ALASKA WORKERS' COMPENSATION BOARD

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

SILVIA A. SARMIENTO-MENDOZA, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201112491
STATE OF ALASKA, Self-Insured Employer, Defendant.	)	AWCB Decision No. 14-0122
	)	Filed with AWCB Anchorage, Alaska on September 2, 2014

Silvia A. Sarmiento-Mendoza's March 29, 2012 and October 9, 2012 claims were heard on August 5 2014 in Anchorage, Alaska. This hearing date was selected on April 30, 2014. Ms. Sarmiento-Mendoza (Employee) appeared and represented herself and testified. Assistant Attorney General, Patricia Huna appeared and represented the State Of Alaska (Employer). Madeline Rush appeared as a witness and testified. The record closed at the hearing's conclusion on August 5, 2014.

ISSUES

Employee's claims raise several issues, but the parties agree the primary issue is whether employment was the substantial cause of Employee's disability or need for medical treatment. Employee contends her employment was the substantial cause, and Employer contends it was not.

1. Was employment the substantial cause of Employee's disability or need for medical treatment?

Employee contends she is entitled to TTD benefits from September 1, 2011 to December 15, 2011. Employer contends Employee is not entitled to TTD because employment was not the

substantial cause of her disability and because Employee voluntarily removed herself from the labor market.

2. Is Employee entitled to TTD, and if so for what time periods.

Employee contends she is entitled to medical costs and medical related transportation costs after June 18, 2012. Employer contends Employee is not entitled to medical costs because employment was not the substantial cause of her need for medical care.

3. Is Employee entitled to medical costs and related transportation costs?

Employee contends she is entitled to permanent partial impairment (PPI) benefits. Employer acknowledges that Employee may have a permanent impairment, but contends the impairment was preexisting, and is not due to her employment.

4. Is Employee entitled to PPI benefits?

Employee contends she is entitled to a reemployment benefits evaluation. Employer contends Employee is not entitled to an evaluation because her PPI is not a result of the work injury and she can return to her job at the time of injury.

5. Is Employee entitled to a reemployment benefits evaluation?

Employee contends she is entitled to interest on benefits that were not timely paid. Employer contends Employee was timely paid all benefits due under the Act, and no interest is due.

6. Is Employee entitled to interest?

Employee contends she is entitled to a penalty on benefits that were not timely paid. Employer contends Employee was timely paid all benefits due under the Act, and no interest is due.

7. Is Employee entitled to a penalty?

Employee contends Employer unfairly or frivolously controverted her benefits. Employer did not address this issue, but presumably contends its controversions were filed in good faith and are not frivolous.

8. Did Employer unfairly or frivolously controvert Employee's benefits?

FINDINGS OF FACT

The following findings of fact and factual conclusions are established by a preponderance of the evidence:

1. Employee was born in Peru, but has lived in Alaska for several years. She has a graduate degree in fisheries, and is fluent in English. (Dr. James, Chart Note, February 9, 2009; observation).
2. On October 28, 2008, Employee had a cervical MRI after a fall. There were no fractures or abnormalities of the paraspinous soft tissues. There were minimal broad disk bulges at C4-C5 and C6-C7, but they did not cause canal or foraminal stenosis. The remaining discs were entirely normal. (Providence Health Services, MRI Report, October 21, 2008).
3. On February 23, 2009, Employee was seen by PA-C John Love at Orthopedic Physicians Anchorage. Employee reported bilateral elbow pain and numbness and tingling in her hands, with the left greater than the right. She was working at a fish hatchery in Prince William Sound, and had been carrying heavy buckets and handling large items on a regular basis. PA-C Love diagnosed bilateral carpal tunnel syndrome, left lateral epicondylitis, and left ulnar-sided wrist pain, which he attributed to overuse. He referred Employee for further testing. (PA-C Love, Chart Note, February 23, 2009).
4. On February 24, 2009, Employee was seen by J. Michael James, M.D., at Alaska Spine Institute. Dr. James performed electromyography (EMG) and nerve conduction velocity (NCV) testing on Employee. The results were normal except for some high frequency discharges in the left pronator teres. X-rays showed moderate disc space narrowing at C5, and significant foraminal encroachment. Dr. James diagnosed mild left C6 root irritation, with no evidence of peripheral nerve entrapment or gross radiculopathy. (Alaska Spine Institute, Chart Note, X-ray Report, February 24, 2009).
5. On February 27, 2009, Shawna Wilson, ANP-C, at Alaska Spine Institute referred Employee for three sessions of physical therapy. (Alaska Spine Institute, Note, February 27, 2009).
6. On March 9, 2009, PA-C Love determined Employee was medically stable. PA-C Love checked a box on the form indicating the release was for "modified work," but did not indicate any restrictions or modifications other than instructing Employee to use wrist splints if her wrists hurt. He also recommended she seek less physically demanding work. His

