ALASKA WORKERS' COMPENSATION BOARD

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

RICHARD ROBERGE, Employee, Claimant, v. ASRC CONSTRUCTION HOLDING CO., Employer, and ARCTIC SLOPE REGIONAL CORPORATION, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201410169 AWCB Decision No. 19-0063 Filed with AWCB Juneau, Alaska on June 4, 2019

Richard Roberge's (Employee) February 22, 2016 and May 26, 2017 claims and ASRC Construction Holding Co. and Arctic Slope Regional Corporation's (Employer) February 22, 2019 petition to dismiss were heard on May 7, 2019 in Juneau, Alaska, a date selected on February 20, 2019. A January 23, 2019 affidavit of readiness for hearing (ARH) gave rise to this hearing. Attorney Eric Croft appeared and represented Employee. Attorney Nora Barlow appeared and represented Employer. *Roberge v. ASRC Construction Holding Co.*, AWCB Decision No. 18-0128 (December 14, 2018) (*Roberge I*) denied Employee's November 5, 2015 claim for failure to timely request a hearing under AS 23.30.110(c). There were no witnesses. The record closed at the hearing's conclusion on May 7, 2019.

ISSUES

Employee contends he timely appealed the Rehabilitation Benefits Administrator's designee's (RBA-designee) decision finding him ineligible for reemployment benefits. He contends the RBA-designee abused her discretion in finding him ineligible for reemployment benefits. Employee contends the RBA-designee erred when she misread the medical record. He also contends new, more credible medical evidence supports finding Employee eligible for reemployment benefits. Employee requests an order granting his February 22, 2016 claim.

Employer contends the RBA-designee did not abuse her discretion and correctly found Employee ineligible. It contends substantial evidence supports the RBA-designee's decision. Employer contends Employee's physical capacities have not changed and he failed to object to the RBA-designee considering only his treating physician's opinion. It requests an order denying Employee's February 22, 2016 claim.

1) **Should the RBA-designee's eligibility determination be remanded, reversed or modified?**

Employer contends Employee's May 26, 2017 claim merges with his November 5, 2015 claim which was denied for failure to timely request a hearing under AS 23.30.110(c) in *Roberge I.* It contends the medical treatment sought in the May 26, 2017 claim was the same sought in the November 5, 2015 claim, specifically electromyogram (EMG) and nerve conduction studies (NCS). Employer contends the recommendations for the medical treatment were based on the same medical history and made for the same diagnostic purpose for both claims. It contends there was no change in Employee's medical condition. Employer requests an order denying and dismissing Employee's May 26, 2017 claim. In the alternative, it requests Employee's May 26, 2017 claim be held in abeyance pending the outcome of his appeal of *Roberge I.*

Employee contends claim preclusion requires a judgment on the merits of the claim. He contends dismissal of the November 5, 2015 claim for a procedural reason in *Roberge I* does not preclude his later claim. Employee contends precluding a subsequent timely claim because the first was denied as untimely under AS 23.30.110(c) is unfair. He contends new medical treatment restarts the statute of limitations. Employee contends no time limit applies to his claim for the EMG and

NCS because the expense has not been incurred, as he cannot afford to pay for it and seek reimbursement later. He contends he timely filed his May 26, 2017 claim after the SIME physician confirmed he wanted the tests, three months after the insurance company refused to pay for it, 16 months after Employer's limited authorization for the testing and 22 months after the EME report, and less than two years after Employee's treating physician requested it. Employee requests an order denying Employer's petition to deny his May 26, 2017 claim.

2) Should Employee's May 26, 2017 claim be denied?

Employee contends the work injury is the substantial cause of his need for medical treatment for his left hand. He requests an order granting his May 26, 2017 claim.

Employer contends the work injury is not the substantial cause of his need for medical treatment for his left hand. Rather, it contends Employee's non-work related, personal medical condition is the cause of his need for medical treatment. Employer requests an order denying Employee's May 26, 2017 claim.

3) Is Employee entitled to an EMG and NCS?

FINDINGS OF FACT

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

1) On May 14, 2014, Employee injured his left shoulder while carrying rebar. (First Report of Injury, June 16, 2014).

2) On May 21, 2014, Employee sought care with Donald Lehmann, M.D., for left shoulder pain. He injured his left shoulder on the job when pushing off with his left arm while carrying rebar. Dr. Lehmann diagnosed left rotator cuff tendinitis and left impingement syndrome and prescribed Medrol. (Lehmann Orthopedic Evaluation, May 21, 2014).

3) On June 19, 2014, Employee complained of left shoulder pain when he actively moved his arm overhead above shoulder level, difficulty lying on his left shoulder and joint stiffness. Dr. Lehmann recommended a left shoulder MRI. (Lehmann Chart Note, June 19, 2014).

4) On September 30, 2014, Dr. Lehmann wrote a letter to Employee and stated his MRI did not reveal a rotator cuff tear but did reveal a shoulder injury and arthritis, both were probably

contributing to his symptoms. Dr. Lehmann recommended consulting an orthopedic surgeon. (Lehmann letter, September 30, 2014).

5) On October 27, 2014, Cary Keller, an orthopedist, evaluated Employee and diagnosed impingement, degenerative AC joint disease and attenuation of the capsule with an anterior labral tear secondary to trauma. He recommended arthroscopic surgical repair. (Keller Chart Note, October 27, 2014).

6) On November 10, 2014, Employee first visited H. Graeme French, M.D., an orthopedic surgeon, for left shoulder pain. He stated he had 200 pounds of rebar on his right shoulder and was standing in a hole and when he pushed up with his left arm while trying to climb out of the hole, he felt a pop in his left shoulder and had acute shoulder pain, including burning and tingling in the lateral aspect. Afterwards, his left arm felt significantly weaker and he limited heavy lifting. Employee tried physical therapy, a steroid injection and modified his activities. He reported continuing left shoulder pain, popping, clicking, weakness and left arm numbness. Dr. French found no evidence of carpal tunnel or Guyon's canal. Employee's left shoulder was tender over the coracoid-acromial arch, biceps tendon, posterior joint line, supraclavicular brachial plexus and spinoglenoid notch. Dr. French diagnosed left anterior shoulder joint instability, left SLAP lesion and a left brachial plexus injury. He recommended left shoulder surgery. (French Chart Note, November 10, 2014).

7) On December 2, 2014, Dr. French performed left shoulder arthroscopic surgical repair, including anterior and posterior Bankart repair, biceps tenodesis, SLAP reconstruction, rotator interval closure, subcoracoid and subacromial bursectomy and microfracture of the inferior glenoid and acromioclacicular resection arthroplasty. (French Operative Report, December 2, 2014).

8) On February 20, 2015, Employee's supraclavicular plexus, infraclavicular and spinoglenoid notch were mildly tender and his pectoralis minor was moderately tender. His radial tunnel, cubital tunnel, carpel tunnel and Guyon's canal were not tender. Employee continued to report radiating numbness and paresthesia down his left arm, particularly with overhead use of his arm, and left arm weakness. He was rehabilitating his left shoulder with a home exercise program and was making excellent progress. Dr. French diagnosed a left brachial plexus injury and recommended Employee continue his home exercise program. (French Chart Note, February 20, 2015).

9) On March 30, 2015, Employee reported continuing left arm pain and numbness but his left shoulder pain was gradually improving and he was no longer using narcotics. Dr. French recommended he continue his home exercise program. (French Chart Note, March 30, 2015).

10) On May 18, 2015, Employee was mildly tender over his left supraclavicular and infraclavicular brachial plexus and was moderately tender over the median and ulnar nerves crossing his left wrist. Dr. French thought Employee had left shoulder bursitis and osteoarthritis and injected Marcaine and Celestone into his shoulder. Employee reported a 50 percent reduction in left shoulder pain five minutes after the injection. Dr. French thought he probably had significant low median and ulnar nerve compressions and recommended electrical diagnosing testing for left carpal tunnel syndrome and low ulnar nerve compression. (French Medical Report, May 18, 2015).

