ALASKA WORKERS' COMPENSATION BOARD

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

NANCY A. DWYER, Employee, Claimant, v. ICICLE SEAFOODS, INC., Employer, and SEABRIGHT INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201202260 AWCB Decision No. 19-0036 Filed with AWCB Anchorage, Alaska on March 14, 2019

Nancy A. Dwyer's September 14, 2015 claim and Icicle Seafoods, Inc.'s June 14, 2018 petition for a finding of an excessive change in physicians and its June 28, 2018 petition to recover an overpayment were heard on February 13, 2019 in Anchorage, Alaska, a date selected on November 6, 2018. An October 22, 2018 affidavit of readiness for hearing gave rise to this hearing. Non-attorney Mark Dwyer appeared and represented Nancy A. Dwyer (Employee). Attorney Merrilee Harrell appeared and represented Icicle Seafoods, Inc. and Seabright Insurance Company (Employer). Employee, Mr. Dwyer, Doug Imagliazzo, Seanne Popp and Aleksandra Zietak, M.D., testified. The record closed at the hearing's conclusion on February 13, 2019.

ISSUES

Employee contends her work injury remains the substantial cause of her disability and need for medical treatment and she is entitled to additional temporary total disability (TTD) benefits, medical and transportation costs, and attorney fees and costs. Employer contends the work injury is no longer the substantial cause of Employee's disability or need for medical treatment, so no further benefits are owed.

1) **Is the work injury the substantial cause of Employee's disability and need for medical treatment, and, if so, to what benefits is she entitled?**

Employer contends Employee made an excessive change in physicians when she changed from a doctor in Texas to a previous doctor in North Dakota and back again. Employee contends the Texas doctor only provided pain management services, and the North Dakota doctor was her attending physician.

2) **Did Employee make an unauthorized change in physicians?**

Employer contends Employee was overpaid permanent partial impairment (PPI) benefits and should be ordered to return the overpayment to Employer. Employee argues the overpayment resulted from Employer's poor accounting and contends the money should not be returned until her proper impairment rating has been established.

3) **Should Employee be ordered to reimburse Employer for the overpayment of benefits?**

FINDINGS OF FACT

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

1) On January 2, 2012, Employee began working for Employer as a seafood processor aboard the processing vessel Bering Star at Dutch Harbor, Alaska. (Employee; Report of Injury, February 9, 2014).

2) On January 5 and 6, 2012, Employee reported sore muscles and aches and pains. On January 15, 2012, she reported a "knot" on her upper right back, and she couldn't turn her head. She was given ice packs and pain relief gel. On January 16, 2012, her neck was still stiff, and on January 17, 2012, she was given Ibuprofen and additional pain relief gel. On February 4, 2012,

Employee again complained of a "knot" in her upper right shoulder and was given a heating pad, ice, and pain relief gel. (Employer, 2012 Medical Log).

3) On January 17, 2012, Employee was taken off work due to a cold; she was released to return to light-duty work on January 25, 2012, with a resumption of full-duty work on January 29, 2012. (Iliuliuk Family & Health Services (IFHS), Chart Notes, January 17, 2012, January 21, 2012, and January 24, 2012).

4) On February 4, 2012, Employee again complained of a "knot" in her upper right shoulder and was given a heating pad, ice, and a pain relief gel. (Employer, 2012 Medical Log).

5) On February 8, 2012, Employee reported that on February 4, 2012 she began experiencing pain in her shoulders, mostly on the right, and on February 8, 2012 the pain began to spread to her mid-back. (Report of Injury, February 9, 2012).

6) On February 9, 2012, Employee also completed an Employee Injury Report for Employer. She described the pain as being in the top of her shoulders leading to the mid-back area and stated the injury occurred while she was at the sorting table sorting roe. On a pain diagram, she indicated the pain was over both shoulder blades and in her right lumbar area. (Employer Report of Injury Form, February 9, 2012).

7) On February 9, 2012, Employee was seen at IFHS. Employee reported right shoulder blade pain radiating to the left shoulder. She stated the pain had begun three days before when she was packing heavy fish. X-rays were taken, and Employee was restricted from work until evaluated by an orthopedic surgeon. (IFHS, Chart Note and Work Status Note, February 6, 2012).

8) On February 11, 2012, Employee went to the Providence Alaska Medical Center (PAMC) emergency department in Anchorage. A cervical MRI of Employee's thoracic spine showed a small disc protrusion at T7-8, but was otherwise normal. An MRI showed multilevel degenerative changes and disc bulges causing cervical stenosis, and she was referred to Timothy Cohen, M.D. The emergency room physician:

9)

10) Discussed the results at length with the patient. She perseverated somewhat on the idea that all the findings/abnormalities on the studies were related to her job. I explained that while some of her symptoms may be related to the physical demands of her current job, many of the findings present took many years to develop.

