ALASKA WORKERS' COMPENSATION BOARD

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

KOLLEEN A. KESSLER, Employee, Claimant, v. STATE OF ALASKA, Self-Insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 201501516 AWCB Decision No. 20-0055 Filed with AWCB Anchorage, Alaska on July 9, 2020

Kolleen A. Kessler's October 31, 2016 claim was heard in Anchorage, Alaska, on December 11, 2019 and February 12, 2020, dates selected on November 14, 2019 and December 11, 2019. An October 9, 2018 affidavit of readiness for hearing gave rise to this hearing. Attorney Randall Cavanaugh appeared and represented Ms. Kessler (Employee). Assistant Attorney General Adam Franklin appeared and represented State of Alaska (Employer). Employee, Richard Ealum, D.O., Robin Schmid, Dee Savage, Sunny Hefley, John Croughen, Laurie Macchello, and Susan Draveling testified. The record remained open to permit the deposition of Employee's doctor and for the parties to file written closing arguments. The record was reopened to consider Employee's April 6, 2020 petition for a stay and Employer's opposition, and closed on June 18, 2020 when the panel deliberated.

ISSUES

On April 6, 2020, Employee filed a petition requesting a stay until the COVID-19 crisis has been resolved. On the same day, Employer filed its opposition to a stay noting Employee had not

deposed her doctor within the time provided, and contending an indefinite stay would prevent timely resolution of the matter.

1) Should the case be stayed?

Employee contends a combination of repetitive work activities and poor workstations is the substantial cause of her disability and need for medical treatment, and, consequently, she contends she is entitled to benefits. Employee also contends Employer's actions at work caused her mental stress. Employer contends neither the work activities nor the workstations are the cause of Employee's disability or need for medical treatment. Employer also contends that any stress Employee may have suffered is not compensable, and she is not entitled to any benefits.

2) Were the work activities and workstations the substantial cause of Employee's disability or need for medical treatment, and, if so, to what benefits is she entitled?

FINDINGS OF FACT

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

1) Employee began working for Employer as an Adult Probation Officer in 2001. Much of her time was spent in the field, where she had to wear a Kevlar vest and a heavy belt with handcuffs, pepper spray, and radio. In May 2005, she transferred to the Alcohol Safety Action Program (ASAP), which entailed primarily office work monitoring clients and testifying in court. In December 2008, she transferred to the Anchorage wellness court, and her duties were much like her duties as an adult probation officer, in that she had to make home visits, monitor living conditions, and transport people to court. (Employee).

2) Employee stated that in 2010 she was the whistleblower that resulted in another probation officer being arrested for sexually abusing female clients and the State being sued. She contends her supervisor was friendly with the probation officer who was arrested, and he began retaliating against her. In 2012, she transferred back to ASAP. (Employee).

3) Employee stated she had no ergonomic problems before 2008, and no problems with her back, neck or arms. However at wellness court she was working in a cramped office and had a poor chair that tilted to the left side. She began having problems with her back, legs, and feet. She told her supervisor she was having problems with the chair, but it was never replaced. At

ASAP, files were stored on large file cabinets on tracks that required a hand wheel to move. (Employee).

4) In June 2006, Employee had been seen at the Alaska Chiropractic Center for low back pain due to pregnancy. (Alaska Chiropractic Center, Chart Note, June 21, 2006).

5) In October 2009, Employee returned to the Alaska Chiropractic Center three times for severe low back pain. The chart notes do not indicated what caused the pain. (Alaska Chiropractic Center, Chart Notes, October, 12, 13, and 14, 2009).

6) On January 11, 2011 Employee complained to Michael Reeves, M.D., that she was under a great deal of stress at work because of litigation. Dr. Reeves diagnosed situational anxiety and prescribed medication. The chart note does not mention low back pain. (Dr. Reeves, Chart Note, January 11, 2011).

7) Employee returned to Dr. Reeves on February 22, 2011, March 10, 2011, May 10, 2011, and April 11, 2012. Although Employee complained of pelvic pain and anxiety regarding litigation, none of the chart notes mention low back pain. (Dr. Reeves, Chart Notes, February 22, 2011, March 10, 2011, May 10, 2011, and April 11, 2012).

8) On May 9, 2012, Employee reported to Dr. Reeves she was experiencing stress as a result of harassment at work. She also reported she had leg pain and had no history of back pain or back injury. She attributed the pain to her inability to move about the office. Dr. Reeves diagnosed back pain and anxiety and possible iliotibial band syndrome, a condition in which the ligament from the pelvis to the shinbone becomes painful. (Dr. Reeves, Chart Note, May 9, 2012).

9) May 9, 2012 x-rays of Employee's lumbar spine showed disc space narrowing at L2 and L5 with small osteophytes throughout. The radiologist determined she had moderate degenerative changes throughout the lumbar spine. (Harold Cable, M.D., Radiology Report, May 9, 2012).

10) Dr. Reeves provided Employee an accommodation request that stated she was taking medication for anxiety caused by her job, but it did not identify any accommodations that would allow Employee to perform her job, and it did not mention her low back. (Dr. Reeves, ADA Accommodation Request, May 9, 2012).

11) On May 23, 2012, Employee returned to Dr. Reeves, who noted the May 9th x-rays showed multilevel disc space narrowing and degenerative changes. He determined the pain in Employee's leg was likely lumbar radiculopathy and prescribed physical therapy.

12) A May 30, 2012 MRI showed mild to moderate degenerative disc disease at all levels of Employee's lumbar spine. (University Imaging Center, MRI Report, May 30, 2012).

13) On September 24, 2012, Employee returned to Alaska Chiropractic Center, stating she had woken up with severe low back pain that was exacerbated by sitting for long periods. (Alaska Chiropractic Center, Chart Note, September 24, 2013).

14) On September 28, 2012, Richard Ealum, D.C., wrote a letter saying Employee was under his care for a low back condition, that she needed to change her posture at least hourly, and requesting an ergonomic assessment of her workstation. (Dr. Ealum, Letter, September 28, 2012).

15) In late 2012, Employee transferred back to ASAP. While there, she frequently had to transport numerous files to court. She requested a rolling cart, but was given a briefcase with wheels that required her to stoop. She again experienced back pain. Her job required significant computer work, and she often had to cradle the telephone handset between her head and shoulder. (Employee).

16) On October 9, 2012, Laurie Maccello performed an ergonomic assessment of Employee's workstation. At that time Employee had been back in the ASAP office for two days. The evaluator noted she had significant low back pain she attributed to her prior office chair and that Employee was under a chiropractor's care. The report describes her work as being 70 percent computer work, 20 percent paperwork, and less than 10 percent phone use. She was seated on a Physio Ball. The evaluator moved her monitors, and recommended an office chair, a document holder, use of an existing keyboard tray, and raising the desk. (Ergonomic Assessment, October 9, 2012).

