ALASKA WORKERS' COMPENSATION BOARD

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

MARTHA L. CORREA, Employee, Claimant, v. STATE OF ALASKA, Self-Insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 201700660 AWCB Decision No. 21-0030 Filed with AWCB Anchorage, Alaska on April 5, 2021.

Martha L. Correa's November 14, 2017 workers' compensation claim for a remand to the reemployment benefit administrator (RBA) for reevaluation and an order her left shoulder is compensable was heard in Anchorage, Alaska, on January 27, 2021, a date selected on January 7, 2021. A June 23, 2020 Affidavit of Readiness for hearing gave rise to this hearing. Attorney Joseph Kalamarides appeared and represented Martha Correa (Employee). Assistant Attorney General Kim Stone appeared and represented the State of Alaska (Employer). Employee appeared and testified. Alexa Correa, Employee's daughter, was a witness for Employee. Interpreter Kristian Anderson appeared to interpret for Employee if needed. The record was held open for receipt of Employee's attorney's amended attorney fee statement and Employer's objections to the attorney fee statement. The record closed on February 16, 2021.

ISSUES

Employee contends her work for Employer was the substantial cause of her left shoulder disability and need for medical treatment and her claim for benefits related to her left shoulder is

compensable under the Alaska Workers' Compensation Act (Act). Employer contends Employee's disability and need for medical treatment are due to a pre-existent degenerative condition rendered symptomatic by her age and genetics.

1. **What is the substantial cause of Employee's disability and need for medical treatment for her left shoulder?**

Employee contends when the RBA designee determined on July 17, 2017, Employee was not eligible for reemployment benefits, Employee's physician's assistant expected her to make a full recovery as did she and, therefore, Employee did not seek review of the RBA designee's determination. Employee contends not only did she not recover from the first surgery as expected, she had two subsequent surgeries on her right shoulder and the determination she is not eligible for reemployment benefits should be modified. Employee requests the determination she is not eligible for reemployment benefits be remanded to the RBA designee.

Employer contends Employee is not entitled to a reemployment benefits evaluation as she was found not eligible on July 17, 2017 and did not timely seek review of the evaluation decision. In addition, Employer contends there is no "newly discovered" evidence that could not have been produced for the administrator's consideration that would justify a review of the RBA designee's determination of ineligibility. Employer argues alternatively, if Employee's petition is found timely and supported, Employee's case should be remanded to the RBA.

2. **Is Employee entitled to relief from the RBA-Designee's decision finding her not eligible for reemployment benefits?**

Employee contends she is entitled to actual attorney fees and costs itemized on Joseph Kalamarides' January 25, 2021 and February 3, 2021 attorney fee affidavits.

Employer's attorney requested the record be held open so she would have an opportunity to raise any objections to Employee's attorney fees and costs after the supplemental affidavit was filed. The record was held open until February 16, 2021 for Employer's objections, if any. Employer did not object to Employee's attorney fees and costs, but instead filed a request to hold the issue

of attorney fees in abeyance until 10 days after the board's decision on the merits of Employee's claims. Employer contends a decision on the merits of the claims brought by Employee is necessary in order to apply the appropriate statutory provision.

3. Is Employee entitled to actual attorney fees and costs?

FINDINGS OF FACT

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

1) On December 24, 2016, Employee's right shoulder was injured when she was transferring a patient into a bed while working for Employer as a certified nursing assistant (CNA) at the Anchorage Pioneer Home. (Report of Injury, January 13, 2017.)

2) Employee subsequently also claimed injuries to her right wrist and left shoulder. (Claim, November 13, 2017.)

3) Employee claimed temporary total disability (TTD), permanent partial impairment (PPI), attorney fees, transportation costs, medical costs, interest, and a reemployment eligibility evaluation. (*Id*.).

4) Employer initially accepted the injury and Employee began treating with chiropractor Mathew Huettl, D.C., on January 7, 2017 shortly after her work injury to her right shoulder. In addition to right shoulder pain she also complained of weakness in her right hand. (Dr. Huettl Clinic note, January 7, 2017.)

5) On January 26, 2017, a magnetic resonance imaging (MRI) study on Employee's right shoulder showed mild osteoarthritis of the acromioclavicular joint, a full thickness tear of the supraspinatus tendon with retraction and tendinosis of the infraspinatus tendon. (MRI report, January 26, 2017.)

6) Dr. Huettl referred Employee to orthopedic surgeon Kevin Paisley, D.O., for a consult on surgical repair of her right shoulder, which was performed on March 2, 2017. (Dr. Huettl Clinic notes, March 2, 2017.)

7) After the March 2, 2017 surgery, Employee continued to treat with Dr. Huettl several times each month. (Dr. Huettl Clinic notes, March through July 2017.)

8) On June 17, 2017, Rehabilitation Specialist Janice Shipman, M.Ed., CRC, GCDF, recommended Employee be found not eligible for reemployment benefits based on Dr. Paisley's

Physician Assistant (PA) David Wonchala's June 14, 2017 prediction Employee would have the permanent physical capacities to perform the physical demands of her job of injury. (RS Shipman's June 17, 2017 letter.)

9) On July 17, 2017, RBA Designee Deborah Torgerson determined Employee was not eligible for reemployment benefits based on RS Shipman's June 17, 2017 eligibility evaluation report. (RBA Designee's Letter, July 17, 2017.)

10) Within 10 days of the RBA designee's determination Employee is not eligible for reemployment benefits she did not request review the determination. (Observations).

11) On August 2, 2017, Dr. Huettl referred Employee to Larry Levine, M.D., for an electrodiagnostic study her right upper extremity. Dr. Levine diagnosed moderate to severe carpal tunnel syndrome on Employee's right wrist. (Dr. Levine's letter, August 2, 2017).

12) On August 10, 2017, Employee complained of pain in her left anterior shoulder. She stated it had been slowly hurting more and more over the last two or three months. Before her right shoulder injury, she reported she alternated between the left and right sides when sleeping. Dr. Huettl noted she is right hand dominant. Since her right shoulder surgery she has become dramatically dependent on her left hand and cannot sleep on her right side any more. (Dr. Huettl Clinic note, August 10, 2017).

13) On August 15, 2017, Dr. Huettl noted Employee's left shoulder had at least some moderate to severe tendonitis and bursitis, but the probability of a tear was high. He planned to order a left shoulder MRI if there was not 50% improvement after one month of conservative treatment. (Dr. Huettl Clinic note, August 15, 2017).

14) On September 5, 2017, an MRI was performed on Employee's left shoulder due to complaints of severe pain, weakness and loss of range of motion which had not responded to conservative care. The MRI showed a full-thickness tear of the supraspinatus tendon at its insertion on the great tuberosity, with the remainder of the rotator cuff intact. There was also degeneration of the anterior superior labrum, minor changes in the adjacent glenoid, and degenerative changes in the acromioclavicular joint. (MRI report, September 5, 2017).

15) On September 6, 2017, Dr. Huettl noted Employee's September 5, 2017 left shoulder MRI showed a full thickness tear in her supraspinatus muscle. He opined it was due to overuse of her left arm as she had gone so long without adequate function of her right arm due to her work injury, and the slow recovery of her right shoulder. (Dr. Huettl Clinic note, September 6, 2017).

16) On September 8, 2017, Dr. Huettl opined Employee would not reach maximum medical improvement without surgeries to her right shoulder, right wrist, and her left shoulder. (Dr. Huettl Clinic note, September 8, 2017).