11)

12) (PAMC, Emergency Department Note, February 11, 2012; PAMC Radiology Report, February 12, 2012).

13) Employee returned to the PAMC emergency room on February 15, 2012, stating she had been unable to see Dr. Cohen due to insurance issues. She asked for another referral, and was referred to Susanne Fix, M.D. (PAMC, Emergency Department Notes, February 15, 2012).

14) On February 23, 2012, Employee completed another Report of Injury form listing the date of injury as February 6, 2012. She explained the injury occurred as a result of "16 hour shifts of my head being down with repeated arm and shoulder movements," and during a truck ride to the clinic, the pain had spread up the right side of her neck. (Report of Injury, February 23, 2012).

15) Employee was next seen at Mercy Medical Center in Williston, North Dakota, on April 24, 2012 seeking a refill of her pain medications. (Mercy Medical Center, Chart Note, April 24, 2012).

16) On June 11, 2012, Employee was seen by Gary Ramage, M.D., at McKenzie County Healthcare Systems. Employee reported that on February 6, 2012 she had suffered a chronic repetitive injury from working 16 hour shifts. Dr. Ramage prescribed a muscle relaxer and Valium and referred Employee to physical therapy. (Dr. Ramage, Chart Note, June 11, 2012).

17) On September 3, 2012, Employee went to McKenzie County Healthcare Systems, reporting the onset of right shoulder and upper arm pain after moving chairs and tables while setting up for a BBQ. She stated the pain was related to her February 2012 work injury. Employee brought a copy of the MRI done in February. X-rays of both shoulders were normal. She was prescribed a muscle relaxer and a non-steroidal anti-inflammatory. (McKenzie County Healthcare Systems, Chart Note, Radiology Report, September 3, 2012).

18) On October 2, 2012, Employee was seen by Charles Peterson, M.D., an orthopedic surgeon, for an employer's medical evaluation (EME). Dr. Peterson reviewed Employee's medical records since the injury as well as x-rays and MRIs. Dr. Peterson stated a shoulder exam was almost impossible to perform due to Employee's inhibited movement. Employee's range of motion, both active and passive, was limited to a greater extent on the left than on the right, and she refused to do adduction on either side. He diagnosed cervical and bilateral shoulder strains as a result of the work injury, as well as preexisting cervical and thoracic

spondylosis and degenerative disc disease that were not aggravated by the work injury. Dr. Peterson stated Employee demonstrated nonphysiological behavior and volitionally limited her neck, shoulder, and arm movement. Dr. Peterson stated the strains had long since resolved and needed no further treatment. Dr. Peterson rated Employee with a one percent whole person impairment due to the work injury. (Dr. Peterson, EME Report, October 2, 2012).

19) On October 16, 2012, Employee returned to Dr. Ramage. He noted the range of movement of Employee's right shoulder was within normal limits. She was able to flex, extend, rotate internally and externally abduct and adduct without complications. She was able to abduct to 90 degrees. Dr. Ramage attributed Employee's pain to her cervical neuropathy with subsequent spasm of the trapezius muscle, and he referred her to Stuart Rice, M.D., a neurosurgeon, at Black Hills Neurosurgery and Spine. (McKenzie County Healthcare Systems, Chart Note, October 16, 2012; McKenzie County Healthcare Systems, Patient Referral, October 17, 2012).

20) An October 19, 2012 cervical spine x-ray showed disc narrowing and degenerative arthritic changes, but was otherwise unremarkable. (McKenzie County Healthcare Systems, Radiology Report, October 19, 2012).

21) Employee saw Dr. Rice on November 20, 2012, and explained the injury occurred when she was working on a conveyor belt, putting things in a basket or bucket then twisting to put the bucket behind her. Employee stated that at the time of the injury, she had pain in her right scapular area extending into her shoulder and right arm. Palpation revealed no tenderness in Employee's cervical spine, but some tenderness along the medial edge of her right scapula. Dr. Rice found good range of motion and no pain or tenderness in the shoulder joint. Dr. Rice diagnosed a probable right rotator cuff tear, but did not believe her cervical spine was contributing to her symptoms. Dr. Rice referred Employee for an evaluation of her right shoulder. (Dr. Rice, Chart Note, November 20, 2012).

22) A February 9, 2013, MRI of Employee's right shoulder revealed a partial tear of the supraspinatous tendon and a down-sloping acromion. (Mercy Medical Center, MRI Report, February 9, 2013).

23) Employee was seen by Roxanne Keene, M.D., on February 15, 2013. Dr. Keene reviewed the February 9, 2013 MRI, stating there was no evidence of a high-grade tear, but

Employee did have right shoulder impingement syndrome. (Dr. Keene, Chart Note, February 15, 2013).