17) On October 16, 2012, Employer purchased a new office chair and a new keyboard tray for Employee's use. (Field Purchase Order, October 16, 2012).

18) On October 16, 2012, Dr. Ealum wrote a letter stating he still required Employee to take frequent breaks, and it was necessary for her to walk during the breaks. (Dr. Ealum, Letter, October 12, 2012).

19) On November 16, 2012, Dr. Reeves wrote a "to whom it may concern" letter stating that while Employee had not been diagnosed with back problems on February, 22, 2011, the back problems were likely the cause of her pain complaints at that time. (Dr. Reeves, Letter, November 16, 2012).

20) On December 21, 2012, Employer filed a Report of Occupational Injury by Employee. Employee did not sign the report, but it states that from June 2011 to the present, repetitive ongoing issues with office ergonomics had caused injuries to her left hip and leg and to her lower back. (AWCB Case No. 201218222, Report of Occupational Injury, December 21, 2011).

21) On February 1, 2013, Employee was seen by Larry Kropp, M.D., an interventional anesthesiologist. She reported her symptoms began in 2011 when working at a desk and had worsened lately. Dr. Kropp referred her for a lumbar MRI. (Dr. Kropp, Chart Note, February 1, 2013).

22) On February 6, 2013, Employee had the MRI which showed annular disk tears at every level, particularly at L3, L4, and L5, any of which could produce nerve root irritation and back pain. (University Imaging Center, MRI Report, February 6, 2013).

23) On February 13, 2013, Dr. Kropp stated the MRI showed a terrible annulus at L4-5, with a protrusion that caused foraminal stenosis. He performed a nerve root block at the L4-5 level of Employee's spine. (Dr. Kropp, Chart Note and Procedure Note, February 13, 2013).

24) On February 19, 2013, Employee reported to Dr. Kropp that her pain had decreased by more than half, and she was interested in repeating the injection. The procedure was performed that day. (Dr. Kropp, Consultation Note and Procedure Note, February 19, 2013).

25) On February 26, 2013, Employee reported to Dr. Kropp that the pain was better, but her spine was still sore. She again asked to repeat the procedure. (Dr. Kropp, Consultation Note, February 26, 2013).

26) On May 10, 2013 Employee reported to Dr. Kropp that she was still experiencing a lot of stress and work had become "extremely restrictive with the co-worker situation." He wanted her to be moving around, and Employee was to bring him a letter from Employer restricting her motion throughout the day. (Dr. Kropp, Chart Note, May 10, 2013).

27) There is no letter in the record from Employer stating Employee's motion was restricted. (Observation, Record).

28) On May 14, 2013, Dr. Kropp wrote a letter to Susan Draveling, Employee's supervisor. He stated Employee had a protruding disc in her low back and he asked that Employee be allowed to vary her posture throughout the day, including being able to walk around. (Dr. Kropp, Letter to Susan Draveling, May 14, 2013).

29) On May 23, 2013, Dr. Kropp responded to a letter from Employer's adjuster. Dr. Kropp stated Employee had a displaced disc at L4-5 and piriformis syndrome. He also stated the June 1, 2011 injury was the substantial cause of her need for treatment because she was ordered not to rise from her desk and was unable to move around. (Dr. Kropp, Response to Adjuster Letter, May 23, 2013).

30) On September 3, 2013, Dr. Kropp wrote to Employer requesting an ergonomic evaluation of Employee's workspace. (Dr. Kropp, Work Note, September 3, 2013).

31) On September 17, 2013, Dr. Kropp performed an epidural steroid injection at the L4 level of Employee's spine. (Dr. Kropp, Procedure Note, September 17, 2013).

32) On September 30, 2013, Rina Luban, a physical therapist, performed an ergonomic evaluation. Employee stated that after the prior evaluation she had been provided a sit-to-stand workstation which had been much more comfortable, but her workstation had been moved about a month ago. Her workload was again described at 70 percent computer work, 20 percent paper work, and less than 10 percent telephone work. It was noted Employee's monitors were not centered, the desk was too low in the standing position, and her chair was not adjusted properly. Employee was not using a document holder. Ms. Luban made adjustments to Employee's chair and desk, and recommended a document holder be purchased. (Luban, Ergonomic Evaluation, September 30, 2013).

33) On November 6, 2013, Employee returned to Dr. Kropp. Employee reported left shoulder pain in addition to her low back pain. Dr. Kropp ordered an MRI of her left shoulder. (Dr. Kropp, Chart Noted, November 6, 2013).

34) On November 12, 2013, Employee reported to Employer she had twisted her ankle when crouching to retrieve a file. (AWCB Case No. 201401109, First Report of Occupational Injury).

35) On December 31, 2013, the MRI was done on Employee's left shoulder. It showed a partial thickness tear of the supraspinatus tendon and tendinopathy of the supraspinatus and infraspinatus tendons. (Imaging Associates of Providence, Imaging Report, December 31, 2013).

36) Employee returned to Dr. Kropp on January 20, 2014. He restricted her work duties until her shoulder could be seen by a surgeon. (Dr. Kropp, Chart Note, January 20, 2014).

37) On January 22, 2014, Employee was seen by Elisha Powell, M.D., an orthopedic surgeon. Employee did not recall a specific incident, but her shoulder had become increasingly painful over the last year. Dr. Powell found Employee had full range of motion and good strength in her left shoulder, and he diagnosed a minimal partial thickness rotator cuff tear. He advised physical therapy and a possible steroid injection. (Dr. Powell, Chart Note, January 22, 2014).

38) On February 6, 2014, Employer reported that on October 14, 2013 Employee had reported an injury to her right shoulder moving large, heavy stacks of files. (AWCB Case No. 201406154, First Report of Occupational Injury).

39) On February 6, 2014, Employee reported to Employer that repetitive movement and stress had caused an injury to her neck. (AWCB Case No. 201408170, First Report of Occupational Injury).

40) On March 6, 2014 Ms. Macchello performed another ergonomic assessment. She noted Employee was now spending about four hours per week at a desk in the lobby, but the time she spent on the computer, paperwork, and the telephone remained unchanged. The lobby desk had an adjustable desk, but a standard keyboard and mouse, and the monitors and customer service window were to the right. Additionally, because she was required to type while on the telephone, Employee had to cradle the telephone between her neck and ear. Ms. Macchello adjusted the monitor and moved the desk to reduce neck strain, and she identified a particular cart that Employee could use to move files to and from the file room. She recommended a pillow be purchased for the chair, a headset for the telephone, and a wireless keyboard for the computer. (Macchello, Ergonomic Assessment, March 6, 2014).

