has demonstrated by a preponderance of the evidence the substantial cause of her disability and need for medical treatment for her left hip was the May 21, 2019 work injury. *AS 23.30.122; Tinker; Morrison; Traugott; Moore; Rogers & Babler*

2) Is Employee entitled to medical and related benefits?

Employee claims medical benefits and related transportation costs from October 30, 2019 until she completed treatment and returned to work. Employee's entitlement to medical benefits is a factual issue to which the presumption applies. *Meek*. Dr. Prevost's opinion that work is the substantial cause of Employee's need for left hip treatment, including surgery, raises the presumption she is entitled to medical benefits. *Cheeks*. Employer rebuts the presumption with Dr. Purcell's opinion Employee's work injury was nothing more than a muscle strain that resolved in six weeks or less and, thereafter, no additional medical treatment was reasonable or necessary for the muscle strain and Employee's continuing need for medical treatment was her preexisting impingements and CAM deformity. *Huit*. At the third stage, Employee is able to prove work was the substantial cause of her need for medical treatment after the first six weeks

post injury. Dr. Prevost treated Employee and was aware of her preexisting yet asymptomatic hip conditions. He considered the unusual work activity Employee was engaged in, the imaging study that showed a labral tear right after the work incident and concluded work was a substantial cause of Employee's need for treatment, including left hip surgery and post-surgical physical therapy. *Saxton*. Dr. Prevost's opinion is given more weight than Dr. Purcell's. AS 23.30.122. Dr. Purcell insists it was Employee's preexisting left hip impingement that caused the labral tear and that running as fast as she could on dirt and rocks did not contribute to her need for medical treatment past six weeks after the injury, because she merely sustained a muscle strain. His opinions do not induce a belief that his assertions and opinions are true. *Saxton; Rogers & Babler*.

Employee's work injury is the substantial cause of her need for medical treatment, Employer must pay the reasonable and necessary costs, including medical, surgical and other attendance or treatment, such as transportation and medicine for the period the process of recovery from her left hip injury requires. AS 23.30.095(a). Employer controverted all benefits after October 30, 2019, and Employee's health insurance through the Alaska Teamsters-ER Welfare Trust paid her medical expenses after that time. Employee had to pay deductibles and copays herself. Therefore Employer is required to pay for Employee's left hip work injury medical treatment and related costs from November 17, 2019 and ongoing, according to the Alaska Workers' Compensation Medical Fee Schedule, in effect for the year medical services were provided. AS 23.30.097.

Employer must pay Employee's personal health insurance, the Alaska Teamsters-ER Welfare Trust, interest on the \$33,434.7 it paid for Employee's medical treatment. Interest must be paid from the date each medical payment was made by the Trust on Employee's behalf for work injury medical treatment until the interest is paid. AS 23.30.155; AS 09.30.070(a); 8 AAC 45.142(a) and (b)(3)(B).

Employer must pay Employee interest on out-of-pocket medical treatment costs of \$2,439.16. Employer should also pay Employee interest for her out-of-pocket prescription costs of \$35.38,

medical hardware of \$50.33, and the cost of meals of \$245.77, for a total of \$331.48, plus interest. AS 23.30.155; AS 9.30.070(a); 8 AAC 45.142(b)(3)(A).

Employee is entitled to be paid mileage reimbursement. AS 23.30.095. In 2019, she traveled 1,038.8 miles at \$.58 per mile and is owed \$602.50. In 2020, she traveled 535.4 miles at \$.575 per mile and is owed \$307.86. Employee is entitled to interest from the day she submitted her logs until her mileage reimbursement is paid. AS 23.30.155; AS 9.30.070(a); 8 AAC 45.142(a) and (b)(3)(A).

3) Is Employee entitled to TTD benefits?

Employee received TTD benefits from June 21, 2019 through November 17, 2019, at which time Employer controverted all benefits. Employee claims additional TTD benefits from November 18, 2019 through June 16, 2020. AS 23.30.185. To obtain TTD Employee must show by a preponderance of the evidence work was the substantial cause of her disability and she was both disabled by her work injury and not yet medically stable during these periods. AS 23.30.010(a); AS 23.30.120(1); AS 23.30.185; AS 23.30.395(28); *Saxton*.

