ALASKA WORKERS' COMPENSATION BOARD

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

MINDIE L. MOORE,	)	
	)	
Employee,	)	FINAL DECISION AND ORDER
Claimant,	)	
	)	AWCB Case No. 201807743
v.	)	
	)	AWCB Decision No. 20-0041
STATE OF ALASKA,	)	
	)	Filed with AWCB Juneau, Alaska
Self-Insured Employer,	)	On June 1, 2020
Defendant.	)	
	)	

Mindie L. Moore's (Employee) August 20, 2018 claim and September 9, 2018 petition for a second-independent medical evaluation (SIME) were heard on May 5, 2020 in Juneau, Alaska, a date selected on February 13, 2020. A January 16, 2020 affidavit of readiness for hearing gave rise to this hearing. Attorney Chris Peloso appeared and represented Employee, who appeared and testified. Attorney Henry Tashjian appeared and represented State of Alaska (Employer). Dominic T. Gomez-Leonardelli, M.D., appeared and testified on behalf of Employer. The record closed at the hearing's conclusion on May 5, 2020.

ISSUES

Employee contends a gap in the medical record justifies an SIME as the medical record is insufficient to decide the merits of her claim. She contends there is a medical dispute between her physician and Employer's physician regarding causation. Employee requests an SIME.

Employer contends there is no significant medical dispute between its physician and Employee's physician. It contends granting an SIME would provide Employee a new opinion at its expense,

contravening the Alaska Workers' Compensation Act's (Act) intent to ensure quick, fair, efficient and predictable resolution of a claim. Employer contends there is no significant gap in the medical or scientific evidence. It requests an order denying Employee's request for an SIME.

1) Should an SIME be ordered?

In the alternative, Employee contends her work activities are the substantial cause of the development of her bilateral hand symptoms. She contends she never had bilateral hand symptoms until after she began employment with Employer. Employee contends she sustained a cumulative injury from repetitive work activities, such as sweeping, mopping, vacuuming, cleaning and lifting. She seeks an order awarding her temporary total disability (TTD) and medical benefits after August 8, 2018.

Employer contends Employee's work injury is not the substantial cause of her disability and need for medical treatment after August 8, 2018. It contends the work activities temporarily exacerbated her idiopathic conditions and preexisting condition. Employer contends the idiopathic conditions are the substantial cause of her disability and need for medical treatment after August 8, 2018. It seeks an order denying Employee's claim for TTD and medical benefits.

2) Is Employee entitled to TTD and medical benefits after August 8, 2018?

FINDINGS OF FACT

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

1) On May 4, 2001, Barry Smith, M.D., performed a right wrist dorsal ganglion cyst aspiration. (Smith progress report, May 4, 2001).

2) On February 13, 2002, Employee reported a mass on the dorsum of her right hand for the past four years. She had no numbness or tingling distal to the mass but it caused her some pain from time to time. Employee was diagnosed with a right hand dorsum ganglion cyst. The cyst had been aspirated once before but it recurred within two weeks. Employee was interested in getting the cyst removed due to the moderate pain she experienced after typing for long periods

of time and the unappealing cosmetic appearance. (Blaine Etzel, PA-C, chart note, February 13, 2002).

3) On June 16, 2002, Curtis Settergren, M.D., performed a right dorsal wrist mass excision. (Settergren operative note, June 16, 2002).

4) On July 2, 2002, Employee was concerned she had a reoccurrence of a ganglion cyst because there was a little bump beneath the incision. She was diagnosed with minimal scar tissue adhesions. (Etzel chart note, July 2, 2002).

5) On December 7, 2004, Employee's mother contacted her physician's office and stated her wrist ganglion came back. (Mary Johnson office note, December 7, 2004).

6) On June 1, 2018, Employer reported it knew on May 27, 2018, that Employee sustained wrist injuries from repetitive work activities motion with both hands on March 26, 2018. (First Report of Occupational Injury or Illness, June 1, 2018).

7) On May 4, 2018, Employee complained of bilateral hand numbness and tingling which had been going on for at least three months. The symptoms were worse in the morning and after doing repetitive tasks, such as sweeping, texting, washing dishes, etc. Employee also noted a lump on her right wrist just below the palm that had been there for a few months. It never went away but sometimes became bigger. Shawna Shaw, FNP, examined Employee and noted a ganglion cyst on the volar aspect of her right wrist. She diagnosed right wrist ganglion and CTS. Employee declined wrist splints or braces. FNP Shaw recommended ibuprofen and Voltaren gel and referred Employee to an orthopedist. (Shaw clinical note, May 4, 2018).