41) On May 2, 2014, Employer purchased two wireless headsets for Employee's use. (Field Purchase Orders, May 2, 2014).

42) On March 7, 2014, Employee returned to Dr. Reeves and reported she had sprained her ankle at work in November. Dr. Reeves referred her to physical therapy. (Dr. Reeves, Chart Note, March 7, 2014).

43) X-rays of Employee's right ankle taken on March 7, 2014 showed an osteophyte on the navicular, but no other abnormalities. (Diagnostic Imaging of Alaska, Radiology Report, March 7, 2014).

44) On June 11, 2014, an x-ray of Employee' neck showed degenerative changes with evidence of muscle spasm. (University Imaging Center, Radiology Report, June 11, 2014).

45) On August 8, 2014, Employee had an MRI of her cervical spine that showed degenerative disc disease at C3-4 and C6-7 with small disc protrusions at both levels. The protrusion at C3-4 caused some foraminal narrowing, but the protrusion at C6-7 did not. (University Imaging Center, MRI Report, August 8, 2014).

46) On August 12, 2014, Dr. Ealum referred Employee to Dr. Kropp for neck and left shoulder treatment. (Dr. Ealum, Referral Letter, August 12, 2014).

47) On August 15, 2014, Dr. Kropp performed a selective nerve root block and diagnostic epidurogram at C6-7. The epidurogram showed osteophytes and severe degenerative changes. (Dr. Kropp, Procedure Note, August 15, 2014).

48) On September 2 2014, Employee reported to Dr. Kropp that the nerve root block had taken away most of her symptoms. Employee explained she still had to move her neck to one side at work, and Dr. Kropp wrote to Employer to see if the office could be arranged differently. (Dr. Kropp, Chart Note and Letter, September 2, 2014).

49) On September 10, 2014, Employer sent Employee information and forms regarding the Americans with Disabilities Act that she could discuss with her doctors. (Email, S. Lilly to Employee, September 10, 2014).

50) Employee returned to Dr. Kropp on September 29, 2014. Dr. Kropp explained that Employee had some work restrictions, but he did not believe she was disabled. Dr. Kropp performed a diagnostic epidurogram and selective nerve root block at the L4-5 level. The epidurogram showed osteophytes and severe degenerative changes. (Dr. Kropp, Chart Note and Procedure Note, September 29, 2014).

51) On October 1, 2014, Ms. Draveling emailed Employee stating she had received the doctor's letter regarding Employee's workstation. Ms. Draveling had checked the workstation and found the monitors were centered on the desk, and she told Employee they could be reconfigured to change the primary screen, but Employee declined saying her desk needed to be moved. Ms. Draveling explained moving the desk would do nothing to affect how Employee moved her neck as it would be the same desk in a different location. Ms. Draveling stated she was willing to rearrange the desk to help, but all of the recommendations by the ergonomic assessors had been put into place. (Email, S. Draveling to Employee, October 1, 2014).

52) Employee returned to Dr. Kropp on October 6, 2014 saying Employer refused to move her desk, and Employee did not believe Employer had complied with the ergonomic assessments. Dr. Kropp stated it would be beneficial to have the ergonomic specialist review the situation again. (Dr. Kropp, Chart Note, October 6, 2014).

53) On November 6, 2014, Employee was seen by Charles Craven, M.D., for an employer's medical evaluation (EME). Dr. Craven reviewed Employee's medical records from May 9, 2012 through September 20, 2014, and examined Employee. Employee explained she began having back and hip pain in 2010 after using a chair that tilted to the side. Dr. Craven diagnosed cervical and lumbar strains caused by prolonged sitting at work and a left shoulder strain also caused by work. He diagnosed cervical and lumbar degenerative spondylosis and left shoulder tendinopathy and partial thickness rotator cuff tear that were unrelated to Employee's work. Dr. Craven explained that the degenerative changes to Employee's back were preexisting and due to age; work was not the substantial cause. He acknowledged that repetitive activities could lead to a left shoulder strain, but the activities would not cause a partial thickness rotator cuff tear. He found Employee's left shoulder was medically stable as of June 25 2014, when she was seen by Dr. Powell, and she was able to return to work without restrictions. (Dr. Craven, EME Report, November 6, 2014).

54) On November 26, 2014, Ms. Macchello performed another ergonomic assessment. Employee explained she had to constantly turn to the left when people approached her desk, which exacerbated her neck and shoulder pain. Ms. Macchello noted the ergonomic keyboard ordered in the last assessment was being used, but the document holder and cushion were not. She noted the recommendations regarding the lobby workstation had been provided, although Employer had not been informed the headset had since broken. Employee continued to carry files to the file room although the recommended cart was available. Ms. Macchello recommended Employee's desk in the lobby desk be turned 90 degrees so that she would not have to turn to the left to address people. (Macchello, Ergonomic Assessment, November 26, 2014).

55) On December 9, 2014, Dr. Kropp released Employee to full duty with no restrictions as of January 5, 2014. (Dr. Kropp, Work Note, December 9, 2014).

56) On January 21, 2015, Employee reported to Employer that she was experiencing headaches and pain in right arm due to repetitive movement. (AWCB Case No. 201501516, First Report of Occupational Injury).

57) On January 26, 2015, Employee returned to Dr. Kropp, explaining another ergonomic assessment had been done, and Employer had moved her desk. However, it seemed incorrect to Employee and she had filed an appeal with the union. (Dr. Kropp, Chart Note, January 26, 2015).

58) Employee returned to Dr. Kropp on February 24 2015 with new symptoms of numbness in her right hand, and Dr. Kropp referred her to a neurologist. (Dr. Kropp, Chart Note, February 24, 2015).

59) On May 18, 2015, Employee was seen by neurologist Marci Troxell, D.O. Employee explained she had worked at a desk job that caused lower back and neck pain because of postural misalignments and frequent telephone use. Although ergonomic assessments had been done, not all the recommended equipment was provided. Dr. Troxell recommended EMG and nerve conduction studies. (Dr. Troxell, Chart Note, May 18, 2015).

60) Dr. Troxell performed the EMG and nerve conduction study on July 2, 2015, and the results were normal; she also ordered a brain MRI. (Dr. Troxell, Chart Note, July 2, 2015).

61) On July 15, 2015, Employer controverted all benefits related to Employee's left shoulder and cervical and lumbar spine. (Controversion Notices, July 15, 2015).

62) The MRI of Employee's brain was done on July 22, 2015. It revealed no abnormalities. (University Imaging Center, MRI Report, July 22, 2015).