Differing medical opinions on disability raise factual disputes to which the presumption of compensability must be applied. AS 23.30.120(1); *Meek*; *Carter*. Employee raised the presumption she is also entitled to TTD benefits from November 18, 2019 through June 16, 2020 as Dr. Prevost restricted her to either sedentary or light duty work from June 20, 2019 through June 16, 2020. Employee did work light duty and was paid temporary partial disability (TPD) starting in May 2019 after her work injury until June 20, 2019, but Employee stated Employer did not offer her light duty work after June 26, 2019.

At the second stage, Employer rebutted the presumption with Dr. Purcell's opinion that Employee's disability after the first six weeks was not work-related. At the third stage, Employee has proven by a preponderance of the evidence she incurred a work injury that caused a decrease in her earning capacity. Dr. Prevost restricted Employee to light work from June 20, 2019 and did not release her to full duty work until June 17, 2020. Dr. Prevost's opinion work is

the substantial cause of Employee's disability is given more weight than Dr. Purcell's opinion her work related disability lasted no more than six weeks and thereafter she was medically stable. AS 23.30.122. Dr. Prevost monitored Employee's progress and improved physical capacity to work prior to and after her surgery. Dr. Prevost determined Employee was medically stable on April 1, 2020. From November 18, 2019 through March 31, 2020, Employee is entitled to TTD benefits and interest until the benefits are paid. AS 23.30.185; 8 AAC 45.142(a).

After March 31, 2020, Employee is unable to prove she is entitled to TTD benefits. AS 23.30.185. Dr. Prevost found Employee medically stable as of April 1, 2020, and referred her for a PPI rating, which was performed on April 1, 2020. Dr. Prevost did not withdraw his opinion Employee was medically stable on March 31, 2020, nor did he prescribe further medical treatment for Employee's left hip after March 31, 2020. Therefore, Employee is entitled to TTD starting on November 18, 2019 through March 31, 2020, a period of 19.3 weeks. Employee's compensation rate is \$1,211 per week, so the total amount of TTD due is \$23,372.30. Employee is also entitled to interest on the late paid TTD at the interest rate in effect on the date the compensation was due. AS 23.30.155; AS 09.30.070; 8 AAC 45.142(a).

4) Is Employee entitled to PPI benefits?

Employee's claim requests PPI benefits. AS 23.30.190(a). Differing medical opinions on PPI raise a factual dispute to which the presumption of compensability must be applied. AS 23.30.120(1); *Meek*; *Carter*. Employee raises the presumption with Dr. Levine's two percent PPI rating. *Cheek*. Dr. Purcell opined in his September 15 2020 and October 8, 2020 EME reports he agreed with Dr. Levine's PPI rating, but disagreed it was work related. In his October 21, 2020 report Dr. Purcell opined Employee had no PPI rating at all, regardless of etiology, as she had returned to her job of injury and was fully functional. Dr. Purcell's opinions, viewed in isolation, do rebut the presumption. However, Employee has proven her entitlement to the two percent whole person PPI rating by a preponderance of the evidence. *Runstrom*; *Huit*. First, Dr. Levine did not include any left hip degenerative changes in his PPI rating. Second, Dr. Purcell's opinion Employee had no PPI is given no weight. It was not based on a PPI rating according to the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*, as required by the

Act and was merely a conclusion based upon his opinion Employee's work injury resolved six weeks after the incident. 8 AAC 45.122.

Employee is entitled to two percent PPI, \$3,540 ($\$177,000 \times .02 = \$3,540$), based on Dr. Levine's April 1, 2020 rating. Dr. Levine's PPI rating was performed as required. AS 23.30.190. 8 AAC 45.122. Employee is entitled to interest on the unpaid PPI from April 1, 2020. AS 23.30.155; AS 09.30.070; 8 AAC 45.142.

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

Employee requests actual attorney fees of \$31,667 through June 10, 2021 and costs through June 11, 2021. At the hearing's conclusion, the record was held open for Employee's attorney's supplemental fee affidavit and Employer's objections, if any, to Employee's attorney fees and costs.

