

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

KAREN BROWN,)
)
Employee,)
Claimant,)
)
v.) FINAL DECISION AND ORDER
)
) AWCB Case No. 201914471
TITAN MEDICAL HOLDINGS, INC.,)
) AWCB Decision No. 21-0081
Employer,)
and) Filed with AWCB Fairbanks, Alaska
) on September 8, 2021
QBE INSURANCE CORPORATION,)
)
Insurer,)
Defendants.)
)
_____)

Karen Brown (Employee)'s January 28, 2021 workers' compensation claim was heard on July 15, 2021 in Fairbanks, Alaska, a date selected on June 2, 2021. A March 19, 2021 affidavit of readiness for hearing gave rise to this hearing. Attorney Keenan Powell appeared and represented Employee. Attorney Michael Budzinski appeared and represented Titan Medical Holdings, Inc. and QBE Insurance Corporation (Employer). Employee testified. The record closed on August 4, 2021 to allow for supplemental attorney fee and cost filings and additional deliberations.

ISSUES

Employee contends the work injury is the substantial cause of her current disability and need for medical treatment as set out in the employer's medical evaluation (EME) report.

Employer contends it has accepted the fall as a work-related injury.

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

Employee contends she was limited to part-time work due to shoulder pain, and that she reasonably resigned when COVID became a concern at her hospital job. Employee contends she cannot work due to current shoulder pain and lifting restrictions. Employee contends she is entitled to temporary total disability (TTD) benefits from March 28, 2020 and into the future.

Employer contends Employee is not entitled to TTD benefits after March 28, 2020, as she was released to regular work for at least a portion of the relevant timeframe, she had the capacity to work at least part-time and she elected to stop working, had an intervening injury, and may have retired or otherwise removed herself from the workforce.

2) Is Employee entitled to TTD benefits?

Employee contends she had a work injury due to a fall at Employer-provided housing. She asserts her entitlement to medical benefits is supported by the EME's opinion.

Employer contends it accepted Employee's fall as a work-related injury and medical benefits are currently being provided.

3) Is Employee entitled to medical benefits?

Employee contends she is entitled to transportation costs.

Employer contends it accepted Employee's claim as a work injury and makes no objection to transportation costs asserted by Employee.

4) Is Employee entitled to transportation costs?

KAREN BROWN v. TITAN MEDICAL HOLDINGS, INC.

Employee contends a compensation rate adjustment is appropriate.

Employer contends it is entitled to an offset for Social Security Retirement benefits received as well as a cost of living adjustment (COLA).

5) Is Employee entitled to a compensation rate adjustment?

Employee contends Employer's January 20, 2021 controversion was not supported by the medical opinion cited in support of it. Despite filing an amended controversion, Employer has failed to pay benefits. Employee requests a referral to the director.

Employer makes no specific assertions regarding unfair or frivolous controversion; it is assumed that Employer opposes a referral.

6) Is Employee entitled to referral for unfair or frivolous controversion?

Employee contends compensation was not paid when due and a penalty is appropriate.

Employer makes no specific assertions regarding timely payment; it is assumed that Employer opposes a penalty for late paid compensation.

7) Is Employee entitled to a penalty for late paid compensation?

Employee contends benefits were not paid when due and she is entitled to interest on late-paid compensation. She also contends she should prevail on all issues at hearing and is entitled to full actual attorney's fees and costs on past benefits awarded, as well as statutory attorney's fees for the award of future benefits.

Employer makes no specific contentions regarding interest. It does not dispute Employee's attorney fee rate or hours billed, but contends statutory fees may not be granted for past benefits awarded.

8) Is Employee entitled to interest, attorney's fees, and costs?

FINDINGS OF FACT

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

- 1) On October 3, 2019, Employee reported “slipping on landing on stairway falling backward hitting coccyx and right knee on ground. No symptoms of distress were noted. Pain was located in right lateral shoulder, right hip, lower back (“awareness but not pain”), and right knee.” Employee denied any limitations of movement of upper and lower extremities but had pain in her right shoulder with certain movements. Impression was sprain to right shoulder. Rotator cuff precautions were discussed. (Emergency room records, October 3, 2019).
- 2) On October 17, 2019, Employee had continued complaints of low middle back pain and episodic right shoulder pain. Over-the-counter painkillers were provided and lumbosacral x-rays were ordered. (Hospital records, October 17, 2019). X-rays found scoliosis, spondylosis, and osteopenia. (Christensen report, October 17, 2019).
- 3) On October 18, 2019, a First Report of Injury (FROI) was filed for injury to Employee’s back, buttocks, right knee, and right shoulder due to a slip, trip or fall. (FROI, October 18, 2021). The FROI was updated on May 10, 2021, to note affected areas included back, buttocks, right knee, and bilateral shoulders. (Updated FROI, May 10, 2021).
- 4) On November 19, 2019, Employee was examined by Thomas Kuprys, M.D. She reported falling at her housing coming “down the steps . . . using a handrail and slipped on some ice at the landing and fell onto her backside and bottom.” Employee reported moderate-sharp lower back pain persisting after the fall. She noted bilateral shoulder pain since the injury and right knee pain. There was bilateral shoulder tenderness with mild impingement sign and negative Lockman, posterior drawer, and McMurry’s noted. Magnetic Resonance Imaging (MRI) was recommended to assess for acute injury. Diagnoses included arthritis of the right knee, right knee pain, chronic scoliosis, lower back pain, neck pain, bilateral shoulder pain, and shoulder tendonitis. Employee might benefit from physical therapy once imaging completed. (Kuprys record, November 19, 2019). Employee was released to work after the MRI. (Kuprys work release, November 19, 2019).
- 5) On November 19, 2019, Employer began TTD payments to Employee at a \$266 weekly rate. TTD payments continued through February 20, 2020, totaling \$3,192.00. (ICERs database).
- 6) On December 12, 2019, the MRI was compared to prior imaging dated June 27, 2017, and found no traumatic, inflammatory, infectious or neoplastic findings. Impression was of lumbar spondylosis and scoliosis. (Paraliticci MRI report, December 12, 2019).