11) On July 31, 2015, Theresa McFarland, M.D., an orthopedic surgeon, and Lewis Almaraz, M.D., a neurologist, examined Employee for an Employer's Medical Evaluation (EME). Employee stated he injured his left shoulder at work when he had a large amount of rebar balanced on his right shoulder and was preparing to walk up an embankment and he reached out and pushed himself off the wall using his left hand. He felt and heard a pop that sounded like a stick breaking. Initially Employee had minor pain but it began worsening the next day and then progressively worsened. He stated there was no dislocation or feeling of instability it was simply painful with movement beyond the horizontal. After the industrial injury but before his shoulder surgery, he noticed numbness and tingling in his left hand and fingers. Drs. McFarland and Almaraz opined Employee's work injury is not the substantial cause of his need for an EMG and NCS; rather his intervening development of left cubital tunnel and carpal tunnel syndrome is the substantial cause of Employee's need for these studies. No further treatment was reasonable for Employee's work-related left shoulder strain and he was medically stable. Employee "may require assistance with lifting overhead, using both hands, of greater than 25 pounds" and those restrictions are attributable to the work injury. If his cubital tunnel and carpel tunnel syndromes are properly treated, he should be able to perform the Superintendent job with the recommended restrictions. They opined Employee has a six percent permanent partial impairment (PPI) related to the work injury. (McFarland and Almaraz EME report, July 31, 2015).

12) On September 2, 2015, Employee continued to experience radiating left arm pain and numbness and sensory loss in his left hand. Repeated and overhead left arm use severely aggravated the symptoms. Dr. French opined Employee had progressive findings of a left

neurogenic thoracic outlet syndrome and no clinical findings of a left cubital syndrome or a more distal nerve entrapment except for minimal tenderness of the ulnar nerve and median nerve in the left forearm and wrist. He referred Employee to Dr. Johansen, for surgical treatment of neurogenic thoracic outlet syndrome. Dr. French wrote a letter addressed to the claims adjuster disagreeing with Drs. McFarland's and Almaraz's conclusions in the July 31, 2015 EME report. He contended they ignored Employee's whole left arm numbness and failed to examine him for a left brachial plexus injury or compression injury to the brachial plexus. Dr. French agreed Employee had mild tenderness over the left ulnar nerve but opined it was due to his left brachial plexus injury caused by a heavy traction injury during his work injury. (French Chart Note, September 2, 2015; French letter, September 2, 2015).

13) On September 18, 2015, Drs. McFarland and Almaraz reviewed Dr. French's September 2, 2015 letter and chart note. They stated their opinions had not changed:

> I disagree with Dr. French's re-statement of the history, as this is not the same history provided by [Employee] or substantiated in the medical record. [Employee] has a discrete left shoulder strain that did not result in any type of nerve traction injury. The nerve symptoms developed many months after his injury, shortly before his surgery was performed. He may have an electrodiagnostic test that would confirm neurogenic thoracic outlet syndrome, but even if so, this would not be related to the industrial injury, on a more-probable-than-not basis. (McFarland and Almaraz EME addendum, September 18, 2015).

14) On September 28, 2015, Employer denied medical treatment for Employee's right shoulder, temporary total disability (TTD), temporary partial disability (TPD), and PPI benefits related to thoracic outlet syndrome or nerve injury based on Drs. McFarland's and Almaraz's EME reports. It contends Employee sustained a work-related left shoulder strain and non-work related cubital tunnel and carpal tunnel syndrome and no further treatment is reasonable for his shoulder injury. Employer contended Employee's work injury did not cause any type of nerve traction injury. (Controversion Notice, September 28, 2015).

15) On September 30, 2015, Employee reported continuing severe sensory loss throughout his left hand and arm. Dr. French recommended a left upper extremity EMG and NCS to evaluate him for a left low median and ulnar nerve compression. If Employee had significant abnormalities across the left wrist, he recommended treating the carpal tunnel syndrome and ulnar nerve compression prior to decompression of his neurogenic thoracic outlet. Dr. French stated the

mechanism of injury was sufficient to result in left neurogenic thoracic outlet syndrome and opined all of Employee's left upper extremity symptoms were caused by the work injury. He referred Employee to Dr. Johansen for surgical treatment of left neurogenic thoracic outlet syndrome. (French Chart Note, September 30, 2015).

16) On October 5, 2015, Employer denied medical treatment for Employee's left shoulder, TTD, TPD and PPI related to thoracic outlet syndrome or nerve injury. (Controversion Notice, October 5, 2015).

17) On November 5, 2015, Employee sought TTD from August 19, 2015 through medical stability, PPI greater than six percent, medical costs, penalty, interest and attorney's fees. Employee also sought a weekly compensation rate of $1,143, medical treatment recommended by Dr. French, authorization for a referral to Dr. Johansen and a Second Independent Medical Evaluation (SIME). (Claim for Workers' Compensation Benefits, November 5, 2015).

18) On November 17, 2015, Employee petitioned for an SIME. He contended a dispute existed between Dr. French, Employee's treating physician, and Drs. McFarland and Dr. Almaraz, the EME physicians, regarding compensability, degree of impairment, treatment, medical stability, and functional capacity. Employee contended Dr. French's September 2, 2015 letter and the July 31, 2015 EME report contained the medical opinions in dispute. (Petition, November 17, 2015).

19) On December 2, 2015, Employer filed a controversion notice denying TTD from August 19, 2015 ongoing, PPI greater than six percent, all medical benefits after July 31, 2015, compensation rate adjustment, penalty, interest and attorney's fees and costs based on the July 31, 2015 EME report. It relied on the July 31, 2015 EME report to contend no additional medical care was reasonable or necessary. (Controversion Notice, December 2, 2015).

20) On December 28, 2015, Employer's claims adjuster mailed the injury report, employment application, job description, compensation reports, controversion and medical records to the rehabilitation specialist and the reemployment benefits section. (Employer letter, December 28, 2015).

21) On January 7, 2016, Employer's attorney emailed Employee's attorney's office and stated:

> I talked with Katie [Weimer] and she is willing to authorize an EMG before the SIME. However, the tests need to be done by someone other than to whom Dr. French has referred [Employee]. I can contact a nurse case manager in Idaho for a list of names. I won't go through an EME vendor. Let me know what you think. (Email, January 7, 2016).

22) On January 18, 2016, a representative from Employee's attorney office emailed Employer's attorney the name and contact information for two medical providers, including CDA Spine, and stated, "Here are two places [Employee] is looking into for NCS. Are you having any luck?" (Email, January 19, 2016).

23) On January 20, 2016, Dr. French checked "yes" when asked to predict whether Employee will have permanent physical capacities to perform the physical demands of a Construction Superintendent, a Construction Worker and three other positions Employee held within the last ten years. He also added a written comments, "[W]ith [thoracic outlet syndrome] treatment only" and "[O]nly with [thoracic outlet syndrome] treatment." He predicted Employee will have a PPI rating greater than zero as a result of the work injury and commented that Employee will be permanently disabled without the treatment. (French response, January 20, 2016).

24) On January 21, 2016, the rehabilitation specialist found Employee eligible for reemployment benefits based on Dr. French's predictions. The specialist combined two job descriptions, Construction Superintendent and Construction Worker I, for Employee's job for Employer and for a previous job for a different employer: the Construction Superintendent job description requires light strength, "exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly" and requires frequent "Reaching."; the Construction Worker I job description requires heavy strength, "Lifting, carrying, pushing, pulling 50-100 pounds occasionally, 20-50 pounds frequently, 10-20 pounds constantly" and requires frequent "Reaching." The three other job descriptions selected by the rehabilitation specialist for previous jobs Employee held require medium strength, "lifting, carrying, pushing 20 to 60 pounds occasionally, 10 to 25 pounds of frequently, or up to 10 pounds constantly" and continuous or frequent "Reaching." The specialist did not summarize any additional medical records in his report. (Rehabilitation Specialist evaluation and letter, January 21, 2016).

25) On January 29, 2016, Employee's attorney's office emailed Employer's attorney and stated, "[Employee] contacted CDA Spine and they will do the nerve conduction testing. If you[r] client will authorize I'll get [Employee] to get in as quickly as possible. (Email, January 29, 2016).

26) On February 2, 2016, Employer's attorney emailed Employee's attorney's office and stated, "I obtained authority from client to move forward with testing! Sorry about the delay." (Email, February 2, 2016).

27) On February 2, 2016, Employer urged the RBA-designee to find Employee not eligible for reemployment benefits:

> As the *Guide for Preparing Reemployment Benefits Eligibility Evaluations, Revised November 26, 2012*, makes clear, "proposed treatment" is not a topic for an eligibility evaluation. Thus, Dr. French's inclusion of a proposed treatment is not a consideration for [the rehabilitation specialist] in making her recommendation and nor should it be for the RBA in making its determination. Dr. French's prediction should be treated as a prediction of [Employee's] permanent physical capacities upon completion of medical treatment. (Employer letter, February 2, 2016).