17) On September 23, 2017, Employee saw orthopedic surgeon Charles Craven, M.D. for an employer's medical examination (EME). Dr. Craven examined Employee and reviewed her medical history related to left shoulder, her right shoulder, and right carpal tunnel syndrome (CTS). Dr. Craven opined the September 5, 2017 MRI of Employee's left shoulder showed an articular-sided tear of the supraspinatus footprint which was partial thickness. There was no muscle atrophy and the tear was not retracted. There was degenerative change of the AC joint and no convincing tear of the labrum. Dr. Craven diagnosed a left shoulder rotator cuff tear which was a degenerative consequence owing to Employee's age, genetics and degenerative process of aging. He noted Employee stated her left shoulder was rendered symptomatic in May due to performing activities of daily living. There was no injurious event documented to the left shoulder. He opined the left shoulder symptomatology was a consequence of activity-related aggravation of a likely pre-existent degenerative rotator cuff tear and unrelated to the December 24, 2016 work injury. This work injury also did not aggravate, accelerate or combine with a preexisting condition to produce the necessity for current medical treatment or disability. (EME report, September 23, 2017).

18) Dr. Craven opined Employee's right shoulder had not yet reached medical stability as of the date of his examination. He restricted Employee to sedentary or light work only with no lifting, pushing or pulling greater than 10 pounds with her right shoulder on a temporary basis until she underwent a further surgical procedure. (*Id*.).

19) On October 3, 2017, Dr. Paisley performed a right shoulder manipulation and arthroscopy with a capsular release, as she had developed adhesive capsulitis. (Dr. Paisley Clinic notes, October 3, 2017).

20) On October 9, 2017, Employer controverted all benefits for Employee's right wrist and left shoulder. (Controversion, October 9, 2017).

21) On November 2, 2017, Dr. Huettl noted Employee's right shoulder and right wrist were still painful. He noted the left shoulder MRI confirmed a full thickness tear in her supraspinatus muscle, which he opined was due to the overuse of her left arm as she had gone so long without adequate function of her right arm due to her work injury. Dr. Huettl instructed Employee to do

the same home exercise program with her left shoulder as she was doing with her right. (Dr. Huettl Clinic notes, November 2, 2017).

22) On November 14, 2017, Attorney Joseph Kalamarides entered his appearance for Employee. (Notice of Appearance, November 14, 2017).

23) On November 14, 2017, Employee filed her workers' compensation claim for TTD, PPI, attorney fees and costs, transportation costs, medical costs, and interest. A second independent medical examination (SIME) and a reemployment eligibility evaluation were also requested. (Claim, November 14, 2017.)

24) On April 24, 2018, Employee was examined by orthopedic surgeon William Curran, Jr., M.D., in a second independent medical evaluation (SIME). Dr. Curran examined Employee and reviewed her medical records. He opined Employee's December 24, 2016 work injury was the substantial cause of both Employee's right shoulder and right wrist carpal tunnel syndrome disability and need for medical treatment. Employee was not medically stable, but he predicted she would be in May 2019. Employee would have a permanent impairment and would not be able to return to her job as a CNA. Dr. Curran predicted Employee would have a permanent partial impairment. (SIME report, April 24, 2018.)

25) Dr. Curran opined the osteoarthritis in the acromioclavicular joint and mild labrum degeneration and supraspinatus tear in the left shoulder were not causally related to the December 24, 2016 work injury. (*Id*.)

26) Dr. Curran did not explain the reasoning for this opinion. Nor did he address whether the pain and disability in the left shoulder, as opposed to the underlying pathology of the left shoulder, was causally related to the December 24, 2016 work injury. (Observation).

27) Throughout 2018 Employee continued to treat with Dr. Huettl for her right shoulder, right wrist CTS and left shoulder. (Dr. Huettl clinic notes, January through December, 2018.)

28) On March 4, 2019, Dr. Paisley, Employee's treating orthopedic surgeon, noted he had treated Employee for bilateral shoulder pain and dysfunction. Dr. Paisley opined the work injury to the right shoulder was the most important cause of the pain and dysfunction Employee experienced in her left shoulder. Employee had to rely very heavily on her left shoulder, which resulted in her experiencing significant and severe pain as well as ultimately even a tear within her rotator cuff. Employee had a very complicated course regarding her right shoulder and underwent surgeries in March and October of 2017 and also in August of 2018. This led to her

having to rely very heavily on her nondominant shoulder, which appears to have ultimately resulted in an insidious onset of rotator cuff pathology. (Letter, March 4, 2019.)

29) On July 29, 2019, Dr. Paisley opined Employee's left shoulder injury was work-related and would require surgery as she had not progressed after nearly two years with her overall improvement for her left shoulder. Employee had a full-thickness tear within her supraspinatus tendon as well as acromioclavicular (AC) joint arthritis, a superior labrum anterior and posterior (SLAP) tear and adhesive capsulitis. (Letter, July 29, 2019.)

30) On June 12, 2019, Employee testified by deposition. She has three children. Her son lives in California. One daughter, Olivia, has four children and lives in Wasilla. The youngest daughter Alexa lives with her mother and father and works as a beautician. (Deposition testimony, June 12, 2019.)

31) Employee has participated in her home exercise program, which consists of stretching and moving her arms three times a day. She also walks on a treadmill for one to two hours a day. (*Id*.).

32) Employee's grandchildren visit her once a week, but she does not pick them up or carry them, which they understand, as they know her shoulders have been injured. (*Id*.).

33) There was never a particular incident when Employee felt she hurt her left shoulder. The pain started slowly, and then became worse. Several months after her right shoulder injury, she started to notice pain on the upper part of her left shoulder, and then she noticed pain in her hand. She does "usual things" while at home, including cooking, laundry, and picking up around the house. She is not able to do everything, but does what she can. (*Id*.).

34) Employee often was tired at the end of the day while she was working, then she would go home and do house chores. She did feel exhausted a lot as the job she did was tough. Now she feels worse than she did before because of the stress thinking about the fact she has lost everything. Previously she had income, insurance and retirement. Now she has lost her job, her insurance and everything. She feels depressed as she does not know what will happen. She would like to work again if she could, but not at her job at the Pioneer Home. (*Id*.).

35) Employee injured her hand as well as her right shoulder in the December 24, 2016 work injury. She put her hand under the patient to get her up. Later she was not able to use her hand to brush her teeth. Then she was not able to raise her elbow, and she started to feel pain in her

shoulder. She continued to work until her supervisor at work said she had to stop and go to see the doctor, which she did in January 2017. (*Id*.).

36) Her right shoulder did not improve after the March 2017 surgery, as her arm got frozen. She could not move it and had to have another surgery. Then she continued to have pain and an MRI was done which showed one of the tendons was torn. (*Id*.).

37) The problems with her right hand, the tingling and going to sleep started when the work injury occurred in December 2016. Her right hand is worse now. (*Id*.).

38) Employee cannot tell exactly when her left shoulder started to hurt, but it was several months after her right shoulder operation in March 2017. (*Id*.).

39) On October 28, 2019, chiropractor Edward Barrington, D.C., evaluated Employee for a permanent partial impairment (PPI) rating. He found she had a right shoulder upper extremity impairment of 23 percent or 14 percent whole person impairment. The left shoulder upper extremity impairment was 19 percent, or 11 percent whole person impairment. Her right carpal tunnel syndrome impairment (CTS) was 4 percent or 2 percent whole person impairment. Her total right upper extremity impairment, including the right shoulder and the right CTS converted to a 16 percent whole person impairment. The total PPI rating is 27 percent whole person impairment. (PPI rating, October 28, 2019.)