diagnosis was left tennis elbow (lateral epicondylitis) and bilateral wrist tendonitis as a result of overuse at work. (PA-C Love, Physician's Report, March 9, 2009).

7. Employee reported an injury to both wrists on August 22, 2011. She was then employed as a fish technician with Employer at the Fort Richardson Fish Hatchery. (Report of Injury, August 24, 2011).
8. Employee had been employed for the season, which began mid-June 2011. Her employment was originally scheduled to end on August 15, 2011, but was extended for two weeks. There was no acute injury; rather, for several days Employee had been carrying buckets of fry to trucks for delivery to release points. Because it is impractical to count the fry, the average weight of a fish was determined, and the number of fish determined by the collective weight. A few gallons of water were placed in a 10 gallon bucket, which was weighed. Fry were collected in a net and dumped into the 10 gallon bucket, which was weighed again, and the weight was recorded. The buckets were filled up to three-fourths full, and weighed from 20 to 30 kilograms (44 to 66 pounds). The buckets had to be carried carefully so as not to spill any fish for a distance of about 60 feet. They were then lifted to a platform on the side of the delivery truck where another person emptied them into a tank on the truck. The platform was as high as Employee's nose. (Employee, Photograph of Employee and Delivery Truck).
9. Employee had worked for Employer during the 2010 season doing the same job. When carrying the buckets of fish at the end of the season, more employees were available, and Employee carried fewer buckets. After carrying the fish in 2010, employee's wrists bothered her, but she did not seek medical attention. (Employee).
10. One gallon of water weighs approximately 8.3 pounds. (Official Notice; Observation).
11. Employee was unable to get an appointment with Dr. James until August 30, 2011. She continued to work, but was given lighter duties. (Employee).
12. On August 30, 2011, Employee was seen by Dr. James. Dr. James noted that when Employee was seen in 2009, testing showed a mild irritation of the left C6 nerve root, but that Employee had been symptom-free for two years. Employee reported she was again working at a fish hatchery carrying buckets of fish, which had to be held away from her body. Dr. James reported the weight of the buckets as 20 to 30 pounds. He noted Employee was complaining of bilateral arm pain and parasthesias as well as neck pain that persisted after the work activities. She had only mild improvement even though placed on light-duty

work. Electrodiagnostic testing results were similar to 2009, with some high frequency discharges in the left biceps, pronator teres and cervical paraspinals. Dr. James diagnosed a mild left C6 radiculopathy, but referred Employee for an MRI. (Dr. James, Chart Note, August 30, 2011).

13. A cervical MRI done on September 1, 2011 showed no central or foraminal stenosis, but midline protrusions at C4-5 and C6-7 with annular tears at both locations and muscle spasms. (University Imaging Center, MRI Report, September 1, 2011).
14. On September 14, 2011, Employee returned to Dr. James, who, after reviewing the MRI, diagnosed discogenic neck pain with variable root irritation. He prescribed physical therapy for a month. (Dr. James, Chart Note, September 14, 2011).
15. On November 4, 2011, Employee again saw Dr. James. He noted Employee was not working because she had been laid off at the end of the season. Employee had improved since her last visit, but was to continue physical therapy. Dr. James diagnosed discogenic neck pain with resolving radiculopathy. (Dr. James, Chart Note, November 4, 2011).
16. Employee was again seen by Dr. James on December 29, 2011. He noted continued improvement, and discontinued physical therapy in favor of a home exercise program. (Dr. James, Chart Note, December 29, 2011).
17. On January 12, 2012, ANP-C Wilson prescribed a TENS unit for Employee. (ANP-C Wilson, Letter of Medical Necessity, January 12, 2012).
18. On March 16, 2012, Employee returned to Dr. James. He noted Employee's symptoms wax and wane depending on her activity level, primarily on the right. He also noted impaired mobility in Employee's neck, with mild Spurling's signs on the right and mild hypesthesia on the left. His impression was cervical radiculopathy which was basically stable and mostly resolved. (Dr. James, Chart Note, March 16, 2012).
19. On March 28, 2012, Employee returned to Dr. James for a permanent impairment rating. He noted her symptoms were aggravated with heavy use or that require strength, such as her work at the fish hatchery. He reported mildly positive Spurling's signs on the right and hypesthesia of the right lateral upper arm and radial forearm. He noted the MRI had shown annular tears at C4-5 and C6-7 "superimposed on some midline protrusions and some underlying degenerative disc disease." He determined she had a 12 percent whole person