- 7) On December 13, 2019, the adjuster sent questions to Emory Southern Orthopedics, which were answered and signed on December 31, 2019 (signature illegible but believed to be Thomas Kuprys, M.D.). The signed response included diagnoses of back pain and shoulder tendonitis, a physical therapy recommendation, indicated Employee was not medically stable, and said Employee could perform medium duty sedentary work until February 4, 2020. (Malone letter, December 13, 2019).
- 8) On December 20, 2019, Employee reported significant improvement in her neck and lower back pain. Her right shoulder was moderately tender with improved range of motion. No extremity weakness or sensory changes were noted. Diagnoses included lower back pain, likely “lumbar strain no benefit from physical therapy core strengthening. Patient provided seated work restriction until repeat evaluation after physical therapy” and shoulder tendonitis, “[m]ild rotator cuff tendinitis (sic) no benefit from physical therapy.” Dr. Kuprys reviewed the lumbar MRI and found no acute injury or fracture, but noted a “L1 superior endplate defect consistent with Schmorl’s node.” (Kuprys record, December 20, 2019). Employee was released to sedentary work only for four to six weeks. (Kuprys work release, December 20, 2019).
- 9) On January 8, 2020, Employer’s HR manager emailed Employee that “[d]ue to your job we cannot accommodate light duty. [Illegible] advised the insurance company to keep paying you lost wages.” (Batiste email, January 8, 2020).
- 10) On January 21, 2020, Employee’s lower back symptoms were significantly improved. She had not started physical therapy pending an approval from workers’ compensation. She was taking over-the-counter anti-inflammatories and had brought a June 2017 MRI. Diagnoses included back pain and lumbar compression fracture. The L1 endplate deformity was new since 2017 and was “potentially a compression endplate injury related to her fall in October. Radiographs today demonstrate stable alignment compared to 2019 October radiographs and December MRI.” Physical therapy was recommended. (Kuprys record, January 21, 2020). Employee received a full work release without restrictions. (Kuprys work release, January 21, 2020). Dr. Kuprys completed a “Return to Work Certificate” for Employee indicating that she was now able to perform all of her job functions and was released to work effective January 22, 2020. (Return to Work Certificate, January 22, 2020).
- 11) On March 9, 2020, Employee’s chief complaints were lower back pain, neck pain, and bilateral shoulder pain. “The patient presents with increased pain, decreased ROM, and decreased strength secondary to LBP, neck pain, bilat[eral] shoulder pain consistent with T12-L1

compression [fracture], arthritis, and bilat[eral] shoulder impingement.” (Southern Rehab & Sports Medicine record, March 9, 2020). Employee continued physical therapy to June 4, 2020 with overall improvement. On May 28, 2020, chart notes provided “Lumbar and R shoulder pain has resolved however she continues to experience L upper cervical and LUE pain that increases with activity levels.” June 4, 2020 chart notes indicated the left shoulder was painful especially when reaching. Employee had been treated for cervical pain with a history of compression fractures; her main complaint now was pain in the left shoulder at end range and weakness of the left rotator cuff. The physical therapist “[i]nitiating rotator cuff program today and adjusted her HEP accordingly. She will benefit from continued rehab with focus on RTC and cervical (sic) rehab.” (Southern Rehab & Sports Medicine records, assorted dates).

12) On May 29, 2020, Employee was “not currently working related to the COVID-19 pandemic. Back symptoms have resolved related to her prior lumbar compression injury.” She had persistent left shoulder pain with activity and chronic bilateral hand numbness that predated her injury, unrelated to the left shoulder pain. Diagnoses included shoulder tendonitis and non-work-related bilateral carpal tunnel. Continued left shoulder physical therapy was recommended. (Kuprys record, May 29, 2020). Employee was released to work effective June 1, 2020 with a six-week, 10-pound left shoulder and arm lifting restriction. (Kuprys work release, May 29, 2020).

13) On June 3, 2020, the adjuster sent a letter to Emory Southern Orthopedics requesting information about Employee’s October 3, 2019 injury to her back, right knee, and right shoulder. (Malone letter, June 3, 2020). Dr. Kuprys responded and provided diagnoses of back pain and shoulder tendonitis. Physical therapy was recommended until July 10, 2020. Employee was not medically stable but would be re-evaluated on July 10, 2020. Employee could perform modified, medium-duty work with a 10-pound lifting restriction for her left shoulder and arm. “Attached notes” as referenced by Dr. Kuprys in his response were not provided. (Kuprys response, June 9, 2020).

14) On June 25, 2020, Employee underwent an EME with orthopedic surgeon Wilbert B. Pino, M.D. Employee reported an injury after falling down a flight of stairs, slipping on ice. She injured her left upper extremity with immediate onset of pain; she was able to complete her shift with increasing pain noted throughout the day and the next morning. She also injured her lower back and buttocks. Employee was able to complete her shift and “returned to work without restrictions with persistent discomfort, during her traveling assignment, that lasted approximately five weeks.”

She saw her primary care provider while in Alaska and continued to have persistent discomfort after returning home. Three weeks after returning to Georgia, Employee had increasing difficulty in her right shoulder. She received an MRI of her lumbar spine, which demonstrated a small node and possible compression fracture. She began physical therapy and had gradual improvement of pain with minimal discomfort when she finished about four weeks earlier. “At this point, she continued to report pain in her left shoulder that interfered with activities of daily living.” Employee also reported a recent left distal radius fracture after a fall at home, for which she anticipated surgery in the next few days. Dr. Pino summarized prior medical records and noted Employee was currently unemployed “and has decided to retire as a result of the COVID-19 pandemic.” Employee reported discomfort around her left shoulder and minimal discomfort in her lower back. Employee was wearing a short-arm cast relating to the left distal radius fracture. She had pain with range of motion and difficulties with overhead activity for the left upper extremity, which she attributed to her work injury. Her right shoulder had minimal symptoms; lower back discomfort was minimal but varied from day to day. She had occasional pain at night when lying flat and positional discomfort in her lower back. Dr. Pino noted

Examination of the left upper extremity is impaired as a result of a recent non claim related injury to the left upper extremity with a short-arm cast present. There is pain with range of motion . . . There is full motion of the elbow. The wrist and hand are not evaluated due to the cast present. There is normal sensation and vascular examination of the left upper extremity noted.

Diagnoses included:

- a. Left shoulder tendinopathy, work related after a fall of October 03, 2019, persistently symptomatic as a result of a claim related injury and aggravated by [a] recent non claim related injury.
- b. Right shoulder strain, claim related, resolved, at maximum medical improvement.
- c. Compression fracture L1, resolved, claim related as a result of a work-related injury of October 03, 2019, at maximum medical improvement.
- d. Pre-existing history of degenerative joint disease and herniated disc lumbar spine, L4-L5, not claim related, asymptomatic.
- e. Distal radius fracture, not claim related, pending surgical intervention.

Dr. Pino found the substantial cause of Employee’s disability:

Based on the clinical examination findings . . . it is my conclusion that [Employee]’s current disability of the left upper extremity is as a result of a recent nonclaim-related injury to her left distal radius limiting the value of the clinical findings.

Based on the clinical history and presentation, it is my opinion that [Employee] has sustained an injury to her left shoulder rotator cuff. [She] has responded well to conservative treatment, physical therapy and other non-interventional modalities for her left shoulder but examination at the time of this independent medical examination is limited due to the recency of another unrelated injury, limiting the value of the current clinical findings.