28) On February 4, 2016, Employee requested the RBA-designee find him eligible for reemployment benefits because Dr. French stated he will be "permanently disabled" without thoracic outlet syndrome treatment. He contended his physician predicted he lacks the physical capacity to perform his prior job unless he gets the treatment and Employer will not pay for this treatment. Employee contended Employer's controversion of the medical treatment "does not serve as a reason to delay the reemployment process." He contended he is eligible for reemployment benefits because his physician predicted he lacks the physical capacity to perform his job unless he gets treatment and Employer will not pay for it. (Employee letter, February 4, 2016).

29) On February 11, 2016, at a prehearing conference, the parties stipulated to an SIME and set deadlines to submit SIME medical binders, SIME questions and a mutually signed SIME form. (Prehearing Conference Summary, February 11, 2016).

30) On February 11, 2016, the reemployment benefits administrator (RBA) designee sent a letter to the parties. It noted the reemployment benefit specialist asked Employee's treating physician to provide a prediction regarding Employee's permanent physical capacities as it relates to his ability to perform the physical demands as represented in the 1993 Edition of the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (SCODRDOT) job descriptions. In response to the questions posed by the specialist, Employee's physician responded in the affirmative by checking the box marked "Yes" for each of the jobs represented by the SCODRDOT job descriptions and added a qualifier to his prediction indicating his response is predicated on Employee receiving treatment for a specific

condition, neurogenic thoracic outlet syndrome. The letter stated based on all the information received, the RBA designee would find Employee not eligible for reemployment benefits:

> Eligibility requirements are mandated by law when an employee has been totally unable to return to the job of injury for 90 consecutive days; the specialist then has a maximum of 60 days to complete the evaluation and file a report with recommendation. Very frequently the employee is still receiving treatment or in the recovery state for the work-related injury or illness during the eligibility evaluation process. It is apparent from the wording of AS 23.30.041(e), medical treatment does not have to be completed, nor does the employee have to be medically stable, before the doctor provides his/her opinion of whether the employee will be able to perform a job described in the SCODRDOT. If all predictions were qualified on the employee receiving or completing certain treatments, then the process would be bogged down considerably. This was obviously not the intent of the legislature in the 1988 reenactment of AS 23.30.041.
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> The employee points out that the employee's medical treatment for [thoracic outlet syndrome] under the Act has been controverted by the employer based on the opinions of their medical expert. The employee acknowledges the employer's right to do so. The employee has filed a claim seeking payment for medical treatment; it is the employee's right to do so. However, whether or not the employee has the medical treatment recommended by his doctor is the employee's decision. It is clear his doctor predicts the employee will have the permanent physical capacities to perform the physical demands for his job of injury and all of the jobs in his relevant work history if he pursues the treatment recommended. Whether this procedure should be paid for by the employer involves compensability and must either be resolved by the parties or decided by the Alaska Workers' Compensation Board.

The RBA-designee cited *Konecky v. Camco Wireline Inc.*, 920 P.2d 277 (Alaska 1996), which quoted *Rydwell v. Anchorage School District*, AWCB Decision No. 91-0151 (May 17, 1991) when it discussed the legislative intent of AS 23.30.041. She set a deadline date of close of business on February 24, 2016 to receive any additional information Employee, Employer or the specialist would like her to consider. (Letter, February 11, 2016).

31) On February 22, 2016, Employee filed a claim seeking review of the RBA eligibility determination and attorney fees and costs. (Claim, February 22, 2016).

32) On February 22, 2016, Employee requested a hearing on his February 22, 2016 claim. (ARH, February 22, 2016).

33) On February 25, 2016, the RBA designee found Employee ineligible for reemployment benefits based on Dr. French's prediction he will have the permanent physical capacities to

perform the physical demands for Construction Superintendent and Construction Worker as described in the SCODRDOT job descriptions. The RBA-designee noted Dr. French also predicted Employee would have the permanent physical capacities to perform the physical demands of other jobs he held within a 10-year period prior to his job of injury and the specialist determined he met the specific vocational preparation code for those jobs. A claim form was attached to the letter and, if Employee disagreed with her decision, he was directed to complete it, "paying particular attention to section 24(g)", and return it within 10 days of the letter. (RBA-designee letter, February 25, 2016).

34) On February 29, 2016, Employer deposed Dr. French. (French Deposition, February 29, 2016). Employee told him he was carrying a load of rebar weighing about 200 pounds while climbing out of a hole and he pushing himself up with his left arm and he felt a pop and acute shoulder pain. *Id*. at 11. Dr. French stated the mechanism of injury was consistent with shoulder subluxation or tearing of the rotator cuff. *Id*. at 12. He stated it was not a traction injury but more like a leverage injury. *Id*. Dr. French believed Employee subluxated his shoulder breaking the vacuum in the shoulder and basically leveraged the shoulder out of joint stretching the nerve. *Id*. If Employee's shoulder was not down but to the side, it would make the injury more likely because there was more leverage. *Id*. at 12-13. Employee could have carpel tunnel syndrome or the thoracic outlet syndrome could be causing persistent tenderness and positive stress test for carpel tunnel syndrome and ulnar nerve compression at the wrist. *Id*. at 30. Neurogenic thoracic outlet is a compression syndrome. *Id*. at 35. Stretching the nerve causes scar in and around the nerve and as the scar matures around the nerve, it can result in compression. *Id*. at 37. If the EMG has abnormal findings at the wrist, then treatment of the wrist also has to be considered. *Id*. at 40. If there is a small injury to the brachial plexus, the nerve conduction will bypass the injury and the injury would be invisible because the nerve fibers interconnect but the wrist and elbow are not anastomosis so the NCS is more accurate at picking up a wrist or elbow nerve injury. *Id*. at 41. A neurogenic thoracic outlet syndrome should generally be negative on an EMG until at the very end when the arm is severely paralyzed and completely atrophied. *Id*. at 43. One of the reasons to get an EMG and NCS is to distinguish between brachial plexus injury and neurogenic thoracic outlet syndrome and another is to see if there is more generalized neuropathy, like from diabetic neuropathies. *Id*. at 43. He ordered an EMG and NCS to look at Employee's carpel tunnel and ulnar nerve compression. *Id.* at 44. An adequate carpel tunnel exam should pick up nerve root

patterns from the neck, a ruptured brachial plexus and familial neuropathy. *Id*. at 44. He does not think Employee has a ruptured brachial plexus because his motor function is too good nor does he think Employee has familial neuropathy because he has one-arm symptoms. *Id*. If Employee has no findings of a neurogenic thoracic outlet syndrome he does not need a referral to Dr. Johansen and if all he has is hand findings, he probably needs a carpel tunnel release. *Id*. at 64.

35) On February 29, 2016, Employer deposed Employee. (Employee Deposition, February 29, 2016). Employee does not have chronic neck pain. *Id*. at 35. Employee walked down in a hole that was 60 by 20 feet to clean up rebar. *Id*. at 48. The rebar was different lengths and he picked them up and put them on his shoulder. The rebar dragged on the ground because he only picked up one end to drag them out. *Id*. at 49. Employee thought he carried 70 or 80 pounds, not 200 pounds. *Id*. at 51. He placed the rebar on his right shoulder and used his left arm to push off the abutment and go up the hill. *Id*. at 51-52. Employee was standing when he pushed off with his arm a little bit above shoulder height and felt a pop and sharp pain in his shoulder. *Id*. at 52-53. It was sore the next day and steadily got worse. *Id*. at 54. He continued working until November but he quit lifting. *Id*. at 55-56. Eventually, he could barely lift his arm and it hurt. *Id*. at 56. Employee had tingling and numbness in his forearm. *Id*. at 64. He did not have radiating pain from his shoulder down to his arm. *Id*. at 65. Employee did not have any burning or tingling in his shoulder after the injury, he just felt pain. *Id*. at 65. When his shoulder totally relaxes, he feels movement in there and that started immediately after the injury. *Id*. at 70. He does not have pain in his arm. *Id*. Employee cannot lift overhead. *Id*. His whole left arm is only numb when he rides his motorcycle. *Id*. at 71. Wearing a seatbelt across his collar bone, the pressure and rubbing, bothers him so he shoves it off his arm when driving. *Id*. at 72-74. Employee felt numbness and tingling in his left hand right after the injury and it progressively worsened. *Id*. at 78-79. His hand is constantly numb. *Id*. at 82.

