Alaska Workers' Compensation Appeals Commission

Linda S. Rockstad, Appellant, vs. Chugach Eareckson Support Services, Zurich American Insurance Co., and NovaPro Risk Solutions, Appellees.	Final Decision Decision No. 140 November 5, 2010 AWCAC Appeal No. 10-008 AWCB Decision Nos. 09-0195 and 10-0015 AWCB Case No. 200320305

Appeal from Alaska Workers' Compensation Board Decision No. 09-0195, issued at Anchorage on December 16, 2009, and Alaska Workers' Compensation Board Decision No. 10-0015, issued at Anchorage on January 22, 2010, by southcentral panel members Linda M. Cerro, Chair, Patricia Vollendorf, Member for Labor, and Linda Hutchings, Member for Industry.

Appearances: Linda S. Rockstad, Mary I. Thoeni, non-attorney representative, for appellant, Linda S. Rockstad; Robert J. Bredesen, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, Chugach Eareckson Support Services, Zurich American Insurance Co., and NovaPro Risk Solutions.

Commission Proceedings: Appeal filed February 8, 2010; briefing completed July 29, 2010; oral argument on appeal presented September 1, 2010.

Commissioners: David Richards, Stephen T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

The employee, appellant, Linda S. Rockstad (Rockstad), pursued a workers' compensation claim against her employer, appellee, Chugach Eareckson Support Services (CESS), with an injury date of August 4, 2003. Following a hearing on September 16 and 17, 2009, the Alaska Workers' Compensation Board (board) issued a

Decision & Order (D&O) in which it denied Rockstad's claim.[1] The board found that, except for a temporary aggravation of a pre-existing right wrist condition, her employment with CESS was not a substantial factor in causing the medical conditions of which Rockstad complained.[2] Thereafter, in response to Rockstad's request for reconsideration, the board issued a Final Decision and Order on Reconsideration and Modification (D&OR&M).[3] In the D&OR&M, it ruled against Rockstad on all of the assertions of error raised in her request.[4]

In this appeal to the commission, Rockstad questions the board's rulings on certain issues that were addressed in the D&O and in the D&OR&M. Paraphrased, those issues are: 1) whether AS 23.30.122 is constitutional; 2) whether the board made mistakes of fact or mistakes of law in concluding that Rockstad was not entitled

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[1] *See Linda S. Rockstad v. Chugach Eareckson Support Services, et al.,* Alaska Workers' Comp. Bd. Dec. No. 09-0195 (Dec. 16, 2009) (*Rockstad I).*

[2] *Id.* at 75. The conditions are: 1) de Quervain or de Quervain's (DQ) tenosynovitis, right wrist, 2) right lateral epicondylitis, 3) right medial epicondylitis, 4) ganglion cyst, right wrist, 5) complex regional pain syndrome (CPRS), 6) neuroma, 7) neuritis, and 8) injury-related mood disorder. *See Rockstad I*, Bd. Dec. No. 09-0195 at 3-4.

[3] *See Linda S. Rockstad v. Chugach Eareckson Support Services, et al.*, Alaska Workers' Comp. Bd. Dec. No. 10-0015 (Jan. 22, 2010)(*Rockstad II*).

[4] *See* Appendix A, *Rockstad II*, Bd. Dec. No. 10-0015 at 10-20. We have edited the ANALYSIS section of the board's D&OR&M to conform to our technical rules. Rockstad's assertions of board error were: 1) reliance on the reports and testimony of Stephen Fuller, M.D.; 2) acceptance of the hearing brief of CESS in a three-ring binder; 3) requiring an allegedly discriminatory oath to be sworn by Rockstad's non-attorney representative; 4) approval of the use of a computer and video monitors at hearing by CESS; 5) disregard of an *ex parte* communication with counsel for CESS by the division of workers' compensation; 6) assignment of a new designated chair for the September 16 and 17, 2009, hearing; 7) reliance on multiple or erroneous predictions of medical stability; 8) misapplication of the remote site doctrine; 9) allowance of an unlawful change of physicians by CESS; 10) failure to require substantial evidence to support its factual findings; and 11) acquiescence in CESS withholding evidence. *See* Appendix A, *infra* at 39-50.

to any further benefits after September 2003; and 3) whether the board failed to recognize that CESS withheld or destroyed evidence.[5]

We affirm the board in respect of all three of these issues. As for the third issue, we adopt its decision.[6]

2. Factual background.

Rockstad claimed she was injured on August 4, 2003, while working for CESS on Shemya Island.[7] In February 2003, the employer-run clinic on the island diagnosed lateral epicondylitis as a result of her complaints of elbow pain due to washing dishes.[8] She also reported occasional right wrist pain.[9] She next reported to the medical clinic for complaints related to her right wrist on May 27, 2003.[10] Rockstad was diagnosed with de Quervian's (DQ) tenosynovitis in her right wrist and prescribed Naporoxen and ice packs for pain relief.[11] A few months later, on August 4, 2003, she returned to the clinic to report increased right thumb and wrist pain since beginning an administrative job requiring typing and computer work.[12] The clinic's notes indicated that Rockstad reported experiencing mild intermittent right thumb and wrist pain for 10 years.[13] She

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5 *See* Appellant's Br. at 3-4.

6 *See* Appendix A, *infra* at 49-50.

7 R. 0001.

8 R. 2113.

9 R. 2113.

10 R. 2112.

11 R. 2112.

12 R. 2101.

13 R. 2101. Dr. Charles Kase, an orthopedic surgeon, who had years earlier operated on Rockstad's left wrist to treat DQ tenosynovitis in that wrist (R. 2127), noted on January 28, 1999, that Rockstad had "similar symptoms of de Quervain's in the right wrist as well as a ganglion cyst in the area, or a probable ganglion cyst in the area." R. 2125. He further noted on February 7, 2000, that Rockstad was still having pain in both wrists and had positive Finkelstein's tests, the test for DQ in both wrists. R. 2120. *See also* R. 0773 (noting that Rockstad's right hand also was mildly hurt but that this injury was not reflected on the report of injury filed in the earlier workers' compensation case against Alaska Cleaners for DQ in Rockstad's left wrist).

was prescribed a thumb splint and more painkillers, and received recommendations that her work station be modified and that she see an orthopedic surgeon.[14] At a follow-up clinic visit on August 9, 2003, Rockstad reported that she was "feeling much better."[15]

During her time off, Rockstad saw Dr. Kase in Anchorage.[16] He ordered physical therapy, prescribed Motrin and a thumb splint, and recommended a steroid injection for pain in November or December if her symptoms persisted.[17] Rockstad attended three sessions of physical therapy before returning as scheduled to Shemya.[18]

The board record does not reflect any further medical treatment for Rockstad's right elbow or right wrist during the remainder of her CESS employment, although she did go to the Shemya clinic two more times, once for a vaccination and once for sinusitis.[19] Rockstad testified that she had "good days" and "bad days" in terms of the pain in her right wrist and right elbow while employed by CESS.[20] She claimed that she continued to seek treatment for these problems at the Shemya clinic from September 2003 until her employment with CESS ended in April 2004 and asserted that CESS must have withheld or destroyed these medical records.[21] Co-worker Sharry Christianson testified that Rockstad used ice packs and took medications for her condition up until Rockstad left CESS,[22] and that it seemed Rockstad "got worse and worse and worse[.]"[23] She also testified that Rockstad went to the clinic "at least three times" after an alleged October 2002 assault, but did not specify whether Rockstad went to the

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14 R. 2101.

15 R. 2110.

16 Sept. 16, 2009, Hr'g Tr. 206:6-11.

17 R. 2100.

18 R. 2093-98.

19 R. 2682-83.

20 Sept. 16, 2009, Hr'g Tr. 208:4-11.

21 Appellant's Br. at 36-37.

22 Aug. 25, 2007, S. Christianson Dep. 25:23–26:3.

23 Aug. 25, 2007, S. Christianson Dep. 11:1-7.

clinic between September 2003 and April 2004.[24] Supervisor Mary McCully testified that over five or six months, Rockstad "kept complaining about the pain in her arms" but she could not recall the exact dates.[25] McCully left her employment with CESS about six months before Rockstad did[26] and she did "not know how often [Rockstad] was treated at the clinic."[27]

Rockstad quit CESS in April 2004 to take a data-entry job at Nye Toyota.[28] On a pre-employment health questionnaire, Rockstad acknowledged that she was "injured on the job and needed surgery. Had surgery on my left wrist."[29] She made no mention of any problems with her right wrist or right elbow.[30] McCully, Rockstad's former supervisor at CESS and her supervisor while Rockstad worked at Nye, testified that "[Rockstad] appeared to be better . . . I remember the pain that [Rockstad] was in on the island. I did not see that type of excruciating pain in her face or in her movements when I interviewed her for the [Nye] position."[31] Nevertheless, Rockstad's condition forced her to quit after only working two months at Nye and being absent "quite a bit . . . due to pain in her wrists"[32] or "probably half."[33] However, Rockstad's personnel file at Nye documented only four absences from work, including two for unspecified illnesses, one for a family emergency, and one for unspecified reasons.[34]

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24 Aug. 25, 2007, S. Christianson Dep. 24:1–25:18.