As it relates to the lumbar spine, [Employee] has diagnostic studies consistent with compression deformity of the superior endplate of L1 that is consistent with the mechanism of injury of a fall at the time of the industrial injury reported. [She] has demonstrated clinical improvement with minimal symptomatology which is also evidenced on minimal findings at the time of this independent medical examination. Based on the clinical findings reported, the previous diagnostic studies and the clinical presentation at the time of this exam, it is my conclusion that [her] low back complaints are consistent with an acute/subacute injury to the superior endplate of L1 from which has done well.

Further recommended treatment included an independent unsupervised exercise program for her right shoulder, and conservative non-interventional management of her lumbar spine. No further treatment was recommended for the right knee.

Regarding Employee’s left shoulder:

The etiology and causation of her left upper extremity injury is mixed in nature and certainly modulated by the presence of a new non-claim related injury that has happened in the last few weeks.

Regarding treatment for the left shoulder, [Employee]’s symptoms appear to be pre-existing to her most recent injury and I conclude that symptomatology and presentation consisting of persistent pain in the left shoulder is directly related to the claim injury of October of 2019.

It is my recommendation that once [she] has recovered from surgical intervention for her left distal radius that she consider further diagnostic study or treatment for the left shoulder.

Employee was not released to work without restrictions; Dr. Pino restricted use of her left shoulder for repetitive activities, overhead work, and pushing or pulling more than 10 pounds. Employee had not reached “maximum medical improvement” regarding her left shoulder; that would likely

occur after completing left shoulder physical therapy and diagnostic studies to evaluate for a rotator cuff tear. Dr. Pino found a zero percent permanent partial impairment (PPI) rating applicable to the right shoulder and L1 compression fracture; the left shoulder was not medically stable and a rating was not indicated at that time. (Pino EME report, June 25, 2020).

15) On July 1, 2020, Employee underwent surgical repair of her displaced left distal radius fracture without complications. (Comerford operative note, July 1, 2020). Follow-up examinations occurred on August 4, 2020, and October 8, 2020. Employee was released from care regarding the wrist fracture on October 8, 2020. (Comerford records, August 4 and October 8, 2020).

16) On July 23, 2020, Employee reported a fractured left wrist with a surgical repair since her last visit. A left shoulder MRI was recommended due to persistent symptoms. (Kuprys record, July 23, 2020). Employee was released to work effective July 23, 2020 with a four-week, 10-pound lifting restriction for her left shoulder and arm. (Kuprys work release, July 23, 2020).

17) On August 6, 2020, Employee reported having previously undergone physical therapy but treatment had been put on hold after she fell and fractured her left wrist, unrelated to work. Her main complaint was pain in her left shoulder at end range and weakness of her left rotator cuff. (Jeter Record, August 6, 2020). Employee continued treating at Southern Rehab & Sports Medicine through August 25, 2020. (Jeter records, assorted dates). Discharge from physical therapy was recommended due to lack of progress. (Jeter record, August 25, 2020).

18) On September 10, 2020, an MRI showed rotator cuff tearing, tenosynovitis, tendinosis, labral degeneration and tear, and thinning cartilage. (Kakarala MRI report, September 14, 2020).

19) On September 17, 2020, Dr. Kuprys diagnosed rotator cuff tear, left biceps tendinitis, and shoulder osteoarthritis. He reviewed the recent MRI with its findings for rotator cuff tear, long head biceps tenosynovitis, labral degeneration, and diffuse glenohumeral change and recommended Employee follow-up with Dr. Danny Guy for a shoulder consultation. (Kuprys record, September 17, 2020). Dr. Kuprys provided a work release effective September 17, 2020 with a 10-pound lifting restriction for the left shoulder and arm until her follow-up appointment with Dr. Guy. (Kuprys work release, September 17, 2020).

20) On October 14, 2020, Employee was found to have an injury of tendon of long head of left biceps, nontraumatic type 2 superior labrum SLAP lesion of left shoulder, primary osteoarthritis of left shoulder, rotator cuff tear, and rotator cuff impingement syndrome of left shoulder. Dr.

Guy recommended arthroscopy of the left shoulder with acromioplasty and distal clavicle resection with possible repair of the rotator cuff, labrum, or biceps dependent upon surgical findings. (Guy record, October 14, 2020). Dr. Guy provided a work release effective October 14, 2020, with a five-pound lifting restriction for left arm, and no overhead activity. Surgery was scheduled for November 13, 2020 and restrictions were effective until after surgery. (Guy work release, October 14, 2020).

21) On January 20, 2021, Employer denied TTD, temporary partial disability (TPD), PPI, and vocational rehabilitation benefits, and “ongoing medical treatment and transportation costs related to the lumbar spine, bilateral shoulders, [and] right knee.” Employer relied on Dr. Pino’s June 25, 2020 EME. (Controversion Notice, January 20, 2021).

22) On January 28, 2021, Employee filed a claim for workers’ compensation benefits, requesting TTD benefits, compensation rate adjustment, an unfair or frivolous controversion finding, attorney’s fees and costs, transportation costs, medical costs, penalty for late-paid compensation, and interest. Employee did not request TPD. (Claim for Workers’ Compensation Benefits, January 28, 2021).

23) On February 23, 2021, Employer denied TTD benefits for dates Employee was able to work following the work injury, TTD related to Employee’s left wrist fracture, and TTD benefits sought after retirement. It also denied medical benefits and transportation related to the left wrist fracture, attorney fees and costs, penalties and interest, and unfair or frivolous controversion. A compensation rate adjustment had yet to be determined, subject to Social Security offsets and COLA. Employer contended Employee retired due to COVID and voluntarily removed herself from the labor market. It contended the June 25, 2020 EME found her left shoulder work injury had been aggravated by a left wrist injury that occurred at home. (Answer, February 23, 2021).

24) On March 15, 2021, Employee’s attorney emailed Employer to request a copy of the EME report cited in the January 20, 2021 controversion. (Powell email, March 15, 2021). After review of the EME report, Employee’s attorney advised Employer’s attorney the report found the left shoulder symptomatology was directly related to the October 2019 work injury. (Powell email, March 18, 2021). Employer responded, noting the preparation of an amended controversion notice that did not deny medical benefits for the left shoulder, and noting “I think we can get left shoulder treatment going in order to avoid additional delay.” (Budzinski email, March 18, 2021).

Employee’s attorney was instrumental in obtaining previously-denied medical benefits for the left shoulder injury. (Particular facts, circumstances, judgment, experience, inferences drawn).