24) On March 14, 2013, Dr. Keene responded to questions from Employee's attorney. She stated the down-sloping acromion was not caused by Employee's work, but the work may have contributed to her increased pain.

25) On April 25, 2013, Employee was seen by Paul Puziss, M.D., an orthopedic surgeon for a second independent medical evaluation (SIME). Employee told Dr. Puziss her job consisted mainly of removing gills and entrails, sorting roe and bagging milt, typically the fish weighed 10 to 15 pounds, but on February 4, 2012, there were a lot of heavy cod, up to 30 pounds, which were falling onto the conveyor belt. That day she had to lift about 50 heavy fish about four to four and one-half feet to place them in a bin. Dr. Puziss diagnosed right shoulder and cervical stains, and a small full-thickness rotator cuff tear that caused acromial impingement, scapular pain due to abnormal shoulder biomechanics, and a mild left shoulder strain. He concluded Employee's neck and shoulder symptoms were caused by repetitive, moderately heavy lifting because she had no pain prior to the incident. Dr. Puziss did not observe any nonphysiological behavior. He recommended right shoulder arthroscopy and possible decompression. (Dr. Puziss, SIME Report, April 25, 2013).

26) On August 14, 2013, Employee was seen by Samuel Mortimer, M.D., for her right shoulder. Dr. Mortimer ordered another MRI, noting a discrepancy between the radiologists report and an "independent medical examiner's" reading. He noted Employee demonstrated pain out of proportion to the examination. Dr. Mortimer also evaluated Employee's left shoulder, but found no significant abnormality. (Dr. Mortimer, Chart Note, August 14, 2013).

27) The right shoulder MRI ordered by Dr. Mortimer was done. It revealed a small full-thickness tear of the supraspinatus tendon, and mild stenosis due to a down-sloping acromion. (Black Hills Surgical Hospital, Radiology Report, September 10, 2013).

28) Employee returned to Dr. Mortimer on October 23, 2013, and after reviewing the MRI, he recommended arthroscopic surgery. (Dr. Mortimer, Chart Note, October 23, 3013).

29) On November 12, 2013, Dr. Mortimer performed the arthroscopic surgery to repair Employee's right shoulder. (Black Hills, Surgical Hospital, Operative Report, November 12, 2013).

30) On January 27, 2014, Employee reported to Dr. Mortimer she was having increasing problems with her left shoulder. Dr. Mortimer evaluated Employee's left shoulder, found no significant tenderness and good range of motion, but he ordered an MRI of her left shoulder. (Dr. Mortimer, Chart Note, January 27, 2014).

31) The February 18, 2014 MRI of Employee's left shoulder revealed an irregular, frayed, full-thickness tear of the supraspinatus. (Black Hills, Surgical Hospital, Radiology Report, February 18, 2014).

32) On March 12, 2014, Dr. Mortimer recommended surgery on Employee's left shoulder, but not until six months after her November 2013 surgery. (Dr. Mortimer, Chart Note, March 12, 2014).

33) On August 26, 2014, Dr. Mortimer performed arthroscopic surgery on Employee's left shoulder. (Black Hills, Surgical Hospital, Operative Report, August 26, 2014).

34) On November 7, 2014, Employee reported to Dr. Mortimer she continued to have pain in her neck. (Dr. Mortimer, Chart Note, November 7, 2014).

35) An MRI of Employee's neck done December 5, 2014 showed central canal stenosis, foraminal narrowing, and facet arthropathy from C4 to C7. (Black Hills, Surgical Hospital, Radiology Report, December 5, 2014).

36) Dr. Mortimer referred Employee to Robert Woodruff, M.D. for her neck. Dr. Mortimer diagnosed possible cervical radiculopathy, and recommended an epidural steroid injection (ESI). (Dr. Mortimer, Chart Note, January 15, 2015).

37) On January 20, 2015, Dr. Woodruff responded to a letter from Employer's adjuster asking if the conditions shown on the December 5, 2014 MRI were related to the February 4, 2012 injury. Dr. Woodruff stated Employee had not mentioned the work injury, and he was under the impression the neck pain arose after her last shoulder surgery. He stated he would clarify the time frame with Employee at her next visit. (Dr. Woodruff, Chart Note, January 20, 2015).

38) On February 15, 2015, Dr. Woodruff supplemented his response to Employer's adjuster. He stated it would be very difficult to draw a direct correlation between the February 4, 2012 work injury and Employee's current neck complaints, but he noted he had not seen an MRI from near the time of the injury. (Dr. Woodruff, Letter to Adjuster, February 15, 2015).

39) On March 17, 2015, the ESI was done. (Black Hills Surgical Hospital, Injection Procedure, March 17, 2015).

