ALASKA WORKERS' COMPENSATION BOARD

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

CHERYL L. RAPP, Employee, Claimant, v. CHUGACH ELECTRIC COMPANY, Self-insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 202128184 AWCB Decision No. 23-0004 Filed with AWCB Anchorage, Alaska on January 13, 2023

Cheryl L. Rapp's (Employee) March 24, 2022 claim for workers' compensation benefits was heard on September 13, 2022, in Anchorage, Alaska, a date selected on July 18, 2022. A June 3, 2022 Affidavit of Readiness for Hearing gave rise to this hearing. Employee appeared telephonically, represented herself and testified. Attorney Michael Budzinski appeared and represented self-insured Chugach Electric Company (Employer). Rachel Frison testified on Employer's behalf. The record closed on October 6, 2022, after the parties provided additional documentation to the Division at the designated chair's request.

ISSUES

Employee contends she was exposed to COVID-19 in her workplace by an unvaccinated co-worker and subsequently contracted COVID-19, which required her to miss work. She contends she is entitled to temporary total disability (TTD) benefits.

Employer contends Employee's COVID-19 illness was not an "occupational disease" within the meaning of the Alaska Workers' Compensation Act (the Act), and she is not entitled to benefits related to her August 2021 COVID-19 infection.

1) Is Employee entitled to TTD benefits for a workplace illness?

Employee requests an order finding Employer frivolously or unfairly controverted her right to benefits for her COVID-19 illness.

Employer contends Employee is not entitled to a "frivolous or unfair" finding because Employee's condition did not meet the statutory definition of an "injury" under AS 23.30.395(24). It further contends there was evidence showing Employee's COVID-19 was not substantially caused by her employment because Employee's work created no higher risk of contracting COVID-19 than exists in employment in general, and her reported timeline did not coincide with a work exposure.

2) Was Employer's controversion frivolous or unfair?

FINDINGS OF FACT

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

1) On May 11, 2020, Employee while working for Employer requested and was granted an accommodation for reassignment based on her underlying medical conditions and the COVID-19 pandemic. She was reassigned to an empty conference room in a warehouse across the street from Employer's main office. While reassigned, Employee performed customer service-related tasks via the telephone. (Prehearing Brief of Employee, September 7, 2022; Employee).

2) On April 15, 2021, Employee filed a new accommodation request because Employer would be moving employees back to the main campus building. She provided a note from Catherine Kilby, MD, which stated, "Accommodation for Covid mitigation due to underlying risk factors making a severe complication more likely. Given close quarters in call center & customer contact @ front desk & unknown vaccination status of co-workers recommended she remain in warehouse." (Prehearing Brief of Employee, Exhibit B, September 7, 2022).

3) In May 2021, Employee was directed to return to the main campus building. Based on her accommodation requests, she and two other employees were placed in a separate area apart from the main work and public access areas on the main campus with cubicles dividing their respective workspaces. (Prehearing Brief of Employee, September 7, 2022; Employee).

4) On August 5, 2021, Employee received notification from a co-worker that the co-worker in her accommodated space had tested positive for COVID-19. (Prehearing Brief of Employee, September 7, 2022; Employee).

5) When asked if she had contact with the infected co-worker on the day prior to that worker's positive COVID-19 test, Employee stated she was exposed to co-worker "Jenny" for several days before August 5, 2021, when Jenny was "coughing and sneezing" and said she had "allergies." They were "working on a project together." Employee said she was exposed to Jenny the "first week of August, but prior to the 5th." She did not have contact with Jenny on the fifth. Employee testified regarding seeing Jenny on August 4th, "Yes, I believe I didn't see her -- she didn't say anything, and then when I got back from lunch I think I realized, gee, Jenny never said anything and she's not here. She must have left. . . ." Employee further explained with respect to August 4th, when Jenny was only present for about 2.5 hours, "yeah, that's the -- that's the day that she was exhibiting symptoms and left, but she was exhibiting symptoms for several days prior to that day." When asked if August 4, 2021 was the "the last day" she was "exposed to [Jenny]," Employee said, "That is correct." Employee's first COVID-19 symptoms started on Friday, August 13, 2021, in the afternoon; these included "coughing, sore throat" and she thought perhaps it was her allergies. A test that day was negative for COVID-19. Employee's symptoms progressed over the weekend and on Monday, August 16, 2021, she lost her sense of smell and retested on August 17, 2021; the August 17, 2021 test was positive for COVID-19. Her safety manager Marty Freeman told her the soonest she could return to work was August 30, 2021. Freeman based this instruction on Center for Disease Control (CDC) recommendations in effect at that time. Employee took vacation time "because [she] was sick." She did not feel well enough to return to work on August 30, 2021, so that is when she used up her vacation. Other than working, Employee did "minimal" grocery shopping about once "every two weeks" but "always with a mask." She attended church services online. Employee explained she had no in-person contact at relevant times with any local relatives, including those who had COVID-19. She was "so afraid of getting COVID" that she went to work, and the grocery store as stated, and