25 Aug. 7, 2009, M. McCully Dep. 8:22-25, 9:16-18.

26 Aug. 7, 2009, M. McCully Dep. 8:23-25.

27 Aug. 7, 2009, M. McCully Dep. 22:13-14.

28 Sept. 16, 2009, Hr'g Tr. 207:17-18.

29 R. 4259.

30 R. 4259.

31 Aug. 7, 2009, M. McCully Dep. 15:4, 15:10-13.

32 Aug. 7, 2009, M. McCully Dep. 14:19-20.

33 Sept. 16, 2009, Hr'g Tr. 210:10-12 (Rockstad's testimony that she was absent "probably half" her days at Nye).

34 R. 4280, 4282.

On June 28, 2004, Rockstad went to the emergency room (ER) complaining of right wrist pain. The report noted "Patient has evidence of positive Finkelstein test consistent with de Quervain's tenosynovitis, . . ."[35] She was prescribed painkillers and told to follow up with Dr. Kase.[36]

On July 5, 2004, Dr. Kase recommended surgery for DQ tenosynovitis of the right wrist and a steroid injection for lateral epicondylitis of the right elbow.[37] On July 13, 2004, he performed a release of the right first dorsal wrist compartment and performed a partial release of the transverse carpal ligament, as well as the steroid injection.[38] His operative notes also mention a diagnosis of "mild carpal tunnel syndrome."[39] On September 30, 2004, Dr. Kase noted that Rockstad was developing a ganglion cyst in the tendon sheath.[40] He ultimately recommended another surgery to remove the suspected cyst and to release her right first dorsal compartment again through a different incision site.[41] However, Dr. Kase did not perform this surgery and he stopped treating Rockstad.[42] At his deposition, Dr. Kase declined to express an opinion as to whether any of Rockstad's conditions were work-related, although he did note that DQ "tends to be more common in people who perform repetitive activities with their wrist and hands."[43]

Rockstad saw Dr. George Siegfried twice in September 2004 and February 2005.[44] Dr. Siegfried concluded that Rockstad was still suffering from DQ in her right

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35 R. 2173.

36 R. 2173.

37 R. 1817-18.

38 R. 1820.

39 R. 1820.

40 R. 1829.

41 R. 1831.

42 Sept. 16, 2009, Hr'g Tr. 166:5–167:2; Dec. 14, 2006, L. Rockstad Dep. 54:15-17.

43 Aug. 1, 2007, C. Kase, M.D., Dep. 28:2-20, 27:22-24.

44 Medical Records Vol. 1 of 2, 000207, 000236.

wrist and referred her to Dr. Michael McNamara.[45] Dr. Siegfried expressed no opinion on causation.[46]

On May 11, 2005, Dr. McNamara performed a repeat DQ release, noting he found and released an accessory tendon sheath in the first dorsal compartment. He also performed a right lateral epicondylectomy with debridement.[47] Post-surgical notes documented that Rockstad reported feeling "70% improved at this time than she did before surgery" and had no numbness or tingling.[48] Dr. McNamara's PA-C, Robert Thomas, concluded that she was medically stable four months after her surgery, on September 20, 2005.[49]

After the surgery done by Dr. McNamara, the medical records indicated that Rockstad's first complaint of medial (rather than lateral) elbow pain arose during an occupational therapy session.[50] PA-C Thomas examined her on August 9, 2005, and observed that "patient is nontender to palpation at the medial epicondylar area. Where her point of tenderness is at appears to be more in the belly muscle of the common flexors."[51] He concluded she had a "[c]ommon flexor muscle strain" and prescribed more occupational therapy.[52]

On November 2, 2005, Dr. McNamara wrote to Rockstad advising her to find a new doctor because her questions about the accuracy of his chart notes indicated to him that she lacked trust and confidence in his clinic.[53] Dr. McNamara never expressed an opinion about whether her conditions were related to her work at CESS.[54]

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45 Medical Records Vol. 1 of 2, 000207, 000236.

46 Oct. 30, 2007, G. Siegfried, M.D., Dep. at 12-13, 16.

47 R. 2017-18.

48 R. 1994, Sept. 16, 2009, Hr'g Tr. 264:1-7.

49 R. 1967.

50 R. 1981.

51 R. 1981.

52 R. 1981.

53 R. 3150.

54 Dec. 5, 2007, M. McNamara, M.D., Dep. 47:24–48:12.

Meanwhile, in September 2005, Dr. Rafael Prieto performed a permanent partial impairment (PPI) rating.[55] He noted that Rockstad had reached medical stability and that her right wrist and right elbow conditions were related to her work for CESS. He rated her as having an 8 percent impairment of the whole person.[56] Dr. Prieto acknowledged that Rockstad's pain complaints exceeded his objective findings during examination.[57] Dr. Prieto's PPI rating was based on range of motion findings that were dependent on a valid presentation of Rockstad's efforts.[58] He testified that he had no choice but to rely on the range of motion findings because "I believed there was some impairment, and that was the only way to even give her any rating at all."[59] On the same day, a work performance evaluation summary concluded Rockstad was unable to perform a sedentary job for eight hours per day because she could not complete the evaluation without rest periods due to pain.[60]

In January 2006, Dr. Gregory Polston evaluated Rockstad. He diagnosed scar neuroma and suggested starting her on Lyrica for her pain.[61] Rockstad saw Dr. Polston one last time in late January and informed him she was moving to Florida.[62] Rockstad also informed her other medical providers of her intended move.[63]

To address Rockstad's mental health and to deal with her ongoing pain complaints, Rockstad was referred to Dr. Joella Beard, a physical medicine and rehabilitation specialist, for treatment of pain and reactive depression in April 2005, a

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55 R. 1950.

56 R. 1954.

57 Dec. 13, 2007, R. Prieto, M.D., Dep. 28:16-18.

58 Dec. 13, 2007, R. Prieto, M.D., Dep. 48:2-5, 28:20-23.

59 Dec. 13, 2007, R. Prieto, M.D., Dep. 48:5-10.

60 R. 1958.

61 R. 1931-32.

62 R. 1901.

63 R. 2556, 2559 (notifying Dr. Beard), R. 1900 (notifying Dr. Michaud), R. 1903 (notifying Judd).

few weeks before her second right wrist surgery.[64] In April 2005, Dr. Beard noted that Rockstad seemed to be magnifying her symptoms beyond what would be reasonably medically expected, and she referred Rockstad to Dr. Lois Michaud, a psychologist, and Connie Judd, a psychiatric nurse practitioner.[65] In December 2005, Dr. Beard noted that Rockstad's request for a handicap sticker, which Dr. Beard denied, was suggestive of a psychological overlay.[66] Dr. Beard recommended pool therapy and using her arm as much as possible.[67] Dr. Beard also suggested that CESS should conduct an employer medical evaluation (EME).[68]

A medical panel consisting of Dr. Stephen Fuller, orthopedic surgeon, Dr. Gerald Reimer, neurologist, and Dr. S. David Glass, psychiatrist, conducted an EME on February 20, 2006.[69] Drs. Fuller and Reimer concluded that the CESS work caused a temporary aggravation of Rockstad's pre-existing right DQ tenosynovitis, which resolved in mid-September 2003:

> [D]e Quervain's tenosynovitis occurs spontaneously and frequently presents with multiple transient episodes. This condition is often attributable to abnormal anatomical tendon alignment.
>
> Therefore, after 08/04/03, her transient exacerbation of her pre-existing de Quervain's tenosynovitis appeared to resolve, as of 09/10/03, after which the [medical] record is silent for 10 months.[70]

Drs. Fuller and Reimer concluded that her lateral epicondylitis complaints were not work-related because they did not arise until July 2004, months after she quit

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64 R. 2025.

65 R. 2223; Sept. 14, 2007, J. Beard, M.D., Dep. 18:25–19:10.

66 R. 1936.

67 R. 1936.

68 R. 1936.

69 R. 1873.

70 R. 1895.

working for CESS.[71] Similarly, Drs. Fuller and Reimer found that medial epicondylitis "did not appear until July 2005 and has no connection, directly or consequentially, with the 08/04/03 computer data entry activities."[72] Lastly, Drs. Fuller and Reimer noted that carpal tunnel syndrome was never diagnosed, based on subjective complaints or objective findings.[73] Overall, the panel found that "there was no objective pathology that supported her subjective claims of pain, which were significantly magnified."[74] Specifically, the panel noted that "[h]er PCE [physical capacity evaluation] results were 'fake bad' and do not match up with the minor nature of both surgeries nor do they match up with the reasonable recovery illustrated in Dr. McNamara's follow-up records and the post-operative physical therapy records."[75]

In terms of treating her mental health, Rockstad saw nurse practitioner Connie Judd from June 2005 into 2009, except when Rockstad was out of state.[76] Judd initially diagnosed adjustment disorder with depressed mood, provisional pain disorder with psychological factors and medical conditions (pain), insomnia secondary to adjustment

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[71] R. 1895. Missing from the record initially provided to the EME panel was the February 2003 Shemya clinic note diagnosing lateral epicondylitis. However, when Dr. Fuller was provided with this clinic note, he concluded that it did not change his opinion. He noted that her "first mention of right lateral elbow pain was on 02/06/03[,]" concluding that "[T]his condition, if present, resolves and stops if the activity stops. . . . The early record suggests Ms. Rockstad's Nautilus workouts as a cause of this condition." R. 2780.