8) On May 31, 2018, Employee complained of bilateral hand pain, numbness and swelling since March. She attributed the pain and numbness to her work and described worsening pain during work-related repetitive activities. Employee reported recurrent swelling in the area of her previous right wrist dorsal ganglion cyst excision. Daniel Schlecht, PA-C found a palpable bony prominence in the carpometacarpal joint region in her right wrist. Soft tissue fluctuating swelling appeared in the dorsal central aspect of her right wrist was consistent with a ganglion cyst. PA-C Schlecht diagnosed bilateral CTS and recurrent right dorsal ganglion cyst. Right wrist x-rays demonstrated dorsal osteophyte complex at the carpometacarpal joint at the base of the third metacarpal. The left wrist imaging was unremarkable. He recommended bilateral upper extremity electromyelograms (EMG). Employee stated she was unable to work in that condition and requested an unfit for duty form due to the CTS which developed routinely throughout her

daily work activities. (Schlecht progress note, May 31, 2018). PA-C Schlecht stated Employee was unfit for duty as of May 31, 2018 for bilateral CTS. (Schlecht, Unfit/Fit for Duty Form, May 31, 2018).

9) On May 31, 2018, Employee said her hand symptoms were present since the end of March and were worse on the right than the left. She worked as a steward and reported her job required repetitive use of the hands. John Bursell, M.D., performed a nerve conduction study found mild right wrist median neuropathy and normal left median and bilateral ulnar nerve conduction response. (Bursell chart note, May 31, 2018).

10) On June 29, 2018, Employee stated her job as a steward required her to do a great deal of repetitive activity with her hands. She reported spontaneous onset of pain and numbness in both hands, worse on the right, in the end of March. Using wrist splints at night helped prevent her from waking up with severe pain but she still developed significant pain in the thumb, index finger and occasionally the middle finger. Employee stated she had a dorsal right wrist ganglion cyst excised twenty years prior at age 30 and it recurred. She thought it contributed to her right wrist pain. Steven Becker, M.D., did not observe the cyst upon examination. Dr. Becker assessed minimally symptomatic right carpel tunnel syndrome. Employee attributed her minimal symptoms to being off work as they recurred fairly severely when she attempted to resume repetitive activities. Dr. Becker recommended a carpal tunnel release. (Becker progress note, June 29, 2018).

11) On July 27, 2018, Dr. Gomez-Leonardelli, an orthopedic surgeon, examined Employee for an employer's medical evaluation (EME) and diagnosed right CTS, left wrist ganglion/carpal boss, right wrist de Quervain's tenosynovitis and left wrist extensor digitorum communis tendonitis. He opined the work injury is not the substantial cause of Employee's disability and need for medical treatment. Dr. Gomez-Leondarelli concluded the substantial cause of Employee's need for treatment is idiopathic development related most substantially to nonoccupational risk factors. He stated:

> With regard to right carpel tunnel syndrome, occupational risk factors which are commonly attributed to increasing risk of development of [CTS] are work repetition, work flexion, powerful grip, and vibration. There is some data to suggest that these activities need to be done at least 30 percent of the day in a repetitive fashion with sustained force. Based upon interview with [Employee] and discussion of typical occupational activities, there is insufficient evidence to

suggest that her duties in her current position meet these criteria. The highest rates of [CTS] occurring in occupations with higher upper extremity physical demands including meat packing, poultry processing, automobile assembly work, and other occupations requiring intensive manual exertion of the distal limbs. There is conflicting evidence that highly repetitive work alone may contribute to the development of [CTS]. Additionally, the medical literature suggests that forceful work involving the distal upper extremities may result in an increased risk of development of [CTS], but, again, based upon reported job activities associated with [Employee's] occupation, these are not present.

There are nonoccupational risk factors for the development of [CTS], with gender being shown in the medical literature to demonstrate a very strong correlation. [Employee] has no known or documented comorbid conditions or nonoccupational risk factors . . . that increase the risk of development of [CTS]. Additionally, it is well-described that [CTS] does arise idiopathically and in a review article in 2008 in the Journal of Hand Surgery, authors reviewed all the data concerning occupational risk factors and [CTS] and concluded that the etiology of [CTS] is largely structural, genetic, and biologic, with environmental and occupational risk factors such as repetitive hand use playing a minor role or debatable role. It is the opinion of this examiner that occupational risk factors and the industrial exposure incurred by [Employee] is not the substantial cause of the development of [CTS].