otherwise stayed home. Employee occasionally went for a walk with a friend in the park but they both wore masks. (Deposition of Cheryl Rapp, July 5, 2022).

6) On August 19, 2021, Employee saw Dr. Kilby via telehealth, who stated: "Pt tested positive for Covid on testing done Tuesday 8/17/21. Started with symptom of cough last week, tested Friday for Covid and negative. Planned to stay home until Wednesday but on Monday night she lost her smell and Tuesday re-tested for Covid. Wednesday am received test result. Staying home." (Medical Summary, June 28, 2022).

7) On August 24, 2021, Employee had a follow-up telehealth appointment with Dr. Kilby, who noted: "(Employee). . . felt as though she markedly improved over the weekend. Still fatigued and sleeping a lot. A little cough still but clearly improved." (Medical Summary, June 28, 2022).

8) On November 15, 2021, Employee filed an injury report for her August 17, 2021 COVID-19 infection. (First Report of Injury, November 15, 2021).

9) On November 22, 2021, Employer denied Employee's claim and controverted "all benefits," citing two grounds: (1) "There is no evidence to support the employee's claimed exposure to COVID was substantially caused by her employment," and (2) "Per AS 23.30.395(24) the employee's condition does not meet the statutory definition of and [sic] "injury." (Controversion Notice, November 22, 2021).

10) The November 22, 2021 Controversion Notice was not found in Employee's agency file; the designated chair obtained a copy from the parties after the hearing. (Agency file).

11) On March 29, 2022, Employee claimed TTD benefits and an unfair or frivolous controversion. She contended she "was required to work with an unvaccinated employee despite having HR accommodation for high risk of adverse effects of COVID. All 3 of us were placed in an accommodation area but I did not know until after co-worker was diagnosed with COVID that she was unvaccinated, and we were all working together unmasked breathing same air. Had successfully avoided COVID until then. HR & Safety depts. did not notify me I had been exposed." (Claim for Workers' Compensation Benefits, March 24, 2022).

12) On April 15, 2022, Employer through its claims examiner disputed the TTD benefits claim and unfair or frivolous controversion finding request, stating: "There is no evidence to support employee's claimed exposure to COVID was substantially caused by her employment. Per AS

23.30.395(24) employee's condition does not meet the statutory definition of an "injury." (Answer to Employee's 3/24/2022 Workers' Compensation Claim, April 15, 2022).

13) There is no post-claim controversion found in Employee's agency file. (Agency file).