[72] R. 1895. When Dr. Fuller reviewed additional records, in April 2008, he also concluded that the diagnosis of medial epicondylitis was never related to any of her work activities or her surgeries or to any of her rehabilitative activities, in terms of reasonable medical probability, because each of these activities was insufficient to cause a micro tear of the common flexor origin. There was insufficient force, insufficient repetition, and insufficient duration of activities. In fact, if one were to believe Ms. Rockstad, that she had not used her arm for any activity whatsoever, basically since the time of the 05/11/05 surgery . . . approximately 1½ years of inactivity certainly would have healed any micro tear in the tendons involved. R. 2781.

[73] R. 1895.

[74] R. 2725.

[75] R. 1867, 1897.

[76] R. 1852.

and pain disorders, and nicotine dependence.[77] In August 2006, Judd diagnosed depression disorder secondary to medical condition and to insomnia, pain disorder with psychological factors and general medical condition, nicotine dependence, and possible post-traumatic stress disorder symptoms related to Rockstad's perceived betrayal by the workers' compensation system.[78] In July 2008, Judd theorized that Rockstad's symptoms "maybe better explained by a Mood or Bipolar Disorder, NOS [not otherwise specified][.] Pain Disorder with both psychological factors . . . ."[79] In December 2008, Judd again noted that Rockstad's "recurrent depressive moods and insomnia maybe better be explained by a Mood Disorder, NOS which have thus far responded fairly well to antidepressants and benzodiazepines."[80]

One of the employer's evaluators, Dr. Glass, considered Rockstad's psychiatric condition in a separate report on February 20, 2006.[81] He diagnosed Rockstad with a pain disorder associated with psychological factors, noting "[t]his diagnosis is determined in view of Ms. Rockstad's history of ongoing subjective pain complaints that are not clearly substantiated by the level of actual physical pathology, as well as having not responded to conservative management and surgeries."[82] He concluded:

> From a psychiatric standpoint, Ms. Rockstad does not have a disorder caused, worsened, accelerated or combined as a result of her work exposure.
>
> A somatoform pain disorder (307.80) is caused by non-work psychosocial issues interacting with constitutional and developmental factors (personality); these disorders are not caused by actual injury or tissue pathology.[83]

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77 R. 2002.

78 R. 1852, R. 2508.

79 R. 3131.

80 R. 3195. Rockstad also had some appointments with Dr. Michaud who advised Rockstad on biofeedback techniques, relaxation and self-soothing methods, and smoking cessation techniques, as well as providing emotional support. R. 1933, 3352.

81 R. 1855.

82 R. 1864.

83 R. 1865.

Dr. Glass testified that he essentially diagnosed the same condition, somatoform pain disorder, as Judd did, who described it as "pain disorder with psychological factors," and that this disorder was basically "pain without a physical cause."[84] He further explained that "a pain disorder associated with psychological factors . . . represents a subconscious non-deliberate development of pain as a way of dealing with some conflict psychological issue . . . ."[85]

Rockstad disputed the accuracy of Dr. Glass's conclusions by arguing that she did not take a Minnesota Mutliphasic Personality Inventory-2 (MMPI-2) test because she did not write her name on the scoring sheet and did not remember taking the test.[86] However, Dr. Glass stated that he wrote her name on the scoring sheet and gave her the test to complete in private.[87] He also testified that, in any event, he did not make diagnoses "on the basis of an MMPI testing" but rather the testing "was really consistent with Ms. Rockstad's report of her symptoms and her behaviors and it . . . reinforced the idea that she could be someone with a psychogenic pain disorder."[88]

After reviewing the EME panel's reports on April 7, 2006, Dr. Beard completely agreed with the panel's diagnoses and opinions on causation, except that "the emergence of golfer's elbow or medial epicondylitis is questionable whether it ever really existed."[89]

Rockstad was in Florida from April 2006 to August 2006.[90] She testified that she continued to have problems with her right arm while in Florida.[91] In May 2006, she was

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84 Sept. 17, 2009, Hr'g Tr. 428:20-21, 429:7.

85 Sept. 17, 2009, Hr'g Tr. 437:7-14.

86 R. 1872; Sept. 16, 2009, Hr'g Tr. 177:25–178:24.

87 R. 3144; Sept. 17, 2009, Hr'g Tr. 424:21, 425:13-16.

88 Sept. 17, 2009, Hr'g Tr. 435:5-11.

89 R. 1868-70.

90 March 9, 2007, L. Rockstad Dep. 79, 81:11-12; Sept. 16, 2009, Hr'g Tr. 180:19-20.

91 March 9, 2007, L. Rockstad Dep. 80:5-7.

hospitalized for weeks for an abscess on her neck and cellulitis.[92] The hospital records show no complaints about her right wrist or arm. Hospital staff observed her eating without complaining of distress or discomfort.[93] The records show that at times an intravenous (IV) was inserted into her right wrist or arm.[94]

When she returned to Alaska, Rockstad began treating with Dr. Jon Hinman for right arm pain. Dr. Hinman diagnosed her with scar neuroma.[95] In late August 2006, he gave her injections into her elbow and wrist to reduce her pain,[96] but Rockstad reported her pain was still a 9 out of 10, on September 12, 2006, and on December 5, 2006.[97] Dr. Hinman noted at this time that he expected her to recover from her scar neuroma condition with twelve or more months of therapy, including medications, Bier blocks, and stellate ganglion blocks.[98] Dr. Hinman continued to treat Rockstad throughout 2007 and into 2008. During this time period, Rockstad consistently described her pain as an 8 or 9 out of 10 and/or as "continuous."[99]

On December 14, 2006, CESS began taking Rockstad's deposition. Rockstad did not raise her right hand when the oath was administered, explaining she was unable to do so because her "arm is really hurting."[100] She testified her inability to raise her arm

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92 R. 2359-60.

93 R. 2924.

94 R. 2921-22, 2929-30, 2937, 2945 (all indicating IV in upper right arm); 2995, 3002 (both indicating IV in right wrist); Sept. 16, 2009, Hr'g Tr. 286:2-14.

95 R. 1853.

96 R. 1849.

97 R. 1847 (indicating Rockstad was without pain for only two hours following injection), R. 2187.

98 R. 2187-88.

99 R. 2107, 2180, 2505, 2513, 2524 (although her pain on September 5, 2007, was reported as 9 out of 10 and continuous, she also said she had two days of "excellent" pain relief from stellate ganglion block), 2335, 2656, 2673. Only on two visits did Rockstad describe her pain as less than 8 or 9 out of 10. R. 2337 (on May 2, 2007, describing her pain as 6 out of 10), R. 2658 (on February 18, 2008, describing pain as 7 out of 10 and continuous).

100 Dec. 14, 2006, L. Rockstad Dep. at 7:14, 7:18-21.

had been "ongoing since my injury" and that her condition did not come and go but rather was "24/7" since the injury.[101] She explained that she was holding her arm next to her body because "it's hurting" and that she has to hold it that way regularly or on a daily basis.[102] She testified that she could not use her right hand or arm to remove the cap from a water bottle,[103] to open or close a door,[104] to drive,[105] or to hold a 12-ounce paper cup full of coffee.[106] The deposition ended a few hours later because Rockstad was too tired and in too much pain to continue.[107]

After the deposition, Rockstad and her representative Mary Thoeni were filmed returning to Rockstad's car. Rockstad removed a parking ticket from the windshield, put her handbag on the back seat, and smoked a cigarette, all with her right hand. Rockstad then drove to a location marked "patient drop-off," Thoeni got out, Rockstad parked for a while and then picked Thoeni up.[108]

When her deposition resumed on March 9, 2007, Rockstad testified about her activities on December 14, 2006. She testified that her pain levels remained at a 10 that day, and that she took Thoeni home, went home herself, and went to bed.[109]

On April 23, 2008, Dr. Fuller reviewed records that were not provided at the time of the February 2006 EME or that had been created since the EME.[110] These records included the video surveillance of Rockstad. Dr. Fuller described a video on January 26, 2006, that showed Rockstad carrying a stack of boxes from a building to her vehicle with "her elbows . . . flexed at 90°, the right elbow was functioning normally in

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101 Dec. 14, 2006, L. Rockstad Dep. 7:22–8:3.

102 Dec. 14, 2006, L. Rockstad Dep. 8:6-8.

103 Dec. 14, 2006, L. Rockstad Dep. 38:12-17.

104 Dec. 14, 2006, L. Rockstad Dep. 52:2-4.

105 Dec. 14, 2006, L. Rockstad Dep. 51:22-24.

106 Dec. 14, 2006, L. Rockstad Dep. 52:13-17.

107 Dec. 14, 2006, L. Rockstad Dep. 63:8-9, 63:14-18.

108 *Rockstad I*, Bd. Dec. No. 09-0195 at 33.