. . . the medical literature suggests that occupational risk factors for the development of de Quervain's disease include a combination of force and repetition, force and posture, as well as highly repetitive work alone or in combination with other factors as occupational contributors to this disease process. Specifically, they document repetitive bending and twisting of the hand as an increased risk factor, as well as high-force grip as an increased occupation such as meat cutters and processors, as well as textile workers.

Nonoccupational risk factors for [Employee] include a female gender, which the medical literature suggests a strong incidence of de Quervain's, with a 5 to 1 female ratio reported. The reported daily activities of the occupation of [Employee] are not consistent with occupational risk factors opined to be consistent with that reported in the medical literature to have shown an increased risk for the development of this disease. Therefore, it is the opinion of this examiner that occupational risk factors and the industrial exposure is not the substantial cause of this diagnosis.

With respect to the right wrist ganglion, most consistent with a carpal boss, this is an unrelated diagnosis and noted to be pre-existing.

. . . occupational risk factors for the development of tendinitis include repetitive motions, awkward positions, vibration, and forceful exertion, which again have not been demonstrated to be present in the daily occupational duties reported by

> [Employee]. Nonoccupational risks factors for this disease are similar to that for the development of de Quervain's tenosynovitis, with nonoccupational risk factor identified in [Employee] being female gender.

Dr. Gomez-Leonardelli stated the work injury resulted in a temporary exacerbation of the idiopathic conditions, without causing a permanent change. He opined the temporary aggravation of the conditions ended six weeks after onset of treatment. Dr. Gomez-Leonardelli recommended a corticosteroid injection and possible surgical release for Employee's right CTS; occupational therapy, nonsteroidal anti-inflammatory medications, a corticosteroid injection to the first extensor compartment and possible surgical release of the first extensor compartment for right wrist de Quervain's tenosynovitis; and immobilization for six weeks and anti-inflammatory medications for left wrist extensor digitorum communis tendonitis. He restricted Employee from repetitive use of her upper right extremity and lifting greater than 10 pounds and recommended she use splinting during work activities. Dr. Gomez-Leonardelli opined Employee's need for treatment and work restrictions are caused by her idiopathic and preexisting conditions and not the work activities. (Gomez-Leonardelli EME report, July 27, 2018).

12) On August 10, 2018, Employer denied all benefits based upon Dr. Gomez-Leonardelli's EME report. (Controversion Notice, August 10, 2018).

13) On August 20, 2018, Employee sought TTD benefits, medical costs, transportation costs, a compensation rate adjustment, penalty, interest and a finding unfair or frivolous controvert and requested an SIME for carpel tunnel syndrome caused by "excessive use of wrists performing steward duties." (Claim for Workers' Compensation Benefits, August 20, 2018).

14) On August 29, 2018, Employer answered Employee's claim and denied all benefits sought and contended Employee was not entitled to an SIME. (Answer, August 29, 2018).

15) On September 9, 2018, Employee requested an SIME. (Petition, September 9, 2018). She there was a dispute regarding causation between Dr. Becker's June 29, 2018 progress note and Dr. Gomez-Leonardelli's July 27, 2018 EME report. Employee contended an SIME with an orthopedic surgeon was required. (SIME Form, September 9, 2018).

16) On September 25, 2018, Employer responded to Employee's petition for an SIME, contending an SIME was premature because it was currently engaged in discovery, including collecting Employee's medical records. (Employer's Response to Employee's Petition for an SIME, September 25, 2018).

17) On September 28, 2018, Employer denied all benefits based upon Dr. Gomez-Leonardelli's EME report. (Controversion Notice, September 28, 2018).

18) On January 31, 2019, Employer reported it paid TTD from May 31, 2018 through August 8, 2018. (Second Report of Occupational Injury or Illness, January 31, 2019).

19) On May 7, 2019, Dr. Becker stated he agreed with Dr. Gomez-Leonardelli's opinion regarding the causes of Employee's disability and need for medical treatment. (Becker response, May 7, 2019).