40) On December 12, 2019, Employer paid Employee for the 14 percent PPI rating for the right shoulder impairment. (Payment report, December 12, 2019.)

41) Employee had continued to treat with Dr. Huettl for her right shoulder, right wrist CTS and left shoulder through 2019 and up until February 2020. (Dr. Huettl clinic notes, 2019 and 2020).

42) On March 3, 2020, Employer withdrew its controversion of Employee's right wrist CTS. (Controversion withdrawal letter, March 3, 2020.)

43) On October 7, 2020, Dr. Craven performed a records review addendum to his September 23, 2017 EME. Dr. Craven again opined performing activities of daily living during the five-month period from the December 24, 2016 work injury until Employee's left shoulder became symptomatic in May 2017, in the absence of a singular injurious or traumatic event, did not constitute the substantial cause of her left rotator cuff tear or need for treatment when weighed against other factors, such as age, genetics, and the degenerative process of aging of the rotator cuff. The left shoulder MRI finding of September 5, 2017 demonstrated a degenerative rotator cuff tear. The performance of activities of daily living from the date of injury until the onset of

left shoulder symptoms may have contributed to, but were not the substantial cause of Employee's need for medical treatment when weighed against all other causes. Although performing activities of daily living can cause a previously asymptomatic rotator cuff to become symptomatic, it is a reasonable presumption Employee would have used her left upper extremity for such activities regardless of the issues with her right upper extremity. (Supplemental EME report, October 7, 2020.)

44) Dr. Craven was unable to determine if Employee had the physical capacity to perform her job as a CNA due to her work-related right shoulder rotator cuff condition. He recommended Employee undergo a performance-based function capacity evaluation (FCE) to determine this. (*Id*.)

45) Dr. Craven opined Employee's right shoulder was medically stable one year after her August 9, 2018 surgery for debridement and rotator cuff repair. He agreed with Dr. Barrington's PPI rating of 14 percent whole person impairment for the right shoulder and 2 percent whole person for the right wrist CTS. (*Id*.)

46) On November 18, 2020, Dr. Craven testified by deposition. He opined Employee's left shoulder was rendered symptomatic as a consequence of activity-related aggravation with a preexistent degenerative rotator cuff tear unrelated to the work injury to the right shoulder. (Dr. Craven's November 18, 2020 deposition.)

47) According to the orthopedic literature, some studies show there are degenerative rotator cuff tears present in up to 20 to 25% of the population in the patient's age group. In addition the natural history or progression of asymptomatic rotator cuff tears is to become symptomatic. Therefore, whether the work injury is the substantial cause of the left shoulder injury depends on what she was doing in the time frame from her right shoulder surgery until the onset of symptoms in May. Employee stated the activities she did during that time were activities of daily living for which she would still have been using her left upper extremity as those activities are inherently two-handed activities. Therefore those activities were not sufficient to constitute the substantial cause when weighed against other causes of the onset of her left shoulder pain and the MRI-proven rotator cuff tear. (*Id*. at 14.)

48) Dr. Craven conceded he could not say had the right shoulder injury not occurred if Employee would have had symptoms in her left shoulder. (*Id*. at 19.)

49) Dr. Craven stated the use of Employee's left arm and left shoulder after the March 2017 surgery was a cause, but not the substantial cause of what made the left shoulder symptomatic. He reasoned the literature shows an asymptomatic rotator cuff tear in 30 percent of individuals over a three-year course of time is to become symptomatic, irrespective of external factors. (*Id*. at 23.)

50) Dr. Craven stated it would be hypothetical to say when Employee's left shoulder would have become symptomatic. It might have been never or it might have been ten years later. (*Id*. at 23-24.)

51) Dr. Craven disagreed with Dr. Paisley's opinion Employee's left shoulder pain and disability was caused by the work injury to the right shoulder in part because according to Dr. Paisley's February 22, 2019 chart note, his opinion was based on a belief the left shoulder pain developed two years after the work injury of December 2016. (*Id*. at 24-25.)

52) On January 20, 2021, Dr. Paisley testified by deposition. He is a board-certified orthopedic surgeon, and has received specialty training in shoulder and elbow surgery during a fellowship he completed at the University of Texas San Antonio. He has published in peer-reviewed journals in the world of shoulder and elbow surgery. Dr. Paisley has been in private practice in Alaska since 2014. (Dr. Paisley's deposition testimony, January 20, 2021.)

53) The problems with Employee's right shoulder, due to her December 2016 work injury, eventually resulted in surgery in March 2017, consisting of predominantly rotor cuff repair, totaling three of the four rotator cuff tendons, as well as a release of the biceps tendon, decompression of the acromion and generalized debridement. (*Id*. at 5.)

54) In October 2017, a subsequent surgical procedure was performed to address Employee's right shoulder adhesive capsulitis or frozen shoulder. This procedure included manipulation under anesthesia, release of the capsule, and debridement of the adhesions that had formed. (*Id*. at 5.)

55) In August 2018, a third surgical procedure on the right shoulder was performed. The subscapularis tendon had been torn again, but the supraspinatus and infraspinatus tendons had healed. Some of the capsular tissue was again released, as it had stiffened up. (*Id*. at 5-6.)

56) In July 2019, Employee was still experiencing some pain and dysfunction within her right shoulder. She was participating in physical therapy. Her main concern was her left shoulder,

which was becoming more symptomatic than her right. Dr. Paisley first documented a problem with the left shoulder in February 2019. (*Id*. at 6-7.)

57) Employee told Dr. Paisley she thought the pain and disability in her left shoulder were due to having to rely on that shoulder so much more due to the right shoulder injury. (*Id*. at 7-8.)

58) It is not unusual for a person who goes through a traumatic event and loses mobility of one shoulder, and then during the recovery period have the contralateral shoulder become much more symptomatic, and at times even becoming more symptomatic than the actual operated-on shoulder. (*Id*. at 8.)

59) By looking at images, it is not possible to tell beyond a reasonable doubt whether Employee's left shoulder rotator cuff tear occurred prior to the work injury or developed after she had to rely on the left shoulder more. (Id. at 11.)

60) It is very well known and documented a certain set of the population has an asymptomatic rotator cuff tear. Then once they have to begin utilizing that extremity more, it can become symptomatic. It is possible Employee may have had the rotator cuff tear prior to her work injury then, when she had to rely on the left shoulder more, it became symptomatic. It is reasonable to conclude the onset of pain in Employee's left shoulder was due to the overuse of that shoulder after the right shoulder work injury, especially since there is no history of documented discomfort with regard to the left shoulder prior to the right shoulder injury and treatment. (*Id*. at 11.)

61) If considered all possible causes for Employee's left shoulder rotator cuff tear that is now symptomatic, the work injury and subsequent treatment to the right shoulder is the more important cause. (*Id*. at 12.)

62) The substantial cause of the need for medical treatment for the pain in the left shoulder is the overreliance on the left shoulder due to the right shoulder injury. (*Id*. at 13.)

63) Dr. Paisley said Employee's left shoulder pain and disability resulted from overuse due to the right shoulder injury. His opinion did not change when he learned Employee first reported left shoulder pain to Dr. Huettl as beginning in May or June of 2017. Dr. Paisley explained rotator cuff injuries are notorious for not presenting immediately and sometimes present in a delayed fashion. At the time of Employee's December 2016 work injury to her right shoulder, she may have sustained a rotator cuff injury to her left shoulder as well. It is not uncommon for the less symptomatic one to present at a later date. (*Id*. at 23-24.)