14) At hearing on September 13, 2022, Employee testified her injury was work-related and compensable. She relied on documentary evidence from the CDC that COVID-19 symptoms may appear two to 14 days after exposure to the virus. Employee said she was exposed to COVID-19 by her co-worker on August 4, 2022, and was notified of her co-worker's positive COVID-19 test on August 5, 2022. She contended she did not interact with any person except her co-workers prior to her exposure. Employee testified she tested positive for COVID-19 13 days after exposure to her co-worker and contended she is entitled to compensation for the time she was required to miss work because of her positive COVID-19 test. She testified her allergy-related asthma, obesity, prior pneumonia, chronic bronchitis, and diabetes placed her at higher risk for an adverse outcome should she acquire COVID-19. While Employee often became ill from common viruses while at work, in her view COVID-19 was "different" because she was required to work next to at least one person who was not vaccinated. She agreed COVID-19 was generally present in the community at large. However, Employee said given her high risk she was supposed to have been given an accommodation but was required to work next to a co-worker who remained unvaccinated, which created a higher risk of infection. She testified not only was her co-worker unvaccinated, that worker did not tell her she was unvaccinated and eventually came to work infected with COVID-19. Employee said the purpose behind her accommodation was to protect her from co-workers and the public. Unlike other employees, Employee could not work from home. She agreed employees coming to work sick was and is a common experience. Employee and her co-workers normally did not wear masks in the accommodated area. She contended there was a higher risk of infection at work because Employer had no COVID-19 vaccination requirement, and a high percentage of her co-workers were not vaccinated. She distinguished between a common cold and the COVID-19 pandemic, which she implied was much more serious. Employee at times wore a mask at work, but it was not easy to speak on the telephone to customers while wearing a mask. She recalled one co-worker who coughed every 10 minutes, was found to have pneumonia, was sent home, and later passed away. Employee was told this co-worker did not have COVID-19. It was unclear from Employee's testimony the dates she claims she was disabled because of her COVID-19 infection,

and for which she claimed TTD benefits. She relies primarily on CDC information attached to her hearing brief, which sets forth the time during which a person can develop symptoms after first contact with the COVID-19 infected person. (Prehearing Brief of Employee, September 7, 2022; Employee).

15) At hearing, Employer's human resources person Frison testified at the time Employee claimed her exposure to COVID-19 at work, Employer "mimicked" CDC guidelines. She said Employer did not know Jenny had COVID-19 prior to Jenny's test results. Frison said no employee was ever terminated because they failed to return to work at the main campus. In her view, Employer's pandemic response was to accommodate high-risk employees, follow CDC and municipal recommendations and mandates, and avoid spreading COVID-19 to its workers, all while providing electricity to the community. In Frison's opinion, this protocol was effective. (Frison).

16) At hearing, Employer contended Employee did not acquire COVID-19 at work and if she did it is not an "occupational disease" under the Act for which benefits could be awarded. It contended under the applicable statute and relevant caselaw, the presumption of compensability did not apply, and in this case did not attach to her claim for an occupational disease. Employer contended a two-part test applies to "occupational diseases" and requires (1) causation and (2) a finding that the employment caused a higher risk of disease than that experienced by people in the public. Employer conceded diseases can be contracted at work that are not "occupational" diseases. However, it contended Employee's work did not involve exposures that increased her risk of illness, such as a person working in the medical field might experience while tending to sick patients. Employer contended Employee had to prove a higher or "abnormal" risk of illness from her employment that caused her injury. If the Board were to find the presumption of compensability attached, Employer rebutted it with substantial evidence, and insufficient evidence had been presented to prove Employee's claim by a preponderance of the evidence. Therefore, it contended the Board should deny Employee's claim for benefits related to her August 2021 COVID-19 infection. Employer presented expert witness opinions from Employer's medical evaluator (EME) Brent Burton, MD:

ANALYSIS

Ms. Rapp reports that she began experiencing a cough on 13 Aug 2021 and tested negative for COVID-19 on that date. The negative test on that date rules out a relationship between her initial symptoms and a COVID-19 infection. However, the onset of symptoms and the second COVID-19 test on 17 Aug 2021 confirms the onset of the infection on that date.

The incubation period, i.e. the time between the exposure and onset of symptoms, is 5-6 days. Although there are potential exceptions, the highest probability is between the fifth and sixth day following exposure. Thus, the probability of exposure to Ms. Rapp is between 11-12 Aug 2021. This time span makes it improbable that Ms. Rapp acquired COVID-19 on 5 Aug 2021 from Jenny on the last day she was present at work. Ms. Rapp's potential contacts during the period of probable exposure are not described. Although she acknowledged that multiple family members had acquired COVID-19 and tested positive, she provided no specific dates that she had contact. Instead, she indicated her belief that they had become ill after she tested positive. This report is insufficient to form a conclusion that Ms. Rapp acquired COVID-19 through a work source.

The following are answers to the questions posed in your letter of 11 Aug 2022.