Attorney fees may be awarded when an employer resists the payment of compensation or medical and related benefits and if an attorney is successful in prosecuting the employee's claim. AS 23.30.145; *Childs*. Employee prevails on her claims for medical costs, transportation costs, temporary total disability, interest, and permanent partial impairment. This permits an actual attorney fees award under AS 23.30.145(b). Employee's attorney filed an affidavit itemizing the hours expended as well as the extent and character of the work performed. 8 AAC 45.180(b). *Rusch* requires the eight factors in Alaska Rule of Professional Conduct 1.5(a) be considered when determining a reasonable fee. The case dealt with causation and compensability of Employee's left hip disability and need for medical treatment, medical and related costs, PPI benefits, indemnity benefits and interest. Compensability depends on complicated legal concepts and complex facts. Ms. Porcello's brief and accompanying exhibits, which laid Employee's case out clearly and understandably, and her arguments at hearing were very helpful. Employee's attorney has practiced law for more than 38 years, most of it involving workers' compensation cases. Her work for Employee in this case would have limited her ability to take on additional cases. Other Alaska attorneys with similar experience have been awarded \$450 per hour. Employee's attorney did not identify any time limitation imposed by her client or the circumstances, nor did she explain how the length of the professional relationship would affect the fee. Employee prevails on her medical and transportation costs and interest claims, as well as

her claims for indemnity and PPI benefits, which are of substantial value. Given Employee's attorney's experience and the contingent nature of employee attorney work, the \$400 hourly rate through June 15, 2020 and the \$410 hourly rate thereafter are appropriate.

Employee's attorney expended 12.9 hours from November 27, 2019 through June 15, 2020 and seeks \$400 per hour for that time period. She expended 77.6 hours from July 20, 2020 through June 10, 2021 and seeks \$410 per hour for that time period. The total attorney fee requested from November 27, through June 10, 2021 is \$31,667.00. Total costs requested is \$134.10. From June 11, 2021 through June 16, 2021, Employee's attorney expended an additional 21.8 hours and seeks \$410 for that time period, which equals \$8,938.00 in legal fees, plus an addition \$15.10 in costs. Thus the total attorney fee requested is \$40,605, plus costs of \$150.00. Considering the significant benefits obtained and the time expended, Employee is entitled to \$40,605.00 in fees and \$150.00 in costs which is reasonable and fully compensatory. AS 23.30.145(b); *Bignell; Childs*.

CONCLUSIONS OF LAW

- 1) Work is the substantial cause of Employee's left hip disability and need for medical treatment.
- 2) Employee is entitled to medical and related benefits.
- 3) Employee is entitled to TTD benefits.
- 4) Employee is entitled to PPI benefits.
- 5) Employee is entitled to attorney fees and costs.

ORDERS

- 1) Employee's May 21, 2019 work injury is the substantial cause of her left hip disability and need for medical treatment.
- 2) Employee is entitled to medical and related costs for her left hip disability in accord with this decision.
- 3) Employee is entitled to TTD from November 18, 2019 through March 31, 2020, totaling \$23,372.30, plus interest pursuant to 8 AAC 45.142.
- 4) Employee is entitled to \$3,540 for PPI benefits of two percent whole person, plus interest pursuant to 8 AAC 45.142 from April 1, 2020.

- 5) Employer shall pay Employee's medical providers according to Alaska Workers' Compensation Medical Fee Schedule, in effect for the year medical services were provided.
- 6) Employer shall pay interest to Employee's private health insurance the Alaska Teamsters-ER Welfare Trust on amount, totaling \$33,434.27 it paid for Employee's medical benefits pursuant to 8 AAC 45.142.
- 7) Employer shall pay Employee interest on her out-of-pocket medical and related costs pursuant to 8 AAC 45.142.
- 8) Employer shall pay attorney fees and costs to Tasha Porcello in the amount of \$40,755.00.

Dated in Anchorage, Alaska on August 13, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Judith DeMarsh, Designated Chair

/s/
Robert Weel, Member

/s/
Bronson Frye, 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 SARAH WINTER, employee / claimant v. UNITED PARCEL SERVICE, INC., employer; LIBERTY MUTUAL INSURANCE CORPORATION, insurer / defendants; Case No. 201906774; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on August 13, 2021.

/s/
Nenita Farmer, Office Assistant