64) Dr. Paisley recommended Employee be referred for a reemployment eligibility evaluation. He doubted Employee would be able to meet the strength requirements of her CNA job as she would not be able to lift 50 pounds on a regular basis with her right shoulder. Her problems with her left shoulder would add to that and it is reasonable to train her in a different field. (*Id*. at 15-17.)

65) At the hearing on January 27, 2021, Employee testified she was born in Columbia, South America. She completed the 11th grade. She came to Alaska when she was 15 years old and is now a United States citizen. (Employee's hearing testimony, January 27, 2021.)

66) Employee obtained her certified nursing assistant (CNA) credentials about 23 years ago. She worked for Employer for about 10 years. Her duties as a CNA consisted of taking care of on average eight patients a day, including getting them up in the morning, cleaning them up, changing their briefs, showering, helping them put on compression stockings, transferring to wheel chairs, brushing teeth and hair, and taking vital signs. Before nine in the morning, the patients had to be taken to the dining room, where some patients had to be fed. After the patients had eaten breakfast, they had to be taken to the living room. Then they had to be taken to their rooms to change. Some patients were paralyzed from the neck down, so everything had to be done for them. The patients weighed between 100 and 300 pounds. (*Id*.)

67) To move a paralyzed patient from bed to a wheelchair, they used a lift with a sling. Employee usually had to do this by herself, as all the CNA's were so busy. The patients had to be transferred from the bed to the wheelchair and back several times a day, as their briefs were required to be changed every two to three hours. She also pushed patients in their wheelchairs. (*Id*.)

68) Employee worked from seven in the morning until three in afternoon, five to six days a week. Sometimes she had to work double shifts. (*Id*.)

69) From the time she started working for Employer until the work injury on December 24, 2016, Employee had no problems with or any pain at all in her left shoulder. (*Id*.)

70) On December 24, 2016, at about two in the afternoon, Employee had to put a patient back to bed. She brought both the patient in her wheelchair and the transfer lift to the patient's room. When she had everything hooked up, and started to raise the patient up in the lift, she saw the patient start to slide down. Employee used her right arm under the patients arm to pull her up. She then used both her arms to hold the patient up. She called for help and held the patient up on

her own until help arrived. When help did arrive, three people put the patient back to bed. The patient weighed an estimated 170 to 175 pounds. (*Id*.)

71) Although she did not feel pain right away, she did fill out an incident report as the nurse said it had to be filled out that day. (*Id*.)

72) She continued to work for the Anchorage Pioneer Home after the December 24, 2017 incident. The first time she noticed a problem was on the third day after the incident. When she brushed her teeth in the morning her hand hurt and felt weak, and the pain went to her elbow. She did not report it. Although she thought it was due to what happened at work, she thought the problem would go away. She did not think it would be so serious. (*Id*.)

73) Her right shoulder also started to hurt, and the pain worsened, but she continued to work until around January 7th or 8th, 2017, when the nurse told her she needed to see a doctor. (*Id*.)

74) She did go to see Dr. Huettl for the pain in her whole arm. Dr. Huettl treated her and ordered a right shoulder MRI. He referred her to Dr. Paisley when the MRI showed a rotator cuff tear. (*Id*.)

75) Dr. Paisley told her she had a tear in her shoulder and needed surgery, which she did have in the middle of 2017, although she could not remember the exact date. After the surgery, she wore a sling. She participated in therapy, and then later home exercise. She had a lot of pain after the surgery, and although she went to therapy, it only helped a little. (Id.)

76) She had another surgery for "frozen shoulder," but the shoulder was still painful and the therapy was very painful as well. The pain was almost constant until she had the third surgery. (*Id*.)

77) While her right arm was in a sling, she used her left shoulder for everything, except for cooking, which she could not do with one hand. The left shoulder became more painful as she had to use it so much. She told both Dr. Huettl and Dr. Paisley about the pain in her left shoulder. Dr. Huettl sent her for an MRI, which showed a tear in the left shoulder. (*Id*.).

78) She talked with RS Shipman on the telephone regarding reemployment benefits. RS Shipman informed her she did not qualify for reemployment benefits. At that time, Employee still thought she would be able to return to her job of injury. (*Id*.)

79) Employee continued to have a lot of pain in her right shoulder, so she had another MRI, which showed one of the tendons which had previously been repaired was torn again. She was told she would have to have another surgery to repair it. (*Id*.)

80) Interpreter Kris Anderson interpreted for Employee only for the question and answer in factual finding #75 above. (Observation.)

81) She did have the third surgery, after which her right shoulder was still painful for a while. Her left shoulder continued to be very painful. She has to hold her arm close to her body. (Employee's January 27, 2021 testimony, hearing record.)

82) While Employee was going through her surgeries for her right shoulder, she used her left shoulder much more. The pain in her left shoulder came on gradually. (*Id*.)

83) Employee's husband is a roofer, so he does not work when it is snowing. After her injury in December 2016, he drove her to medical appointments. He helped her get dressed, but he did not help with the housework. (*Id*.)

84) Employee's daughter was working part time after Employee's work injury and when she was home she was able to assist her mother in dressing and showering right after the surgery. (*Id*.)

85) Employee took a three week trip with her husband to California to see their son in May of 2017. The pain in her left shoulder had started before the trip to California. (*Id*.)

86) Employee also took a trip to Mexico with her husband as her husband's mother had passed away. She thinks it was in December. Her husband carried her bags for her. (*Id*.)

87) Employee has not seen a physician for her right shoulder or right wrist since January 2020. She does exercises for both her hands and she has a brace to wear on her right hand. She stated she scheduled surgery for her right wrist, but it was cancelled by Dr. Paisley's office. She was told it was cancelled because the bills had not been paid. Employee is waiting for the right wrist surgery to be approved. (*Id*.)

88) Employee has received a $3,000.00 bill for an MRI on her left shoulder and some bills from Dr. Paisley's office that have not been paid. She understands this is why the surgery for her right wrist was cancelled. (*Id*.)

89) Employee only drives when she has to, as it is hard for her to make turns due to the pain and stiffness in her shoulders. (*Id*.)

90) Employee is credible. AS 23.30.122.

91) Alexa Correa, Employee's daughter, was living with her mother at the time of her work injury in December 2016. She was able to observe her mother's ability to use her right and left arms after the injury. She was also able to observe her mother after the first surgery. Alexa took

time off work and stayed home with her mother for about four days to a week. Employee had a lot of pain for the first week and required assistance using the restroom. Then she started physical therapy. She could not drive at that time and also required help opening doors. (Alexa Correa's hearing testimony, January 27, 2021.)

92) Since Employee's right arm was in a sling, she relied on her left shoulder and hand for almost everything. She tried to make coffee, wash dishes, do the laundry, make the bed and pick up things. (*Id*.)

93) After the surgery on her right shoulder, Employee started to complain about the pain in the left shoulder and that it was hard to lift the left shoulder. It was about six months after the first surgery on her right shoulder that Employee started complaining of the pain in the left shoulder. (*Id*.)

94) On January 25, 2021 Employee's attorney submitted his attorney fee affidavit requesting actual attorney fees and costs.. (Attorney fee affidavit, January 25, 2021.)

95) On February 3, 2021 Employee's attorney submitted his amended attorney fee affidavit requesting actual fees and costs. (Amended attorney fee affidavit, February 3, 2021.)