20) On June 26, 2019, Dr. Bursell stated his evaluation of Employee was directed to make a diagnosis and not at determining causation. He did not assess all of the possible causes of her disabilities. Employee reported to him her work requires repetitive use of the hands. Therefore, her work would be "a possible cause of her right hand symptoms." Dr. Bursell noted Dr. Gomez-Leonardelli's EME report based its conclusions on studies assessing probability. He stated while the studies are useful in determining probability of a condition occurring in populations, they were not useful in making a determination of fact in individuals. (Bursell response, June 26, 2019).

21) On April 28, 2020, Employer filed a hearing brief contending Employee's work injury requires highly technical evidence to attach the presumption of compensability. It contended Employee failed to attach the presumption because CTS is a condition which requires medical analysis to prove because it arises idiopathically and there is no opinion in her favor comparing the occupational and nonoccupational causes. Employer contended Employee's assertion her CTS arose after her work for Employer is insufficient attach the presumption. In the alternative, it contended Employer rebutted the presumption with Dr. Gomez-Leonardelli's opinion. Employer contended *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016) is limited to cases in which there is no alternative cause other than the work. It contended *Huit* is inapplicable because Dr. Gomez-Leonardelli identified other causes and risk factors. Employer contended Employee failed to prove her claim by a preponderance of the evidence because she does not have objective medical evidence in favor of compensability. It contends Dr. Bursell's response did not assess causation and did not opine her work was a cause because it merely identified her work as a possible cause. (Employer hearing brief, April 28, 2020).

22) On May 4, 2020, Employee filed a hearing brief contending her work injury requires highly technical evidence to attach the presumption of compensability. She contended the presumption

attached based upon Dr. Bursell's opinion the work activities possibly caused CTS and Drs. Becker and Gomez-Leonardelli's opinion the CTS was idiopathic. Employee contends Dr. Gomez-Leonardelli's opinion failed to rebut the presumption because it presents no alternative causation and admits to having insufficient evidence to rule out an occupational cause. She contends Dr. Bursell's opinion is stronger than Dr. Gomez-Leonardelli's opinion because Dr. Gomez-Leonardelli basically said he did not know what caused her CTS. (Employee hearing brief, May 4, 2020).

23) Employee testified she was hired by Employer in October 2016 and started working March 2017. She never had CTS before working for Employer and she never had problems with her wrists before working for Employer. Employee worked as a steward for Employer and her duties included sweeping, mopping, vacuuming, cleaning state rooms, washing dishes with a commercial dishwasher, moving galley mats and cleaning them, washing windows and laundry. Her job required a lot of repetitive hand activities and bending of wrists and arms. Employee gripped, lifted and carried heavy objects. The floor polisher and vacuum vibrated. She worked 12 hours shifts for 7 days and the entire shift involved repetitive tasks and bending her wrists. Employee began experiencing symptoms of carpal tunnel four months before she talked to her doctor. She noticed her hands were swollen, tingling and numbness, her hands felt tight and she could not make a fist. Employee's right hand was worse than her left. Eventually the symptoms interfered with her ability to complete her job duties. Employee' symptoms improved when she stopped working. She does not have any hobbies involving repetitive hand tasks, gripping heavy objects or vibratory equipment as she reads, cooks, goes for a drive, walks and watches movies in her spare time. Dr. Gomez-Leonardelli asked Employee questions about her job duties and lifestyle. She told him her job required repetitive hand tasks for 12 hour shifts similar to what she just described. Employee had a right hand ganglion cyst removed when she was 20 years old because it was sore and tender and "in the way." The cyst did not return after it was removed and she did not have any problems with it after removal. Employee has a scar and a bump from removal of the ganglion cyst. The cyst did not return around the time of her work injury. Employee is not currently working. Since stopping working for Employer in March 2018, she worked as a seasonal harbor master from April 2019 to September 2019 for 8 hours a day, four days a week answering the radio and parking boats. Employee did not apply for or receive unemployment benefits or social security benefits. Her wrists are feeling better and she has no

symptoms at this time. Employee last experienced symptoms one month after not working for Employer. Her last unfit for duty form was from May 2018. Employee spent 5-6 hours moving heavy galley mats and other heavy weights, 5-6 hours sweeping, moping and washing dishes, cleaning rooms and 5-6 hours washing windows or doing laundry deck. (Employee).