63) On November 5, 2015, Employee reported to Dr. Reeves that she had four ergonomic assessments but none of the recommendations had been followed. The telephone headset had broken and she had neck pain from cradling the receiver, and she had to move a heavy desk at her secondary worksite and had been told by her supervisor she could not ask for help. Employee also brought Dr. Reeves a copy of Dr. Craven's EME report, which he stated he would review in detail. (Dr. Reeves, Chart Note, November 5, 2015).

64) On November 13, 2015, Dr. Reeves wrote a "to whom it may concern" letter.

> l have known Ms. Kolleen Kessler since 2012, when I evaluated her for back pain which she attributed to ergonomic problems in her work space. Since that time I have seen the patient on multiple occasions for problems primarily attributable to the same conditions.

The patient states that her ergonomic evaluations have been done, however she feels that the recommendations in those evaluation were not followed.

I do not have access to those recommendations, however the patient brings in an independent medical evaluation from August 110th 2015 and photographs of her work space, which appear to be in two separate locations.

Her primary workstation has been rotated 90° from its previous location as part of ergonomic improvement. However, the patient doesn't feel that the situation has changed much. Additionally, the patient has a portable workstation, which is evidently quite heavy when it needs to be moved, I believe once weekly, by herself. She states she is not allowed to ask for help and feels that this work station is too heavy for her to manipulate without causing injury to her back and shoulders.

Finally, the patient has a headset which she uses to access the telephone, however, the headset is old and comes apart easily, and the patient is frequently having to hold the phone with her shoulder and head which she believes contributes to her neck and shoulder pain.

The patient's workman's comp claim has been controverted. She says that while seeing Dr. Kropp she was referred to a neurologist for presumably an EMG and MRI of the brain. She was unable to get those results due to the controversion.

The patient is basically requesting documentation of the above by me today. The patient attributes her anxiety to stressful work environment and stress from working in an uncomfortable position. (Dr. Reeves, Letter, November 13, 2015).

65) On January 13, 2016, Employee returned to Dr. Reeves complaining of left hip and leg pain, shoulder pain, low back pain, right foot pain, headaches and pain in her face, all of which she attributed to her workplace environment. Dr. Reeves told Employee it was not possible to address all of her complaints in one visit, and he focused on her back and shoulder pain. Employee requested a referral to Dr. Kropp saying she could not see him again without a referral. (Dr. Kropp, Chart Note, January 13, 2016).

66) On January 28, 2016, Employee returned to Dr. Kropp for shoulder and neck pain and indicated it was a new workers' compensation injury. He administered a diagnostic epidurogram and selective nerve root block at L4-5. Osteophytes and severe degenerative changes were noted. (Dr. Kropp, Chart Note and Procedure Note January 28, 2016).

67) On April 21, 2015, Employee returned to Dr. Kropp. The nerve root block had provided relief for a few days, but pain returned, but her neck was bothering her more. Dr. Kropp ordered another cervical MRI. (Dr. Kropp, Chart Note, April 21, 2015).

68) The MRI ordered by Dr. Kroppp was done on May 2, 2016. It showed a large protrusion at C6-7 affecting the left C7 nerve, an annular tear at C2-3, and a mild annular bulge at C3-4 that did not affect the nerves. (University Imaging Center, MRI report, May 2, 2016).

69) On May 10, 2016, Dr. Kropp reviewed the MRI and referred Employee to Louis Kralick, M.D., a surgeon. (Dr. Kropp, Chart Note and Referral Letter, May 10, 2016).

70) Employee saw Dr. Kralick on May 20, 2016 explaining her neck pain had significantly worsened over the last year and attributing her pain to ergonomic deficiencies that required her to enter and exit her workstation from only one side, but the problem had recently been corrected. Dr. Kralick recommended surgery to remove the disc and osteophyte and fuse the C6 and C7 vertebrae. (Dr. Kralick, Chart Note, May 20, 2016).

71) On May 26, 2016, Dr. Kropp performed a bilateral nerve root block at the L5-S1 level of Employee's spine. (Dr. Kropp, Procedure Note, May 26, 2016).

72) On June 2, 2016, Employee returned to Dr. Kropp and stated the insurer had put the surgery with Dr. Kralick on hold to schedule an EME. He wrote a letter to the adjuster explaining the delay put Employee at risk for serious complications, and he asked the surgery proceed without delay. (Dr. Kropp, Chart Note and Letter, June 2, 2016).

73) On June 3, 2016, Employee was again seen by John Ballard, M.D., for an EME. When asked about the January 21 and July 21, 2015 injury dates, Employee explained there had not been a new injury, but she had filed the paperwork so she could get care. Dr. Ballard opined there was no indication Employee's workstations or the faulty chair were the substantial cause of her low back or neck symptomology. Her complaints were all secondary to pre-existing degenerative changes in her back and cervical spine. Dr. Ballard agreed with Dr. Kralick as to the need for the C6-7 surgery, but stated the need for treatment was not related to any work exposure. (Dr. Ballard, EME Report, June 3, 2016).

74) On June 14, 2016, Employer again controverted all benefits related to Employee's cervical spine based on Dr. Craven's June 3, 2016 EME report. (Controversion Notice, June 9, 2016).

75) On June 30, 2016, Dr. Reeves responded to questions from Employer's adjuster. In answer to a question asking whether work conditions were the substantial cause of the need for treatment of Employee's low back, neck, hip, leg, and left shoulder conditions, Dr. Reeves responded, "unknown." In response to a question about the reasonableness and necessity of the

surgery proposed by Dr. Kralick, Dr. Reeves responded it was "absolutely necessary," but the cause was unknown. (Dr. Reeves, Response to Questions, June 30, 2020).

76) On July 7, 2016, Dr. Kralick performed a discectomy, osteophyte excision, spinal canal and foraminal decompression, and fusion at C6-7. (Alaska Regional Hospital, Operative Note, July 7, 2016).

77) At the July 12, 2016 prehearing conference, six of Employee's cases were joined. (Prehearing Conference Summary, July 12, 2016).

78) On July 19, 2016, Employee returned to Dr. Kralick for a checkup stating she still had pain in her neck and shoulders. (Dr. Kralick, Chart Note, July 19, 2016).

79) On August 23, 2016, Employee was seen by PA-C Darcie Sorenson in Dr. Kralick's office. Employee reported she was doing well with a significant improvement in her pain. (PA Sorenson, Chart Note, August 23, 2016).

80) Also on August 23, 2016, Dr. Kralick wrote a letter to Employer saying Employee was concerned about returning to work because the position of her desk required her to constantly look in one direction, and he recommended her desk arrangement be changed so that she could look straight forward. (Dr. Kralick, Letter, August 23, 2016).

81) On September 14, 2016, Employee reported to Dr. Kropp that she had pain in her low back extending into her hips and calves. Dr. Kropp ordered another lumbar MRI. (Dr. Kropp, Chart Note, September 14, 2016).