25) On March 19, 2021, Employer amended its prior denial of benefits to note specific benefits controverted: “TTD benefits while the employee was released to full duty or modified work; TTD, TPD or PTD benefits after the employee retired; PPI benefits for the lumbar spine and right shoulder; [a]ll benefits related to the left wrist fracture[.]” Reasons for the denial of benefits included “TTD benefits are not payable while the employee was working on a full duty or modified basis after the work injury. TTD, TPD, and/or PTD benefits are also not payable after the employee voluntarily removed herself from the labor market by retiring due to COVID-19 in late May or early June 2020. All benefits related to the employee’s left wrist fracture are denied on the basis that the fracture did not occur in the course of employment but occurred at home. Disability benefits arising from the left arm are not payable while the left wrist fracture was the substantial cause of left arm disability as stated by Dr. Pino in his EIME report of 6/25/20. According to Dr. Pino, the employee has 0% permanent impairment with respect to the lumbar spine and right shoulder.” (Controversion Notice, March 19, 2021).

26) On April 9, 2021, Employee indicated she had received \$21,725.40 in net Social Security benefits in 2020. (SSA-1099, April 9, 2021).

27) On April 9, 2021, paystubs from Piedmont Newnan Hospital indicated that Employee received \$39.00 per hour as an ultrasound technician, with the following earnings:

| | | |
|---------------------------------|-------------------------|-----------------------|
| February 9 – February 15, 2020 | Gross Income \$1,020.38 | Net Income \$ 789.88 |
| February 16 – February 29, 2020 | Gross Income \$2,181.92 | Net Income \$1,688.97 |
| March 1 – March 14, 2020 | Gross Income \$1,340.70 | Net Income \$1,061.42 |
| March 15 – March 28, 2020 | Gross Income \$ 988.10 | Net Income \$ 732.36 |

(Employee paystubs, various dates).

28) On April 13, 2021, a Social Security Administration Benefit Verification Letter set out Employee’s regular Social Security payment as \$1,524.00 per month from January 2020 to November 2020, and \$1,689.00 beginning December, 2020. (Social Security Benefit Verification Letter, April 13, 2021). Employee provided this information to Employer on Tuesday, April 13, 2021 and it was received the same day. (Powell email, April 13, 2021 and Budzinski reply email, April 13, 2021).

29) On May 17, 2021, Employee testified she was injured from a fall on ice at Employer-provided housing; she had traveled down the stairs and her “feet slipped out from under” her and

she landed on her bottom. She injured her knee in the fall but could not say how. A taxi took her to work. She called her supervisor with Employer and at the hospital, and was advised to go to the emergency room. She didn't have a lot of pain at that time but was very stiff. She referenced her neck, shoulders, knee, and back.

Employee was able to continue working in Barrow after the fall; she had a light schedule. She would use her right arm for scanning and type with her left. The night of the fall, she woke up in the middle of the night and had excruciating pain in her back. Employee had seen Dr. Gaela at the hospital in Barrow and received a referral for physical therapy. Employee cancelled because she knew there was "no way [she] wanted to try to do anything physical therapy-wise." Her back injury was very painful, anything that involved her shoulders or back hurt.

Employee saw Dr. Kuprys in December of 2019 and physical therapy was ordered but not approved until March of 2020. Left shoulder surgery had been recommended but not received to date. Her right shoulder got better over time; she can still have pain when she moves certain ways, but the "right shoulder is good." Her right knee issues had resolved.

Employee worked in x-rays for about 10 years before she changed to ultrasound. She has been doing ultrasound for 34 years and is certified in OB/GYN, abdominal, vascular, and breast ultrasound. Employee had her own contract sonography business from 2006 to 2010. Before she left to take the job in Barrow with Employer, she had completed all paperwork to start her business again; she planned to start up after she returned from Alaska on November 2, 2019. Her last day of work in Barrow for Employer was November 1, 2019. She was still employed by Employer at that time; the process was that they would call with an opportunity and she would decide whether to take it. She had the opportunity to work through Employer and turned down shifts that were offered to her after leaving Alaska. Her pay would change somewhat depending on what part of the country she worked in; she made more money through her own company.

Dr. Kuprys put her on restrictions. Employer had told her they could not staff her anywhere with her restrictions. She did not work after returning to Georgia from Alaska, except at Piedmont Hospital in Newnan, Georgia from February 10 to April 5, 2020. She worked there two days per

week, eight hours per day. That was all the work they had available, and they had transporters who brought the patients to her although she did perform portable imaging. She did not think she could have worked more hours due to the pain in her shoulders, her primary physical problem at that time. Employee was paid disability benefits from when she returned home to Georgia until February 10, 2020.

Hospital sonographers may need to scan with one hand and press or move portions of the patient's anatomy with the other. Non-hospital work is not usually as strenuous. Her previous business serviced hospitals, doctors' offices, and imaging centers.

COVID hit while Employee was working at Piedmont; her last day was April 5 at noon. She discussed it with her family and decided she would "just bow out for now." Employee has two chronic health conditions. She was going to wait until things calmed down with her shoulders and back and COVID calmed down and then get her business going again. Piedmont would have continued to provide work. It was Employee's decision not to work due to COVID that caused her to stop work at Piedmont. Employee did not retire due to COVID. She would not go back into a hospital setting now. Her business would target outpatient offices, imaging centers, and OB/GYN offices. She had limitations on what she could do since the injury. Employee does not know how she will recover after surgery; there is a lot of physical movement in the work which she thought would bother her back, but it does not totally restrict her. Her left shoulder would definitely restrict some of the physical things she would need to do. She has had carpal tunnel off and on but did not think it would interfere with her self-employment. Employee's plan is to return to work as an ultrasound technician if the left shoulder surgery significantly improves her condition. She intends to work as long as she can.

Employee fractured her left wrist in June 2020 working in her yard. It resolved after surgery. It will not interfere with her going back to work as an ultrasound technician. The June 2020 fall did not have any impact on her left shoulder; it has been the same since the October 2019 injury.

Employee did not collect any unemployment benefits after she left Alaska. She has been receiving Social Security retirement since 2017 or 2018. She thought her monthly payment started out at

\$1,544. At the time of her October 3, 2019 injury, she was married without any additional dependents. (Employee deposition, May 17, 2021).

30) Employee testified at hearing substantially as she did in her deposition. Her shoulder condition has not improved since her fall – it is no worse or better since the fall at home where she broke her wrist. An MRI in September 2020 showed she had a significant rotator cuff tear. Shoulder surgery had initially been scheduled for November, 2020 but it was cancelled as preapproval had not been received. On June 28 the surgeon was leaning toward a total shoulder replacement rather than repair; Employee was to go back for a follow-up at the end of July.

Employee was able to complete five weeks of work in Barrow, with a total of about 15 patients. Her shift in Barrow was 4 p.m. to 1 am, and she only did emergency room or OB scans. She went slowly and carefully and did not need any assistance at that jobsite.