36) On March 9, 2016, Employer's attorney emailed Employer's attorney's office asking, "Any luck with the studies?" (Email, March 9, 2016).

37) On March 18, 2016, Employer denied Employee's appeal of the RBA eligibility evaluation and attorney fees and costs. It contended the RBA-designee did not abuse her discretion in determining Employee was ineligible for reemployment benefits. (Controversion Notice, March 18, 2016).

38) On March 31, 2016, at a prehearing conference, the parties discussed the following:

> The parties want to put the SIME process on hold and agreed not to take any action on Employee's February 22, 2016 ARH or schedule a hearing until Employee had nerve conduction and EMG studies. Those results will help them determine the next steps before proceeding. (Prehearing Conference, March 31, 2016).

39) On April 14, 2016, Employer's attorney emailed Employee's attorney and stated, "Wondering if we are making any progress on EMG studies. Let me know!" (Email, April 14, 2016).

40) On May 16, 2016, Employer controverted AS 23.30.041(k) stipend as of February 25, 2016 because the RBA-designee found Employee ineligible for reemployment benefits and contended it overpaid stipend benefits. (Controversion Notice, May 16, 2016).

41) On September 2, 2016, Dennis Chong, M.D., examined Employee for an EME. He diagnosed a work related left shoulder sprain or strain, pre-existing left shoulder SLAP tear temporarily aggravated by the work injury and bilateral carpel tunnel syndrome unrelated to, not caused by and not aggravated by the work injury. Dr. Chong opined there was no evidence of neurogenic or vasculogenic thoracic outlet syndrome. He stated there was no documentation to diagnose a brachial plexus injury and disagreed with Dr. French's diagnosis. Dr. Chong stated Dr. French's approach to diagnosing and treating was very unique and "not found in community practice with his peers." He was unaware of any medical literature which supported Dr. French's approach. Dr. Chong opined it would be rare for a shoulder sprain or strain to result in a brachial plexus injury and Employee's mechanism of injury would not result in a brachial plexus injury. He agreed Employee should have an EMG and NCS for non-work related carpel tunnel syndrome. Dr. Chong "categorically disagreed" with Dr. French's recommendation of a left brachial plexus surgery and stated the surgery would likely result in substantial worsening of his symptoms. He opined Employee reached medical stability on July 31, 2015. (Chong EME report, September 2, 2016).

42) On September 22, 2016, Lorne Direnfeld, M.D., a neurologist, examined Employee for a SIME. He diagnosed left shoulder pain and left hand sensory complaints, likely secondary to a combination of carpel tunnel syndrome and ulnar neuropathy at the wrist or elbow. Dr. Direnfeld noted several different potential causes of Employee's left hand sensory complaints, including: (1) thoracic outlet syndrome, (2) cervical radiculopathy, and (3) carpel tunnel syndrome and ulnar neuropathy. He believed cervical radiculopathy unlikely because the distribution of symptoms extended over at least four nerve root levels, C6, 7 and 8 and T1. Dr. Direnfeld opined the pathophysiologic mechanism provided by Employee and in the records was unlikely to have

resulted in shoulder dislocation which could have stretched the brachial plexus and noted neither Dr. Lehmann on May 21 and June 19, 2014, nor Dr. Keller on October 27, 2014, documented any sensory complaints or diagnosed a history of dislocation. He stated,

> Considering all of the currently available data, the most likely cause of [Employee's] left hand sensory symptoms includes median nerve entrapment at the wrist and ulnar nerve entrapment at the wrist or elbow.
>
> Additional investigations that would be helpful in clarifying [Employee's] diagnosis include an EMG and nerve conduction study in the upper extremities.
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> Additional investigations that may be required, depending on the results of neurophysiologic studies include imaging studies of the cervical spine.
> . . . .

Dr. Direnfeld opined Employee's left hand sensory symptoms are most likely attributable to personal medical conditions including carpel tunnel syndrome and ulnar neuropathy, at either the wrist or elbow. An EMG and NCS would be helpful in confirming his clinical impression and clarifying the location of the lesion causing Employee's ulnar distribution symptoms. The work injury did not aggravate, accelerate or combine with a pre-existing condition to cause disability or need for medical treatment. Dr. Direnfeld stated although it was unlikely, the results of an EMG and NCS could "conceivably impact" the answer to whether the work injury aggravated, accelerated or combined with a pre-existing condition to cause disability or need for medical treatment. He opined carpel tunnel syndrome and ulnar sensory neuropathy would not be attributable to the mechanism of the work injury. After reviewing SCODRDOT job descriptions for a Construction Superintendent and a Construction Worker, Dr. Direnfeld opined Employee is able to work as a foreman/construction supervisor "without any limitations or restrictions to the extent that this work is primarily supervisory." However, Employee has some limitations regarding his left shoulder range of motion and problems with sensation in his left hand. Dr. Direnfeld refrained from giving a PPI rating because Employee was not medically stable "from a neurologic perspective." He said,

> Although currently it is medically probable Employee's left hand sensory symptoms are not related to the work injury, this impression is derived from an incomplete database. If an EMG and nerve conduction study is done (and ideally this should be done in both upper extremities), I will be glad to review the results of that study and further address the questions.

Dr. Direnfeld deferred orthopedic treatment questions to Floyd Pohlman, M.D., and stated no additional treatment is required for the "neurologic aspects" of the work injury based on the currently available data. (Direnfeld SIME report, September 22, 2016)

43) On September 23, 2016, Dr. Pohlman, an orthopedist, examined Employee for a SIME. When asked to list all causes of Employee's disability or need for treatment, he stated (1) left shoulder SLAP lesion, (2) partial tear of the left shoulder biceps tendon, (3) left shoulder acromioclavicular arthrosis and (4) left shoulder impingement syndrome. Dr. Pohlman opined the SLAP lesion and biceps tendon lesions were work-related and the pre-existing acromioclavicular arthrosis combined with the other injuries to aggravate the acromioclavicular arthrosis and resulted in a permanent change. He opined the substantial cause of Employee's disability was the partial rupture of the biceps tendon as well as the SLAP lesion and the pop Employee heard at the time of the injury was likely the partial rupture of the biceps tendon, causing the SLAP lesion. Employee was medically stable as of July 31, 2015 and he was able to return to work with restrictions. Dr. Pohlman opined no further treatment was necessary for Employee's shoulder injury. After reviewing SCODRDOT job descriptions for a Construction Superintendent and a Construction Worker, he stated Employee will not be able to work as a foreman/construction supervisor unless limitations are placed including avoiding overhead work and not lifting more than 25 pounds overhead. Dr. Pohlman assessed an eight percent PPI rating. (Pohlman SIME report, September 23, 2016).

44) On October 10, 2016, Employer's attorney sent Employee's attorney a letter stating:

> Dr. Direnfeld believes that the most likely cause of [Employee]'s left hand sensory symptoms includes median nerve entrapment at the wrist and ulnar nerve entrapment at the wrist or the elbow. He feels additional investigation would be helpful in clarifying [Employee]'s diagnosis included an EMG nerve conduction study in the upper extremities. (SIME pp. 50-51.)
>
> We were aware of the need for EMG conduction studies and my client communicated to your office on 1/7/16 that the studies were authorized. On 1/18/16, Patty Jones sent an email indicating that [Employee] had identified two clinics in Idaho who could perform the studies and then on 1/29/16 Ms. Jones followed up with an email indicating that [Employee] had, in fact, selected one of the two clinics. On 2/2/16, I again communicated to Ms. Jones that my client had authorized [Employee] to proceed with the studies. In March, not having heard anything, I emailed Ms. Jones inquiring as to the status of the studies. At this point,

> we had put the SIME process on hold pending the EMG studies. In April, I emailed your office inquiring into the status of the studies. In May, the board contacted us regarding the status of the SIME and the SIME was thereafter scheduled.
>
> Thus, I was surprised to find in Dr. Direnfeld's SIME report that [Employee] told Dr. Direnfeld that the Employer declined to pay for EMG and nerve conduction studies. (SIME p. 3). As described above, the Employer authorized the EMG studies nine months before the SIME exam occurred and any suggestion by [Employee] to the contrary is false. The authorization for the EMG studies remain in place and [Employee] should expedite obtaining the studies. (Letter, October 10, 2016).