82) On September 29, 2016, Employee had the MRI ordered by Dr. Kropp. It showed mild degenerative changes at L3-4 and L4-5 without central canal or foraminal stenosis and a tiny annular fissure at L4-5. There were degenerative facet changes throughout. (Imaging Associates, MRI Report, September 29, 2016).

83) On November 9, 2016, Dr. Kropp reviewed the MRI stating it showed some minor degenerative changes with an annular tear at L2-3. Employee expressed her concerns Employer was requiring her to do work in excess of Dr. Kropp's work restrictions. (Dr. Kropp, Chart Note, November 9, 2016).

84) On December 14, 2016, Dr. Kropp performed a selective nerve root block at L2-3. (Dr. Kropp, Chart Note and Procedure Note, December 14 2016).

85) On January 12, 2017, Dr. Kropp performed a selective nerve root block at L4-5. (Dr. Kropp, Chart Note and Procedure Note, January 12, 2017).

86) On January 26, 2017, Employee reported to Dr. Reeves that the last two injections by Dr. Kropp had provided no relief. (Dr. Reeves, Chart Note, January 26, 2017).

87) On February 14, 2017, Employee was seen by ANP Jennifer McGrath in Dr. Kralick's office. Employee reported numbness and tingling in her left hand and forearm and was referred for EMG and nerve conduction velocity studies. (ANP McGrath, Chart Note, February 14, 2017).

88) The EMG and nerve conduction studies on Employee left arm were normal. (Anchorage Neurosurgical Associates, Electrodiagnostic Report, March 22, 2017).

89) On February 1, 2018, John Ballard, M.D., reviewed additional medical records and issued an addendum to his June 3, 2016 EME report, specifically in regard to the January and July 2013 injuries reported by Employee. Dr. Ballard diagnosed multilevel degenerative disc disease, spondylosis, and annular tears in her low back, a post-surgery disc protrusion at C6-7and degenerative disc disease in her cervical spine, and a partial rotator cuff tear in her left shoulder. Dr. Ballard stated the type of work Employee did in January and July 2015 was not the substantial cause of her conditions. He pointed out that Employee could not recall an injury to her left shoulder and concluded the rotator cuff tear was most likely degenerative. Similarly, there was no indication of an injury to her low back or neck, and the repetitive type of work she did was not a factor in causing the degenerative disease. He explained the changes were idiopathic and related to genetics and aging. (Dr. Ballard, EME Addendum Report, February 1 2018).

90) On March 21, 2018, Dr. Ballard reviewed affidavits of Ms. Draveling and Employee's prior supervisor as well as additional medical records and issued a second addendum to his EME report. As to Employee's low back, Dr. Ballard diagnosed multilevel degenerative disc disease and facet arthrosis based on her MRIs in May 2012 and February 2013. He also diagnosed C6-7 degenerative disc disease based on the May 2016 and August 2014 MRIs. He again stated the January and July 2015 work injuries were not the substantial cause of Employee's disability or need for medical treatment.

91) On August 6, 2018, Employee was seen by Bruce McCormack, M.D., for a second independent medical evaluation (SIME). Dr. McCormack examined Employee and reviewed her medical records. Employee explained to Dr. McCormack that before 2012 she had a broken office chair. Then in 2012 she had been the whistleblower that had resulted in a coworker being

fired, which had cost the State a lot of money and was the basis for retaliatory efforts against her, specifically, she no longer did field work and had to remain in an office with a poor ergonometrics after 2012. She had four ergonomic assessments, but nothing was done. Dr. McCormack noted Employee had treated for low back pain in 2006, before any reported work injury, which combined with the MRI findings would account for the symptoms without any repetitive trauma from a poorly designed workstation. Dr. McCormack agreed with Dr. Ballard that Employee may have had a temporary shoulder strain from working in the file room that would have resolved within a few days to weeks. As part of the examination, Employee completed a pain diagram showing pain in the top of her head, left eye, right shoulder, both elbows, forearms, and fingers, her waist, thighs, knees, calves and feet, as well as her left shoulder blade and low back. Dr. McCormack stated complaints in all of these body parts was likely constitutional. (Dr. McCormack, SIME Report, August 16, 2018).

92) On November 4 2018, David Roberts, M.D., completed an ADA accommodation request for Employee. He explained better lighting could reduce Employee's migraines. (Dr. Roberts, ADA Accommodation Request, November 4, 2018).

93) Dr. Roberts practices in Anchorage, Alaska. (Observation, Experience).

94) At the September 18, 2019 prehearing conference, the parties stipulated to a December 11, 2019 hearing on Employee's October 31, 2016 claim. The issues for hearing were identified as temporary total disability (TTD), permanent partial impairment (PPI), medical costs, transportation costs, interest, and attorney fees and costs. (Prehearing Conference Summary, September 18, 2019).

95) On October 17, 2019, Ms. Macchello performed another ergonomic assessment. Employee stated she had developed migraine headaches over the last two years which she attributed to lighting. Ms. Macchello noted Employee's workspace had been modified by installing a nylon "leaf" over her desk to filter some of the light. Employee also reported bilateral hand numbness and tingling and a history of lumbar disc herniations. Employee's desk was positioned so there was no direct glare from windows. Employee was not using the document holder that had been supplied but had fashioned one that would hold legal folders. The document holder and computer monitors were repositioned to the center of Employee's desk to avoid neck rotation. Although the light level was within the acceptable range, Ms. Macchello recommended the leaf be removed, some bulbs be removed from the overhead fixture, and the

remaining bulbs be replaced with warmer color bulbs. (Macchello, Ergonomic Report, October 17, 2019).

96) During her employment with Employer, Employee filed at least seven complaints or grievances. None of the complaints or grievances were resolved in Employee's favor. (State Case Nos. 12-G-049, 12-G-329, 15-G-223, 16-G-124, 16-G-267, 16-G-268, 17-G-126).

97) In 2016 Employee appealed a denial of a performance incentive pay increase, and the matter proceeded to arbitration. The arbitrator denied the appeal noting:

> [T]he apparent animosity that exists between [Employee] and supervisor Susan Draveling. It appears [Employee] does not understand who is in charge. The State of Alaska has the right to establish work place rules, regulations and standards of conduct. It appears that Draveling has taken steps to convince [Employee] of this, but to no avail. (Arbitrator Decision, August 11, 2016).

98) On December 4, 2019, Employee filed a notice stating one of her witnesses, Dr. Roberts, was unavailable for the December 11, 2019 hearing because he had been in an automobile accident. She asked that the hearing record be left open until he was available. (Employee, Notice of Dr. Roberts' Unavailability, December 4, 2019).