Employee's back pain has resolved. Employee was placed on work restrictions; she was released to full duty in January 2020 to take a job at Piedmont. Piedmont provided patient assistance for her ultrasound duties. Sixteen hours a week was all that she could physically handle; she did not know if Piedmont had more hours available. The work there did not affect her injury, she was not injured while she was there, and her shoulder has not changed significantly since the initial injury in Barrow.

Employer had told her they would not hire her back due to her restrictions. Employee was unaware of any other temporary service who would hire her with restrictions. Employee enjoyed working and had planned to start her own company, not knowing she would be injured. She quit work at Piedmont willingly. She had thought she would be getting shoulder surgery at any time, and had no reason to go to work – with an anticipated three-month recovery she did not want to take a job then have to quit. Employee had not planned on retiring. She had planned to restart her staffing agency in January 2020 after she returned from Alaska. She was physically fine when she went to Barrow.

Employee fractured her wrist and it was surgically repaired. She could not do the Piedmont work during the acute phase – the initial fracture and surgery. Her physician thought she had recovered

from the wrist fracture in August 2020. She did not consider returning to work at that time because COVID was still around. Employee does not know if work would have been available at Piedmont starting in August 2020. Employee did not answer a question about whether she could physically work 16 hours a week at Piedmont at the time of hearing. Regarding the impact of COVID on her work, she is more apt to go back now because of vaccines. COVID would not prevent Employee from returning to work for herself if she was physically able. Employee is not vaccinated. (Brown, July 15, 2021).

31) Employee was generally credible. (Experience; observations; judgment; inferences drawn therefrom).

32) The closest area to Employee's residence in Hogansville, Georgia is LaGrange-Troup County, Georgia with an applicable COLA of .6426 for 2020-2022. (Alaska Workers' Compensation Bulletin No. 19-09, December 10, 2019). LaGrange-Troup County is not listed for 2017-2019; the closest applicable area in 2019 is Fayetteville-Fayette County, Georgia with an applicable COLA of .6858. (Alaska Workers' Compensation Bulletin No. 16-05, November 29, 2016).

33) On June 16, 2021, Employee filed 2019 and 2020 mileage logs, reflecting 80.4 miles in 2019, and 643.2 miles in 2020, for medical travel from Hogansville, Georgia to LaGrange, Georgia. (Mileage logs, June 16, 2021).

34) On July 7, 2021, Employee requested 29.3 hours of attorney time at \$400 per hour and \$160.40 in costs for a total of \$11,880.00. (Affidavit, July 7, 2021). On July 15, 2021, Employee requested an updated total of 33.0 hours of attorney time and costs of \$160.40 for a revised total of \$13,360.40. (Supplemental Affidavit, July 15, 2021).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the Legislature and construction of chapter. It is the intent of the legislature that

- (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
- (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

....

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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." That some persons "may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987)(further citations omitted).

AS 23.30.010. Coverage. (a) Except as provided in (b) of this section, compensation and 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 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 disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

....

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, 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 the 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 medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.

....

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

The application of the presumption involves a three-step analysis; for injuries occurring after 2005, if an employee establishes a preliminary link between the injury and the employment, the presumption "may be overcome at the second stage when the employer presents substantial evidence, which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment." *Runstrom v. Alaska Native Med. Ctr.*, AWCAC Dec. No. 150 at 7 (March 25, 2011). The employee need only provide minimal relevant evidence to establish the preliminary link between the injury and employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 339, 244 (Alaska 1987). Credibility is not weighed at this stage. *Resler v. Universal Services, Inc.*, 778 P.2d 1146 (Alaska 1989). In claims arising after November 5, 2005, employment must be the substantial cause of the disability or need for medical treatment. AS 23.30.010(a). If the employer's evidence is sufficient to rebut the presumption, the employee must then prove his case by a preponderance of the evidence. *Runstrom* at 8. Credibility is not weighed at the second step. *Resler*. An employer can rebut the presumption by showing that the injury did not arise out of the employment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). To do so, the employer needs to show the work injury could not have caused the condition requiring treatment or causing disability (the negative-evidence test) or that another, non-work-related event or condition caused it (the affirmative-evidence test). *Id.*; *Corona v. State of Alaska*, AWCBC Dec. No. 20-0032 (May 21, 2020).

In the third step, if the employer has successfully rebutted the presumption, it drops out and the employee must prove their claim by a preponderance of the evidence. *Runstrom* at 8. When determining whether the disability or need for treatment arose out of and in the course of employment, the factfinders in step three of the analysis must evaluate the relative contribution of different causes of the disability or need for treatment. *Huit*. The board must review the different causes of the benefits sought and identify one cause as “the substantial cause.”

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness

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

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical or related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

. . . .

AS 23.30.155. Payment of Compensation. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .

....

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment.

....

(o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

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

Where an employer neither controverts employee's right to compensation, nor pays compensation due, subsection .155 imposes a penalty. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352 (Alaska 1992). To avoid a penalty, a controversion must be filed in good faith, meaning the employer must possess sufficient evidence in support of the controversion that, if Employee does not introduce evidence opposing the controversion, the board would find that he claimant was not entitled to benefits. *Id.*

The division of insurance will be notified if the board finds that Employer's insurer has frivolously or unfairly controverted compensation. "Frivolous" is not defined in the Act. Black's Law Dictionary defines "frivolous" as "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful." BLACK'S LAW DICTIONARY, 10TH ED., at 783 (2009). The Alaska Supreme Court adopted a definition of frivolous used by the Alaska Workers' Compensation Appeals Commission where the parties did not otherwise ask for a review of its meaning: "a 'frivolous' controversion is one 'completely lacking a plausible legal defense or evidence to support a fact-based controversion.'" *Ge Vue v. Walmart Assoc., Inc.*, 475 P.3d 270, 288 (Alaska 2020)(further citation omitted). Cases reviewing the standard for Rule 11 civil sanctions on frivolous pleadings have found the determining factor to be whether there was a reasonable basis, *Alaska Fed. S & L v. Bernhardt*, 794 P.2d 579 (Alaska 1990), and being "both baseless and made without a reasonable and competent inquiry," *Garcia v. Gallo*, 2018 WL 3414324 (D. Alaska, 2018).

A workers' compensation award, or any part thereof, accrues lawful interest from the date it should have been paid. *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187 (Alaska 1984).

AS 23.30.175. Rates of Compensation. . . . (b) The following rules apply to benefits payable to recipients not residing in the state at the time compensation benefits are payable:

(1) the weekly rate of compensation shall be calculated by multiplying the recipient's weekly compensation rate calculated under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215 by the ratio of the cost of living of the area in which the recipient resides to the cost of living in this state;

....

(4) application of this subsection may not reduce the weekly compensation rate to less than \$154 a week, except as provided in (a) of this section;

....