impairment, and would be unable to return to any medium or heavy work, including work as a fish technician. (Dr. James, Chart Note, March 28, 2012).

20. On May 23, 2012, Employee returned to Dr. James seeking clarification. Dr. James stated her present problem was a result of the August 2011 work injury. He did not believe she was able to return to work before early December 2011, and she would not be able to return to work as a fisheries technician if it required lifting of 40 to 50 pounds. (Dr. James, Chart Note, May 23, 2012).
21. On June 11, 2012, Patrick Radicki, M.D., performed an employer's medical evaluation (EME). He reviewed medical records, but did not examine Employee. Madeline Rush, Employer's current adjuster, was not the adjuster at the time of the EME. She stated the normal practice was to send all medical records in Employer's possession at the time to the medical evaluator. Based on the adjuster's date stamp on medical reports in the filed medical summaries, that would include Dr. James's reports from August 30, 2011 through March 28, 2012, the September 1, 2011 MRI report, and several physical therapy reports. (Dr. Radicki, EME Report, June 11, 2012; Employee; Rush; Employer's Medical Summaries, April 10 and June 14, 2012).
22. Medical evaluators typically identify the reports they reviewed; Dr. Radicki did not do so. In discussion, Dr. Radicki refers only to Dr. James's reports dated August 30, 2011, November 4, 2011, December 29, 2011, March 16, 2012 and March 28, 2012. (Observation; Dr. Radicki, EME Report, June 11, 2012).
23. In his report, Dr. Radicki responded to questions posed by Employer's adjuster in a May 31, 2012 letter. His diagnosis was preexisting mild cervical degenerative disc disease with a history of previous injury in February 2009, and, based on Dr. James's report, in August 2011, Employee developed new symptoms without a specific injury. Dr. Radicki also stated the March 28, 2012 symptoms on Employee's right side evidenced a right C6 radiculopathy, a new condition unrelated to work. (Dr. Radicki, EME Report, June 11, 2011).
24. In response to a question asking him to identify all possible causes of Employee's conditions or symptoms, Dr. Radicki identified C6 radiculopathy, the substantial cause of which was her preexisting degenerative disc disease. Dr. Radicki stated the work injury was not the substantial cause of Employee's work injury because "She did not have a work injury. She had symptoms that became apparent following a day of work, during which apparently no

specific out-of-the ordinary activity occurred. . . ." He did not feel the August 2011 work activities aggravated Employee's preexisting right C6 radiculopathy because "In the absence of her preexisting degenerative disc disease and in the absence of her previous C6 radiculopathy, it is not likely that the task of lifting 20 to 30 pound buckets of fish would cause a radiculopathy." (Dr. Radicki, EME Report, June 11, 2011).