109 March 9, 2007, L. Rockstad Dep. 75:9–76:1.

110 R. 2725.

carrying, lifting and extending."[111] He further observed:

> As she carried the boxes her hands were on the side of the boxes with the fingers curled underneath. In this fashion her right wrist is at maximum ulnar deviation and her thumb is opposed about 50% along the side of the box.
>
> The above position is the same wrist/thumb position used to perform a Finkelstein's test which is the diagnostic test for de Quervain's tenosynovitis . . . . This test obviously is negative in this case and is not painful because she is able to adopt this prolonged carrying position without any problems.[112]

He also discussed video from December 12, 2006, in which she was observed using her right hand to take an object off a shelf, opening her car's trunk with her right hand, lifting bags into her car with both hands, and picking up a large bottle of water with the fingertips of her right hand.[113] Dr. Fuller stated that "normal function was observed involving her right elbow, wrist, and fingers[.]"[114] Finally, he discussed the video surveillance conducted the day of Rockstad's deposition that showed her apparently using her right hand normally[115] despite testifying that on that day she was in pain "24/7."[116]

From these videos, Dr. Fuller concluded that Rockstad was "malingering."[117] Dr. Glass concurred in a separate report.[118] Dr. Glass testified that in contrast to a pain disorder with psychological factors, "malingering represents a deliberate falsification embellishment of symptoms as a way of presenting oneself as more ill than they are in reality[.]"[119] He concluded: "Likely there is an element of both conscious and

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111 R. 2778.

112 R. 2778.

113 R. 2779.

114 R. 2779.

115 R. 2779.

116 Dec. 14, 2006, L. Rockstad Dep. at 7:22–8:3.

117 R. 2780.

118 R. 2783-91.

119 Sept. 17, 2009, Hr'g Tr. 437:15-17.

subconscious in Ms. Rockstad's presentation of her symptoms, but with conscious embellishment predominating."[120]

Meanwhile, on May 2, 2007, Dr. Hinman referred Rockstad to Dr. Doug Vermillion for an evaluation.[121] Dr. Vermillion's initial impressions were that Rockstad had median nerve neuropathy, complex regional pain syndrome (CRPS), and a history of tennis elbow, possible golfer's elbow, and recurrent DQ.[122] He ordered an electromyography (EMG) to check for neuropathic pathologies.[123] The EMG studies indicated Rockstad's symptoms were not neuropathic.[124] Dr. Vermillion abandoned his possible diagnoses of median nerve neuropathy and CRPS, noting the EMG studies were "normal."[125] However, Dr. Hinman continued to list CRPS among his diagnoses.[126] Moreover, despite ruling it out earlier, Dr. Vermillion stated on September 15, 2008, that Rockstad

> was noted to have complex regional pain syndrome by her previous treating pain doctor, Dr. Hinman. It appears that she responded to the blocks, which indicates that the symptoms do exist and it is complex regional pain syndrome. It appears that this most likely does originate from the employee's work, the neuroma from the treatment of the injury at work, and is related.[127]

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[120] R. 2788. Dr. Glass also addressed a February 6, 2007, psychiatric evaluation done by Dr. David Holladay as part of Rockstad's application for Social Security disability benefits. R. 2787-88, 2132-36. Dr. Holladay diagnosed her provisionally with bipolar disorder, depressed type and probable agoraphobia. R. 2787, 2135. Dr. Glass concluded these diagnoses were inappropriate because no medical records or evaluations had indicated that Rockstad had experienced "hypomanic or manic episodes/behaviors" and because she had never been treated with mood stabilizing agents effective with that disorder. R. 2788. In any event, Dr. Glass concluded that if she were suffering from bipolar disorder, it was not caused by a work-related injury. R. 2788.

[121] R. 2338.

[122] R. 2295.

[123] R. 2296.

[124] R. 2562-63.

[125] R. 2340.

[126] R. 0463.

[127] R. 3159.

On January 15, 2008, a Magnetic Resonance Imaging (MRI) ordered by Dr. Vermillion confirmed that Rockstad had a ganglion cyst of lateral aspect on her right wrist and detected nothing abnormal with her right elbow.[128] On September 2, 2008, Dr. Vermillion surgically excised the ganglion cyst, performed a surgical release of the first dorsal compartment of Rockstad's right wrist, and bathed the right epicondylar area in platelet gel.[129] Dr. Fuller testified that this surgery by itself proved that Rockstad did not have CRPS:

> [I]f you're going to go in and add surgical insult to that portion of the body, it aggravates and flares up complex regional pain syndrome . . . if it's actually present. . . . It's like throwing gasoline on a fire. So the - - the fact that Dr. Vermillion went ahead and operated on this same body part pretty well proves the condition isn't there.[130]

He also testified that the insertion of an IV in the affected arm, as occurred during Rockstad's Florida hospitalization, would have been "hell on earth" and "extremely provocative" to a person with CRPS.[131]

In terms of Rockstad's DQ and elbow conditions, Dr. Vermillion noted in his operative report that upon exposing the right lateral epicondyle, it "looked completely normal."[132] On exposing the first dorsal compartment in the wrist, he found that the tendons moved freely and "looked completely normal."[133] However, he testified that he did release a tendon that had not previously been released.[134] Dr. Vermillion noted on September 5, 2008, significant improvement in Rockstad's symptoms, and Rockstad noted continued improvement in her symptoms.[135]

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128 R. 2646-47.

129 R. 3152-53.

130 Sept. 16, 2009, Hr'g Tr. 285:13-23.

131 Sept. 16, 2009, Hr'g Tr. 288:7-8.

132 R. 3152.

133 R. 3153.

134 Aug. 17, 2009, D. Vermillion, M.D., Dep. 11:17-20.

135 R. 3256.

Dr. Vermillion testified that the cyst he excised could have been a cause of Rockstad's wrist pain,[136] but he could not attribute it to her employment with CESS.[137] Dr. Vermillion was of the opinion, however, that "the medical cause of the employee's lateral epicondylitis is most likely due to overuse and a workstation environment. . . . The cause of the patient's medial elbow pain is most likely from the same thing."[138] Dr. Vermillion also stated that surgery was the medical cause of scar neuroma and that "this is most likely work related from the injury and treatment of the injury[.]"[139] Lastly, Dr. Vermillion strongly implied that DQ in Rockstad's right wrist was work-related since he related the scar neuroma and CRPS to her work and those injuries occurred due to treatment of DQ. He noted that "what may be related is the fact that the employer did not allow her to have the workstation changed to help prevent further injury at the time."[140] But he later testified that although the DQ "probably was" related to the typing and data entry work for CESS, he could not definitively "co-relate" the two because he had not seen Rockstad at the time of the work injury or at the time of her first surgery.[141] He acknowledged that he did not review Drs. Fuller, Reimer, and Glass's reports and that he relied more on Rockstad's verbal history than the medical record in formulating his opinions.[142]

On December 2, 2008, Dr. Fuller issued another supplemental report but did not change any of his prior opinions.[143] He stated:

> Particularly during her time spent in [the Florida hospital], the medical record repeatedly indicates that she was using her right arm normally. . . . This normal use in May 2006 (after identical surgery performed in May

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136 Aug. 17, 2009, D. Vermillion, M.D., Dep. 10:14-16.

137 R. 3158.

138 R. 3158.

139 R. 3158.

140 R. 3159.

141 Aug. 17, 2009, D. Vermillion, M.D., Dep. 9:22-25.

142 Aug. 17, 2009, D. Vermillion, M.D., Dep. 43:19-23, 29:9-13.

143 R. 3178, 3183.

> 2005) while she was claiming persistent disability in her right arm, plus her normal use demonstrated per the videotape surveillance, plus the lack of pathology found in all regions, subsequently, by Dr. Vermillion on 09/02/08, confirms that there was no objective pathology at any of these locations in her right arm which was reasonably attributable or was a residual of any work exposure which may have occurred circa 08/04/03.[144]

Dr. Christopher Wilson, orthopedic surgeon, performed a Second Independent Medical Evaluation (SIME) and issued his report on April 21, 2009.[145] Dr. Wilson concluded there was "no certain diagnosis of a ganglion cyst . . . until the January 2008 MRI scan. She last worked in June 2004. Therefore, I do not consider the ganglion cyst to be a work-related condition."[146] However, Dr. Wilson found that Rockstad's lateral epicondylitis, medial epicondylitis, DQ tenosynovitis, and any CRPS were related to her work with CESS or were as a result of her required treatment.[147] He also noted that if she had an actual scar neuroma, then it was most likely due to treatment and the three surgical procedures in that area.[148] In terms of the DQ tenosynovitis, he did not believe her work with CESS caused a temporary aggravation of a pre-existing problem because "[h]er records are not clear enough to establish this diagnosis [in 1998]. She then had a period of several years of no symptoms in the right wrist, therefore, it is my opinion that her onset . . . in 2003 was a new problem."[149]

Dr. Wilson concluded that Rockstad was medically stable on January 2, 2009, four months after the date of her last surgery.[150] He observed Rockstad moving and using her right hand and arm normally with no protective behavior.[151] Dr. Wilson testified that in formulating his opinions, he looks at all the records, talks to the patient,

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144 R. 3183.