1. Based upon the information currently available, is it more probable than not that Ms. Rapp acquired COVID from her COVID-positive co-worker around 8/4/21? In answering this question, please address whether a nine-day delay in the onset of COVID symptoms would rule out the 8/4/21 work exposure as a possible cause of Ms. Rapp's COVID infection.

Answer: Based upon the analysis presented above, it is improbable that Ms. Rapp acquired COVID-19 from a source at her workplace. Even if the initial symptoms reported on 13 Aug 2021 are considered as the onset of illness, the time span is still too large to consider an infection arising from a workplace exposure.

2. Did Ms. Rapp's employment as a customer service representative expose her to a greater risk of acquiring COVID than that which generally prevails in employment and living conditions? In answering this question, please address a) whether the general nature of Ms. Rapp's work as a customer service representative created a greater risk of acquiring COVID than generally exists in employment, and b) whether Ms. Rapp did anything as part of her work that created a greater risk of acquiring COVID than generally exists in employment or living conditions. Please explain the reasons behind your opinions.

Answer: There are no factors described to indicate any greater risk of acquiring a COVID-19 infection through a source at the workplace, compared to an exposure through activities of daily living. Obviously, Ms. Rapp was not employed in a healthcare occupation in which it could be anticipated that contact with COVID-19 infected patients could transmit the virus. Her job, in fact, places her at a

> lower risk of being exposed to the virus because she was not working with the public, but only three other workers in her office environment. Although it is not explicitly stated in this case if masks were required, Ms. Rapp mentioned that a 6' distancing rule was in place. Utilization of a mask and social distancing generally result in a decreased probability of exposure at the workplace, compared to activities of daily living. (Employer's Hearing Brief, September 13, 2022; Burton letter, August 24, 2022).

17) Dr. Burton's letter discloses only that Employer's attorney provided him with Employee's limited medical records. His letter refers to deposition testimony but does not say he ever read Employee's deposition in its entirety, or simply read excerpts provided by Employer's attorney. (Burton letter, August 24, 2022).

18) On September 29, 2022, the designated chair identified a discrepancy within the agency file regarding the November 22, 2021 controversion and re-opened the hearing record for more evidence. The controversion had been noted as served on Employee by Employer's adjuster but had not been filed directly with the Division. Employee acknowledged she had received the controversion and Employer believed that due to an error within the Electronic Data Interchange (EDI) reporting system it had not made it into the Division's file. (Communications Tab, Email, September 29, 2022; Division emails).

PRINCIPLES OF LAW

> **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 the need for medical treatment of an employee if the disability . . . 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 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 the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . 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 . . . 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 the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment.

> **AS 23.30.120 Presumptions.** 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; . . . .

Benefits sought by an injured worker are presumptively compensable and the presumption applies to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, and without regard to credibility, an injured employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, and without regard to credibility, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). If the employer's evidence rebuts the presumption, it drops out and the employee must prove his claim by a preponderance of the evidence. *Id*. This means the employee must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn, and credibility is considered. *Huit*.

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

The Board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009). When doctors' opinions disagree, the Board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Dec. No. 087 at 11 (August 25, 2008).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
> . . . .

> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. . . .
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employee's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

Harp v. ARCO Alaska, Inc. 831 P.2d 352, 358 (Alaska 1992) said, "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Vue v. Walmart Associates, Inc.*, 475 P.3d 270 (Alaska 2020), stated valid Controversion Notices must give notice of disputed issues, which an employee can then use to pursue a claim. *Vue* also adopted *Harp*'s standard to evaluate unfair and frivolous controversion claims.

> **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 23.30.395. Definitions**. In this chapter . . .
>
> (24) "**injury**" means accidental injury or death arising out of an in the course of employment, and an occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury. . . .