45) On December 16, 2016, an Employee's attorney's office emailed Employer's attorney and asked, "Would your client agree to the testing recommended by the SIME doctors?" (Email, December 16, 2016).

46) On December 19, 2016, Employer's attorney emailed Employee's attorney's office and stated, "I'll let you know and [get] back to you on this." (Email, December 19, 2016).

47) On February 6, 2017, Dr. French opined Employee sustained a severe traction injury where he pulled his shoulder out of joint and injured his brachial plexus which continued to cause significant left arm numbness and weakness. He performed scalene block injections to evaluate Employee's neurogenic outlet syndrome. Dr. French noted significant improvement in sensation in Employee's ring and little fingers following the anterior scalene injection and near complete return of normal sensation in the entire hand following the pectoralis minor injection. He referred Employee to Dr. Johansen for decompression of Employee's left brachial plexus because his response to the injections suggested he would have a 90 percent chance of significant improvement of neurologic function in his left arm. (French Medical Report, February 6, 2017).

48) On February 13, 2017, Employee's attorney's office emailed Employer's attorney and stated, "I dropped the ball on this. Do you have any response to my December 16 email to you?" (Email, February 13, 2017).

49) On February 13, 2017, Employer's attorney emailed Employee's attorney's office and stated, "We will not agree at this point. We authorized the procedure for the SIME and [Employee] never took any action. It's now too late." (Email, February 13, 2017).

50) On April 5, 2017, Employee filed a letter addressed to Dr. Direnfeld and served it upon Employer, stating:

> Thank you for your evaluation of [Employee] and your report dated September 28, 2016. On Page 51, you recommend further testing. "Additional investigations that would be helpful in clarifying [Employee]'s diagnosis include an EMG and nerve conduction study in the upper extremity." The insurance company has not agreed to this further testing.
>
> On February 6, 2017, [Employee] had a scalene block injection that provided [Employee] substantial but temporary relief. "The patient had near complete return of normal sensation in the entire hand following the pectorals minor injection, including near normal sensation in the thumb and index finger." Please review this medical record. If the results of the injection change any of your conclusions, let the Board and the parties know in a supplemental report. In particular, please inform us if you still feel that an EMG and nerve conduction study would be diagnostically useful. (Letter, April 5, 2017).

51) On April 24, 2017, the division received a letter from Dr. Direnfeld responding to Employee's April 5, 2017 letter stating, the recommendations he made "continue to apply." He stated:

> The injections administered by Dr. French do not rule out the role of potential more peripheral neurologic pathology as it may contribute to [Employee's] symptom complex which may require a different approach to treatment or may adversely affect the results of treatment for the potential diagnosis of neurogenic thoracic outlet syndrome. (Direnfeld letter, April 24, 2017).

52) On May 26, 2017, Employee filed a claim requesting medical treatment recommended by Dr. Direnfeld. (Claim, May 26, 2017).

53) On June 19, 2017, Employer denied the EMG and NCS recommended by Dr. Direnfeld. (Controversion Notice, June 19, 2017).

54) On June 20, 2018, Dr. Johansen opined Employee's work injury caused Employee's need for left arm and hand medical treatment. He diagnosed neurogenic thoracic outlet syndrome,

> It seems likely that he had both direct brachial plexus traction injury, which has resolved itself over time, as well as worsening scalene muscle fibrosis and compression of the brachial plexus, resulting in his neurogenic thoracic outlet syndrome symptoms. The onset of his symptoms was delayed for a period of time, which is in fact what is seen in the course of neurogenic thoracic outlet syndrome following such injuries.

He reviewed "various IMEs" and fully disagreed with their conclusions. Dr. Johansen believed Employee will remain symptomatic and unable to carryout workplace activities until he undergoes treatment of his neurogenic thoracic outlet syndrome. (Johansen Medical Report, June 20, 2018).

55) On July 5, 2018, Dr. Johansen opined no additional tests are necessary to evaluate Employee's chronic left upper extremity neuromuscular dysfunction and recommended "thoracic outlet decompressive surgery." He stated, "Vascular studies, imaging techniques and electrodiagnostic evaluation lack sensitivity and specificity for diagnosing neurogenic thoracic outlet syndrome" and are "not helpful in making or ruling out" that diagnosis. He also opined Employee was currently unable to work without any restrictions or limitations. (Johansen letter, July 5, 2018).

56) On August 27, 2018, Employee requested a hearing on his November 5, 2015 claim. (ARH, August 27, 2018).

57) On September 6, 2018, Employer opposed Employee's August 27, 2018 ARH contending it was untimely under AS 23.30.110(c). (Opposition, September 6, 2018).

58) On September 6, 2018, Employer petitioned to dismiss Employee's November 5, 2015 claim under AS 23.30.110(c). (Petition, September 6, 2018).

59) On December 14, 2018, *Roberge I,* an interlocutory decision, issued and denied Employee's November 5, 2015 claim for failure to timely request a hearing under AS 23.30.110(c) and granted Employer's September 6, 2018 petition to dismiss. (*Roberge I*).

60) On January 29, 2019, the Alaska Workers' Compensation Appeals Commission (AWCAC) held *Roberge I* was a final order for purposes of appeal because the decision making process was complete and the result directly affected the parties. It stated Employee's other claims remained open and may proceed forward even while he appealed *Roberge I*. (*Roberge v. ASRC Construction Holding Company*, AWCAC Order Appeal No. 19-001, January 29, 2019).

61) On February 22, 2019, Employer requested Employee's May 26, 2017 claim be denied or held in abeyance pending the outcome of Employee's appeal of *Roberge I*. It contended Employee's November 5, 2015 claim and May 26, 2017 claim arose out of the same conduction, transaction or occurrence and the May 26, 2017 claim amends and relates back to the November 5, 2015 claim. Employer contended AS 23.30.110(c) bars his May 26, 2017 claim because the May 26, 2017 claim amended the November 5, 2015 claim. It requests Employee's May 26, 2017 claim be denied. Alternatively, it contended the medical treatment Employee seeks is not relevant to any claim and ordering the Employer to pay for such medical tests would be contrary to the intent of the Act. Employer requests Employee's claim be held in abeyance pending the outcome of his appeal of *Roberge I*. (Petition, February 22, 2019).

62) Employee contended Employer interfered with his medical treatment by agreeing to an EMG and NCS only if not conducted by Dr. French or any physician recommended or referred by Dr. French. He contended his May 26, 2017 claim cannot be precluded because a judgment on the merits is required for claim preclusion. Employee contended each new medical treatment restarts the statute of limitations. He contended his medical record continued to evolve and the RBA-designee misread the medical record. Employee contended Dr. Pohlman's opinion is the most credible on Employee's ability to perform job duties of jobs he held in the last 10 years. He contends the RBA-designee's decision should be made without prejudice and he should be able to submit new, more credible medical evidence. (Employee hearing arguments).

63) Employer objected to Employee's contention it interfered with his choice of physician because there was no basis in facts to support it. It contended there could be no interference because the medical treatment sought was controverted and it agreed for the EMG studies for the SIME and Employee failed to obtain the medical treatment when it was interested in paying for the procedure. Employer contended Dr. French is not credible because his diagnosis and treatment approach is not common or normal and is not used by his peers. It contended Employee's May 26, 2017 claim sought the same medical treatment sought in his denied November 5, 2015 claim and there was no different nature of the injury previously unknown to Employee. Employer contended the RBA-designee provided Employee 10 more days to obtain and provide more evidence and he failed to do so. It contended the recommendation for medical treatment has not changed since the November 5, 2015 claim. (Employer's hearing arguments).

PRINCIPLES OF LAW

> **AS 23.30.001. Legislative intent.** 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;
>
> . . . .

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). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
> . . . .
>
> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.
>
> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles" for:
>
> (1) the employee's job at the time of injury; or
>
> (2) other jobs that exist in the labor market that the Employee has held or received training for within 10 years before the injury or that the Employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles". . . .
> . . . .

Several "abuse of discretion" definitions appear in Alaska law but none appear in the Act. The Alaska Supreme Court stated "abuse of discretion" includes "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). An agency's failure to properly apply controlling law may also be an abuse of discretion. *Manthey v. Collier* 367 P.2d 884 (Alaska 1962).