40) On April 10, 2015, Employee was seen by Eric Harris, M.D., for an EME. Employee reported the ESI helped for a couple hours, but she was now having bilateral arm pain. Dr. Harris diagnosed preexisting cervical degenerative disc disease/spondylosis and bilateral acromioclavicular (AC) joint degenerative joint disease. He also diagnosed degenerative tears of both right and left rotator cuffs, which were not work related. Dr. Harris explained Employee may have had overuse injuries to her shoulders due to work, but those injuries would have healed in eight weeks or so. He stated Employee's description of her duties did not include any activity that could reasonably be expected to cause a rotator cuff tear, and six weeks of work with Employer would not have contributed to her AC joint arthritis or cervical degenerative disc disease. (Dr. Harris, EME Report, April 10, 2015).

41) On June 11, 2015, Dr. Harris responded to a request that he assign a permanent partial impairment rating to Employee. He rated Employee with a four percent whole person impairment due to her right shoulder and six percent due to the left shoulder, for a combined rating of ten percent, but did not state how much of the impairment was due to the work injury. (Dr. Harris, Supplemental EME Report, June 11, 2015).

42) On June 19, 2015, Employer controverted all benefits related to Employee's cervical spine based on Dr. Harris's April 10, 2015 report. (Controversion Notice, June 19, 2015).

43) On July 10, 2015, Employer controverted further disability benefits related to Employee's shoulders based on Dr. Harris's April 10, 2015 report. (Controversion Notice, July 10, 2015).

44) On September 3, 2015, Dr. Woodruff responded to a July 9, 2015 letter from Employer's adjuster. He stated the February 4, 2012 work injury was the substantial cause of Employee's neck and arm symptoms as there was no indication she suffered from similar symptoms prior to the injury. Dr. Woodruff proposed a three-level cervical fusion. (Dr. Woodruff, Chart Note, September 3 2015).

45) On June 22, 2016, Employee was seen by Dr. Puziss for another SIME. He reviewed medical records since his 2013 evaluation and examined Employee. Employee reported no history of neck pain prior to the injury, but she explained she had cervical pain ever since the injury. Although he had opined in 2013 that Employee had only a neck strain that was basically

healed, he now agreed with Dr. Woodruff that the work injury was the cause of the disability due to her neck. Dr. Puziss reiterated his opinion that the work injury was the cause of Employee's rotator cuff tears and stated the work injury caused a permanent aggravation of her preexisting AC joint arthritis. He found Employee's right shoulder was medically stable and rated her with a 13percent right shoulder impairment. Dr. Puziss recommended an SIME with a neurosurgeon specializing in cervical fusions. Dr. Puziss also requested x-rays and MRIs that were not included with Employee's medical records be sent to him. (Dr. Puziss, Second SIME Report, June 22, 2016).

46) Although the exact date is unclear, Employee moved from North Dakota to Texas around March 2016. (Employee).

47) On June 30, 2016, Employee was seen by Steven Serrano, D.O., She explained she had been injured in 2012 after working 16 hour days lifting very heavy fish. Employee thought she might need a complete disc replacement. Employee explained she had been getting her medications from a North Dakota doctor, but could not fill the prescriptions in Texas. Dr. Serrano prescribed Norco for pain. (Dr. Serrano, Chart Note, June 30, 2016).

48) Employee returned to Dr. Serrano on August 25, 2016. He noted she brought an IME report with her, but it is unclear which report. Employee stated she wanted more imaging done on her left shoulder. (Dr. Serrano, Chart Note, August 25, 2016).

49) On September 8, 2016, an MRI of Employee's left shoulder showed evidence of the rotator cuff repair, subacromial decompression, and mild bursitis, but was otherwise normal. (Golder Cat Scan & MRI Center, Radiology Report, September 8, 2016).

50) On October 10, 2016, Dr. Harris reviewed additional medical records through the September 8, 2016 MRI and issued a supplemental report. Dr. Harris noted Employee demonstrated a significantly better range of motion when examined by Dr. Mortimer than she had when he examined her. He attributed this to symptom magnification and poor effort during his examination. Dr. Harris disagreed with Dr. Woodruff's opinion as to the cause of Employee's neck injury noting there was no forceful injury to Employee's cervical spine at the time of the February 2012 incident. He stated the September 8, 2016 MRI showed no pathology that would require surgical intervention, and his earlier opinions remained unchanged. (Dr. Harris, Supplemental EME Report, October 10, 2016).

51) On March 14, 2017, after reviewing the x-rays and MRIs he had requested, Dr. Puziss issued a supplemental report stating his June 22, 2016 opinions had not changed. (Dr. Puziss, Supplemental SIME Report, March 14, 2017).