25. Dr. Radicki disagreed with Dr. James's 12 percent PPI rating. Dr. Radicki attributed 6 percent to the left C6 radiculopathy, but opined it was due to the 2009 work injury. He attributed the remaining 6 percent to the right C6 radiculopathy diagnosed in March 2012 to a new injury, not the August 2011 work incident. (Dr. Radicki, EME Report, June 11, 2011).
26. On June 19, 2012, Employer controverted all benefits based on Dr. Radicki's EME report. (Controversion Notice, June 18, 2012).
27. On August 29, 2012, Employee returned to Alaska Spine Institute where she was seen by ANP-C Wilson, who reviewed Dr. Radicki's EME report. Employee continued to have neck and bilateral arm pain that was aggravated by overhead work and lifting. Employee had returned to work in a light-duty position, without any significant aggravation of her symptoms. She showed positive Spurling's signs bilaterally. ANP-C Wilson disagreed with Dr. Radicki's interpretation of Employee's chart. She stated that while Employee had similar symptoms in 2009, they resolved with conservative treatment and she was symptom-free for two years. She disagreed that there was no specific injury in August 2011; it was well documented Employee was carrying buckets held out from her body, and on further discussion Employee explained she was lifting the buckets to a platform above her head for several days when she began to develop wrist, arm, and neck pain. She disagreed that Employee's right upper extremity findings were new in March 2012; the pain diagram completed by Employee at her August 30, 2011 visit showed bilateral symptoms, even though Employee did not show nerve compromise at that time. She stated that lifting above the head certainly uses muscles that stabilize the shoulder girdle and attach to the cervical region. She stated that at the very least, the August 2011 work was responsible for a permanent aggravation of her previous injury. (ANP-C Wilson, Chart Note, August 29, 2012).
28. On June 26, 2013, Employee attended a second independent medical evaluation (SIME) with Alan C. Roth, M.D. Dr. Roth described the onset of Employee's injury as having lifted a

heavy bucket weighing up to 70 pounds, carrying it about 60 feet, and lifting it up high on a truck for over a week. He noted that Employee had worked at the job in both 2010 and 2011 as a seasonal worker doing "a fair amount of lifting, which generally was not that heavy although during one specific week at the end of each year she had to lift a great deal more." In 2010, she had some discomfort, but it was transient. In 2011 there were fewer employees, so Employee had to do more heavy lifting. He noted that Employee had a significant cervical radiculopathy in 2009, documented by EMG. In the interval between 2009 and 2011 she was on modified regular work, "doing much lighter work" except for the week –long period in 2010 and 2011. (Dr. Roth, SIME Report, June 26, 2013).

29. Dr. Roth opined Employee had cervical radiculopathy as diagnosed by Dr. James in 2009 and more likely than not, the 2011 work exposure caused a temporary flare-up and tendonitis that resolved in a few months. (Dr. Roth, SIME Report, June 26, 2013).
30. In response to a question asking if the August 2011 work injury aggravated, accelerated or combined with a preexisting condition to cause Employee's disability or need for medical treatment, Dr. Roth stated: "[T]he substantial cause of the patient's need for treatment in 2011 was her preexisting cervical radiculopathy, which was flared-up as a result of her work activities. The flare-up was not the substantial cause aggravating, accelerating, or combining with the preexisting condition to cause the employee's disability." A following question asked "What is the substantial cause of the patient's disability?" Dr. Roth answered: "A preexisting cervical radiculopathy and disc disease, which was temporarily aggravated with her work activity of lifting." He was next asked to provide the relative contribution of the different causes of Employees "complaints and symptoms." He attributed 90 percent of her complaints and symptoms to the preexisting radiculopathy and disc disease with some contribution from Employee's apparent depression. (Dr. Roth, SIME Report, June 26, 2013).
31. Dr. Roth did not disagree with Dr. James's 12 percent PPI rating, but attributed Employee's impairment to her preexisting radiculopathy, not the 2011 work injury. He opined Employee could return to work as a Fish Farmer, as defined in the Dictionary of Occupational Titles, which required medium strength, lifting 20 to 50 pounds occasionally. (Dr. Roth, SIME Report, June 26, 2013).
32. Employee was not on light or restricted duty between the 2009 and 2011 injuries. During the 2011 season she carried 44 pound bags of fish food on a daily basis, moved 1,000 kilogram

pallets of fish food using a pallet jack, removed and cleaned five foot by six foot screens from the raceways, and carried heavy incubators. Employee still has pain and symptoms, but has not experienced depression. She would return to her job as a fish technician if she could, but has passed up openings in the field because she cannot do the work. (Employee).