Physicians' opinions under AS 23.30.041(e) must be made in reference to the applicable SCODRDOT job description. *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1108 (Alaska 1999). On appeal from the RBA-designee's eligibility decision, the board will affirm the decision if it is supported by substantial evidence. *Yahara v. Construction & Rigging, Inc*., 851 P.2d 69 (Alaska 1993). The board will not reweigh the evidence upon which the RBA designee relied in reaching her determination. *Miller v. ITT Arctic Services*, 577 P.2d 1044 (Alaska 1978). The board's failure to apply a mandatory statutory provision was harmless error where substantial evidence existed to support the board's position. *Adamson v. University of Alaska*, 819 P.2d 86 (Alaska 1991).

Polak v. Fred Meyer Stores, Inc., AWCB Decision No. 11-0168 (November 25, 2011), held a board decision reviewing the RBA-designee's eligibility determination must be based on "a complete record." In *Polak*, the attending physician made a "contingent" prediction the injured worker would be able to return to a particular job if surgery was performed and if it was successful. The RBA-designee decided Polak was ineligible for retraining benefits before the surgery had occurred. *Polak* stated this, and a failure to obtain opinions from other physicians for different body parts, constituted error, and given an incomplete record, was a lack of substantial evidence supporting the ineligibility decision. *Polak* vacated and remanded to the RBA-designee to complete the record and have the attending physicians reconsider the applicable job descriptions.

In *Rydwell v. Anchorage School District*, 864 P.2d 526 (Alaska 1993), the Alaska Supreme Court affirmed the superior court's denial of an employee's entitlement to reemployment benefits because the employee had no ratable PPI under the AMA Guides. The court stated an employee may start vocational rehabilitation before the employee reaches medical stability, based upon a physician's prediction of physical capacities as it serves the legislature's goal of encouraging early rehabilitation intervention. However, "once the employee has reached medical stability, [the employee] must have a permanent impairment, calculated under AS 23.30.190(b)'s provisions for use of the *AMA* Guides," and an employee receiving a zero percent PPI rating under the AMA Guides is ineligible for reemployment benefits. *Id*. at 531.

In *Konecky*, the Alaska Supreme court quoted *Rydwell v. Anchorage School District*, AWCB Decision No. 91-0151 (May 17, 1991) at 10 to list some of the specific purposes of the reenactment of AS 23.30.041, including:

> 1) to create a less expensive system with fewer employees participating in it; 2) to reduce the use of vocational rehabilitation as a litigation tool; 3) to encourage the use of vocational rehabilitation services for employees "most likely to benefit and who truly desire and need them"; [and] 4) to speed up the vocational rehabilitation process in the expectation of producing more successful outcomes.

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

> **AS 23.30.110. Procedure on claims.**
> . . . .

> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied. . . .

An employee's "claim" for benefits, *i.e.*, his pleading, is differentiated from the employee's right to benefits. Both a worker's right to compensation and his claim may be controverted, but only a controverted claim starts the two-year time period for requesting a hearing. AS 23.30.110(c) requires an employee to timely prosecute a claim once the employer controverts the claim. A "claim" for AS 23.30.110(c) purposes is a "written claim for compensation." *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1123-24 (Alaska 1995).

The Alaska Supreme Court compared AS 23.30.110(c) to a "statute of limitations." *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska, 1987). However, it also differs in a sense from a pure statute of limitations because:

> In *Doyon Drilling*, we held that the word 'claim' in section 110(c) refers only to the employee's written application for benefits, not the employee's right to compensation (citations omitted). Therefore, while the expiration of the two-year period in section 110(c) results in dismissal of the particular claim, it does not prevent the employee from applying for different benefits, or raising other claims, based upon a given injury. In this sense the provision differs from a statute of limitations, which terminates all rights emerging from a cause of action. Nevertheless, as to the particular claim dismissed under its strictures, section 110(c) resembles a statute of limitations. *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 913 n. 4 (Alaska 1996) (citations omitted).

In *Tipton*, the Alaska Supreme Court said AS 23.30.110(c) requires an employee to request a hearing within two years of the controversion, or face claim dismissal. However, *Tipton* also said the statute of limitations defense is "generally disfavored," and neither "the law [n]or the facts should be strained in aid of it." (*Id.* at 913).

In *Summers v. Korobkin Construction*, 814 P.2d 1369, 1371-73 (Alaska 1991), an injured worker filed a claim seeking a decision from the board on whether his injury was "compensable." His doctor said he might need neck surgery and a major factor in the worker's decision whether to pursue surgery was whether the employer would pay for it. The board declined to hear the case noting there was no actual "controversy," since the injured worker had not received any medical care for over a year, and there were no unpaid work-related medical bills or other claims. The superior court agreed. Reversing, the Alaska Supreme Court stated:

> [The Act] also provides that the right to compensation is contingent upon filing a claim. AS 23.30.105. The procedure on claims is established by AS 23.30.110. AS 23.30.110(a) states that 'the board may hear and determine all questions in respect to the claim.' AS 23.30.110(c) requires that the party seeking a hearing file a request for a hearing. . . .
> . . . .
>
> [The Act] does not define 'claim.' It is significant, however, that the right to compensation is contingent upon filing a claim. AS 23.30.105. . . . Under this section of the act, the only requirement for a claim is knowledge of a disability and its work-relatedness. There is no requirement that the injured worker have incurred unpaid medical expenses (footnote omitted).
>
> As Summers filed a claim under the statute, we disagree with the superior court's determination that the Board correctly denied Summers a hearing on the basis that

> he had no claim pending before the Board at the time set for hearing. The text of AS 23.30.110(c) reflects that the legislature intended to award injured workers the right to a hearing on their claims. Pursuant to the provisions of AS 23.30.105, the only prerequisite for filing a claim is a work-related injury. . . .
>
> . . . The dispute between the parties created a 'controversy' which, under the law, entitled the worker to a determination (footnote omitted).
> . . . .
>
> Here, Korobkin disputed many aspects of Summers' application for adjustment of claim. Korobkin's answer advanced numerous defenses to Summer's claim, including that Summers' injury was not work-related. . . . Summers is entitled to a hearing on Korobkin's defenses. If Summers prevails, Korobkin will still be able to controvert Summers' claim at a future hearing, if the grounds for controversion arise after the initial hearing. AS 23.30.130. However, a worker in Summers' position, who has been receiving treatment for an injury which he or she claims occurred in the course of employment, is entitled to a hearing and prospective determination on whether his or her injury is compensable.

In *Bailey v. Texas Instruments, Inc.*, 111 P.3d 321 (Alaska 2005), the Alaska Supreme Court addressed a case where an injured worker filed three claims and each was controverted. At hearing, the board dismissed all three claims, treating the second two "as merging" with the first because "they were for the same benefits originally sought." Since the first claim was time barred under AS 23.30.110(c), the board reasoned the other two were also time-barred because they "merely restated" the first claim and were governed by the first statute of limitations and resultant dismissal. Reversing as to the third claim, *Bailey* held the claimant "did not simply refile the 1997 claim in 2001; rather, he sought compensation for different expenses." *Bailey*, 111 P.3d at 325. AS 23.30.110(c) did not operate to deny the third claim. *Bailey* further explained:

> It is true that Bailey apparently sought the same type of medication in each of his claims. But the fact that Geophysical succeeded in controverting the 1997 pharmacy bills because Bailey failed to file a timely request for a hearing does not mean that Bailey can never again claim reimbursement for narcotics or benzodiazepines. (*Id.*).

Over the lifetime of a workers' compensation case, many claims may be filed as new disablements or medical treatments occur. *Egemo v. Egemo Construction Company*, 998 P.2d 434, 440 (Alaska 2000). In *Egemo* the Court held, "new medical treatment entitles a worker to restart the statute of limitations for medical benefits." *Id.*

In *University of Alaska Fairbanks v. Hogenson*, AWCAC Decision No. 074 (February 28, 2008), the commission held when a claim for benefits expires under AS 23.30.110(c) and is dismissed, a later-filed claim for the same benefits for the same injury may not revive the expired claim, but that a later-filed claim for the same benefits on a different nature of injury previously unknown to the employee, or for a different benefit from the same injury, is not extinguished with the earlier claim. *Id.* at 10. A denial and dismissal of a particular claim under AS 23.30.110(c), after the claimant is given notice and opportunity to present evidence and argue against dismissal of the claim, has the effect of dismissal with prejudice, and precludes raising a later claim for the same benefit, arising from the same injury, against the same employer, based on the same theory (nature) of injury. *Id*. at 14.

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

Under AS 23.30.120(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 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Alaska Workers' Compensation Act (Act). *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). 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). 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. *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991) (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) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc*., 973 P.2d 603 (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 (Alaska 1994).