52) On December 11, 2017, Dr. Serrano wrote a "to whom it may concern" letter stating Employee was under his care for her workers' compensation injuries, and she needed a travel companion to accompany her to see specialists. (Dr. Serrano, Letter, December 11, 2017).

53) On January 5, 2018, Employee was seen by Bruce McCormack, M.D., a neurosurgeon, for an SIME regarding Employee's neck. Employee told Dr. McCormack she was lifting fish weighing from one to 50 pounds and throwing them over a barrier into a hopper. She indicated the pain started in her right scapula. In addition to examining Employee, Dr. McCormack reviewed her medical records. Dr. McCormack diagnosed cervical spondylosis with multilevel stenosis without radiculopathy or spinal cord compression. He stated the February 4, 2012 injury was the substantial cause of an aggravation to Employee's preexisting cervical disc disease and stenosis, but the aggravation stabilized one year after the injury, or by February 4, 2013. Dr. McCormack noted Employee had additional stenosis that was not present on the February 11, 2012 MRI. He did not recommend surgery for Employee's cervical condition. Dr. McCormack rated Employee with a seven percent whole person impairment based on her cervical stenosis. (Dr. McCormack, SIME Report, January 5, 2018).

54) In response to Employer's request, on April 18, 2018, Dr. McCormack apportioned his seven percent PPI rating, attributing one percent to Employee's preexisting degenerative changes and six percent to the February 4, 2012 injury. (Dr. McCormack, Supplemental SIME Report, April 18, 2018).

55) On April 16, 2018, Employee returned to Dr. Mortimer. She noted her right shoulder was doing well, but the left shoulder continued to be painful, and Dr. Mortimer recommended physical therapy. (Dr. Mortimer, Chart Note, April 16, 2018).

56) On April 17, 2018, Employee returned to Dr. Woodruff. Dr. Woodruff reviewed the January 5, 2018 MRI, and agreed with Dr. McCormack that surgery was unlikely to be beneficial. He referred her to a pain management doctor in Texas. (Dr. Woodruff, Chart Note, April 17, 2018).

57) On June 14, 2018, Employer filed a petition asking that Employee's return to Dr. Serrano after receiving care from Drs. Mortimer and Woodruff was an unauthorized change in physicians. (Petition, June 14, 2018).

58) On June 28, 2018, Employer petitioned for recovery of an overpayment to Employee. Employer stated that as a result in change of ownership of the adjuster, Employee was mistakenly overpaid PPI and job dislocation benefit of $22,700.00. (Petition, June 28, 2018).

59) On July 11, 2018, Dr. Harris was deposed. Dr. Harris agreed Employee's shoulder surgeries were reasonable, but the likelihood the rotator cuffs were torn during the work incident was very, very low. He explained that when someone has a traumatic rotator cuff tear, there is an acute onset of pain, yet Employee reported her pain was gradual, and she did not report left shoulder pain until after the right shoulder surgery. Dr. Harris stated many, many people over the age of 40 have degenerative rotator cuff tears, and, in his opinion, this is far more likely to be the substantial cause of Employee's tear. Based on the information as a whole, he concluded Employee definitely had a shoulder strain and probably a cervical strain, but nothing more. While he had provided PPI ratings for Employee's shoulders, he clarified he would not apportion any of the impairment to the work injury. He explained the MRI of Employee's neck showed degenerative changes at essentially every level, but the spinal cord looked fine. There was no evidence of an acute injury, and she was not reporting any radicular symptoms. Dr. Harris agreed with Dr. McCormack's seven percent impairment for Employee's neck, but pointed out the basis for the rating was stenosis, which was entirely preexisting, so he would not have apportioned any impairment to the work injury. (Dr. Harris, Deposition, July 11, 2018).

60) On August 6, 2018, Employee was seen by Aleksandra Zietak, M.D., a physical medicine and rehabilitation specialist, for an EME. Employee explained the injury happened when she had to pick up and carry large fish, moving them away from the table where she was sorting roe; she had to do this for a few days. Employee stated that physical therapy caused pain in her right scapula. Dr. Zietak examined Employee and reviewed her medical records. Dr. Zietak diagnosed preexisting cervical spondylosis that was not aggravated by the February 4, 2012 injury, a thoracic disc protrusion that was unrelated to the work injury, and bilateral upper thoracic strains related to the work injury. Dr. Zietak stated Employee's current medications were palliative, but the Norco she was taking was not reasonable and necessary palliative care. (Dr. Zietak, EME Report, August 6, 2018).

61) On August 31, 2018, Employer controverted medical benefits based on Dr. Zietak's August 6, 2018 report. (Controversion Notice, August 31, 2018).

62) On September 10, 2018, Dr. Mortimer found Employee to be medically stable as to both shoulders and referred her for an impairment evaluation. (Dr. Mortimer, Chart Note, September 10, 2018).