145 R. 3253.

146 R. 3257.

147 R. 3249-50, 3257.

148 R. 3249.

149 R. 3251.

150 R. 3252, 3257.

151 R. 3256.

and forms an opinion,[152] relying on "the sum total of everything."[153] He further noted that he did not consider Rockstad to be a "poor historian"[154] and that the "extensive" medical records "are at times extremely inadequate and sketchy . . . you can't put too much weight on poor medical records."[155]

Dr. Walter Ling, a specialist in neurology and psychiatry, evaluated Rockstad on June 30, 2009, for the SIME.[156] He diagnosed her with adjustment disorder with mixed anxiety and depressed mood, although he described it as mild and residual.[157] On his neurological examination, he found all her systems were normal, including motor and sensory systems and reflexes.[158] He concluded from a neurological standpoint that Rockstad had no deficits in her upper extremities.[159] He deferred to her surgeons' opinions and did not express his own opinion on causation concerning her cyst, epicondylitis, DQ tenosynovitis, neuroma, and CRPS.[160] In the end he concluded that

> her disability is attributable to the activities of her employment and while she may have some symptoms pre-dating the assigned date of injury, her complaints appear to have arisen in the context of her work over time. Therefore one has to accept that her work activities either caused or aggravated her symptoms.[161]

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152 June 23, 2009, C. Wilson, M.D., Dep. 37:1-3.

153 June 23, 2009, C. Wilson, M.D., Dep. 40:21-23.

154 June 23, 2009, C. Wilson, M.D., Dep. 37:7-11.

155 June 23, 2009, C. Wilson, M.D., Dep. 83:20-22.

156 R. 3442.

157 R. 3464.

158 R. 3462-63.

159 R. 3464.

160 R. 3466.

161 R. 3467.

3. Board Proceedings.

CESS initially accepted Rockstad's claim and began paying her temporary total disability (TTD) benefits at the rate of $730.82/week on July 5, 2004.[162] On September 21, 2005, CESS started making periodic payments at the TTD weekly rate, based on Dr. Prieto's 8 percent PPI rating for her right upper extremity DQ tenosynovitis and lateral epicondylitis, and began paying a reemployment stipend in February 2006 after Rockstad's PPI payments were exhausted.[163] Once Drs. Fuller, Reimer, and Glass performed their EME in February 2006 and provided a report, CESS controverted medical and related benefits, TTD/TPD (temporary partial disability), PPI, and reemployment benefits after March 31, 2006, owing to Rockstad's failure to maintain contact with her rehabilitation specialist.[164]

Prior to the September 2009 hearing on the merits of Rockstad's claim, the board issued eight decisions that addressed essentially procedural issues, most of which were raised by Rockstad.[165] At the September 2009 hearing, Rockstad's position was that she was entitled to benefits for having suffered the work-related conditions previously noted.[166] CESS contended: 1) that her DQ tenosynovitis was a temporary aggravation of a pre-existing condition that resolved by September 10, 2003; and 2) that there is no causal connection between those medical conditions and her employment or no persuasive medical evidence that Rockstad suffered from the medical conditions she attributes to her work with CESS.[167]

In its D&O issued after the September 2009 hearing, the board concluded that Rockstad was not credible, citing among other examples, her deposition testimony

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162 *See Rockstad I*, Bd. Dec. No. 09-0195 at 9.

163 R. 0016.

164 *See Rockstad I*, Bd. Dec. No. 09-0195 at 72, R. 0012, R. 0014.

165 *See Rockstad I*, Bd. Dec. No. 09-0195 at 1-2, n.1.

166 *See* n.2, *supra* and *Rockstad I*, Bd. Dec. No. 09-0195 at 3.

167 *See Rockstad I*, Bd. Dec. No. 09-0195 at 3.

contrasted with her actions in the videotaped surveillance that same day.[168] Therefore, the board discounted all medical opinions that relied heavily on Rockstad's self-reporting, including Dr. Wilson's, Dr. Vermillion's, and Dr. Ling's.[169]

The board also concluded that Rockstad's work for CESS caused a temporary aggravation of her pre-existing DQ in her right wrist that resolved in September 2003.[170] The board noted the 10-month gap in treatment for DQ from September 2003 until Rockstad's ER visit on June 28, 2004, as evidence of a temporary aggravation.[171] The board also declined to rely on Dr. Vermillion's opinion because he was equivocal and on Dr. Wilson's opinion because he relied too heavily on Rockstad's credibility.[172] The board observed that none of the other doctors attributed Rockstad's DQ symptoms after September 2003 to Rockstad's work for CESS.[173] Drs. Beard and Fuller outright rejected any link to CESS after September 2003.[174]

Furthermore, the board concluded Rockstad's CESS employment was not a substantial factor in causing right lateral epicondylitis after February 6, 2003. The board noted the 17-month gap in treatment for elbow pain and there were no treatments or complaints of elbow pain indicated in the medical records between February 6, 2003, and July 5, 2004.[175] The board relied on Dr. Fuller's opinions and discredited Dr. Vermillion's and Dr. Wilson's opinions because they did not explain how "the right lateral epicondylitis can be attributed to Claimant's employment when it was asymptomatic for seventeen months, and did not appear until five months after Claimant left CESS' employ."[176]

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168 *Id*. at 55-57.

169 *Id*. at 68, 67.

170 *Id.* at 75.

171 *Id.* at 58.

172 *Id.* at 58-59.

173 *Id*. at 58.

174 *Id*. at 58-59.

175 *Id.* at 60.

176 *Id.* at 61.

The board also rejected that her work at CESS was related to Rockstad's right medial epicondylitis, again noting this was first reported in July 2005, 13 months after leaving her employment with CESS. The board further stated that "[n]one of Claimant's treating physicians attributed medial epicondylitis, if they even diagnosed it, to Claimant's employment with CESS."[177] Only Dr. Wilson connected medial epicondylitis to Rockstad's work, but he acknowledged that this diagnosis was based on Rockstad's subjective reports of pain and noted he found no physical evidence of medial epicondylitis.[178]

The board concluded that the ganglion cyst was not related to Rockstad's employment largely because not a single doctor had opined there was any connection.[179] Next, the board concluded that the scar neuroma and CRPS were not related to Rockstad's work. The board discussed how these conditions were never clearly diagnosed and the weight of evidence supported that she did not have them.[180] The surgeons, Dr. McNamara and Dr. Vermillion, noted no signs of neuroma in their operative reports after her second and third surgeries; Dr. Vermillion ruled CRPS out based on EMG studies. Although Dr. Hinman listed CRPS in his diagnoses at one point, the board inferred that this was based on Rockstad's incorrectly reporting a diagnosis of CRPS.[181] The board also discounted Dr. Vermillion's opinions as unpersuasive because he never diagnosed these conditions, and he "assumed any surgery which may have caused these conditions was necessitated by a work injury, which it was not, and were based almost entirely on Claimant's verbal history, rather than medical record, and Claimant has been found to lack veracity."[182] Moreover, the board discounted Dr. Wilson's opinions because his testimony was contradictory and he misstated the

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177 *Id.*

178 *Id.* at 62.

179 *Id.* at 63.

180 *Id.* at 64-65

181 *Id.* at 65.

182 *Id.* at 66.

names of the conditions, referring at times to "chronic," instead of "complex," regional pain syndrome; and "sensory radial neuritis," instead of the correct "radial sensory neuritis."[183]

Finally the board concluded that Rockstad's employment was not a substantial factor in causing Rockstad to develop an injury-related mood disorder. Because the board concluded none of the diagnoses, other than a temporary aggravation of DQ tenosynovitis, could be attributed to her work, that there was "no legal basis for attributing any mood disorder Claimant may have developed as a result of any of these conditions, or as a result of surgeries she elected to treat any of these conditions, to her employment for CESS."[184] The board further concluded that even if the diagnoses were related to her employment, her work still would not be a substantial factor in causing her psychiatric problems.[185] The board observed that Drs. Beard, Fuller, Reimer, and Glass concluded she suffered from somatoform disorder, which was related to "inherent psychological factors and not to her work," and Dr. Holladay did not diagnose any injury-related mood disorder.[186] In terms of Ms. Judd's diagnoses, the board noted: "Although references appear in some of Ms. Judd's records suggesting that Claimant's reported pain was a result of her work, or surgeries undertaken for work injuries, these are based on patient reporting, and Ms. Judd has never made any independent assessment of the work-relatedness of any of Claimant's reported pain."[187] Lastly, the board discounted Dr. Ling's opinion as unpersuasive because it was equivocal and relied on Rockstad's reporting being accurate.[188]

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183 *Id*.

184 *Id.* at 68.

185 *Id*.

186 *Id*. at 69.

187 *Id*. at 70.

188 *Id*.

The board denied Rockstad's claims for TTD, PPI, medical and transportation costs, penalties, interest, and costs. The Board also denied her claims that CESS had filed unfair or frivolous controversions because the employer's controversions were all valid. On January 4, 2010, Rockstad filed a motion for reconsideration, claiming the board made several errors.[189] The board rejected all these arguments and denied her request for reconsideration and modification.[190]

Rockstad appeals.