24) Dr. Gomez-Leonardelli testified Employee described her work duties and hobbies to him during the evaluation. During his examination, he observed a small bony mass indicative of a ganglion boss. Medical literature indicates development of CTS is a multifactorial process, including several factors such as anatomy, genetics, gender, age, occupational hazards and wrist factures. Employee's duties are not significant risk factors leading to development to CTS. CTS is idiopathic in 60 to 70 percent of cases. Idiopathic does not mean there is no cause but means it is difficult or impossible to find one factor as the leading cause because there are multiple factors. Medical studies have shown occupational risk factors can cause CTS and examples of such jobs includes manufacturing, meat processing and manual labor with vibratory tools. Employee's work activities can be a potential contributing factor. However, the work activities Employee described are not consistent with risk factors shown by medical literature to cause CTS so Dr. Gomez-Leonardelli concluded the work activities were not the substantial cause of her work injuries. (Dr. Gomez-Leonardelli).

PRINCIPLES OF LAW

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

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120 (a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the

> death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
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> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical . . . treatment . . . medicine . . . 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. It shall be additionally provided that, if continued treatment or care or both beyond the two year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
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> (k) In the event of a medical dispute regarding determinations of causation . . . or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .
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> **AS 23.30.110. Procedure on claims.**
> . . . .
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> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.

The following, general criteria are typically considered when ordering an SIME, though the statute does not expressly so require:

(1) Is there a medical dispute between Employee's physician and Employer's EME?

(2) Is the dispute "significant"?

(3) Will an SIME physician's opinion assist the board in resolving the disputes?

Deal v. Municipality of Anchorage (ATU), AWCB Decision No. 97-0165 at 3 (July 23, 1997). Considering the broad procedural discretion granted in AS 23.30.135(a) and AS 23.30.155(h), wide discretion exists under AS 23.30.095(k) and AS 23.30.110(g) to consider any evidence available when deciding whether to order an SIME.

The Alaska Workers' Compensation Appeals Commission (commission) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), addressed the authority to order an SIME under AS 23.30.095(k), when there is a medical dispute, and AS 23.30.110(g), when there is a gap in the medical evidence. The commission outlined the board's authority to order an SIME under §110(g), as follows:

> [T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. . . . Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties.

Id. at 5.

With regard to AS 23.30.095(k), the commission referred to its decision in *Smith v. Anchorage School District*, AWCAC Decision No. 073 (February 27, 2008), at 8, in which it said:

> [t]he statute clearly conditions the Employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the Employee and the employer.

The commission further noted that before ordering an SIME, the board traditionally finds the medical dispute "significant or relevant" to a pending claim or petition, and the SIME will assist in resolving the dispute. *Bah*, at 4. Under either AS 23.30.095(k) or AS 23.30.110(g), the commission noted an SIME's purpose is to assist the board in resolving a significant medical dispute; it is not intended to give Employee an additional medical opinion at Employer's expense when Employee disagrees with his own physician's opinion. (*Id*.). The purpose of an SIME is to have an independent expert provide an opinion about a contested issue. *Seybert v. Cominco*

Alaska Exploration, 182 P.3d 1079, 1097 (Alaska 2008). "[T]he SIME physician is the board's expert." *Bah*, at 5, citing *Olafson v. State, Dep't of Trans. & Pub. Facilities*, AWCAC Decision No. 061, at 23 (October 25, 2007).

> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter . . . .
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> (c) The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress.

When the presumption of compensability applies, 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). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id*. 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*. "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 (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 (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 (Alaska 1964).

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).

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **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.

ANALYSIS

1) Should an SIME be ordered?

There are three requirements before an SIME can be ordered. AS 23.30.095(k); *Bah*. First, there must be a medical dispute between an Employee's attending physician and an EME. Second, the dispute must be significant. Third, an SIME physician's opinion would assist the fact-finders in resolving the dispute. Employee contends there is a dispute between her physician and Employer's physician regarding causation of her bilateral hand symptoms medical treatment and disability. Dr. Becker's June 29, 2018 progress note provided Employee's opinion regarding causation but did not provide a medical opinion regarding causation and assessed minimally symptomatic CTS. Dr. Gomez-Leonardelli opined the work injury is not the substantial cause of Employee's disability and need for medical treatment. He diagnosed right CTS, right wrist de Quervain's tenosynovitis and left wrist extensor digitorum communis tendinitis which developed idiopathically and preexisting left wrist ganglion/carpal boss. Dr. Gomez-Leonardelli found work activities temporarily exacerbated the conditions and the exacerbation ended six weeks after onset of treatment. Subsequently, Dr. Becker agreed with Dr. Gomez-Leonardelli's July 27, 2018 EME report on May 7, 2019. On June 26, 2019, Dr. Bursell stated Employee's work activities were a "possible cause" of her right hand symptoms and he disagreed with Dr. Gomez-Leonardelli's method of assessing causation. However, Dr. Bursell failed to make individual determination on causation. A possible cause means it may or may not be a cause. There is no significant dispute between Employee's physician and Employer's physician. *Rogers & Babler*.