63) On September 12, 2018, Employee received an impairment rating for both shoulders. She was found to have ten percent upper extremity impairment for each shoulder, but neither rating was converted to a whole person impairment nor were they combined. (Black Hills Occupational Medicine, Impairment Rating, September 12, 2018).

64) On September 28, 2018, Employee filed an affidavit of attorney fees and costs requesting $74,881.50 in fees and $907.43 in costs, for a total of $75,788.93. Several pages of billing detail were omitted from the affidavit. (Employee, Fee Affidavit, September 28, 2018).

65) On October 9, 2018, Employer objected to Employee's claimed attorney fees arguing it could not review the claimed fees due to the omitted pages, some items that could have been done by clerical staff were billed at the attorney's rate, and benefits Employer timely paid without dispute should not be considered in evaluating Employee's attorney's results. (Employer, Objection to Attorney Fees, October, 9, 2018).

66) At the February 13, 2019 hearing, Employee testified that at the time of the injury she had been working for about three days at a belt sorting roe by color and placing it in buckets. When the buckets were full, she carried them a short distance to another station. One day two boats came in, and there were many cod falling onto the conveyor belt. She continuously had to throw the heavy cod over a barrier. (Employee).

67) Employee also testified that in May 2018 she received a check from Employer for $34,550.00 with no explanation as to what it was for. Mr. Dwyer stated that after they received the check, they called the adjuster who told them the two checks for PPI benefits issued in June 2015 had never been cashed, and the current check was a replacement plus the additional PPI according to Dr. Harris's rating. Employee told her attorney, and the attorney told her to hold on to the money. (Employee; Mr. Dwyer).

68) Seanne Popp has been the adjuster for Employee's claim. In 2015, Employer paid Employee $22,700.00 based on Dr. Puziss's 10 percent impairment rating. The payment consisted of $17,700.00 in PPI benefits, and a job dislocation benefit of $5,000. When

Employee called asking about the $34,550.00 check in 2018, she explained the records did not show the previous PPI checks had been cashed. Employee then sent her copies of bank statements showing the 2015 checks had been deposited. (Popp).

69) Doug Impagliazzo was a medic and the safety manager with Employer when Employee was injured. He had worked on the Bering Star, but at the time of the injury, he was in Dutch Harbor. He met Employee on the dock and drove her to the clinic. He specifically recalled Employee. Because the safety manager on the Bering Star had trouble communicating with her, Mr. Impagliazzo tried talking with her while driving her to and from the clinic. He reported Employee became "combative" and claimed entries in Employer's medical log were false. The reason he recalls Employee in particular is that she stuck her fingers in her ears to avoid the conversation. He explained that sorting roe was done on a conveyor at waist height. When sorting roe, the cod on the conveyor have already been headed and gutted, and weigh from 4 to 10 or 12 pounds, and the roe and milt weigh less than one pound. (Impagliazzo).

70) Dr. Zietak testified at the February 13, 2019 hearing. After her examination of Employee she concluded Employee suffered a right and left upper thoracic strain on February 4, 2012, which would have healed within eight to twelve weeks. She also diagnosed preexisting cervical spondylosis, cervical stenosis, and rotator cuff tears. Dr. Zietak explained the MRIs of Employee's shoulders showed degenerative changes and were essentially normal for her age. After about age 35, tendinosis and small tears are common, and many people with those tears can do heavy work. To determine whether a rotator cuff tear is due to trauma or is degenerative, a doctor has to look at the mechanism of injury, conduct a physical examination, consider the patient's descriptions, and review MRIs. With an acute tear, the patient will point to the shoulder joint itself as the location of the pain, and during an examination will be unable to move their arm in certain directions. Here, although Employee referred to pain in her shoulders, on the pain diagram she marked the areas of the shoulder blades, not the shoulder itself. The initial medical records did not indicate Employee was unable to move her arm in a way that would suggest a torn rotator cuff. Dr. Zietak reviewed surveillance video taken of Employee and stated Employee presented with much more guarded movements during her examination than shown on the videos. The only medication Employee was taking related to the work injury was Norco, but because it is a narcotic, it was not reasonable palliative care. (Dr. Zietak).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.**
> It is the intent of the legislature that
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> (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;
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . . .

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.

Under the Alaska Workers' Compensation Act, coverage is established by a work connection, meaning the injury must have "arisen out of" and "in the course of" employment. If an accidental injury is connected with any of the incidents of one's employment, then the injury both would "arise out of" and be "in the course of" employment. The "arising out of" and the

"in the course of" tests should not be kept in separate compartments but should be merged into a single concept of "work connection." *Northern Corp. v. Saari*, 409 P.2d 845, 846 (Alaska 1966).