4. Standard of review.

The board has the exclusive power to determine the credibility of a witness.[191] The board's findings regarding the credibility of the testimony of a witness are binding on the commission.[192] A finding by the board concerning the weight to be accorded a

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189 *See* n.4, *supra*.

190 *See Rockstad II*, Bd. Dec. No. 10-0015 (Jan. 22, 2010) at 2-3.

191 *See* AS 23.30.122, which reads:

> **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.

192 *See* AS 23.30.128(b), which states:

> The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

witness's testimony is conclusive even if the evidence is conflicting or susceptible to contrary conclusions.[193]

AS 23.30.128(b) instructs that the commission is to uphold the board's findings of fact if they are supported by substantial evidence.[194] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation

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[193] *See* AS 23.30.122. The Alaska Supreme Court "construes statutes *in pari materia* where two statutes . . . deal with the same subject matter." *Underwater Constr., Inc. v. Shirley,* 884 P.2d 150, 155 (Alaska 1994)(citations omitted). Statutes *in pari materia* are to be construed together. *See* 2B Norman J. Singer, *Sutherland Statutory Construction* § 51:02 (6th ed. 2000)(hereinafter *Sutherland*). Certain portions of AS 23.30.122 and AS 23.30.128(b) deal with the same subject matter: the reviewability of the board's findings. Construed together, the provision in section .122 that the board alone has the power to determine witness credibility and the provision in subsection .128(b) that the board's findings regarding the credibility of witness testimony are binding on the commission would indicate that the commission must defer to the board in terms of its findings on witness credibility. Indeed, applying AS 23.30.122, the supreme court has held that "deference should be given the [b]oard's determination of a witnesses [*sic*] credibility." *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994). There is no comparable provision in subsection .128(b) "binding" the commission relative to the board's "conclusive" finding on the weight given a witness's testimony under section .122. Nevertheless, it is reasonable to construe section .122 such that the commission's authority to review a board finding on the weight accorded testimony is similarly limited.

[194] *See* AS 23.30.128(b). The question arises whether the provision in AS 23.30.122 that the board's findings are subject to the same standard of review as a jury's findings in a civil action can be reconciled with the provision in AS 23.30.128(b) that the standard for commission review of the board's findings of fact is whether there is substantial evidence. A jury's findings in a civil action can be overturned only when, viewing the evidence in the light most favorable to the non-moving party, no reasonable person could have reached such conclusion. *See, e.g., Alaska Children's Servs., Inc. v. Smart*, 677 P.2d 899, 901 (Alaska 1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) quoting *Grove v. Alaska Constr. & Erectors,* 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted). The standards are similar, but not identical. For the purposes of this opinion, we will review the board's findings of fact under the substantial evidence standard, as that is the more recent and more specific statutory directive on the issue. *See Allen v. Alaska Oil and Gas Conservation Comm'n*, 147 P.3d 664, 668 (Alaska 2006).

of a reasonable mind is a question of law"[195] and therefore independently reviewed by the commission.[196]

5. Discussion.

a. The commission is not empowered to rule on the constitutionality of AS 23.30.122.

Rockstad maintains that AS 23.30.122[197] is unconstitutional.[198] CESS has argued that the commission cannot rule on the constitutionality of any part of the Alaska Workers' Compensation Act.[199] We agree with CESS and conclude that the commission is unable to rule on the issue of the constitutionality of AS 23.30.122.

The Alaska Supreme Court has held that the commission is a quasi-judicial administrative agency with adjudicative power, but not judicial power.[200] Its "jurisdiction is limited to 'hearing and determination of all questions of law and fact' arising under the Alaska Workers' Compensation Act in matters that have been appealed to the Appeals Commission."[201] However, as an administrative agency, the commission "do[es] not have jurisdiction to decide issues of constitutional law."[202] In accordance with this authority, whether AS 23.30.122 is constitutional is an issue of constitutional law that the commission has no jurisdiction to decide, and we therefore decline to address it.

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195 *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

196 *See* AS 23.30.128(b).

197 *See* AS 23.30.122, n.191, *supra*.

198 *See* Appellant's Br. at 4-5.

199 *See* Appellees' Br. at 28.

200 *See Alaska Public Interest Research Group v. State*, 167 P.3d 27, 35-36 (Alaska 2007)(*AKPIRG)*.

201 *Id.* at 36 quoting AS 23.30.008(a).

202 *AKPIRG*, 167 P.3d at 36 (footnote omitted).

b. The board made no mistakes of fact or law in concluding that Rockstad was not entitled to any further benefits.

In denying Rockstad further benefits, the board applied the three-step analysis regarding the presumption of compensability.[203] Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable.[204] To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment.[205] If the employee establishes the link, the presumption may be overcome when the employer presents substantial evidence that the injury was not work-related.[206] Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility of the parties and witnesses is not examined at this point.[207] If the board finds that the employer's evidence is sufficient, then the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence.[208] This means that the employee must "induce a belief" in the minds of the board members that the facts being asserted are probably true.[209] At this point, the board weighs the evidence, determines what inferences to draw from the evidence, and considers the question of credibility.

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[203] *See Rockstad I*, Bd. Dec. No. 09-0195 at 47-50.

[204] *See, e.g., Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996).

[205] *See, e.g., Tolbert v. Alascom, Inc.,* 973 P.2d 603, 610 (Alaska 1999).

[206] *See Tolbert*, 973 P.2d at 611 (explaining that to rebut the presumption "an employer must present substantial evidence that either '(1) provides an alternative explanation which, if accepted, would *exclude* work-related factors as a substantial cause of the disability; or (2) directly eliminates *any reasonable possibility* that employment was a factor in causing the disability.'" (italics in original, footnote omitted)); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978)z.

[207] *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

[208] *Miller*, 577 P.2d at 1046.

[209] *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

In its decision,[210] the board methodically discussed each injury that Rockstad alleged was related to her employment with CESS. Applying the three-step presumption of compensability analysis, it found that in each instance, CESS conceded that the presumption attached, the presumption was rebutted by CESS, usually through expert opinion,[211] and, in relation to the third step, Rockstad did not meet her burden of proof by a preponderance of evidence. We find that there was substantial evidence supporting the board's conclusions in these last two respects that the presumption was rebutted and that Rockstad had not met her burden.

i. Substantial evidence in the record supports the board's conclusions that Rockstad's employment with CESS was not a substantial factor in causing right wrist DQ tenosynovitis and that Rockstad did not meet her burden of proof.

The board concluded that Rockstad's right DQ tenosynovitis was pre-existing and that by September 2003 she had returned to her pre-injury status of transient episodes of right thumb and wrist pain.[212] In arriving at these conclusions, it noted that Dr. Kase's medical records indicated that Rockstad had complained of right DQ symptoms as early as 2000.[213] When seen at the Shemya clinic on August 4, 2003, "she admitted to a ten year history of intermittent, controlled, right thumb and wrist problems."[214] Rockstad's workers' compensation records also reflected her having made a prior claim for right wrist DQ tenosynovitis.[215] On causation, the board

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210 *See Rockstad I*, Bd. Dec. No. 09-0195 at 54-70.

211 *See, e.g., Cowen v. Wal-Mart,* 93 P.3d 420, 424-25 (Alaska 2004) (presentation of a qualified expert's opinion that the claimant's work was probably not a substantial cause of an injury or disability rebuts the presumption).

212 *See Rockstad I*, Bd. Dec. No. 09-0195 at 59.

213 *See id*. at 54-55.

214 *Id*. at 55.

215 In 1999, Rockstad brought a claim against her employer at that time, Alaska Cleaners. With respect to that claim, the conditions she complained of were right DQ as well as a ganglion cyst on the right wrist. The claim was settled through a Compromise and Release, which, among other things, included a waiver by Rockstad of any benefits for her right wrist. *See id*. at 55.

observed that "[n]one of Claimant's treating physicians attributed Claimant's recurring right DQ tenosynovitis to her work for CESS."[216] It found that medical records and the opinions of Dr. Fuller were the more persuasive evidence that her employment with CESS was not a substantial factor in causing right wrist DQ tenosynovitis.[217]

In contrast to this evidence, in both her deposition and hearing testimony, Rockstad denied a history of DQ tenosynovitis or having reported any such condition until her employment with CESS. The board found that Rockstad was not credible.[218] Furthermore, it accorded no weight to the opinions of Dr. Vermillion and Dr. Wilson on causation, because the former was equivocal and the latter relied on Rockstad's self-

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[216] *See Rockstad I*, Bd. Dec. No. 09-0195 at 58.

[217] *See id*. at 59.

[218] At this juncture in its decision, the board discussed Rockstad's lack of credibility at length:

> Claimant's lack of veracity in this and other assertions pertaining to her right upper extremity pervade this case. The January 26, December 12[,] and December 14, 2006 surveillance videotapes, in conjunction with Claimant's sworn deposition testimony on December 14, 2006, and March 9, 2007, is convincing evidence to the Board panel of Claimant's untruthfulness throughout these proceedings. At her deposition on December 14, 2006, Claimant testified she has been in constant pain "24/7" since August, 2003. She swore her pain was so great she could not lift her arm to take the oath; she has to cradle her right [arm] against her body daily to protect it due to pain; she is unable to hold a 12-ounce cup of coffee, or unscrew the cap from a bottle of water; she is unable to use her dominant right arm when shopping or carrying anything; she always uses her left arm, not her right, to open a car door; and her pain was so great on December 14, 2006, a 9.5 out of 10 on a ten point pain scale, she had to end the deposition early, and went home to bed for the rest of the day.
>
> In stark contrast to Claimant's testimony, two days before, as well as immediately following the deposition on December 14, Claimant was filmed doing all of the things she swore she could not do. *Id*. at 55-56.