The Alaska Supreme Court analyzed the compensability of an 'occupational disease' in two opinions. *Delaney v. Alaska Airlines*, 693 P.2d 859 (Alaska 1985), and *Aleutian Homes v. Fischer*, 418 P.2d 769 (Alaska 1966). Quoting from *Aleutian Homes* the court stated in *Delaney*:

> We hold that <u>if a disease is caused by the conditions of employment</u> and these conditions carry with them a <u>risk of incurring the disease greater than that which prevails in employment and living conditions in general</u>, then such disease is an occupational disease within the scope of our act. 693 P.2d at 861 (emphasis in original). The court continued:
>
> Thus, in order to succeed, a disabled employee claiming an occupational disease

> must prove two facts: (1) that his disease was caused by the conditions of his employment; and (2) that as a result of those working conditions, the risk of his contracting the disease was greater than that which generally prevails in employment and living conditions. In providing these facts a claimant is aided by the presumption of compensability found in AS 23.20.120. 693 P.2d at 861-62 (footnote omitted).

> **8 AAC 45.182. Controversion.** (a) To controvert a claim the employer shall file form 07-6105 in accordance with AS 23.30.155(a) and shall serve a copy of the notice of controversion upon all parties in accordance with 8 AAC 45.060.
>
> (b) if a claim is controverted . . . on other grounds, the board will, upon request under AS 23.30.110 and 8 AAC 45.070, determine if the other grounds for controversion are supported by the law or the evidence in the controverting party's possession at the time the controversion was filed. If the law does not support the controversion or if evidence to support the controversion was not in the party's possession, the board will invalidate the controversion, and will award additional compensation under AS 23.30.155(e).

ANALYSIS

1) Is Employee entitled to TTD benefits for a workplace illness?

The Act provides TTD benefits when a work "injury" is the substantial cause of the disability. Employee claims TTD benefits under AS 23.30.185. To be the substantial cause of disability, out of all possible causes, employment must be the greater cause. AS 23.30.010(a). Employee contends she contracted COVID-19 while at work for Employer; Employer contends she did not. Employee treats her case like an ordinary "injury," and contends exposure to her co-worker at work caused her to contract the COVID-19 virus, which caused her to miss time from work, for which she seeks TTD benefits. By contrast, Employer contends what Employee really seeks are TTD benefits related to an "occupational disease or infection," which is specifically defined in the Act. These contentions create a factual dispute to which the statutory presumption analysis applies. AS 23.30.120(a); *Meek.*

Before determining if Employee is entitled to TTD benefits, this decision must first decide if she has a work-related "injury" as defined in the Act. As Employer correctly noted, it is possible for a person to obtain an infection while at work but not have a work-related injury, because the

infection is not an "occupational disease or infection" unless it arose naturally out of the employment or naturally or unavoidably resulted from an accidental injury. AS 23.30.395(24).

The legislature contemplated two kinds of work-related "injury," including the more common event where a worker suffers a physical or mental injury, and another where the particular employment risks cause an "occupational disease or infection." AS 23.30.394(25). Examples of the former, more common injury is a slip and fall, or back strain by lifting heavy object; the latter includes for example a coalminer who develops Black Lung Disease from exposure to coal dust in a mine. Regardless of whether this decision treats Employee's claim as one for a commonplace injury or one for an "occupational disease or infection," the statutory presumption still applies. *Meek*. This decision will apply the presumption analysis to the two-part test set forth in *Fischer* and *Delaney*, because the "substantial factor" causation test is included in it, along with the increased risk test. Employee benefits from the presumption that (1) her COVID-19 was caused by the conditions of her employment; and (2) that as a result of her working conditions, the risk of Employee contracting the disease was greater than that which generally prevails in employment and living conditions. *Fischer*; *Delaney*.

At the first state of the presumption analysis, where credibility is not assessed, Employee raised the presumption of compensability for causation and increased risk through her testimony and documented positive COVID-19 test on August 13, 2021. *Tolbert.* She presented medical records showing her positive test and treatment or her symptoms. Employee presented documentary evidence of a co-worker testing positive on August 5, 2021. She also testified she was exposed on August 4, 2021, when the infected co-worker was in the office for part of the day. Employee testified, given her high-risk health factors, when Employer sequestered her with an unvaccinated co-worker who did not wear a mask this increased her risk of exposure and contraction of the COVID-19 virus.