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 his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379 (Alaska 1991). 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).

> **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.

Credibility findings are binding. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001 (Alaska 2009). When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision No. 087 (August 25, 2008).

> **AS 23.30.130. Modification of awards.** (a) upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions . . . or because of mistake in its determination of a fact, the board may, . . . before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect to all claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

The "law of the case" doctrine "maintains that issues previously adjudicated can only be reconsidered where there exist 'exceptional circumstances' presenting a 'clear error constituting a manifest injustice.'" *Groom v. State, Department of Transportation*, 169 P.3d 626, 636 (Alaska 2007). The Alaska Supreme Court applies the *res judicata* (it has already been decided) doctrine to workers' compensation cases. In *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 780 (Alaska 2002), the court said:

> When applicable, *res judicata* precludes a subsequent suit 'between the same parties asserting the same claim for relief when the matter raised was or could have been decided in the first suit' It requires that '(1) the prior judgment was a final judgment on the merits, (2) a court of competent jurisdiction rendered the prior judgment, and (3) the same cause of action and same parties or their privies were involved in both suits.' (citations omitted).

In the case of a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). AS 23.30.130 has been applied to changes in conditions affecting reemployment benefits and vocational status. *See, e.g., Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619 (Alaska 2007); *Imhof v. Eagle River Refuse*, AWCB Decision No. 94-0330 (December 29, 1994). The board may decide, based on evidence in the record upon conclusion of a hearing on modification, whether an employee is entitled to reemployment benefits. *See, e.g., Griffiths*, 165 P.3d at 624.

In *Interior Towing and Salvage, Inc. v. Gracik*, AWCAC Decision No. 239 (September 5, 2017), the Commission held that the provision of AS 23.30.041(d), stating the board "shall uphold the decision of the administrator except for abuse of discretion on the administrator's part" controlled over the modification provisions of AS 23.30.130. Thus, unless the board finds that the RBA-designee abused her discretion in finding an employee eligible or ineligible, the board could not modify the RBA-designee's decision, but must remand the issue to the RBA-designee. In *Gracik*, the Commission did not address the Supreme Court's approval of the board's modification of a reemployment eligibility determination based on newly discovered evidence.

"Predict" means to declare or indicate in advance, to foretell on the basis of observation, experience or scientific reason and to make a prediction. (Merriam-Webster, Online Dictionary: https://www.merriam-webster.com/dictionary/predict. "Prediction" means a statement about what someone thinks will happen, a forecast, the act of making such a statement and a foretelling. *Black's Law Dictionary* 1368 (Tenth Edition 2014). "Reaching" is defined as extending the hands and arms "in any direction." SCODRDOT Appendix C-3 (1993 Edition).

ANALYSIS

1) Should the RBA-designee's ineligibility determination be remanded, reversed or modified?

Employee timely requested review of the RBA-designee's determination he was ineligible for reemployment benefits. AS 23.30.041(d). The RBA-designee found him ineligible based on Dr. French's prediction. The RBA-designee's opinion must be upheld unless Employee proves the RBA-designee abused her discretion. *Id*. Employee does not contend the RBA-designee's decision was arbitrary, capricious, manifestly unreasonable, or stemmed from an improper motive. *Sheehan*.

Employee contends the RBA-designee misread the medical record because Dr. French predicted he lacks the physical capacity to perform his prior job and he would be permanently disabled unless he gets the medical treatment Employer controverted. An abuse of discretion can be found when

the RBA-designee's decision is not supported by substantial evidence or when the RBA designee failed to properly apply the law. *Yahara*; *Manthey*. Dr. French predicted Employee will have permanent physical capacities to perform the physical demands of a Construction Superintendent, a Construction worker and three other positions Employee held within the last ten years if he receives medical treatment for thoracic outlet syndrome. Employee's November 5, 2015 claim which was dismissed in *Roberge I* sought medical benefits, including medical treatment Dr. French recommended for thoracic outlet syndrome, so no order has determined whether he is entitled to thoracic outlet syndrome medical treatment.

Employee contends he should be found eligible because Dr. French's prediction he will have permanent physical capacities to perform the physical demands of the job descriptions is conditional upon receiving the recommended medical treatment and Employer controverted the medical treatment. When the RBA-designee found Employee ineligible, the RBA-designee reasoned medical treatment does not need to be completed nor does the injured worker have to be medically stable for a physician to make such a prediction. *Rydwell* held an employee may start vocational rehabilitation before the employee reaches medical stability based upon a physician's prediction because it serves the legislature's goal of encouraging early rehabilitation intervention. AS 23.30.041(d) requires a reemployment eligibility evaluation be completed within 60 days. Many injured workers' medical treatment is not completed when the eligibility evaluation is completed. *Rogers & Babler*. It would serve the legislature's goal of encouraging early rehabilitation intervention to start vocational rehabilitation before medical treatment is complete. *Rydwell*. While there are some circumstances when an Employer's controversion will require a hearing before an eligibility evaluation under 8 AAC 45.510(b), Employer's controversion of medical benefits is not one of those circumstances. The eligibility decision should not be delayed or suspended because of Employer's controversion.

Employee is in essence contending Dr. French predicted he will not have permanent physical capacities to perform the physical demands of the job descriptions without the recommended medical treatment. Complicating this issue is the fact that "rehabilitation" of injured workers falls under medical benefits in terms of physical rehabilitation and under reemployment in terms of vocational or employment retraining rehabilitation. AS 23.30.041(e) requires the physician to

predict the injured workers' physical capacities to perform the physical demands of the job descriptions but the Act does not define "predict." To predict requires the physician to use his observation, experience and scientific reason to foretell the injured workers' future physical capacity. Merriam-Webster; *Black's.* AS 23.30.041(e) is concerned with permanent physical capabilities but is silent regarding medical treatment. It also does not inquire as to the reason for the physician's opinion, nor does it inquire as to when the physician expects the injured worker to have the permanent physical capacities to perform the job description's physical demands. Dr. French predicted Employee would have permanent physical capacities to perform the physical demands of his job and others he held in the last ten years in the future after receiving medical treatment. The RBA-designee did not misread the medical evidence and did not fail to properly apply the law when she reasoned medical treatment does not need to be completed and determined Dr. French predicted Employee would have the permanent physical capacities to perform the physical demands of the job descriptions. The RBA-designee did not abuse her discretion.

Employee contends new, more credible evidence from Dr. Pohlman shows the RBA-designee abused her discretion. Newly discovered evidence Employee could not have produced for the administrator's consideration under AS 23.30.041(d) may be considered. 8 AAC 45.070(b)(1)(A). Dr. Pohlman's SIME examination occurred on September 23, 2016 and he reviewed the job descriptions for Construction Superintendent and Construction Worker I. Therefore, Employee Dr. Pohlman's SIME report is new evidence which could not have been produced with due diligence on February 25, 2016 when the RBA-designee decided Employee was not eligible for reemployment benefits.

Dr. Pohlman opined Employee will not be able to work as a foreman/construction supervisor unless limitations are placed, including "avoiding overhead work and not lifting more than 25 pounds overhead." The specialist combined two job descriptions, Construction Superintendent and Construction Worker I, for Employee's job for Employer and both require frequent "reaching" which includes extending the arms and hands above his head, which exceeds Dr. Pohlman's reaching limitations. The remaining three job descriptions require medium strength, which exceeds the 25 pound limitation, and continuous or frequent reaching, which exceeds the reaching limitations. Dr. Pohlman's opinion in essence predicted Employee will not have permanent

physical capacities to perform the physical demands of his job at the time of injury or the others he held within the last 10 years, which conflicts with Dr. French's opinion. Because Dr. Pohlman's EME report conflicts with Dr. French's opinion and is new evidence which could have not been produced with due diligence, it may affect the evaluation's outcome.

Dr. Pohlman's physical restriction are similar to the restrictions recommended by Drs. Almaraz's and McFarland's July 31, 2015 EME report which stated he "may require assistance with overhead lifting, using both hands, of greater than 25 pounds." There is no evidence Employee's physical capabilities improved or declined since the RBA-designee's ineligibility determination. Employee has not shown a change in condition. AS 23.30.130. A review of the administrator's decision under 8 AAC 45.070(b)(1)(A) does not require a change in conditions; it only states new evidence can be considered. However, *Gracik* precludes modification of the RBA-designee decision unless there was an abuse of discretion. The ineligibility determination will be remanded back to the RBA-designee to consider and weigh Dr. Pohlman's opinion against Dr. French's opinion. 8 AAC 45.070(b)(1)(A); *Gracik.*

2) Should Employee's May 26, 2017 claim be denied?