96) On February 11, 2021 Employer submitted its request to hold in abeyance the issue of attorney fees until the board decision on the merits so the appropriate statutory provision might be applied. (Employer's request, February 11, 2021.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . . .
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> (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.
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> . . . .

The board may base its decision not only on direct testimony, medical findings, and other

tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

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

. . . .

Under AS 23.30.120, benefits sought by an injured worker are presumed to be compensable, and the burden of producing substantial evidence to the contrary is placed on the employer. *Miller v. ITT Arctic Services*, 577 P2d 1044 (Alaska 1978). 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 v. Best Western Golden Lion Hotel,* 813 P.2d 286, 292 (Alaska 1991).

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 it is determined the employer has produced substantial evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

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

must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

A fundamental principle in workers' compensation law is the "eggshell skull doctrine," which states an employer must take an employee "as he finds him." *Fox v. Alascom, Inc.*, 718 P.2d 977, 982 (Alaska 1986), citing *S.L.W., v. Alaska Workmen's Compensation Board*, 490 P.2d 42, 44 (Alaska 1971); *Wilson v. Erickson,* 477 P.2d 998, 1000 (Alaska 1970). A pre-existing condition does not disqualify a claim if the employment aggravated, accelerated or combined with the pre-existing condition to produce the disability or need for medical treatment for which compensation is sought. Under the Act, there is no distinction between the aggravation of symptoms and the aggravation of the underlying condition. *DeYonge v. NANA/Marriott*, 1 P.3d 90, 96 (Alaska 2000); *Peek v. SKW/Clinton*, 855 P.2d 415, 416 (Alaska 1993).

In *City and Borough of Juneau v. Olsen*, AWCAC Decision No. 11-0185 (August 21, 2013), the commission explained the application of "the substantial cause" in cases where a work injury "aggravates or accelerates" or "combines" with a preexisting condition. When an employee asserts a work injury caused the aggravation or acceleration of a preexisting condition, the board must evaluate the relative contribution of both the preexisting condition and the work injury. To establish causation, the employee must show the work injury played a greater role in the disability or need for medical treatment than did the preexisting condition. *Olsen,* 17-18. When an employee asserts his disability or need for medical treatment arose as a result of a combination of his work injury and a preexisting condition, the employee must establish two additional facts to prevail, first, that the disability or need for treatment would not have happened "but for" the work injury, and second that reasonable persons would regard the work injury as the substantial cause of the disability or need for medical treatment. *Olsen,* 18-19.

In *Tinker v. Veco, Inc.*, 913 P.2d 488 (1996), a worker with a long-standing diabetic foot condition suffered frostbite and a blister on his right foot while at work. His right foot became infected, as did his left foot. He returned to work, and injured his left ankle when he slipped on ice. He was diagnosed with Charcot arthropathy, and underwent surgery on both feet. He returned to work again, but was evacuated after becoming ill with food poisoning. His left leg

was later amputated below the knee, and he filed workers' compensation claims. The board held the Employee had failed to timely notify the Employer of the frostbite injury, and rejected that claim. The board also found he had failed to prove his claims related to the fall and the food poisoning. The Supreme Court affirmed the board as to the fall and the food poisoning, but determined the Employee's failure to give timely notice of the frostbite injury was excusable. The Court remanded to the board for further consideration, noting: "Tinker's diabetes would not have barred his compensation claim, so long as the injury he received on the job aggravated, accelerated, or combined with his medical condition in a manner that resulted in the loss of the leg." *Id.*, footnote 2.

DeYonge held a temporary, symptomatic worsening constitutes an injury. Preexisting conditions do not disqualify a claim under the work-connection requirement if the employment injury aggravated, accelerated or combined with the preexisting infirmity to produce the disability for which compensation is sought. So long as the work injury worsened the injured person's symptoms, the increased symptoms constitute an aggravation, "even when the job does not actually worsen the underlying condition." *Id*. at 96.

In *Morrison v. Alaska Interstate Construction, Inc*., 440 P.3d 224 (Alaska 2019), the Alaska Supreme Court for the first time construed AS 23.30.010(a) and its relationship to the *DeYonge* doctrine and the "last injurious exposure rule." *Morrison* found the legislature did not abrogate the *DeYonge* rule when it amended the coverage statute in 2005. It held the Commission's inquiry improperly focused on what qualifies as an injury, "which is not how the legislature chose to reduce the number of potentially compensable claims." *Id*. at 233. Interpreting AS 23.30.010(a), *Morrison* held the board decides whether "the employment" was "the legal cause," *i.e.*, "a cause important enough to bear legal responsibility for the medical treatment needed for the injury," by looking at the "*causes* of the injury or symptoms" rather than considering the injury type. *Id*. at 233-234; emphasis in original.

Morrison held AS 23.30.010(a) is not complex and requires the board to consider different causes "of the benefit sought" and the extent to which each contributed to the need for the specific benefit. The board must then identify one cause as "the substantial cause," meaning, the

cause which "is the most important or material cause related to that benefit." Based on legislative history, Morrison found the legislature did not intend to require that the substantial cause be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." The comparison made is "among the causes identified, not in isolation or in comparison to an abstract idea." It is a "flexible" and "fact dependent" determination. (*Id*. at 237-238). *Morrison* held the board has the right and responsibility to interpret evidence and draw its own inferences. (*Id*. at 239). Finding no error, *Morrison* reversed the Commission and remanded the case with instructions to reinstate the board's award. (*Id*. at 240).

Traugott v. ARCTEC Alaska, 468 P.3d 499 (Alaska 2020) held the new causation standard in AS 23.30.010 required the board to identify factors contributing to the disability and need for medical treatment and decide which among them was the most material or important one. *Id*. at 514. *Traugott* held "the statute permits the board to determine which cause among all those identified is the most important or material cause of the current disability and need for medical treatment, even if an expert does not regard it as having more than 50% responsibility for the condition." *Id*. at 511, citing *Morrison*. The board, and not a medical expert, is required to consider the possible cause of an employee's disability and need for medical treatment and determine which of the possible causes is the most important in causing the disability and need for medical care. And the board, not a medical expert, is charged with determining legal responsibility. The board as the fact finder has the authority to interpret an expert's opinion and decide what weight to give it. (*Id*. at 514).

> **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.
> . . . .

> **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 finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision No. 087 (August 25, 2008).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . . .
>
> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.
>
> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job . . . for
>
> (1) the employee's job at the time of injury; or
>
> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury . . . .
>
> (f) An employee is not eligible for reemployment benefits if
> . . . .
>
> (4) at the time of medical stability, no permanent impairment is identified or expected.
> . . . .

The legislature granted the RBA authority to decide in the first instance issues related to reemployment preparation benefits, including approving a request for an eligibility evaluation and ultimately deciding whether an injured worker is eligible for rehabilitation and reemployment benefits. *Meza v. Alyeska Seafoods, Inc.*, AWCB Decision No. 89-0207 (August 14, 1989). The RBA's decision must be upheld absent an abuse of discretion on the administrator's part. The Alaska Supreme Court describes abuse of discretion as "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to properly apply controlling law, or follow its own regulations, may also be considered an abuse of discretion. *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1013 (Alaska 2009); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

Discretion to determine which of several competing medical opinions to give greater weight lies with the RBA when a reemployment eligibility determination is made. *Irvine v. Glacier General Construction*, 984 P.2d 1103 (Alaska 1999). On appeal from the RBA-Designee's eligibility decision, the board will affirm the decision if it is supported by substantial evidence. *Yahara v. Construction & Rigging, Inc*., 851 P.2d 69 (Alaska 1993).