At the second stage of the analysis, again without considering credibility, Employer rebutted the causation presumption with Dr. Burton's letter, and rebutted the increased risk presumption with Employee's testimony, supported by Frison's. Dr. Burton in the analysis section of his letter ruled out work as the source of Employee's infection and opined that due to the delay between

exposure on August 4, 2021, and the positive test on August 17, 2021, it was improbable Employee contracted COVID-19 in her workplace. *Huit*. Dr. Burton explained the incubation period between exposure and symptom onset for COVID-19 is five to six days. He opined it would be unlikely if Employee was exposed on August 4, 2021, that she would not have symptoms until August 13, 2021, when she had her first negative COVID-19 test. Dr. Burton said it would be more unlikely her initial exposure was the ultimate cause of her August 17, 2021, positive COVID-19 test. Employee testified COVID-19 was commonplace in the community and easily transmitted among people. She testified about numerous times she became sick at work because other workers were ill with various colds and the flu, failed to stay home and were coughing and sneezing while at work. This evidence rebuts the two presumptions, and the burden returns to Employee, who must prove all elements of her claim by a preponderance of the evidence. *Saxton*. At the third stage of the analysis, the evidence is examined and weighed, and its credibility assessed. *Huit*.

In the third stage, Employee presented and relied on evidence including (1) her three medical visits to her primary care provider, (2) her own lay testimony, and (3) a print out from the CDC website regarding duration of a COVID-19 infection to support her contention that her workplace exposure was the substantial cause of her illness. Employer provided and relied on (1) Dr. Burton's expert letter, and (2) Employee's deposition.

Employee's primary care provider's reports do not state her COVID-19 exposure or illness were workplace related, but rather assess the symptoms and treatment for her COVID-19 diagnosis. In her deposition, Employee agreed her co-worker who tested positive for COVID-19 on August 5, 2021, was only present in the office for two and one-half hours on August 4, 2021. She recalled her co-worker had been coughing all week but was vague about any close contact with her co-worker on August 4, 2021. Employee's deposition testimony highlighted the precautions Employer took in providing a workspace that was socially distanced from co-workers and sequestered from the public. Frison's hearing testimony confirmed Employer's measures. Employee did, however, testify that masks were rarely worn by her co-workers in their accommodated space and that they would engage with one another over the top of each other's cubicles. She relies on CDC guidance that symptoms may appear two to 14 days after exposure

as evidence she contracted COVID-19 in the workplace. Employee's exposure testimony and her lay opinion coincide with CDC parameters for COVID-19 and COVID-19 symptom development. Her testimony and the CDC information will be given some weight and credibility. AS 23.30.122; *Smith*. As for Employee's evidence that her employment caused increased risk, she relies wholly on her own testimony. The heightened risk associated with a "occupational disease or infection" in AS 23.30.395(24) refers to risks inherent with employment, such as those risks experienced by a person who works as a coalminer and inhales coal dust all day long for as long as they work in the mine. *Fischer*; *Delaney*. Employee provided no evidence besides her own testimony that her work in the call center inherently increased her risk of exposure to viruses. Therefore, her testimony about heightened risk will be given little weight and credibility. AS 23.30.122; *Smith*.

Dr. Burton, an expert in Medical Toxicology and Occupational Medicine ruled out workplace exposure as the source for Employee's COVID-19 infection and opined it was unlikely Employee contracted COVID-19 in the workplace. He relied in part on what appear to be excerpts from Employee's deposition testimony to form his opinion. In his view, it was improbable Employee contracted COVID-19 from work as her symptoms and subsequent positive test were too far apart. He opined had Employee been working in a field that was exposed to COVID-19 on a regular basis, such as the health-care field, there was a higher likelihood of her contracting the virus while at work. But Employee had been given accommodations and was completely removed from interacting with the public in her professional capacity; thus, public sources for her COVID-19 infection at work were ruled out. Her co-worker tested positive for COVID-19, but absent evidence linking Employee's exposure on August 4, 2021, and her positive COVID test on August 17, 2021, the medical evidence does not support she contracted COVID-19 in the course of her employment. Dr. Burton's opinion will be given greater weight than Employee's CDC general guidelines and her testimony, on both causation and increased risk. AS 23.30.122; *Smith*; *Moore.*

Employee failed to show her COVID-19 illness arose out of and in the course of her employment with Employer under AS 23.30.010(a) and that it was an "occupational disease or infection" under AS.23.30.395(24). For all these reasons, Employee's COVID-19 infection is not a

compensable work injury under any analysis and her claim for TTD benefits will be denied. This decision does not eliminate the possibility of COVID-19 being considered an occupational disease in future cases as it is a fact specific inquiry.