33. Employer paid Employee's medical bills before its June 19, 2012 controversion. Employee filed one medical bill from Alaska Spine Institute for $242.00 for an office visit on August 29, 2012 that was not paid. She also stated periodic prescriptions for Celebrex had not been paid and ANP-C Wilson recommended physical rehabilitation, estimated to cost about $4,000.00, which Employee was unable to pursue because of Employer's controversion. (Employee).
34. Employee filed a mileage log for medical related travel. The log covers a total of 326.2 miles travel from August 30, 2011 through August 29, 2012. Because it covers time both before and after Employer's June 19, 2012 controversion, it is unclear whether Employee was reimbursed for any of the listed travel. (Travel Log).
35. The reimbursement rate for travel by private automobile from August 30, 2011 through August 29, 2012 was $0.555 per mile. (AWCB Bulletin 11-01). At $0.555 per mile, the reimbursable cost for 326.2 miles is $202.02. (Observation).
36. Employee is very credible. (Observation, Judgment).

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." *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 23.30.041. Rehabilitation of Injured Workers.**
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> (c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected

> by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.
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> **AS 23.30.095. Medical 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. . . .
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> **AS 23.30.097. Fees for medical treatment and services.**
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> (d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later.
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> **AS 23.30.120. Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter; . . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Carter,* 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

Application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. *See, e.g., Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). Medical evidence may be needed to attach the presumption of compensability in a complex medical case. *Burgess Constr. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). However, an employee "need not present substantial evidence that his or her employment was a substantial

cause of his disability." *Fox v. Alascom, Inc.*, 718 P.2d 977, 984 (Alaska 1986) "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

If the employee establishes the preliminary link, then the employer can rebut the presumption by presenting substantial evidence that demonstrates that a cause other than employment played a greater role in causing the disability or need for medical treatment or by substantial evidence that employment was not the substantial cause. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011) at 7); *Atwater Burns Inc. v. Huit*, AWCAS Decision No. 191 (March 18, 2014). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fireman's Fund Am. Ins. Companies v. Gomes*, 544 P.2d 1013, 1015 (Alaska 1976). The determination of whether evidence rises to the level of substantial is a legal question. *Id*. Because the employer's evidence is considered by itself and not weighed at this step, credibility is not examined at this point. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

If the presumption is raised and not rebutted, the claimant need produce no further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Runstrom* at 8.

"[L]ay evidence may be highly relevant, as when it tends to support or contradict the assumptions as to the facts of the claimant's history on which expert medical witnesses rely." *Smith v. University of Alaska, Fairbanks*, 172. P.3d 782, 790 (Alaska 2007).

In *Smith v. University of Alaska (Fairbanks)*, AWCB Decision No. 05-0073 (March 11, 2005), the board found that the employee could not prove his claim by a preponderance of the evidence because no doctor had stated on a more-probable-than-not basis that work cause the employee's disability an need for medical treatment. The Supreme Court reversed in *Smith v. University of*

Alaska, Fairbanks, 172. P.3d 782 (Alaska 2007), stating "A statement by a physician using a probability formula is not required to establish employer liability in workers' compensation."

> **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 finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g., Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005). The board has the sole discretion to determine the weight of the medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision No. 087 (August 25, 2008) at 11.

> **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. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating
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> (1) that the right of the employee to compensation is controverted;
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> (2) the name of the employee;
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> (3) the name of the employer;
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> (4) the date of the alleged injury or death; and
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> (5) the type of compensation and all grounds upon which the right to compensation is controverted.
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> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments,

> every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
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> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due.
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> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
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> (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.

A controversion notice must be filed "in good faith" to protect an employer from a penalty or to avoid referral to the Division of Insurance. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." *See also* 3 A. Larson, *Larson's Workmen's Compensation Law* § 83.41(b)(2) (1990) ("Generally a failure to pay because of a good faith belief that no payment is due will not warrant a penalty."). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to

benefits." *Harp*, 831 P.2d at 358. The evidence which the employer possessed "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id*. The board must examine the evidence in support of a controversion in isolation and without consideration of credibility, to determine if the evidence is sufficient to rebut a presumption of compensability of the compensation controverted. Because the sufficiency of evidence to overcome the presumption is considered without determining credibility or weighing it against other evidence, evidence to support a controversion is also viewed in isolation, without determining weight or credibility. *Municipality of Anchorage v. Monfore*, AWCAC Decision No. 081 (June 18, 2008).

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 23.30.190. Compensation for permanent partial impairment; rating guides.
(a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.

8 AAC 45.142. Interest.
(a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and 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 or, if deceased, to the employee's beneficiary or estate;
> . . . .
>
> (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.
>
> **AS 23.30.395. Definitions.**
> In this chapter,
> . . . .
>
> (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;

"Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary." *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567, 573 (Alaska 2012) citing *Grove v. Alaska Constructors & Erectors*, 948 P.2d 454, 458 (Alaska 1997).