An employee must satisfy several tests to be eligible for reemployment benefits. Among these are tests which render an employee "ineligible" if not met. AS 23.30.041(f). In *Rydwell v. Anchorage School District*, 864 P.2d 526 (Alaska 1993), the Alaska Supreme Court affirmed the superior court's denial of an employee's entitlement to reemployment benefits because the employee had no ratable PPI under the AMA guidelines. *Rydwell* stated an employee may start vocational rehabilitation before reaching medical stability, based upon a physician's prediction of physical capacities. However, "once the employee has reached medical stability," he or she must have a PPI rating calculated under the applicable statute and AMA guidelines. An employee receiving a zero percent PPI rating is ineligible for reemployment benefits. *Id.* at 531.

Where the RBA designee's findings are not supported by substantial evidence in light of the record as a whole abuse of discretion can be established. AS 44.62.570. "If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support

a conclusion, then the order . . . must be upheld." *Id.* Whether the quantum of evidence is substantial enough to support a conclusion, in the contemplation of a reasonable mind, is a question of law. *Lynden Transport v. Mauget*, AWCAC Dec. No. 154 at 8 (June 17, 2011); *McGahuey v. Whitestone Logging, Inc.*, AWCAC Dec. No. 054 at 6 (August 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)). If the RBA's decision is not supported by substantial evidence, the RBA designee abused her discretion and the case is remanded for reexamination and further action. *Mauget* at 12 (failure to apply controlling law); *McGuey* at 11 (incomplete decision or record).

Both the RBA designee's eligibility determination, and the board's decision on review, must be made on a complete record.

Interior Towing & Salvage v. Gracik, AWCAC Decision No. 16-0120 (September 5, 2017) at 8, stated, "Having found the RBA did not abuse her discretion, according to AS 23.30.041(d), the board had no option but to affirm the decision or remand the matter for her to consider the new evidence." *Gracik* held AS 23.30.041(d) does not give the board any authority to make its own decision once it determines the RBA-Designee has not abused her discretion. In that case, the board's only recourse was to remand the decision back to the RBA-Designee to consider the new information. *Gracik* reasoned the RBA-Designee was not afforded the opportunity to review all evidence and, thus to perform her job effectively. *Id.* at 9. *Gracik* said the proper course of action was for the matter to be remanded to the RBA-Designee so the competing opinions of Gracik's treating physician and the doctor who performed a PPI rating could be properly considered by the RBA-Designee and, "ultimately, the decision as to which doctor's opinion is the better weighted and more considered is up to the RBA in her discretion." *Id.* at 10.

However, *Zastrow-Yanagida v. Midnight Sun Smiles*, AWCB Decision No. 18-0041 (April 20, 2018), distinguished *Gracik* because in *Zastrow-Yanagida* two competing opinions regarding the employee's PPI rating did not exist. The only medical opinion in *Zastrow-Yanagida* was the employee had a zero percent PPI rating. Thus, the PPI issue did not require the RBA-Designee's expertise and the case did not need to be remanded for further action.

Similarly, in *Municipality of Anchorage v. Faust*, AWCAC Decision No. 078 (May 22, 2008) at 11, an injured worker argued that a remand to the RBA-designee might result in a different outcome in his case. Disagreeing with this assertion, *Faust* said:

> . . . [I]t does not follow that the administrator's error requires a remand for administrator consideration. A remand is not required when it is certain that the outcome would not change. . . . Faust failed to demonstrate that the administrator's consideration of the circumstance could possibly result in a different outcome.

That being the case, *Faust* held, "A remand to the administrator in such circumstances is futile."

Kirby v. Alaska Treatment Center, 821 P.2d 127, 129 (Alaska 1991), held the statutory presumption of compensability applies to any benefit claim and said:

> In keeping with these decisions, we find that the presumption applies as well to claims for vocational rehabilitation. When an injured employee raises the presumption, the burden shifts and the employer must produce substantial evidence to rebut the presumption. If the employer produces substantial evidence, the presumption drops out and 'the employee must prove all the elements of his case by a preponderance of the evidence' (citations omitted). Thus, we presume that Kirby is eligible for vocational rehabilitation benefits and place the burden upon ATC to produce substantial evidence to the contrary.

The AS 23.30.120(a) presumption of compensability applies to an employee's eligibility for reemployment benefits. *Rockney v. Boslough Constr. Co.*, 115 P.3d 1240, 1243-44 (Alaska 2005) ("[W]e have applied the presumption to any disputes over the employee's eligibility for benefits, including eligibility for reemployment benefits." (Footnotes omitted.)). Relying on this precedent, the commission in *Municipality of Anchorage v. Mahe*, AWCAC Decision No. 129 (March 16, 2010) at 4, noted the presumption is "not irrebutable" and said:

> The presumption of eligibility may be rebutted by substantial evidence that, standing alone and not assessed not assessed for its credibility, would eliminate a required element of eligibility or affirmatively establish non-eligibility. .

> **AS 23.30.130. Modification of awards.**
> (a) Upon its own motion, or upon the application of any party in interest on the

> ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

Right to review under AS 23.30.130(a) occurs upon a party's petition when there is a change of condition, including a mistake in a factual determination. AS 23.30.130 is applied to changes in condition affecting reemployment benefits and vocational status. *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619 (Alaska 2007).

> **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 . . . . 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.

> **8 AAC 45.180. Costs and attorney's fees**. . . .
> . . . .
>
> (b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. . . . An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed. . . .

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id.* at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id.* at 973, 975.

Rusch v. Southeast Alaska Regional Health Consortium, 453 P.3d 784 (Alaska 2019), held the AS 23.30.120 presumption does not apply to attorney fee amounts or reasonableness. It further held the board must consider all factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee and either make findings related to each factor or explain why that factor is not relevant. *Rusch* held attorney fee reasonableness is not a factual finding but is a discretionary exercise.

Childs v. Copper Valley Electric Ass'n, 860 P.2d 1184, 1190 (Alaska 1993), cited AS 23.30.145 and distinguished it from Civil Rule 82, noting AS 23.30.145 provides "attorney's fees in workers' compensation cases should be fully compensatory and reasonable, in order that injured workers have competent counsel available to them." Fees incurred on lost, minor issues will not be reduced if the employee prevails on primary issues. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011).

> **AS 23.30.395. Definitions**.
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> . . . .
>
> (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. **What is the substantial cause of Employee's disability and need for medical treatment for her left shoulder?**

The cause of Employee's disability and need for medical treatment is a factual issue subject to the presumption analysis. Relevant to the presumption analysis in the instant case is the "eggshell doctrine," under which the employer takes an employee as he finds him. It is unknown whether Employee's left shoulder rotator cuff tear pre-existed the December 24, 2016 work injury. In any case her left shoulder pain and other symptoms and disability may be compensable if the right shoulder and wrist injury aggravated, accelerated, or combined with the pre-existing condition leading to Employee's disability and need for medical treatment. *Fox*; *DeYonge*; *Olsen*; *Morrison*. If the pre-existing pathologies are ultimately found to be the substantial cause of the disability or need for medical treatment, then Employer would prevail. AS 23.30.010(a).