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 a period of disability occurring after the date of medical stability.

The fact that an Employee may be concurrently disabled from an unrelated medical condition does not preclude eligibility for TTD benefits. *Estate of Ensley v. Anglo Alaska Constr.*, 773 P.2d 955 (1989).

AS 23.30.200. Temporary Partial Disability. (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

(b) The wage-earning capacity of an injured employee is determined by the actual spendable weekly wage of the employee if the actual spendable weekly wage fairly and reasonably represents the wage-earning capacity of the employee. The board may, in the interest of justice, fix the wage-earning capacity that is reasonable, having due regard to the nature of the injury, the degree of physical impairment,

the usual employment and other factors or circumstances in the case that may affect the capacity of the employee to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future.

The concept of disability compensation rests on the premise that the primary consideration is not medical impairment per se, but rather the loss of earning capacity related to that impairment. *Vetter v. Alaska Workmen's Compensation Bd.*, 524 P.2d 264 (Alaska 1974). Where the Employee voluntarily leaves the labor market, there is no compensable disability. *Id.* The statutory definition of "disability" says nothing about the reasons for leaving work; the issue is whether the claimant was able to work despite the injury, not why she is no longer working. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990).

AS 23.30.220. Determination of Spendable Weekly Wage. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

....

(4) if at the time of injury the employee's earnings are calculated by the year, the employee's gross weekly earnings are the yearly earnings divided by 52;

....

An employer may presume that for an hourly worker AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the employee's wages at the time of injury. The hourly employee has the burden to challenge the compensation rate established under § 220(a) if it does not represent the equivalent wages at the time of injury. *Wilson v. Eastside Carpet Co.*, AWCAC Dec. No. 106 (May 4, 2009).

AS 23.30.225. Social security and pension or profit sharing plan offsets. (a) When periodic retirement . . . benefits are payable . . . the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.

....

“Average weekly wages” are synonymous with “gross weekly earnings” in AS 23.30.220(a)(1). *Underwater Constr. v. Shirley*, 884 P.2d 150 (1994).

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;

. . . .

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

. . . .

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

- (1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its statutory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

. . . .

(d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or more have accumulated, or upon completion of medical care, whichever occurs first.

. . . .

8 AAC 45.138. Cost-of-living adjustment. . . .

. . . .

(c) The results of the cost-of-living survey for this state, various areas in other states and the District of Columbia will be published annually in the Workers' Compensation Manual, published by the department. The cost of living for this state will be the averaged cost of living for Anchorage, Juneau, and Fairbanks.

....

(e) If the recipient does not reside in this state but resides in the United States, the cost-of-living ratio must be determined by using the ratio of the published cost of living for the area nearest where the recipient resides and the cost of living for this state. If the recipient resides an equal distance between two areas for which cost-of-living surveys have been published, the ratio that results in the highest compensation rate must be used.

....

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.

....

8 AAC 45.180. Costs and attorney's fees. . . .

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

(c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed.

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.146(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.

(2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

....

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. . . .

Attorney's fees in Alaska workers' compensation cases should be "fully compensatory and reasonable" to ensure injured workers have "competent counsel available to them." *Childs v. Copper Valley Elec. Ass'n*, 860 P.3d 1184, 1190 (Alaska 1993); *Wise Mechanical Contractors v. Bignell*, 718 P.3d 971 (Alaska 1986). Employees are entitled to attorney fees when the attorney is instrumental in causing the Employer to voluntarily pay benefits. *Childs*. The factors set out in ARPC 1.5(a) are reviewed to determine attorney's fee awards. *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.2d 784, n. 51 (Alaska 2019). Those factors are:

(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.

Each factor is to be considered and findings or explanation made as to why the factor was not relevant. The presumption of compensability does not apply to the amount of fees and their reasonableness. *Rusch*. If an attorney's fee award under AS 23.30.145(a) and (b) is reasonable, then an award of statutory fees on benefits awarded and divided between actual fees incurred through hearing and fees on future benefits is also reasonable. *State of Alaska v. Wozniak*, AWCAC Dec. No. 276 (March 26, 2020).

8 AAC 45.210. Weekly Compensation Rate. (a) The weekly rate of compensation is based on a seven-day week. When computing compensation for a number of days not equally divisible by seven, the result will be carried to three decimals.

....

8 AAC 45.225. Social security and pension or profit sharing plan offsets. (a) An employer may reduce an employee's or beneficiary's weekly compensation under AS 23.30.225(a) by

- (1) getting a copy of the Social Security Administration's award letter showing the
 - (A) employee . . . is being paid retirement . . . benefits;
 - (B) amount, month, and year of the initial entitlement; and

....

- (2) computing the reduction using the employee's initial Social Security entitlement, and excluding any cost-of-living adjustments; and
- (3) completing, filing with the board, and serving upon the employee . . . a Compensation Report form showing the reduction and how it was computed, together with a copy of the Social Security Administration's award letter.

....

(d) An employee or beneficiary who is receiving weekly compensation benefits shall

- (1) send the employer a copy of the award letter from the Social Security Administration

ANALYSIS

1) Is the work injury the substantial cause of Employee’s current disability and need for medical treatment?

A three-part test determines whether Employee’s employment is the substantial cause of any disability or need for treatment. A.S. 23.30.010(a); AS 23.30.120. Credibility is not weighed at this stage. *Resler*. Employee attached the presumption of compensability by her testimony that she fell and injured herself at Employer-provided housing on her way to work. *Cheeks*. She reported injuries to her shoulders, back, right hip, and right knee at the emergency room shortly after her fall. The burden now shifts to Employer who must rebut the presumption with substantial evidence to the contrary.

Credibility is not weighed at this second step. *Resler*. EME Dr. Pino found in June 2020 that Employee’s then-current disability was related to a recent broken left wrist, not work related, which was later resolved through surgery. He also diagnosed left shoulder tendinopathy from the fall at work, work-related right shoulder strain (resolved), L1 compression fracture (resolved), and pre-existing degenerative joint disease and herniated disc of the lumbar spine (asymptomatic and unrelated to the work injury).

Dr. Pino concluded that Employee had suffered a left rotator cuff injury, with symptoms pre-dating the wrist fracture, and “conclude[d] that symptomatology and presentation consisting of persistent pain in the left shoulder is directly related to the claim injury of October 2019.” Employee’s left shoulder is the center of her current asserted disability and need for treatment.

Employer did not rebut the presumption of compensability through the EME report or otherwise. *Huit; Corona*. Employer did not oppose a finding that work was the substantial cause of

Employee's current disability and need for treatment. As Employer did not rebut the presumption of credibility, the presumption remains and the third step of the analysis need not be undertaken. *Runstrom*.

The work injury of October 3, 2019, is the substantial cause of Employee's current disability and need for treatment for her left shoulder.