The board's discussion continued with several more examples of Rockstad's untruthfulness with respect to significant matters. *See id*. at 56-57.

reporting.[219]

We find the foregoing is substantial evidence in the record for the board to conclude that CESS had rebutted the presumption and that Rockstad did not meet her burden of proof by a preponderance of evidence that her employment with CESS was a substantial factor in causing her DQ tenosynovitis. In the process, we defer, as we are legally required, to the board's assessment of Rockstad's credibility and decline to reweigh the medical testimony on causation, as the board's finding in this respect, by statute, is conclusive.

ii. Substantial evidence in the record supports the board's conclusions with respect to Rockstad's claim for right lateral epicondylitis.

Rockstad worked for CESS between August 2002 and April 2004. As noted by the board, over that time period, despite medical treatment on numerous occasions, her medical records reflect a single complaint of right elbow pain on February 6, 2003.[220] Rockstad's next report of right elbow pain was in July 2004, seventeen months after her initial complaint, three months after leaving employment with CESS, and two months after she began her data entry position with Nye Toyota.[221] This evidence, coupled with the opinion in the February 20, 2006, EME report of Drs. Fuller and Reimer, that Rockstad's right lateral epicondylitis was not work-related,[222] led the board to conclude that there was substantial evidence that CESS had rebutted the presumption of

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219 The board stated:

> Where a physician does not give serious consideration to problems with an employee's credibility, or other evidence in the record establishing an employee was presenting less that truthful versions of events, the opinions rendered as a result are no more reliable than the erroneous information provided to them, and will be accorded less weight. *Id*. at 58-59 (footnote omitted).

220 *See Rockstad I*, Bd. Dec. No. 09-0195 at 59.

221 *See id*. at 60.

222 The board again found the opinions of Drs. Vermillion and Wilson on causation unpersuasive because neither explained how Rockstad's right lateral epicondylitis could be attributed to her employment with CESS when it was asymptomatic for seventeen months. *See id*. at 61.

compensability and that Rockstad had failed to meet her burden of proving her claim. We find that there was substantial evidence in the record supporting the board's conclusions.

iii. Substantial evidence in the record supports the board's conclusions with respect to Rockstad's claim for right medial epicondylitis.

The board questioned whether Rockstad had actually suffered from right medial epicondylitis, in the process of concluding that CESS had met its burden rebutting the presumption, and that Rockstad had failed to prove by a preponderance of evidence that her employment with CESS was a substantial factor in causing any such condition.[223] Rockstad first complained of right medial epicondyle pain in July 2005, more than a year after leaving her employment with CESS in April 2004.[224] According to the board's findings, the only diagnosis of right medial epicondylitis came in August 2005 and was suspect because it was based solely on Rockstad's subjective complaints, which were inconsistent with the contemporaneous objective findings.[225] The board specifically noted that in November 2005, Rockstad requested Dr. Prieto to amend his earlier diagnosis to include medial epicondylitis.[226] Irrespective of any diagnosis of right medial epicondylitis, neither Drs. Fuller and Reimer, nor any of Rockstad's treating physicians attributed right medial epicondylitis to her employment with CESS.[227] This substantial evidence supports the board's conclusions.

iv. Substantial evidence in the record supports the board's conclusions with respect to Rockstad's claim that she developed a ganglion cyst.

The board definitively concluded that CESS had rebutted the presumption of compensability and that Rockstad had failed to meet her burden on the work-

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223 *See id*. at 61-62.

224 *See id*. at 61.

225 *See id*.

226 *See id*.

227 *See id*. at 61-62.

relatedness of her ganglion cyst.[228] The commission finds that there is substantial evidence in the record to support both of these conclusions by the board. In his April 2008 EME report, Dr. Fuller indicated that the cyst was not work-related. Furthermore, none of Rockstad's treating physicians attributed a ganglion cyst to her employment with CESS. Dr. Kase's medical records noted a probable right ganglion cyst in 1999, however, no ganglion cyst existed when Dr. McNamara performed a right DQ release in May 2005, and Dr. Wilson was of the opinion that the cyst was not work-related.[229]

v. Substantial evidence in the record supports the board's conclusions with respect to Rockstad's claims for CRPS, neuritis, or neuroma.

In its analysis whether any of the medical conditions that Rockstad alleged were related to her work with CESS, the board grouped three conditions together: 1) CRPS, 2) neuritis, and 3) neuroma.[230] It noted that CESS rebutted the presumption of compensability through the testimony of Drs. Reimer and Fuller.[231] Dr. Reimer stated that Rockstad showed no signs of CRPS or scar neuroma when he examined her on February 20, 2006.[232] Dr. Fuller testified that, during his physical examination of Rockstad on February 20, 2006, he could not elicit any neuroma response, and otherwise found no persuasive evidence that she ever suffered CRPS or neuritis.[233] We agree with the board that this is substantial evidence rebutting the presumption.

In contrast, the board observed that none of Rockstad's treating physicians stated an opinion that any of the three conditions were caused by her employment with CESS.[234] Dr. Beard's opinion, as of January 2005, was that Rockstad did not have

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228 *See id*. at 63.

229 *See id*.

230 *See id*. at 63-67.

231 *See id*. at 63-64.

232 *See id*. at 63.

233 *See id*. at 63-64.

234 *See id*. at 64.

CRPS.[235] Dr. Prieto testified that he saw no objective signs of CRPS and that Rockstad presented as magnifying her symptoms.[236] Furthermore, none of her surgeons, Dr. Kase, Dr. McNamara, and Dr. Vermillion, ever diagnosed CRPS, neuritis, or neuroma.[237]

Dr. Hinman's diagnosis of CRPS on August 10, 2007, was based on Rockstad telling him she had a diagnosis of CRPS, the reporting of which was contrary to Dr. Vermillion having ruled it out in June 2007. By February 2008, following a MRI, Dr. Hinman's diagnosis of Rockstad's continuing complaints did not include CRPS.[238]

Dr. Vermillion's responses to written inquiries posed to him in September 2008 by Ms. Thoeni, Rockstad's non-attorney representative, were accorded no weight by the board, as they were the product of misinformation conveyed to him in the questions posed by Ms. Thoeni.[239] The board also found Dr. Wilson's evidence unpersuasive because it included contradictions and misnomers.[240]

Finally, the board noted that neither Dr. Wilson nor Dr. Vermillion explained how, if Rockstad was suffering unrelenting pain following the surgeries by Dr. Kase and Dr. McNamara, she was able to travel from Alaska to Florida and back twice, travel from Florida to Las Vegas and back, and to go yachting in the Bahamas, between January 2006 and August 2006, without seeking any medical care for arm pain.[241]

On the basis of the foregoing evidence, which we find substantial, the board correctly concluded that Rockstad had failed to meet her burden of proof by a preponderance of the evidence.

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235 *See id*.

236 *See id*.

237 *See id*. at 64-65.

238 *See id*. at 65-66.

239 *See id*. at 66.

240 *See id*.

241 *See id*. at 66-67.

vi. Substantial evidence in the record supports the board's conclusions with respect to Rockstad's claim for injury-related mood disorder.

The board concluded that CESS had rebutted the presumption of an injury-related mood disorder through the February 20, 2006, report of EME psychiatrist, Dr. Glass. He held the opinion that, even though Rockstad suffered a somatoform pain disorder, it was not caused, aggravated, or accelerated by her employment with CESS.[242] The commission concurs that this is substantial evidence rebutting the presumption.

On the issue whether Rockstad met her burden of proof, the board pointed out that her work with CESS caused only a transient exacerbation of her pre-existing DQ tenosynovitis which resolved by September 2003.[243] Otherwise, her work was not a substantial factor in causing any of the other conditions of which she complained.[244] Accordingly, the board found that "there is no legal basis for attributing any mood disorder [Rockstad] may have developed as a result of any of these conditions, or as a result of surgeries she elected to treat any of these conditions, to her employment for CESS."[245] The board went on to list the evidence on which it was relying for this conclusion.

In April 2005, Dr. Beard found Rockstad's presentation and complaints of pain inconsistent with her medical examination, concluding that Rockstad needed psychological intervention and referring her to psychologist Lois Michaud and psychiatric nurse practitioner Connie Judd.[246] Ultimately, Dr. Beard agreed with Drs. Fuller, Reimer, and Glass, that Rockstad's "pain complaints were unjustified by her physical condition, and were the result of a somatoform disorder, related to inherent

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242 *See id*. at 67.

243 *See id*. at 68.

244 *See id*.

245 *Id*. at 68.