> **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. . . . 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.
> **8 AAC 45.082. Medical treatment.**
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> (b) A physician may be changed as follows:
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> (2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service
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> (A) at a hospital or an emergency care facility;
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> (B) from a physician
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> (i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;
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> (ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or
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> (iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician;

> . . . .
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> (4) regardless of an employee's date of injury, the following is not a change of an attending physician:
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> (A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitution of physicians and not a change of attending physicians;
>
> (B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians;
>
> (C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician;
>
> (D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.
>
> **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 . . . .
>
> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

Under AS 23.30.120(a), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce "some" "minimal" relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

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

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of her case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381. At this

last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

The Alaska Supreme Court has repeatedly held the fact symptoms arose after an event is insufficient to establish causation in workers' compensation cases. *Lindhag v. State*¸123 P.3d 948 (Alaska 2005); *Rivera v. Wal-Mart Stores, Inc.*, 247 P.3d 957 (Alaska 2011); *Buchinsky v. The Arc of Anchorage*, Slip Op. S-15547 (Alaska 2016).

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.

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

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

> proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150-51 (Alaska 2007), the Supreme Court explained fee awards under AS 23.30.145(a) and (b):

> Subsection (a) authorizes the Board to award attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim. . . . In contrast, subsection (b) requires an employer to pay reasonable attorney's fees when the employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim.

Subsections (a) and (b) are not mutually exclusive, however.

> Subsection (a) fees may be awarded only when claims are controverted in actuality or fact. Subsection (b) may apply to fee awards in controverted claims, in cases in which the employer does not controvert but otherwise resists, and in other circumstances. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152, at 15 (May 11, 2011) (Citations omitted).

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990). An employee is entitled to attorney fees when the attorney is instrumental in inducing an employer to voluntarily but belatedly pay benefits. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993).

> **23.30.155. Payment of compensation.**
> . . . .
>
> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board . . . .

> **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.

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;

ANALYSIS

1) **Is the work injury the substantial cause of Employee's disability and need for medical treatment, and, if so, to what benefits is she entitled?**

The presumption of compensability applies to the issue of causation. Because Employer initially accepted the claim and paid benefits, only disability benefits after Employer's June 19, 2015 controversion and medical benefits after its August 31, 2018 controversion are in dispute. Without regard to conflicting evidence, and without considering credibility, Employee raised the presumption that the February 4, 2012 injury was the substantial cause of her disability and need for medical treatment; both Dr. Woodruff and Dr. Puziss opined the injury was the substantial cause of Employee's cervical symptoms and rotator cuff tears. Because Employee raised the presumption, Employer was required to rebut it. It did so through the opinions of Dr. Harris and Dr. Zietak that the work injury caused only a strain that had long-since resolved.

Because Employer rebutted the presumption, Employee was required to prove by a preponderance of the evidence that she is entitled to benefits after Employer's controversions. She did not do so. Employee's description of the injury to doctors has been inconsistent and incomplete. She first reported a "knot" on her upper right back and a stiff neck on January 15, 2012, and again on February 4, 2012. On February 9, 2012, she reported to IFHS that the pain had begun three days prior when she was packing heavy fish. On the injury report she completed the same day she said the injury occurred while sorting roe. And the report of injury she completed on February 23, 2012 does not mention lifting or throwing heavy fish, it states only that the injury was a result of working with her head down and repeated arm and shoulder movements. When she saw Dr. Rice on November 20, 2012, she stated the injury occurred when working on a conveyor belt, putting things in a bucket. She did not mention lifting or throwing heavy fish. The first mention of lifting heavy fish to place them in a bin was Employee's April 25, 2013 description of the injury to Dr. Puziss. Additionally, Employee's testimony that the injury occurred "one day" when she had to lift fish that fell from the conveyor belt is inconsistent with the fact she reported the "knot' and pain in her upper back multiple times between January 15, 2012 and February 6, 2012. Employee's statement that she was injured while repeatedly lifting or throwing heavy fish is not credible.

Dr. Puziss's causation opinion is given little weight. He relied on Employee's statement she had lifted about fifty fish weighing thirty pounds four to four and one-half feet, but more importantly, the only rationale Dr. Puziss gives for causation is that Employee had no pain prior to the incident. While the timing of the symptoms' onset may provide some evidence of causation, Dr. Puziss mentions nothing about the mechanics of the injury, the location of Employee's reported pain in relation to the injured body part, or explain why the injury was the result of trauma rather than degenerative. Similarly, Dr. Woodruff's opinion is given little weight. He concluded the injury was the substantial cause simply because there was no evidence she had similar symptoms before that time. He did not explain what other causes might be responsible, or weigh any competing causes.