At the first step of the analysis, Employee is required to show a preliminary link between her left shoulder symptoms and disability and the employment. At this stage neither credibility nor the weight of the evidence is considered. Employee successfully raised the presumption through her testimony she had to rely on her left shoulder and upper extremity during the time her right shoulder and wrist were disabled due to the work injury and subsequent treatment, which caused her left shoulder to become symptomatic. Dr. Heuttl and Dr. Paisley's opinions the left shoulder symptoms and need for medical treatment were caused by the overuse of the left upper extremity necessitated by the disability of the right shoulder and right wrist CTS, which were caused by the work injury, also raises the presumption.

Because Employee raised the presumption, Employer must rebut it and may do so with substantial evidence that either: (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability; or (2) directly eliminates any reasonable possibility employment was a factor in causing the disability. *Huit*. Substantial evidence is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller*. Again, neither credibility nor the weight of the evidence is considered at the second step. Employer rebutted the presumption with the EME physician Dr. Craven's opinion Employee's age, genetics and the process of degeneration of the rotator cuff were the substantial cause of

Employee's left shoulder disability and need for medical treatment. *Huit*; *Kramer*; *Tolbert*; *Norcan*.

SIME physician Dr. Curran's opinion does not rebut the presumption, as he simply stated the left shoulder osteoarthritis acromioclavicular joint, mild labrum degeneration, and supraspinatus test were not causally related to the work injury. Dr. Curran did not address whether Employee's left shoulder disability and need for medical treatment were causally related to the work injury. Dr. Curran did not explain his opinion, nor did he provide an alternative explanation excluding work-related factors as a substantial cause or directly eliminate any reasonable possibility employment was a factor in causing the disability. *Huit.*

As Employer rebutted the position, the analysis proceeds to the third step, where Employee must prove by a preponderance of the evidence employment was the substantial cause of her disability and need for medical treatment. In making this determination, credibility is considered, the evidence weighed, and the relative contribution of other causes is considered. *Norcon*; *Olsen.*

Dr. Huettl and Dr. Paisley's causation opinions are given the most weight. Dr. Huettl treated Employee's right shoulder from January 7, 2017 and ongoing until February 2020. He found the left shoulder disability and need for medical treatment were caused because Employee used her left arm for everything after her right shoulder and CTS injury and surgeries. Her left shoulder had started to be painful in May or June of 2017, 5 to 6 months after the work injury and 2 to 3 months after her first right shoulder surgery on March 2, 2017. Dr. Huettl was a constant medical provider for Employee's right shoulder and CTS and left shoulder concerns. He observed the consequences of Employee's inability to use her right upper extremity on her left shoulder and the progression of her left shoulder pain and impairment. No other provider has followed Employee as closely as Dr. Huettl and for this reason, his causation opinions are entitled to greater weight than Dr. Craven's. *Morrison*; *Moore*.

Dr. Paisley is an orthopedic surgeon with specialties in shoulder and elbow surgery. He has treated Employee since February 2017 and performed her three right shoulder surgeries. Dr. Paisley opined it is not atypical for a person to go through a traumatic event and lose mobility in

one shoulder, then during the recovery period have the contralateral shoulder become much more symptomatic, sometimes even more so than the shoulder that was operated on. He also stated it was not possible to tell by reviewing Employee's September 5, 2017 left shoulder MRI whether the left rotator cuff tear pre-existed the December 24, 2016 work injury, or whether it occurred during the work injury itself. He explained it would not be uncommon for the less symptomatic shoulder to present with symptoms at a later date as rotator cuff injuries are notorious for presenting in a delayed fashion. Dr. Paisley's explanation also coincides with the damage in the left shoulder MRI being much less with the right shoulder MRI. Dr. Paisley also stated it is very well known a certain set of the population has asymptomatic rotator cuff tears. Once they have to use that extremity more, it can become symptomatic. He opined it is reasonable to conclude Employee's left shoulder pain was due to the overuse of that shoulder after the right shoulder injury, especially as there was no documented history of left shoulder discomfort prior to the right shoulder work injury and treatment. If one took all the possible causes for Employee's left shoulder rotator cuff that is now symptomatic, the work injury and subsequent treatment to the right shoulder is the more important cause according to Dr. Paisley. Dr. Paisley's opinion is given more weight than Dr. Craven's. *Morrison; Moore*. Dr. Paisley's orthopedic specialty includes shoulders and he based his opinion the substantial cause of Employee's disability and need for left shoulder medical treatment is her right shoulder injury and treatment. Dr. Paisley's expertise in shoulders and his review and comparison of the MRIs of Employee's right and left shoulders provides an individualized causation analysis and assessment, which is more reliable than merely determining causation based upon statistical data from research studies. *Id.*

Dr. Craven opined the substantial cause of Employee left shoulder disability and need for medical treatment was her age, genetics, and the natural process of degeneration of the rotator cuff. Dr. Craven supported his opinion work was not the substantial cause of Employee's left shoulder disability and need for medical treatment, with studies that showed in individuals in Employee's age group, up to 20 to 25 percent will have asymptomatic rotator cuff tears. Of that 20 to 25 percent, 30 percent will go on to become symptomatic over a three year period, irrespective of external factors. Based upon these statistics, only 7-8 people out of 100 with asymptomatic rotator cuff tears subsequently went on to be symptomatic over three years' time and Dr. Craven relied upon these studies to determine Employee's additional dependence on her

left upper extremity due to the work injury could not be the substantial cause of her need for medical treatment or disability. Based on the statistics quoted by Dr. Craven himself, it is much more likely Employee was not among those who had an asymptomatic rotator cuff which subsequently became symptomatic with the passage of time. Even if the 30 percent statistic included all individuals, not just the 20 to 25 percent of those in Employee's age group with asymptomatic rotator cuff tears, it is still much more likely it was not merely the passage of time which caused Employee's left shoulder disability and need for medical treatment. Second, although Dr. Craven acknowledged the extra use required by the left upper extremity after Employee's right shoulder and right wrist work injuries may have caused pain, he opined this extra use could not be the substantial cause of that pain. He opined many of the activities Employee performed with her left shoulder and upper extremity after the right shoulder surgery are usually two-handed activities and Employee would have been using the left upper extremity to perform them in any case. Dr. Craven maintained there would have had to have been unusual force placed on the left upper extremity, such as working as a carpenter doing overhead work for three months, before the work injury and the inability to use the right upper extremity could be considered the substantial cause of the left shoulder disability and need for medical treatment. His opinion did not acknowledge the degree to which Employee's dependence entirely on her left upper extremity to perform activities of daily living would, based on common experience, cause an extra strain. *Rogers & Babler*.

When determining whether the disability and 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 the need for medical treatment. Employee's age, genetics, and preexisting degeneration of the left shoulder joint, whether that included a preexisting asymptomatic rotator cuff tear or not, are significant factors in her disability and need for medical treatment. However, based Dr. Huettl and Dr. Paisley's opinions, as well as the board's own knowledge and experience, Employee has demonstrated by a preponderance of the evidence the substantial cause of her disability and need for medical treatment for her left shoulder was the December 24, 2016 work injury with Employer. *Morrison.*; *Traugott*; *Moore*; *Rogers & Babler.*

2. Is Employee entitled to relief from the RBA-Designee's decision finding her not eligible for reemployment benefits?

On July 17, 2017, the RBA designee determined Employee was not eligible for reemployment benefits based on PA Wonchala's June 16, 2017 prediction she would have the permanent physical capacities to perform the physical demands of her job of injury. Employee requested a reemployment eligibility evaluation for reemployment benefits in her November 13, 2017 workers' compensation claim.