ANALYSIS

1. Was employment the substantial cause of Employee's disability or need for medical treatment?

Employee contends the work injury was the substantial cause of her disability and need for medical treatment. This is a factual question to which the presumption of compensability applies. Employee needed only "some," or "minimal," relevant evidence to raise the presumption. In determining whether the presumption is met, credibility is not considered nor is the evidence weighed against competing evidence. Dr. James's May 23, 2013 report, stating the August 2011

injury was the cause of employee' problem, together with his other reports, is sufficient to raise the presumption.

To rebut the presumption, Employer was required to present substantial evidence demonstrating that employment was not the substantial cause or that a cause other than employment played a greater role in causing Employee's disability and need for medical treatment. Again, credibility is not considered nor is the evidence weighed against competing evidence at this step. Employer successfully rebutted the presumption through Dr. Radicki's June 11, 2011 report. Because Employer rebutted the presumption, Employee must prove by a preponderance of the evidence that the work injury was the substantial cause of her disability or need for medical treatment

Employee credibly explained the weight of the buckets was 20 to 30 kilograms, not 20 to 30 pounds as initially reported by Dr. James. A 10 gallon bucket filled three-fourths with water would weigh about 62 pounds (7.5 gallons x 8.3 lb./gallon = 62.25 lb.). The buckets had to be carried carefully and lifted above shoulder height. This occurred regularly during the last two weeks of the season.

The least weight is given to Dr. Radicki's report. He did not examine Employee, and it is unclear exactly what medical records he reviewed. In his report, he referred only to five medical reports from Dr. James, all in 2011 and 2012. He did not have Employee's medical records from 2009, and relied only on Dr. James's summary of that injury in his 2011 chart notes in determining the 2009 injury was the cause of Employee's disability and need for medical treatment. By relying on Dr. James's misstatement of the weight of the bucket and the limited description in the chart note, Dr. Radicki significantly misunderstood the mechanism of injury. It did not occur after "a day of work" carrying 20 to 30 pound buckets. It occurred after carrying 20 to 30 kilogram buckets numerous times per day over more than a week and lifting them to above shoulder height. Employee's testimony contradicts the facts assumed by Dr. Radkici. Dr. Radicki also appears to misapprehend the nature of an aggravation of a preexisting condition in workers' compensation cases. He stated that in the absence of the preexisting condition, lifting the buckets would not have caused Employee's radiculopathy. However, the question should have been, given Employee's preexisting condition, did lifting the buckets aggravate the

preexisting condition, causing the disability and need for medical treatment. Further, Dr. Radicki's opinion that the onset of right-sided radiculopathy in March 2012 indicated a new injury is not supported by the evidence. Although Employee's left radiculopathy was initially more severe, she reported bilateral symptoms from her first report of injury in August 2011. There is no evidence of an injury or aggravating event in March 2012, and Dr. Radicki's conclusion there was a new injury, rather than a worsening of the symptoms of the earlier injury is speculation. For these reasons, Dr. Radicki's opinions are given little weight.

Less weight is also given to Dr. Roth's opinions. First, Dr. Roth either contradicts himself as to the causation of Employee's disability and need for medical treatment or misunderstands the nature of an aggravation of a preexisting condition. In response to one question he states Employee's preexisting radiculopathy was "flared up" as a result of her work activities, but the flare-up was not the substantial cause of an aggravation to her preexisting condition. Yet in response to a later question he states the substantial cause of Employee's disability was the preexisting radiculopathy which was temporarily aggravated by the work activity. An aggravation need not be permanent to be the substantial cause of an employee's disability or need for treatment. In response to another question, Dr. Roth addressed the relative contribution of the different causes of "complaints and symptoms," and attributed 90 percent of her complaints and symptoms to her preexisting condition. While doctors are not required to use "magic words," the cause of "complaints and symptoms" is not necessarily the same as the substantial cause of disability or need for medical treatment. A preexisting condition may indeed cause 90 percent of a person's complaints and symptoms yet not cause the inability to work or need for medical treatment. Where the disability and need for medical treatment are due to the remaining 10 percent of "complaints and symptoms," the cause of the 10 percent would be the substantial cause. Also, Dr. Roth overstates the 2009 injury and understates the nature of Employee's work between 2009 and 2011. Dr. Roth states Employee had a radiculopathy as diagnosed by Dr. James in 2008 or 2009. There is no report from Dr. James in 2008. On February 24, 2009, Dr. James diagnosed "mild nerve root irritation," with *no gross radiculopathy.* Employee's attending physician in 2009 was PA-C Love. Even after reviewing the 2009 x-ray, and Dr. James's report, his diagnosis remained tennis elbow and tendonitis, not radiculopathy. Additionally, Dr. Roth's statement that except for the week-long period