2) Was Employer's controversion frivolous or unfair?

Employee seeks a finding that Employer's controversion was frivolous or unfair. In this case, there is no "insurer," because Employer is self-insured. The only bases for Employee's request are AS 23.30.155(o) and 8 AAC 45.182(d)(2), which would require the Division to send a copy of this decision and order to the "commissioner's designee" for "consideration in the self-insured employer's renewal application for self-insurance" if this decision found a frivolous or unfair controversion. Notably, Employee did not request a penalty. *Harp*. She may be under the mistaken impression that if this decision found a frivolous or unfair controversion that finding would result in her obtaining additional benefits from Employer; it would not, as the statute states.

Even had she requested a penalty under a different subsection, she would only be entitled to a penalty if she prevailed on her claim for TTD benefits; as shown above, she does not prevail though she would not be entitled to a penalty even had she requested one. 8 AAC 45.082(b). Despite an absence of the filed pre-claim controversion in Employee's agency file, the parties acknowledged they were aware of the controversion, and Employee filed her claim based on the controversion she had received. 8 AAC 45.182.

Employer had to possess sufficient evidence in support of its controversion at the time it controverted, that if Employee did not introduce evidence in opposition to the controversion, it would be found Employee was not entitled to benefits. *Harp*. The Alaska Supreme Court later adopted *Harp*'s penalty analysis to resolve frivolous and unfair controversion issues. *Vue*.

The evidence Employer relied on to controvert Employee's claim at the time the controversion was made is relevant to examine if the controversion was unfair or frivolous. AS 23.30.155(a), (d); *Harp.* A controversion can be based on legal grounds relying on relevant statutes, regulations, and decisional law, on factual grounds, or on both. *Harp.* Employer relied on its

understanding that under AS 23.30.395(24), an infection obtained on the job was not an occupational disease or infection unless there was evidence to prove causation and the employment created an increased risk for the infection. It also relied on the fact that Employee's work duties did not elevate her risk of acquiring COVID-19. Employer relied on the fact Employee's alleged exposure was through a co-worker, which is the same risk of transmitting a community-based disease that exists in employment in general. Employer relied on the fact Employee worked in a relatively secluded area with only two other people and did not work with the public, and that belief formed the basis and substantial evidence that Employee's COVID infection was not a compensable occupational disease. Employer also relied on Employee's statements addressing timing of her COVID-19 testing and her exposure to COVID-19, which presented substantial evidence upon which Employer could question whether employment was the cause of Employee's injury. *Id.*

Had Employee presented no contrary evidence, the above evidence and statute were sufficient for Employer to controvert Employee's right to benefits in good faith. *Harp*; *Vue*. The evidence presented showed Employee was working in a position that did not require her to be exposed to COVID-19 on a regular basis, unlike healthcare workers, first responders or other essential persons that despite the pandemic would have been required to interact with the general public as part of their employment. *Fisher*; *Delaney*. Based upon this analysis, Employer's November 22, 2021 Controversion Notice was neither frivolous nor unfair and her request for a frivolous or unfair controversion finding will be denied.

The fact Employer to date has never controverted Employee's claim is immaterial because Employee never requested a penalty and Employer never defended on grounds that she failed to timely request a hearing. Thus, this decision will not address that issue.

CONCLUSIONS OF LAW

1) Employee is not entitled to TTD benefits for a workplace illness.
2) Employer's controversion was not frivolous or unfair.

ORDER

1) Employee's TTD benefit claim is denied.

2) Employee's request for a frivolous or unfair controversion finding is denied.

Dated in Anchorage, Alaska on January 13, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kyle D. Reding, Designated Chair

/s/
Sara Faulkner, Member

/s/
Pamela Cline, 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 Cheryl L. Rapp, employee / claimant v. Chugach Electric Company, self-insured employer; defendant; Case No. 202128184; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on January 13, 2023.

/s/
Kimberly Weaver, Office Assistant II