The RBA designee's determination is reviewed under an abuse of discretion standard. AS 23.30.041(d). The RBA designee's failure to apply controlling law may constitute abuse of discretion. *Smith*. In addition to a physician's prediction Employee would not have the permanent physical capacities to return to work held in previously held occupations, there must be a prediction Employee will have a permanent partial impairment for Employee to be eligible for reemployment benefits. AS 23.30.041(e)(1),(2); *Rydwell*. Both statutory requirements must be met. *Id*. Neither of these two statutory requirements was met at the time of the RBA designee's July 17, 2017 determination Employee was not eligible for benefits. The RBA designee properly applied controlling law in her finding Employee was not eligible for reemployment benefits. Thus she did not abuse her discretion. *Smith*.

However, the circumstances have changed substantially since the RBA designee's July 17, 2017 determination of ineligibility. Employee's claim for reemployment benefits is entitled to the presumption of compensability. *Rockney*; *Mahe*; *Kirby.* There is no disagreement amongst the physicians Employee has a permanent impairment caused by the work injury. Dr. Craven agrees with the 14 percent rating given by Dr. Barrington for Employee's right shoulder injury.

Employee raises the presumption she is entitled to reemployment benefits with Dr. Huettl and Dr. Paisley's opinions she does not have the physical capacity to return to her CNA job of injury and also the only job she's held in the 10 years prior to her injury.

To rebut the presumption Employee is entitled to reemployment benefits, Employer must produce substantial evidence that eliminates a required element of eligibility or affirmatively

establishes non-eligibility. *Mahe.* There is no question Employee's right shoulder has a permanent impairment. Therefore, to rebut the presumption, Employer must produce substantial evidence Employee has the permanent physical capacities to return to her CNA job. Dr. Craven said he is unable to determine if Employee has the physical capacity to return to her CNA job. To offer an opinion, he said he needed performance-based functional capacity evaluation results. The only opinion in the record Employee has the physical capacity to perform CNA duties was given prior to Employee's second and third right shoulder surgeries and CTS diagnosis and have been modified. Employer is unable to rebut the presumption Employee is entitled reemployment benefits. But even if it was able to rebut the presumption, Employee is able to prove her entitlement by a preponderance of the evidence.

Employee has not recovered as expected after her March 2, 2017 surgery and has had two additional right shoulder surgeries. She was also diagnosed with carpal tunnel syndrome in her right wrist. In addition, SIME physician Dr. Curran opined Employee would not be able to return to her job at the time of injury and also that she would have a permanent impairment. On October 28, 2019, Dr. Barrington rated Employee's right shoulder and right carpal tunnel syndrome as a 16 percent whole person impairment. Her left shoulder was rated at an 11 percent whole person impairment making her total whole person impairment 27 percent. In his October 7, 2020 supplemental EME report, physician Dr. Craven agreed with Dr. Barrington's 14 percent PPI rating for Employee's right shoulder. On January 20, 2021, Dr. Paisley also opined Employee would not have the permanent physical capacity to return to her job as a CNA.

Employer contends Employee did not timely request review within 10 days of the RBA designee's July 17, 2017 decision. While that is true, Employee is requesting modification and did so timely. Employer continues to pay Employee TTD benefits. AS 23.30.130. Further, contrary to Employer's assertion, within 10 days after the determination Employee did not have a prediction she would have a PPI rating and no physician had yet opined Employee would not have the permanent physical capacity to return to her job of injury. Therefore, the evidence of her continuing medical difficulties within the 10 day limit would not have justified a request for review.

Employee is entitled to modification of the determination she was not eligible for reemployment benefits. AS 23.30.130. A remand is not required when it is certain that the outcome would not change. *Faust*; AS 23.30.001. Employer failed to demonstrate that the RBA designee's consideration of the circumstances could possibly result in any outcome other than Employee is eligible for reemployment benefits. *Id.*

3) Is Employee entitled to attorney's fees and costs?

Employee requests actual attorney fees of $31,456.25 and $2,328.60 in costs. At the hearing's conclusion, the record was held open for Employee's attorney's supplemental fee affidavit and Employer's objections, if any, to Employee's attorney fees and costs. Employer had until February 16, 2021 to file its objections, if any. However, on February 11, 2021, Employer filed a request to hold the issue of attorney fees in abeyance until 10 days after the board's decision on the merits of Employee's claims. Employer contended a decision on Employee's claim's merits is necessary in order to apply the appropriate statutory provision. However, Employee's attorney stated in his hearing brief he was requesting actual attorney fees, so this issue was not be held in abeyance.

Attorney fees may be awarded when an employer resists the payment of compensation or medical and related benefits and if an attorney is successful in prosecuting the employee's claim. AS 23.30.145; *Childs*. Employee prevails on her claims for medical costs, transportation costs, temporary total disability, interest, permanent partial impairment, and reemployment benefits. This permits an award actual attorney's fees under AS 23.30.145(b). Employee's attorney filed an affidavit itemizing the hours expended as well as the extent and character of the work performed. 8 AAC 45.180(b). *Rusch* requires the eight factors in Alaska Rule of Professional Conduct 1.5(a) be considered when determining a reasonable fee. The case dealt with causation and compensability of Employee's left shoulder disability and need for medical treatment, eligibility for reemployment benefits and permanent partial impairment benefits beyond the 14 percent Employer has already paid for the right shoulder. Compensability depends on complicated legal concepts and complex facts. Employee's brief and arguments at hearing were very helpful. Employee's attorney has practiced law for more than 40 years, most of it involving workers' compensation cases. His work for Employee in this case would have limited his ability

to take on additional cases. Other Alaska attorneys with similar experience have been awarded $450 per hour. Employee's attorney did not identify any time limitation imposed by his client or the circumstances, nor did he explain how the length of the professional relationship would affect the fee. Employee prevails on her medical and transportation costs and interest claims, as well as her claim for reemployment benefits, which are of substantial value. Given Employee's attorney's experience and the contingent nature of employee attorney work, the hourly rate of $400 and then $425 beginning March, 2019 is appropriate.

Employee seeks $31,456.25 in legal fees and $2,328.60 in costs, for a total of $33,784.85. Considering the benefits obtained and the time expended, Employee is entitled to $31,456.25 in fees and $2,238.60 in costs which is reasonable considering the significant benefits he has obtained for Employee and is a fully compensatory amount. AS 23.30.145(b); *Bignell*; *Childs*.

CONCLUSIONS OF LAW

1) Employee's employment with Employer is the substantial cause of her left shoulder disability and need for medical treatment.
2) Employee is entitled to relief from the RBA designee's decision finding her not eligible for reemployment benefits.
3) Employee is entitled to actual attorney fees and costs.

ORDER

1) Employee's December 24, 2016 work injury with Employer was the substantial cause of her subsequent disability and need for medical treatment of her left shoulder.
2) Employee is entitled to medical and transportation costs, TTD, and interest on any late paid benefits.
3) Employee is entitled to future medical treatment for her left shoulder and right CTS.
4) Employee is entitled to a PPI rating when her left shoulder and right CTS are medically stable.
5) Employee is eligible for reemployment benefits.

6) Employer shall pay attorney fees and costs to Attorney Joseph Kalamarides, in the amount of $33,784.85.

Dated in Anchorage, Alaska on April 5, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Judith A DeMarsh, Designated Chair

/s/
Robert Weel, Member

/s/
Bronson Frye, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all

other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of MARTHA L. CORREA, employee / claimant v. STATE OF ALASKA, self-insured employer; defendant; Case No. 201700660; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on April 5, 2021.

/s/
Nenita Farmer, Office Assistant