Employee was "doing much lighter work in 2010 and 2011 is incorrect. Employee was engaged in heavy work during that period.

Dr. James and ANP-C Wilson's opinions are given the most weight. They examined or treated Employee after both the 2009 and 2011 injuries and are best situated to opine on the effects of the two injuries. Although Dr. James initially reported the weight of the buckets incorrectly, his opinion is in better accord with the facts than the opinions of Dr. Radicki and Dr. Roth. Dr. James diagnosed radiculopathy after the 2011 injury, but not after the injury in 2009, and he opined Employee's problems were a result of the August 2011 work injury. ANP-C Wilson disagreed with Dr. Radicki that there had been no specific injury in August 2011, but at the very least, the August 2011 injury caused a permanent aggravation of her preexisting condition. It is clear from the medical records that regardless of whether the August 2011 work caused a new injury or a permanent aggravation of a preexisting condition, it was markedly different than Employee's 2009 or 2010 injuries. Although testing in 2009 showed some "mild nerve root irritation" there was no radiculopathy. Employee was released to work, without restriction, 15 days after she first sought treatment. That short course of treatment is more consistent with the diagnosis of epicondylitis and tendonitis from overuse than with significant radiculopathy. While Employee also experienced symptoms in 2010, they were not of enough significance to require medical treatment. In comparison, despite her treatment, Employee was still experiencing pain and symptoms at the hearing, almost three years after the 2011 incident. Also, the September 1, 2011 MRI shows annular tears at both C4-5 and C6-7, that were not in evidence in the 2008 MRI. While Employee may have had some preexisting condition, the preponderance of the evidence shows the substantial cause of her disability and need for treatment was the work injury of August 2011.

2. Is Employee entitled to TTD, and if so for what time periods.

Whether an employee is entitled to TTD is a question to which the presumption of compensability applies. However, it was determined above that Employee's work in August 2011 was the substantial cause of her disability. All that remain is determining the time period for which employee is entitled to TTD. Here, Employee contends she is entitled to TTD from September 1, 2011, the day after she last worked, until December 15, 2011. Employee saw Dr.

James on November 4 and December 29, 2012. It was not until May 23, 2012 that he opined Employee was unable to work until "early December" 2011. It would have been helpful if Dr. James had given an exact date when Employee could have returned to work, but he did not see her during that time. However, once an employee is disabled, the disability is presumed to continue until the employer produces substantial evidence to the contrary. Given the little weight given to Dr. Radicki and Dr. Roth's opinions, they are not substantial evidence as to when Employee's disability ended. Given Dr. James's opinion, Employee is presumed disabled through December 15, 2011.

3. Is Employee entitled to medical costs and related transportation costs?

The presumption of compensability also applies to medical and related transportation costs. As Employee established compensability of medical treatment above, the question becomes what costs are compensable. Employer paid medical costs until its controversion on June 19, 2012. Employee had only one unpaid medical bill since that time, a $242.00 bill with Alaska Spine Institute. Employee is entitled to payment of that bill.

Employee also stated she had unpaid prescription costs for Celebrex, and she had foregone physical rehabilitation recommended by ANP-C Wilson, because she was unable to afford it. Neither the prescription for Celebrex nor ANP-C Wilson's recommendation are in the file, and it is unknown whether or not the documentation and bills were presented to Employer. To the extent the bills or the recommendation for physical rehabilitation were presented to Employer, Employee is entitled to payment. To the extent the medication costs are were not presented to Employer, the shall be submitted to Employer for consideration and payment in accordance with the Act.