99) At the December 11, 2019 hearing, Employer did not object to leaving the record open so that Dr. Roberts could testify by deposition. Because not all witnesses were able to testify, at the conclusion of the hearing, the parties agreed to continue the hearing until February 12, 2020. (Record).

100) Dr. Ealum testified he treated Employee from 2006 until shortly before the hearing and believed Employee's work was the substantial cause of her neck and low back conditions. He did not treat her shoulder, but stated that shoulder pain is often caused by problems with the individual's neck. Dr. Ealum disagreed with Dr. Craven's opinion that Employee's need for treatment was due to age and genetics without any effect by work stresses; he explained that the repeated inability to move for periods of time can exacerbate otherwise asymptomatic conditions and cause them to become symptomatic. On cross-examination, he stated he relied on Employee's description of her work environment and he was not familiar with the "the substantial cause" standard in workers' compensation. (Dr. Ealum).

101) Robin Schmid testified she worked at ASAP from December 2016 to September 2017 as a probation officer like Employee. She explained that five people worked in one room. Ms. Schmid could see Employee's workstation; Employee was seated with her back to the door and

could not see any action behind her. Phone calls often required Employee to turn around to ask other probation officers questions. Ms. Schmid explained most files were stored in another room, and not all of the rolling file shelves worked properly; they were difficult for her to move. They often moved boxes of files that weighed 20 or 30 pounds. She stated Employee was not allowed to move freely about the room, but she was not aware of a "stay in place order." (Schmid).

102) John Crouphen was a Criminal Justice Technician I at ASAP from March 2016 until 2019. His work required him to be in the probation officers' office three to five times a day, and he would regularly talk to Employee. It was a cramped office. He didn't observe Employee having difficulties with her workstation, but she told him about them. He observed Employee using a headset while at her workstation, and moving around to help clients. He observed the interactions between Ms. Draveling and Employee were antagonistic. Another coworker told him to be cautious helping Employee with various tasks because if they did things for her, Employee would stop doing them and they would be stuck doing the tasks. (Crouphen).

103) Lauri Macchello is a licensed physical therapist and certified ergonomist. Ms. Macchello performed four ergonomic assessments of Employee's workstation, and Rina Luban, an associate of Ms. Macchello, performed another. The first, in October 2012, was done in response to Employee's complaints of low back and leg pain. She recommended a proper chair, an adjustable desk, and the use of a document holder. All of the recommendations were followed, and Employer provided Employee with an electric desk. The second assessment was done in September 2013 by Ms. Luban because Employee continued to complain of low back pain. At that point, Employee had begun working at another desk in addition to her primary workspace. Employee had not been using her adjustable desk at the proper height, and had not been using the document holder. Her desk and chair were repositioned, and a new keyboard was recommended. A different type of document holder was also recommended. The third assessment was done in March 2014 when Employee reported her work at the second workstation was causing left shoulder issues. The second workstation had an adjustable desk, and Ms. Macchello recommended the desk be turned and that Employee use a headset and different keyboard and wrist support. She observed Employee get files from the file room and use the movable file shelves. The force to move the files was "pretty negligible," but she did recommend Employee use a cart with four articulating wheels to transport the files. The fourth assessment was done in

December 2014 because Employee felt having to turn when people approached her was exacerbating her shoulder pain and she had developed tingling in both hands. Employee was still not in proper position and was not using the wrist support that had been provided after the March 2014 assessment. Employee was also not using the headset at both stations because she felt it was too fragile to move, but Employee had not told Ms. Draveling of that fact. She recommended Employee's desk be turned and that Employee use a headset at both locations. The fifth evaluation in October 2019 was done because Employee had developed migraines and felt the lighting was contributing. Although Employer had provided a shade, she recommended bulbs be removed from the overhead fixtures instead. Ms. Macchello found Ms. Draveling to be very concerned about Employee's complaints as she promptly requested an evaluation every time symptoms arose. (Macchello).

104) Dee Savage worked at ASAP as a Criminal Technician I and saw Employee on a daily basis. Ms. Savage observed Employee having difficulties with her workstation because it was not compatible with her workers' compensation injuries, and Ms. Draveling would complain about having to make changes to the workstation. Employee was not allowed to move freely as she was monitored by Ms. Draveling. Ms. Savage concluded there was a "stay at station" rule for Employee because every time she saw Employee she was at her workstation unless she was on a break. Ms. Savage admitted that she had never seen Employee and Ms. Draveling interact, but Ms. Draveling's interaction with employee were often not professional. (Savage).

105) Sunny Hefley worked at ASAP for about five years as a Criminal Justice Technician when Employee was there. Ms. Draveling made Employee a persona non grata. Ms. Hefley stated Employee was having back pain and needed a higher desk, and she believed Employee had to buy the desk herself. Ms. Hefley was 72 years old and 5 feet 2 inches tall, and she found the movable file shelves difficult to move, but she was able to do so. (Hefley).

106) Susan Draveling has been the ASAP coordinator since 2012. She did not consider Employee to be a good employee; Employee did not follow instructions or procedures, the quality and quantity of her work was not up to par, she was chronically late, and any attempts to improve were short-lived. Ms. Draveling never restricted Employee from walking or talking to others, although she had directed new employees to seek advice from other probation officers. When she was on light duty, certain employees were designated to help Employee when needed. She instructed the office manager to order anything recommended in the ergonomic assessments,

but some items, such as the copy holder disappeared. Ms. Draveling observed Employee make changes to the settings or adjustments recommended by the assessor. (Draveling).

107) At the beginning of the February 12, 2020, Employee stated Dr. Roberts was again unable to testify, but she did not know the reason why. She asked that the record be left open after the hearing so that he could be deposed. Employer objected to leaving the record open pointing out there was no evidence Employee had contacted Dr. Roberts to arrange his testimony until February 10th, two days before the hearing. By an oral ruling, the record was left open for 30 days to allow Employee to depose Dr. Roberts, and the parties were to file written closing arguments within seven days after Dr. Roberts' deposition transcript was filed. (Record).

108) On March 16, 2020, Employer filed its closing arguments. (Employer, Closing Brief, March 16, 2020).

109) On April 6, 2020, Employee's attorney filed a petition to stay the case until the COVID-19 crisis was resolved. He explained he had been diagnosed with pneumonia on March 16, 2020, and had been unable to file Employee's closing argument. He did not address Dr. Roberts' testimony. (Employee, Petition, April 6, 2020).

110) On April 6, 2020, Employer objected to an indefinite stay noting Dr. Roberts had not been deposed. Employer acknowledged personal illness and the COVID-19 pandemic warranted some leeway in filing deadlines, but an indefinite stay prevented a timely resolution of the case. (Employer, Objection to Stay, April 6, 2020).