Employer contends Employee's May 26, 2017 should be denied because *Roberge I* denied his November 5, 2015 claim under AS 23.30.110(c) and he sought the same medical benefit based on the same medical record and for the same diagnostic purpose in his May 26, 2017 claim, and therefore, the claims merged. Employee's November 5, 2015 claim sought medical treatment recommended by Dr. French, specifically an EMG and NCS, and Employer's December 2, 2015 controversion denied all medical benefits after July 31, 2015. He never had an EMG or NCS. Employee's May 26, 2017 claim sought medical treatment recommended by Dr. Direnfeld, specifically an EMG and NCS.

A missed hearing deadline under AS 23.30.110(c) only ends the claimant's right to the benefits actually claimed and controverted. *Jonathan*. Employee retained his right to make claims for other, different benefits not previously claimed, controverted and denied for failure to file a timely hearing request. *Jonathan*; *Suh*; *Tipton*. Employee contends his May 26, 2017 claim seeks a new medical benefit. New medical treatment restarts the statute of limitations for medical expenses.

Egemo. Unlike *Bailey*, where the claimant's third claim sought reimbursement for new prescription expenses incurred after the first two claims, Employee's November 5, 2015 and May 26, 2017 claims seek a prospective determination for a medical treatment or expense, an EMG and NCS. Employee seeks the same medical treatment arising from the same injury against the same Employer. *Hogenson*.

Employee contends his medical record continued to evolve which justifies treating the EMG and NCS as a new medical benefit. However, Employee is seeking the same benefit based on the same theory or nature of injury. *Hogenson*. Employee contends his work injury caused a left shoulder brachial plexus injury which caused his left arm and hands to become numb and tingly and relies on Dr. French's medical opinions to prove his claim. Employer controverted benefits based upon its EME report which concluded Employee's left arm and hand numbness and tingling was caused by non-work related carpel tunnel and left cubital tunnel syndrome. There were two new medical opinions: Dr. Direnfeld diagnosed carpel tunnel syndrome and ulnar neuropathy and recommended an EMG and NCS to clarify his diagnosis and Dr. Johansen opined Employee's work injury caused his need for left arm and hand medical treatment, diagnosed neurogenic thoracic outlet syndrome and stated no additional tests were necessary to evaluate his left shoulder and arm. An opinion from a new physician does not justify treating a recommendation for medical treatment as a new medical benefit unless it is based on a different theory or nature of injury that was previously unknown to Employee. *Id*. Employee's May 26, 2017 claim seeks the same medical treatment arising from the same injury against the same employer based on the same theory or nature of injury as November 5, 2015 claim denied under AS 23.30.110(c). *Rogers & Babler*.

Employee contends *res judicata* cannot preclude his May 26, 2017 claim because *Roberge I* was not a final judgment on the merits. However, a denial under AS 23.30.110(c) has the effect of dismissal with prejudice and precludes a later claim for the same benefit arising from the same injury against the same employer based on the same theory or nature of injury if the claimant had a fair opportunity in a hearing to respond to the petition to dismiss and to present evidence. *Hogenson*; *Bailey*.

Employee contends it would be unfair to dismiss his May 26, 2017 claim because it was timely filed under AS 23.30.105 and Employer interfered with his selection of a physician for the EMG and NCS. Employee's argument regarding AS 23.30.105 is irrelevant because his November 5, 2015 claim was dismissed under AS 23.30.110(c) and Employer did not raise that defense. His contention Employer interfered with his selection of a physician was not properly raised and briefed for this hearing and will not be addressed. Employer controverted both of Employee's claims seeking a prospective determination on medical treatment. He is not required to incur unpaid medical expenses and he is entitled to prospective determination for medical treatment or expenses. *Summers*. However, the language of AS 23.30.110(c) makes no distinction between a claim for an incurred medical expense and a claim seeking a prospective determination for a specific medical treatment or expense. An injured worker must still timely request a hearing on his claim seeking a prospective determination for a specific medical treatment or expense. AS 23.30.110(c). It would contravene the intent of the legislature to ensure the quick, efficient, fair and predictable delivery of medical benefits to injured workers at a reasonable cost to employer if AS 23.30.110(c) did not apply to claims for a prospective determination for a specific medical treatment or expense because the injured worker cannot afford to incur medical expenses. AS 23.30.001(1). Employee's May 26, 2017 is claim is denied under AS 23.30.110(c).

3) Is Employee entitled to an EMG and NCS?

Because Employee's May 26, 2017 claim was dismissed for failure to timely request a hearing, it is unnecessary to address this issue. However, even if Employee had timely requested a hearing, he did not show by a preponderance of the evidence his work for Employer is the substantial cause of his need for an EMG and NCS.

The presumption of compensability applies to this issue. AS 23.30.095(a); AS 23.30.120(a); *Meek*. Without considering witness credibility, Employee raised the presumption with Dr. French's opinion recommending EMG and NCS. *McGauhey*; *Resler*.

Because Employee successfully raised the presumption, Employer must rebut it by presenting substantial evidence that either provided an alternative explanation excluding work-related factors as a substantial cause of the need for treatment or directly eliminated any reasonable possibility

that employment was a factor in causing the need for treatment. *Kramer*; *Huit*. Without considering credibility and weight of evidence, Employer rebutted the presumption with Drs. Chong's, Almaraz's and McFarland's opinions that Employee's non-work related carpel tunnel syndrome is the substantial cause of his need for an EMG and NCS. *Tolbert*; *Norcon*.

Employee must show by a preponderance of the evidence his work injury was the substantial cause of his need for an EMG and NCS. *Koons*. Employee relies on Dr. French's September 2, 2015 opinion that Employee's mild tenderness over the left ulnar nerve was due to his left brachial plexus injury caused by a heavy traction injury during his work injury and Dr. Direnfeld's SIME report recommending EMG and NCS to confirm his diagnosis of left wrist or carpel tunnel syndrome and ulnar neuropathy. Dr. French is considered less credible because his opinions and testimony have been inconsistent: on May 18, 2015, he diagnosed carpal tunnel syndrome and low ulnar nerve compression without attributing it to the work injury; on September 2, 2015, he opined Employee sustained a traction injury to his left brachial plexus which caused his carpel tunnel syndrome symptoms; on February 6, 2017, he opined Employee sustained a severe traction injury to his left brachial plexus; and on February 29, 2016, he stated Employee did not sustain a traction injury but rather sustained a leverage injury to his left brachial plexus and he ordered an EMG and NCS for carpel tunnel syndrome. Although the only other physician that diagnosed neurogenic thoracic outlet syndrome, Dr. Johansen, opined Employee sustained a direct and compression brachial plexus injury, he also opined no additional tests are necessary to evaluate his chronic left upper extremity neuromuscular dysfunction. Dr. Direnfeld opined Employee's left hand numbness is caused by non-work-related carpel tunnel and ulnar neuropathy. While Dr. Direnfeld acknowledged Employee's left hand numbness could be caused by thoracic outlet syndrome and an EMG and nerve conduction study would be helpful in clarifying his diagnosis, he opined the medical evidence and Employee's description of the mechanism of injury was unlikely to result in a shoulder dislocation which could have caused a brachial plexus injury. Employee failed to show by a preponderance of the evidence his work for Employer is the substantial cause of his need for an EMG and NCS. *Saxton*.

CONCLUSIONS OF LAW

1) The RBA-designee's ineligibility determination will be remanded.

2) Employee's May 26, 2017 claim will be denied under AS 23.30.110(c).
3) Employee is not entitled to an EMG and NCS.

ORDER

1) The RBA-designee's ineligibility determination will be remanded back for the RBA-designee to consider Dr. Pohlman's opinion.
2) Employer's February 22, 2019 petition is granted.
3) Employee's May 26, 2017 claim is denied and dismissed.

Dated in Juneau, Alaska on June 4, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Charles Collins, Member

/s/
Bradley Austin, 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 Richard Roberge, employee / claimant v. ASRC Construction Holding Co., employer; Artic Slope Regional Corporation, insurer / defendants; Case No. 201410169; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on June 4, 2019.

/s/
Sue Reishus-O'Brien, WC Officer II