An SIME may also be ordered when there is a gap in medical or scientific evidence. AS 23.30.110(g); *Bah*. The only gap in the medical or scientific evidence is the lack of a medical opinion indicating the work activities are the substantial cause of Employee's disability and medical treatment after August 8, 2018. A lack of a favorable opinion does not constitute a gap in medical or scientific evidence necessitating an SIME. *Id*. An SIME is not intended to give Employee an additional medical opinion at Employer's expense when she disagrees with her own physician's opinion or to provide Employee a favorable medical opinion at Employer's expense. *Bah*; *Olafson*; *Seybert*. Given the lack of a gap in medical or scientific evidence and a

lack of a significant dispute on causation, an SIME will not be ordered. AS 23.30.095(k); AS 23.30.110(g).

2) Is Employee entitled to TTD and medical benefits after August 8, 2018?

The parties dispute whether Employee's disability and need for medical treatment after August 8, 2018, arose out of and in the course of employment. The presumption of compensability applies to this dispute. AS 23.30.010(a); AS 23.30.120(a)(1). Employee must provide some minimal evidence to establish the preliminary link between her injury and employment. The parties agreed the case is more complex and requires highly technical evidence to attach the presumption. *Smallwood*; *Wolfer*. Dr. Bursell stated Employee's work activities were a "possible cause" of her right hand symptoms. None of Employee's treating physicians identified work activities as a cause of her left hand symptoms. Dr. Gomez-Leonardelli opined the work activities temporarily exacerbated her idiopathic right carpal tunnel syndrome (CTS), right wrist de Quervain's tenosynovitis and left wrist extensor digitorum communis tendinitis and her preexisting left wrist ganglion/carpal boss, which resolved six weeks after treatment began. Employee failed to attach the presumption for her left hand but attached it for her right hand. *Rogers & Babler*.

Without considering credibility and weight, Dr. Gomez-Leonardelli's EME report rebutted the presumption because he identified an alternative cause of Employee's hand symptoms based on substantial evidence. *Huit*. After reviewing medical literature concerning causes of CTS, de Quervain's tenosynovitis and digitorum communis tendonitis and considering Employee's work activities, he concluded her work activities were not sufficient to meet the criteria in medical literature known to cause development of those conditions and her gender was the most significant factor for development of those conditions. *Huit*; *Tolbert*; *Norcon*; *Wolfer.*

Employee must prove her claim by a preponderance of the evidence. *Koons*. Employee testified before she worked for Employer she did not have bilateral hand symptoms, including pain, numbness and tingling. However, the fact her symptoms arose while working for Employer is insufficient to establish causation. *Lindhag*; *Rivera*. Dr. Bursell stated work activities were a "possible cause" of Employee's right hand symptoms which does not meet the preponderance of

the evidence standard to prove her disability and need for medical treatment after August 8, 2018, arose out of and in the course of employment. He disagreed with Employer's method of determining causation by relying on medical literature but then failed to perform a full causation assessment of his own. Because his evaluation of Employee's right wrist was directed at making a diagnosis and failed to make individual determination on causation his opinion is given less weight than Dr. Gomez-Leonardelli's. AS 23.30.122; *Smith*; *Moore*. Dr. Becker, Employee's other treating physician, agreed with Dr. Gomez-Leonardelli's opinions. None of Employee's treating physicians identified work activities as a cause of her left hand symptoms. Employee failed to prove her disability and need for medical treatment after August 8, 2018, arose out of and in the course of employment. *Saxton*. She is not entitled to additional TTD and medical benefits. Employee's claim will be denied.

CONCLUSIONS OF LAW

1) An SIME should not be ordered.
2) Employee is not entitled to TTD and medical benefits after August 8, 2018.

ORDER

1) Employee's September 9, 2018 petition is denied.
2) Employee's August 20, 2018 claim is denied.

Dated in Juneau, Alaska on June 1, 2020.

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 MINDIE L. MOORE, employee / claimant v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201807743; 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 1, 2020.

/s/
Dani Byers, WC Officer II