111) On June 1, 2020, the designated chair wrote to Employee's attorney stating it appeared the COVID-19 crisis was likely to persist for several months, and asked what efforts had been made to depose Dr. Roberts since the February 12, 2020 hearing. (Letter to Employee's Attorney, June 1, 2020).

112) No response to the June 1, 2020 letter has been received. (Record).

113) On June 4, 2020, Employee's attorney participated in a prehearing conference in another case. (AWCB Case No. 201806957, Prehearing Conference Summary, June 4, 2020).

114) Employee statements to her doctors are not credible. She repeatedly told her medical providers that Employer had not provided the equipment or made the adjustments recommended in the ergonomic assessments despite clear evidence Employer had done so. In some cases, Employer had provided the equipment or made the adjustments, only to have Employee fail to use the equipment or change the adjustments. (Experience, Observation).

PRINCIPLES OF LAW

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

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
. . . .

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

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

AS 23.30.010. Coverage.
(a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

> (b) Compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer.

Under the Alaska Workers' Compensation Act, coverage is established by a work connection, meaning the injury must have "arisen out of" and "in the course of" employment. If an accidental injury is connected with any of the incidents of one's employment, then the injury both would "arise out of" and be "in the course of" employment. The "arising out of" and the "in the course of" tests should not be kept in separate compartments but should be merged into a single concept of "work connection." *Northern Corp. v. Saari*, 409 P.2d 845, 846 (Alaska 1966).

In *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567, 572 (Alaska 2012), the Supreme Court has divided mental injuries into three categories for purposes of analysis:

> A "physical injury that causes a mental disorder" is considered a "physical-mental" claim; a "mental stimulus that causes a mental disorder" is considered a "mental-mental" claim; and a "mental-physical" claim occurs when a mental stimulus causes a physical injury, such as a heart attack. Classification is important because the presumption of compensability does not apply to mental-mental claims, making them generally more difficult to prove, and those claims must be based on unusual and extraordinary work-related stress. The fact that an accident produces unusual stress does not transform it into a mental-mental claim—the key to analyzing such claims is to look at the underlying cause of the disability. (footnotes omitted)

In *Runstrom*, the employee had been sprayed in the eyes with fluids from an HIV-positive patient. She received immediate treatment, and did not become HIV positive, but she filed a claim for mental stress. The Supreme Court affirmed the Appeals Commission determination it was a physical-mental claim.

In *Kelly v. State of Alaska*, 218 P.3d 291 (Alaska 2009), the Supreme Court addressed a case in which a prison guard, Kelly, filed a claim for job-related stress after being threatened with serious injury or death by an inmate who had been convicted of murder and was armed with a

weapon. The Board had found the guard's stress was not compensable as it would not be unusual or extraordinary for correctional officers to be threatened by inmates. The Court noted that a worker's perception he feels stress is by itself inadequate to establish "extraordinary and unusual" stress. *Id.* at 300. The Court reversed the Board, explaining the employee had experienced extraordinary and unusual stress: while other guards had been threatened, it was often by intoxicated inmates, or inmates behind bars, but when the employee was threatened, he was alone, unarmed, locked in a module with an armed inmate who threatened to stab him in the eyes and then stab him to death. "Individuals in a comparable work environment" means other employees holding the same position for an employer. *Williams*.

> **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. 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.
>
> (i) . . . the improper influencing or attempt by a person to influence a medical opinion of a physician who has treated or examined an injured employee, is a misdemeanor.

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

Under AS 23.30.120, benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption

of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

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

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Kramer* at 473-74, quoting *Smallwood* at 316. To rebut the presumption, an employer must present substantial evidence that either (1) a 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, 611-612 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully

rebuts the presumption, it drops out, and the employee must prove all elements of his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381. At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

In *Huit*, the Supreme Court analyzed the effect of the 2005 change in AS 23.30.010 from "a substantial factor" to "the substantial cause" on the presumption analysis. The Court examined the legislative history and determined there was no indication the legislature intended to change how an employee raises the presumption or how an employer rebuts it. Consequently, any weighing of competing causes must occur at the third stage of the analysis.

In *Morrison v. Alaska Interstate Construction*, 440 P.3d 224 (Alaska 2019), a worker had injured his right knee in 2004 and returned to work following surgery. He worked for about ten years without seeking medical care for the knee. In 2014, while working for another employer, he reinjured his knee. His doctor recommended a second surgery to treat his arthritis. A dispute arose between doctors as to whether the 2004 or the 2014 injury was the substantial cause of the worker's need for medical treatment. The doctors generally agreed that the 2004 injury led to the arthritis, and they agreed that arthritis was only treated when it became symptomatic. The Board held the 2014 injury caused the increase in symptoms that necessitated the medical treatment. The Commission reversed, saying the Board had relied too heavily on the most recent event in determining the substantial cause. The Supreme Court reversed the Commission, noting the worker's increase in symptoms after the 2014 were what required medical attention, and reiterating that an increase in the symptoms of a preexisting condition may be a compensable injury. (*Morrison*).

> **AS 30.135. Procedure before the board.**
>
> (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being

made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.

AS 23.30.145. Attorney fees.

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

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

AS 23.30.185. Compensation for temporary total disability.
In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

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

In *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC decision No. 153 (June 14, 2011), a pro se claimant brought a PPI claim to hearing before the board. However, she did not have a PPI rating from her doctor. The board held the PPI claim was not ripe. On appeal, the commission reversed stating the injured worker's PPI claim was ripe for adjudication. *Settje* held the injured worker is required to obtain a PPI rating and presented at hearing if she wants a PPI award.

> **AS 23.30.395. Definitions.**
>
> In this chapter,
>
> . . . .
>
> (16) 'disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

ANALYSIS

1) Should the case be stayed?

The Act does not specifically provide for a stay in a case, but AS 23.30.135 provides the Board may conduct its hearing in the manner by which it may best ascertain the rights of the parties, and hearings are often continued or the record left open to allow parties additional time to file evidence. As the oral portion of the hearing has concluded, Employee's request for a stay is, in essence, a request to leave the record open indefinitely.

Although the December 11, 2019 hearing had to be continued because there was not time to hear all of the witnesses, the hearing's continuation was scheduled for February 12, 2020 rather than an earlier date to allow Employee to depose Dr. Roberts. Employee did not depose Dr. Roberts before the February 12th hearing, but attempted to call him as a witness at hearing. When Dr. Roberts was unable to attend the hearing, the record was left open until March 13, 2020 for the transcript of his deposition to be filed with the parties' written closing arguments to be filed by March 20th. Seventeen days later Employee's attorney petitioned for a stay until the COVID-19 pandemic was resolved; although he stated he had been diagnosed with pneumonia on March 16th, he did not state whether Dr. Roberts had been deposed. On June 1, 2020, the designated chair wrote to Employee's attorney noting the petition had not yet been addressed and asking him to explain what efforts had been made to depose Dr. Roberts. No response has been received.