As to transportation costs, it is unclear whether or to what extent Employer has already paid the costs identified in Employee's transportation log. However, as Employee is entitled to medical related transportation costs, Employer will be ordered to pay Employee transportation costs documented in Employee's mileage log, with credit for any transportation costs previously paid.

4. Is Employee entitled to PPI benefits?

Employee raised the presumption she is entitled to a PPI of 12 percent, based on Dr. James's report. Employer rebutted the presumption with the opinions of Drs. Radicki and Roth that Employee's impairment is not due to the 2011 work injury. Because Employer rebutted the presumption, Employee must prove she is entitled to PPI benefits.

It is worth noting that neither Dr. Radicki nor Dr. Roth disagree that Employee has a 12 percent permanent impairment, they just attribute it to causes other than the August 2011 work injury. For the reasons given earlier, Drs. Radicki and Roth are given less weight than Dr. James. Employee has proved by a preponderance of the evidence she is entitled to benefits for a 12 percent PPI.

5. Is Employee entitled to a reemployment benefits evaluation?

Under AS 23.30.041(c), an employee is entitled to a reemployment benefits eligibility evaluation if, because of the injury, they are unable to return to their job at the time of injury for 90 consecutive days. Here Dr. James opined Employee was unable to work from August until early December, 2011, more than 90 days. She is entitled to a reemployment benefits evaluation.

6. Is Employee entitled to interest?

An employee is entitled to interest on all benefits not paid when due. In accordance with 8 AAC 45.142, Employer will be ordered to pay interest to Employee on all TTD, PPI benefits, and transportation cos benefits from the date due until paid. Employer will be ordered to pay Alaska Spine Institute interest on the $242.00 medical bill from the date due until paid.

7. Is Employee entitled to a penalty?

Under AS 23.30.155(e), a penalty of 25 percent is owed on any compensation not paid within seven days after it becomes due. Here, Employee was not paid TTD or PPI within seven days

after it became due, and she is entitled to a penalty on those benefits. As noted, it is unclear whether or when Employee's mileage log was submitted to Employer, and what amounts were not reimbursed. To the extent Employee's transportation costs were presented to Employer and not timely paid, she is entitled to a penalty on those costs.

8. Did Employer unfairly or frivolously controvert Employee's benefits?

Under *Harp* and *Monfore*, a controversion is not unfair or frivolous if the employer possesses sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits. The evidence in support of the controversion is viewed in isolation and without consideration of credibility. Here, Employer controverted based on Dr. Radicki's report. If Dr. Radicki's report was viewed in isolation, and without considering credibility or evidence in opposition, Employee would not have been entitled to benefits. Employer's controversion was not unfair or frivolous.

CONCLUSIONS OF LAW

1. 1. Employment with Employer in 2011 was the substantial cause of Employee's disability and need for medical treatment
2. Employee is entitled to TTD from September 1, 2011 to December 15, 2011.
3. Employee is entitled to unpaid medical costs and related transportation costs.
4. Employee is entitled to PPI benefits for a 12 percent impairment.
5. Employee is entitled to a reemployment benefits evaluation.
6. Employee is entitled to interest on benefits not timely paid.
7. Employee is entitled to a penalty on benefits not timely paid.
8. Employer did not unfairly or frivolously controvert Employee's benefits.

ORDER

1. Employee's claim for TTD benefits from September 1, 2011 to December 15, 2011 is granted.
2. Employee's claim for medical costs in the amount of $242.00 is granted. To the extent Employee claimed medical costs for prescription medication and physical rehabilitation and the bills and supporting documents were submitted to Employer, the claim is granted. Bills and supporting documents that have not been submitted to Employer shall be submitted to Employer for processing and payment in accordance with the Act.
3. Employee's claim for medical related transportation costs of $201.02 is granted, with a credit to Employer for transportation costs previously paid.
4. Employee's claim for permanent partial impairment benefits for a 12 percent impairment is granted.
5. Employee's claim for a reemployment benefits evaluation is granted.
6. Employee's claim for interest is granted.
7. Employee's claim for a penalty for benefits not timely paid is granted.
8. Employee's claim for an unfair or frivolous controversion is denied.

Dated in Anchorage, Alaska on September 2, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Designated Chair

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Rick Traini, 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 SILVIA A SARMIENTO, employee / claimant; v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201112491; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on September 2, 2014.

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Sertram Harris, Office Assistant II