2) Is Employee entitled to TTD benefits?

Employee suffered compensable injuries and is entitled to TTD benefits until medically stable where her disability is total in character and temporary in quality. AS 23.30.185. She seeks TTD benefits from March 28, 2020 through the present and into the future. Without regard to credibility, Employee has attached the presumption of disability total in character but temporary in quality via her testimony that she had significant ongoing left shoulder pain that interfered with her ability to work without assistance, and Dr. Kuprys' sedentary-only work release on December 20, 2019. AS 23.30.120.

Without regard to credibility, Employer rebutted the presumption with the January 22, 2020 release to full work from Dr. Kuprys, and pay stubs indicating that Employee worked part time at Piedmont Hospital from February 9, 2020 through March 28, 2020. *Huit; Corona*.

The burden shifts back to Employee to provide a preponderance of evidence that she remained disabled after the last date Employer paid TTD benefits, and clear and convincing evidence that she was not medically stable. AS 23.30.395(16), (28). Dr. Kuprys found Employee was not medically stable as of June 9, 2020. Dr. Pino found she was not medically stable relating to her left shoulder as of June 25, 2020, and did not release her to work without restrictions, recommending restriction of repetitive activities, overhead work, and pushing or pulling more than 10 pounds. Employee has met the burden to provide clear and convincing evidence that she was not medically stable as of June 9, 2020.

For an award of TTD benefits, Employee must also provide a preponderance of evidence that she remained totally disabled. Employee testified that her shoulder was no better or worse than at the

initial injury, she resigned due to the COVID pandemic, that Piedmont would have continued to provide her work had she not resigned, and that Piedmont provided her with lifting assistance. Employee did not provide any evidence to show that Piedmont would not have been able to provide employment to accommodate the lifting restrictions placed in June 2020 or more limiting restrictions placed in October 2020. Employee did not provide a medical opinion that she could not have continued work at Piedmont Hospital with her lifting restrictions.

Employee fell at home and sustained an intervening non-work-related injury that required surgical correction on or about June 14, 2020. Employee underwent surgical repair of the fracture and was found to be recovered and released from care on October 8, 2020. Employee's eligibility for TTD benefits would not be negated on this basis. *Ensley*.

The primary consideration in determining disability is loss of earning capacity from the impairment. *Vetter*. Employee was able to work part time at Piedmont Hospital from February 10, 2020 through March 28, 2020; no complete disability exists during that timeframe. *Id*. The only issue is whether she was able to work despite the shoulder injury, not the reason she stopped working. *Cortay*. Employee was released to full work without restrictions by Dr. Kuprys on January 22, 2020, and was not placed back on lifting restrictions until June 1, 2020. Employee did not meet her burden to provide a preponderance of evidence that she remained totally disabled after the January 22, 2020 work release from Dr. Kuprys. *Runstrom*. Employee may be eligible for TTD in the future in the event she becomes medically unstable and totally disabled because of her work injuries.

Based on the information provided, Employee may be eligible for temporary partial disability (TPD) benefits from February 10, 2020 through March 28, 2020. TPD is not an issue for hearing; however, the parties are urged to resolve TPD benefits absent a hearing.

3) Is Employee entitled to medical benefits?

Employee is entitled to medical benefits if the work injury is the substantial cause of her need for treatment. AS 23.30.010(a); AS 23.30.095. This issue was analyzed as issue 1), above, and is

incorporated here. Employee is entitled to medical benefits from Employer according to the provisions of the Act.

4) Is Employee entitled to transportation costs?

Employee is entitled to transportation costs for medical treatment related to the work injury. 8 AAC 45.084. Employer did not object to the transportation logs filed by Employee, totaling 723.6 miles for a total of \$416.47 in transportation costs.

Employee is entitled to transportation costs and is awarded \$416.67 for transportation costs through July 15, 2021 .

5) Is Employee entitled to a compensation rate adjustment?

Both parties agree that a compensation rate adjustment is appropriate. Employer paid Employee TTD at the rate of \$266 per week from November 19, 2019 through February 10, 2020. Employer may be entitled to an offset for Social Security retirement benefits received by Employee, AS 23.30.225, upon completion of the requirements set out in 8 AAC 45.225.

Employee's weekly compensation rate for TTD is 80 percent of her spendable weekly wages prior to any offsets. AS 23.30.185. Placing the 2019 wage information filed by Employee (\$58,741.20 gross income divided by 52 = 1129.64 weekly gross income; married; 1 dependent – Employee) into the State of Alaska online benefit calculator provides for an unadjusted \$760.31 weekly TTD benefit. Employee resided in Georgia at the time of her work injury and thereafter, necessitating a COLA. 8 AAC 45.138. In 2019, the closest applicable published cost of living to Employee's home in Hogansville, Georgia was Fayetteville-Fayette County, Georgia with a COLA of .6858. (Bulletin 16-05). For 2020-2022, the closest applicable published cost of living is LaGrange-Troup County, Georgia, with a COLA of .6426. (Bulletin 19.09). Applying these COLAs provides an adjusted TTD rate of \$521.42 for 2019, and \$488.58 for 2020 through 2022.

Employee did not challenge the statutory compensation rate as not representing equivalent wages at the time of injury. *Wilson*. Employee's weekly compensation rate is adjusted to \$521.42 for 2019 and \$488.58 for 2020 through 2022 before any offsets.

Weekly workers' compensation benefits payable to Employee in the future may be offset by an amount as equal as practicable to one-half of the federal benefits for a given week. AS 23.30.225(a); *Shirley*. Employee provided a Social Security award letter providing the amount, month, and year of her initial Social Security retirement award. If Employer wishes to receive an offset for Social Security retirement benefits, it is instructed to follow the procedure as provided in 8 AAC 45.225(a).

Employer is instructed to review its prior TTD payments, complete the regulatory requirements for a Social Security offset if it intends to apply the offset, recalculate any amounts owed or overpaid, provide its calculations to Employee, and promptly pay any underpaid TTD.

6) Is Employee entitled to referral for unfair or frivolous controversy?

Employee seeks a finding of unfair or frivolous controversy and a referral to the division of insurance regarding the denial of left shoulder benefits. AS 23.30.155(o). At the time of Employer's January 20, 2021 controversy notice denying benefits for bilateral shoulders, Dr. Pino's report found that Employee's left shoulder disability and need for treatment was work related. No other evidence was cited in support of the controversy of left shoulder benefits. Standing alone, Dr. Pino's report would find the Employee is entitled to benefits for the left shoulder; Employee's January 20, 2021 controversy was frivolous. *Vue; Bernhardt; Gallo*. While portions of that report could have misled an adjuster into denying left shoulder benefits upon an initial reading: "[b]ased on the clinical examination findings . . . it is my conclusion that [Employee]'s current disability of the left upper extremity is as a result of a recent nonclaim-related injury to her left distal radius limiting the value of the clinical findings" and "[t]he etiology and causation of her left upper extremity injury is mixed in nature and certainly modulated by the presence of a new nonclaim-related injury that has happened in the last few weeks" the report clarifies that "symptomatology and presentation consisting of persistent pain in the left shoulder is directly related to the claim injury of October of 2019." A careful and thorough

reading of the EME report does not find support for a left shoulder controversion. Employer filed an amended controversion on March 19, 2021 withdrawing its denial of left shoulder benefits.