As Employer noted in its April 6, 2020 Objection to the stay, parties should be afforded some leeway in meeting deadlines due to personal illness or the COVID-19 pandemic. Without some explanation as to why Employee has been unable to depose Dr. Roberts, a local physician, since December 11, 2019, leaving the evidentiary record open longer is not warranted. Similarly, while Employee's attorney was unable to file a written closing argument by the deadline, over three months have passed, and he still has not filed one although he has resumed his practice. Employee's petition for an indefinite stay will be denied.

2) Were the work activities and workstations the substantial cause of Employee's disability or need for medical treatment, and, if so, to what benefits is she entitled?

Because Employee contends work for the employer was the substantial cause of mental stress as well as physical injuries two analyses are required.

Mental Stress:

Employee identifies two sources of mental stress that she contends were caused by work: First, the stress caused when she was the whistleblower against another employee and Employer's subsequent retaliation against her; and, second, the stress caused by Ms. Draveling's actions. Both are mental-mental injuries; in other words, a mental stimulus that caused a mental disorder.

Because the AS 23.30.120 presumption does not apply to mental-mental injuries, Employee must prove a mental-mental injury by a preponderance of the evidence. Employee must prove: (1) her work-related stress resulted from extraordinary and unusual pressures and tensions in comparison to other persons in a comparable work environment, and (2) her work-related stress was the predominant cause of her anxiety, depression, or other mental injury. AS 23.30.010(b). The amount of work stress must be measured by actual events and cannot be caused by good faith personnel actions such as work evaluations, job transfer or job termination. Claimant's perception she feels stress is, by itself, inadequate to establish "extraordinary and unusual" stress. *Kelly*.

Whistleblower incidents that result in criminal charges against a coworker are, thankfully, extraordinary and unusual. However, Employee's perception she was retaliated against is inadequate to establish extraordinary and unusual stress. There is no evidence of retaliation other than Employee's testimony. While she suggests she was transferred from wellness court to ASAP as retaliation, she had previously voluntarily transferred from Adult Probation to ASAP and she offered no explanation as to why the transfer would have been a form of retaliation. Employee has not established that she suffered a mental-mental injury as a result of the whistleblower incident.

While Employee may have suffered stress as a result of her interaction with Ms. Draveling, that stress cannot be the basis of a workers' compensation claim if it resulted from good faith personnel actions. Clearly, Employee and Ms. Draveling did not get along well. None of the seven complaints or grievances filed by Employee were resolved in her favor, and the arbitrator concluded Employee did not understand who was in charge. The testimony of Employee's coworkers does not show Ms. Draveling acted in bad faith. Ms. Schmid stated Employee was not allowed to move freely about the room, but she was not aware of a "stay in place order." Mr. Crouphen explained it was a cramped office and the interactions between Employee and Ms. Draveling were antagonistic. Ms. Savage concluded from the fact that Employee was at her workstation except when she was on breaks that a "stay at station" order existed, but she had never seen Employee and Ms. Draveling interact. Ms. Draveling credibly testified she had never restricted Employee from walking or talking to others, but given that the quality and quantity of Employee's work was not up to par, such an order would not have been unreasonable. Employee has not shown Ms. Draveling did not act in good faith. Any stress Employee suffered as a result of her interactions with Ms. Draveling resulted from good faith personnel actions.

Physical Injuries:

In cases of physical injuries, the presumption of compensability applies to the issue of causation. Without regard to conflicting evidence, and without considering credibility, Employee raised the presumption that her work for Employer was the substantial cause of her disability and need for medical treatment through her own testimony, Dr. Kropp's May 23, 2013 opinion the June 1, 2011 injury was the substantial cause of her need for treatment because she had been ordered not to rise from her desk, and Dr. Ealum's testimony. Because Employee raised the presumption, Employer was required to rebut it. It did so through the reports of Drs. Craven, Ballard, and McCormack all of whom opined Employee's preexisting degenerative disc disease was the substantial cause of her back and neck pain, and her work would not have caused a rotator cuff tear.

Because Employer rebutted the presumption, Employee was required to prove by a preponderance of the evidence her employment with Employer was the substantial cause of her disability and need for medical treatment. She did not do so. Little weight is given to her

treating doctors' opinions because they are based on Employee's erroneous description of her working conditions, and there is no evidence the doctors reviewed all of her medical records. Employee frequently reported to her physicians that none of the recommended ergonomic changes had been made. Her reports to her physicians were false. The opinions of Dr. Craven and Dr. Ballard are given more weight. After examining Employee and reviewing her medical records, Dr. Craven acknowledged prolonged sitting and work activities could have caused strains, but work was not the cause of the degenerative changes to Employee's neck and low back. The medical records prior to Dr. Craven's evaluation show Employee was treated for degenerative conditions in her low back, cervical spine, and left shoulder, not strains. Similarly, Dr. Ballard examined Employee and reviewed her medical records. He too opined Employee's complaints were due to degenerative changes in her low back and cervical spine, and there was no indication a faulty chair or workstation were the cause. Dr. McCormack's opinion is given the most weight. He examined Employee and reviewed her medical records, including the reports of Drs. Craven and Ballard. Dr. McCormack noted Employee had treated for low back pain as early at 2006, and the 2012 MRI showed preexisting mild to moderate degenerative disc disease at all levels of Employee's lumbar spine which would account for her symptoms without any trauma from a poorly designed workstation. Dr. McCormack concluded Employee's complaints were likely constitutional rather that due to employment based on her pain diagram that showed she had pain in virtually all parts of her body from the top of her head to her feet. The preponderance of the evidence is that work for Employer is not the substantial cause of Employee's disability or need for medical treatment.

Benefits:

Causation is the threshold in workers' compensation. Employee has not shown that employment for Employer is the cause of her disability or need for medical treatment. Consequently, she is not entitled to any of the benefits she requests, nor is she entitled to attorney fees or costs.

CONCLUSIONS OF LAW

1) The case be should not be stayed.

2) The work activities and workstations are not the substantial cause of Employee's disability or need for medical treatment, and she is not entitled to benefits.

ORDER

1) Employee's petition to stay the case is denied.
2) Employee's October 31, 2016 claim is denied.

Dated in Anchorage, Alaska on July 9, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Nancy Shaw, Member

/s/
Randy Beltz, 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 KOLLEEN A. KESSLER, employee / claimant v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201501516; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by Certified U.S. Mail, postage prepaid, on July 9, 2020.

/s/
Nenita Farmer, Office Assistant