Dr. Harris's, Dr. Zietak's, and Dr. McCormack's opinions are given the most weight. They all reviewed Employee's medical records, and explained their rationale. Dr. Harris explained many people over the age of 40 have degenerative rotator cuff tears, and given Employee did not have an acute onset of pain, it is not likely she suffered a traumatic tear. He explained a cervical injury was also unlikely, noting the cervical MRI showed degenerative changes throughout, and Employee did not have radicular symptoms. Similarly, Dr. Zietak explained that when a person suffers a traumatic rotator cuff tear, they will point to the shoulder as the source of the pain, not to the shoulder blade, as Employee did. She also explained none of the early medical records documented Employee was unable to move her arms as would have been the case with a traumatic rotator cuff tear. Dr. McCormack's opinion was limited to Employee's neck, and while he found the February 4, 2012 injury to be the substantial cause of an aggravation, he stated the aggravation had resolved within one year.

Drs. Peterson, Harris, Zietak, and McCormack all agreed Employee suffered a strain or strains as a result of the work injury. Dr. Harris stated the strain would have resolved within eight weeks or so. Dr. Zietak said it would have resolved within eight to twelve weeks, and Dr. McCormack stated she would have been medically stable within one year, or by February 4, 2013. The preponderance of the evidence is that the February 4, 2012 work injury was not the substantial cause of Employee's disability or need for medical treatment after February 4, 2013.

a) TTD

Employee was paid TTD through Employer's July 10, 2015 controversion. This decision has determined Employee's disability ended on February 4, 2013. Employee is not entitled to additional TTD.

b) PPI

Employee's PPI ratings have varied widely. Dr. Peterson rated her at one percent based on a strain. In response to a request that he provide a rating, Dr. Harris rated her at 10 percent, but in his deposition, he explained none of the impairment was due to the work injury. Dr. Puzisss provided a 13 percent rating for Employee's right shoulder, but did not convert that to a whole-person rating.

Dr. McCormack gave Employee a seven percent rating for her neck, but did not combine that with the ratings for her shoulders. And Employee's September 10, 2018 rating of 10 percent for each shoulder was not reduced to a combined whole person rating or apportioned. However, this decision has found the work injury was not the substantial cause of Employee's ongoing disability or need for medical treatment, essentially rejecting medical opinions that Employee suffered anything other than a strain which had resolved. Given that conclusion, Dr. Peterson's one percent rating for a strain is the most appropriate PPI rating, and Employee has been paid in excess of that amount.

c) Medical and Transportation Costs.

This decision has determined the work injury was not the substantial cause of Employee's need for medical treatment after February 4, 2013. She does not contend any medical or transportation costs prior to that date have not been paid.

d) Attorney Fees and Costs.

Under AS 23.30.145(a), attorney fees may be awarded based on the amount of compensation awarded. Under AS 23.30.145(b), fees may be awarded when a claimant successfully prosecutes a claim. Here, Employee was not awarded any additional compensation nor was she successful in prosecuting her claim. There is no basis upon which attorney fees and costs may be awarded.

2) Did Employee make an unauthorized change in physicians?

Employer concedes Employee's return to Dr. Mortimer without a referral after being treated by Dr. Serrano in Texas was allowable, but contends her 2018 return to Dr. Serrano without a referral was an unauthorized change. This decision has found Employee was not entitled to benefits after February 4, 2013. Consequently, whether she improperly changed physicians in 2018 is moot.

3) Should Employee be ordered to reimburse Employer for the overpayment of benefits?

Employer contends Employee should be ordered to return the $34,550.00 overpayment of PPI benefits. Under AS 23.30.155(j), overpayments may only be withheld from future compensation

payments to an employee; no other mechanism to recover overpayments exists. As this decision has determined Employee is not entitled to further compensation benefits, there will be no future payments from which the overpayment may be withheld. Employer's petition must be denied.

CONCLUSIONS OF LAW

1) The work injury is no longer the substantial cause of Employee's disability and need for medical treatment, and, consequently, she is not entitled to additional benefits.

2) Whether Employee made an unauthorized change in physicians is moot

3) Employee will not be ordered to reimburse Employer for the overpayment of benefits.

ORDER

1) Employee's September 14, 2015 claim is denied.
2) Employer's June 14, 2018 petition for a finding of an excessive change in physicians is denied as moot.
3) Employer's June 28, 2018 petition to recover an overpayment is denied.

Dated in Anchorage, Alaska on March 14, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

(Term Expired)
Amy Steele, Member

/s/
Nancy Shaw, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of NANCY A. DWYER, employee / claimant v. ICICLE SEAFOODS, INC., employer; SEABRIGHT INSURANCE COMPANY, insurer / defendants; Case No. 201202260; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on March 14, 2019.

/s/
Nenita Farmer, Office Assistant