Employee is entitled to a finding of frivolous controversion regarding the January 20, 2021 denial of left shoulder benefits and a referral to the division of insurance under AS 23.30.155(o).

7) Is Employee entitled to a penalty for late paid compensation?

Employer may be liable for penalty for any uncontroverted, late paid compensation. AS 23.30.155(a), (e). Compensation includes payment of medical benefits, transportation, and TTD or other indemnity benefits as awarded.

Employee asserted the right to a penalty for late-paid TTD, stating that the controversion of TTD benefits is not supported by the medical records. Employee must be eligible for TTD benefits that were then paid late to receive a penalty. Employee has not been found eligible for TTD benefits in excess of those previously paid by Employer; no penalty is applicable.

8) Is Employee entitled to interest, attorneys fees, and costs?

Interest on unpaid compensation is mandatory. AS 23.30.155(p). Employee is entitled to accrued interest on previously-unpaid benefits awarded. *Id.*; 8 AAC 45.142(a); *Rawls*. Employee is entitled to interest according to statute. AS 23.30.155(p).

Employee requests attorney fees and costs. AS 23.30.145. Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. *Id.*; *Childs*. Employer controverted Employee's claim. Employee successfully prosecuted her claim, excepting TTD. Employee must comply with 8 AAC 45.180(b), which requires an attorney requesting fees in excess of statutory fees to file an affidavit "itemizing the hours expended as well as the extent and character of the work performed." Employee submitted itemized fee affidavits totaling \$13,200 in attorney fees and \$160.40 in costs, for a total requested of \$13,360.40. Pursuant to *Rusch*, the eight factors of Alaska Rule of Professional Conduct 1.5(a) are as follows:

KAREN BROWN v. TITAN MEDICAL HOLDINGS, INC.

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

The questions involved in this case were moderately complex and required a high degree of attention. Counsel's skill was helpful in pursuing Employee's claim. *Rogers & Babler*.

2. *The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.*

To some extent, the acceptance of any case would preclude the attorney involved from using that time for another matter. Employee did not submit any specific information regarding this issue. *Rogers & Babler*.

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

Fees are commonly awarded by Fairbanks hearing panels to attorneys of like experience. Employee provided a specified hourly rate of \$400 per hour, which was not contested by Employer's counsel. *Rogers & Babler*.

4. *The amount involved and the results obtained.*

The amount involved is unknown at this time as Employee is anticipated to undergo shoulder surgery in the near future, but is anticipated to be significant. Employee's counsel obtained a positive result for her client. *Rogers & Babler*.

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

No information was provided regarding time limitations imposed by the client or the circumstances; nothing within the record stands out as being extraordinary. *Rogers & Babler*.

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

The fee affidavit indicated that approximately eight months passed from the first meeting to the date of hearing. This is a medium length relationship. *Rogers & Babler*.

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

The attorney performing the service is highly experienced and has a good reputation. She regularly obtains positive results for clients in workers' compensation matters. *Rogers & Babler*.

8. *Whether the fee is fixed or contingent.*

This matter, like nearly all workers' compensation cases, is based on a contingent fee.

After consideration of the above factors, no objections or information having been provided to indicate that an hourly fee other than the \$400 per hour requested by Employee's attorney is fully compensatory, and the Alaska Supreme Court's guidance regarding full compensation to Employee attorneys, fees will be awarded at the rate of \$400 per hour. Employee prevailed on all issues for hearing excepting TTD after March 28, 2020 and penalty for late-paid compensation. A review of the submitted billings indicates that a fee reduction of 5.0 hours is appropriate relating to these issues.

Employee will be awarded \$11,200 in fees and \$160.40 in costs for benefits awarded in this decision. In light of the benefit obtained for Employee and the time expended, this is a reasonable, fully compensatory amount. AS 23.30.145(a); *Bignell; Childs*.

Employee has also requested statutory fees be awarded for future benefits. AS 23.30.145(a); *Wozniak*. Fees are allowed only on the amount actually controverted and awarded. AS 23.30.145(a). Here Employer controverted payments for left shoulder medical benefits, only revising its controversion after Employee's attorney filed a claim and contacted Employer's counsel to point out that the EME report did not support the controversion of these benefits. Employee's attorney was instrumental in obtaining medical and related transportation benefits for Employee's left shoulder work injury and is entitled to statutory fees on future medical benefits and transportation costs relating to the left shoulder injury. *Wozniak*. Employer shall pay statutory fees pursuant to AS 23.30.145(a) for such medical benefits and transportation costs incurred after July 15, 2021.

CONCLUSIONS OF LAW

1) Work is the substantial cause of Employee's current disability and need for medical treatment.

- 2) Employee is not entitled to TTD benefits.
- 3) Employee is entitled to medical benefits.
- 4) Employee is entitled to transportation costs.
- 5) Employee is entitled to a compensation rate adjustment.
- 6) Employee is entitled to a finding of unfair or frivolous controversion and referral to the Division of Insurance.
- 7) Employee is not entitled to a penalty for late paid compensation.
- 8) Employee is entitled to interest, attorney's fees, and costs.

ORDER

- 1) Employee's October 3, 2019 work injury is the substantial cause of her disability and need for treatment.
- 2) Employee's January 28, 2021 claim is granted in part.
- 3) Employee's compensation rate adjustment request is granted. Employee's adjusted TTD rate for 2019 is \$521.42 and for 2020 through 2022 is \$488.58. Employer is ordered to pay the Employee the difference between her initial rate and this adjusted rate, including interest.
- 4) Employer shall pay medical and related transportation costs for the work injury as awarded and in accordance with the Act.
- 5) Employer shall pay interest pursuant to 8 AAC 45.142(a).
- 6) Employer shall pay \$11,200 in attorney's fees and \$160.40 in costs.
- 7) Employer shall pay statutory attorney's fees on medical and transportation benefits incurred after July 15, 2021.
- 8) This decision will be referred to the Division Director to notify the Division of Insurance as provided in AS 23.30.155(o).

Dated in Fairbanks, Alaska on September 8, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Cassandra Tilly, Designated Chair

/s/
Sarah Lefebvre, Member

/s/
Lake Williams, 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.