246 *See id*. at 68.

psychological factors and not her work."[247]

The board placed great weight on the evidence provided by Dr. Glass.[248] He first diagnosed Rockstad's somatoform pain disorder, attributing it to non-work-related factors and, after viewing the surveillance video, found that she predominately and consciously embellished her presentation of symptoms for secondary gain, which he termed "malingering."[249]

By July 21, 2008, Ms. Judd diagnosed pain disorder, among other things, which she attributed to both psychological factors and Rockstad's general medical condition.[250] The board specifically noted that references in Ms. Judd's records suggesting that Rockstad's reported pain was the result of her work or surgeries undertaken to treat work injuries were based on Rockstad's reporting.[251] According to the board, psychiatric problems associated with psychological factors unrelated to Rockstad's employment with CESS are documented by Ms. Judd.[252] Lastly, the board found Dr. Ling's opinion that Rockstad's psychiatric condition was work-related, unpersuasive because it was dependent on Rockstad being the medical historian.[253]

There is substantial evidence in the record to support the board's conclusion that Rockstad had not met her burden of proving by a preponderance of the evidence that her mood disorder was work-related. In reaching this conclusion, the board discounted Rockstad's testimony because she was not a credible witness and placed greater weight on the medical opinion of Dr. Glass. It was appropriate for the board to make such findings, which we will not disturb on appeal.

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247 *Id*. at 69.

248 *See id*. at 69.

249 *See id*.

250 *See id*. 70.

251 *See id*.

252 *See id*.

253 *See id*.

vii. Because there was substantial evidence in the record that Rockstad's employment with CESS was not a substantial factor in causing, aggravating, or accelerating any of the injuries or conditions of which Rockstad complained, and Rockstad failed to prove otherwise, the board did not err in concluding that she was not entitled to any TTD benefits, PPI benefits, medical and transportation costs, penalties, interest, and costs, and that the employer's controversions were not unfair or frivolous.

The board concluded that CESS had rebutted the presumption of compensability with respect to each of Rockstad's alleged injuries/conditions by showing that her employment with CESS was not a substantial factor in causing, aggravating or accelerating any of them. There was substantial evidence in the record supporting that conclusion. The burden then shifted to Rockstad to prove by a preponderance of the evidence that her work for CESS *was* a factor. That is, she was required to induce a belief in the minds of the board members of the probability that her injuries/conditions were work-related. Based on the board's written findings, she failed to do so. We agree that there was substantial evidence in the record to support the board's conclusion.

The board found that Rockstad was entitled to those workers' compensation benefits that Rockstad had already been paid by CESS, in connection with the temporary aggravation of her pre-existing DQ tenosynovitis, which returned to pre-injury status of transient episodes of right thumb and wrist pain by September 2003. Because the foundation for Rockstad's arguments for further benefits was the work-relatedness of her injuries/conditions, here, in the absence of adequate proof of work-relatedness, there is no such entitlement. The evidence does not support awards of additional benefits of TTD, PPI, medical and transportation costs, penalties, interest, and costs. Finally, because the controversions by CESS turned out to be valid, they were neither unfair nor frivolous.

5. Conclusion.

The commission concludes that it has no jurisdiction to rule on the constitutionality of AS 23.30.122. We also conclude that the board did not make mistakes of fact or of law in concluding that Rockstad was not entitled to any further benefits after September 2003. We therefore AFFIRM the board's decision in *Rockstad I*, Bd. Dec. No. 09-0195. Lastly, the commission agrees with the board's conclusion that CESS did not withhold or destroy evidence, and we AFFIRM and adopt the board's decision in *Rockstad II*, Bd. Dec. No. 10-0015, in that respect.

Date: *5 November 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David Richards, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirmed the board's decision denying the employee's claim for benefits. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days of this decision being distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical and grammatical errors, this is a full and correct copy of the Final Decision No. 140 issued in the matter of *Rockstad v. Chugach Eareckson Support Services et al.,* AWCAC Appeal No. 10-008, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on November 5, 2010.

Date: *Nov. 15, 2010*

Signed
B. Ward, Appeals Commission Clerk

Appendix A: Analysis from Alaska Workers' Comp. Bd. Dec. No. 10-0015

ANALYSIS

1. *Was it an abuse of discretion for the Board to rely on the reports and testimony of Stephen Fuller, M.D.?*

Claimant [Rockstad] contends it was an abuse of discretion to rely on the reports and testimony of Stephen Fuller, M.D., no longer a practicing orthopedic surgeon, who Claimant alleges testified falsely.[1] The Board has the sole power to determine the credibility of a witness. AS 23.30.122. The Board was aware Dr. Fuller was retired from performing surgery at the time of his examination of Claimant in this case.

[1] Claimant's allegations of perjury committed by Dr. Fuller, and what she perceives as the facts in support of her allegation are contained on page 5 of her Request for Reconsideration and Request for Modification.

Nevertheless, the Board concluded Dr. Fuller's opinion, based on his physical examination and findings, and his extensive and thorough review of the medical records and other evidence as more fully described in AWCB Decision No. 09-0195, should be accorded the most weight in weighing the evidence. Dr. Fuller was credible and persuasive in his reports and testimony before the Board.

Citing *Zerbinos v. Lewis*, 394 P.2d 886, 888 (Alaska 1964); *Maddocks v. Bennett*, 456 P.2d 453, 456 (Alaska 1969); and *Davis v. Chism*, 513 P.2d 475, 485 (Alaska 1973); Claimant further contends it was an abuse of discretion to rely on expert witness testimony where "the facts on which an opinion is based are not within the expert witness's own personal knowledge, such facts must have been supplied by other evidence and then presented to the witness hypothetically before his opinion may be received."

Claimant's arguments and cited cases are inapposite. Dr. Fuller examined the entire medical record, interviewed and examined Claimant, viewed Claimant's videotaped deposition and several *sub rosa* videotapes of Claimant's daily activities, and testified to his observations from the medical records, his physical examination, and his observations from the videotapes. He then rendered a professional opinion based on this evidence, and was cross-examined by Claimant. Unlike in the cases cited, questions posed to Dr. Fuller, and answers given were not hypothetical, but based upon his review of the medical record. Moreover, the fact-finder in this case, just as the jury in *Davis,* is the sole arbiter of "what weight to give an expert's opinion." *Davis* at 485.

2. Was it an abuse of discretion for the Board to accept Employer's Hearing Brief, filed in a three ring binder rather than top center two hole punched?

Employer's [CESS] Hearing Brief and accompanying exhibits were filed with the Board and supplied to Claimant in a 3-inch, 3-ring binder. In a preliminary motion at the start of the hearing, Claimant sought to have Employer's Hearing Brief stricken for its failure to comply with Bulletin No. 09-08. The motion was denied.

It was not an abuse of discretion or an example of bias for the Board to allow Employer's Hearing Brief. At the time of hearing the Hearing Brief had already been

filed and accepted, not rejected, by the receiving clerk at the Board. An internal review reflects Bulletin 09-08 has not been uniformly enforced at least in the Anchorage office, particularly with voluminous files such as the file in this case, which is contained in four "bankers' boxes". While Employer's Hearing Brief did not strictly comply with Bulletin 09-08's top center two-hole punch "rule," it is noted that 8 AAC 45.114, a lawfully enacted regulation pertaining to the filing requirements for Legal Memoranda, makes no such mandate. A Bulletin, enacted for the purpose of managing internal procedures, does not carry the full force of law.

Moreover, the law mandates workers' compensation cases be decided on their merits. Hearings must be impartial and fair to all parties. All parties must be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered. Pursuant to 8 AAC 45.195, the Board, in its discretion, may waive procedural rules where manifest injustice would result. Rejecting Employer's Hearing Brief simply because the number and location of punch holes for filing purposes would have been manifestly unjust, and would have deprived Employer of the right to have its arguments fairly considered. Employee's brief would not have been rejected had it been similarly bound.

3. Was non-attorney representative Mary Thoeni subjected to unlawful discrimination when required to swear a modified oath?

Claimant argues her lay advocate, Mary Thoeni, was subjected to unlawful discrimination when, at the outset of the hearing, she was asked to swear the following oath pertaining to her representation of Claimant:

> Do you swear or affirm that your representations to the Board will be the truth, the whole truth and nothing but the truth?

Ms. Thoeni argues such an oath subjects her, a non-attorney representative, to criminal prosecution for perjury, and if convicted, loss of citizenship rights; whereas attorneys, who are not required to swear an oath before the Board because they have sworn an oath before a judicial officer before admission to the bar, involves, at a maximum, only a loss of the right to practice law.

Ms. Thoeni was not the subject of discrimination. The law requires hearings be conducted in the manner by which parties' rights may best be ascertained. AS 23.30.135. It is not only non-attorney representatives who are asked to swear an oath to be truthful in their representations. Attorneys who have not been admitted to the Alaska Bar and have not sworn an oath to uphold the law and the canons of professional responsibility are also sworn. As parties' advocates, non-attorney representatives and non-admitted attorneys are asked to swear an oath to ensure they adhere to rules of professional conduct similar to that of admitted attorneys against whom they practice. The purpose is to ensure integrity and administration of justice, not to hold non-attorneys and non-admitted attorneys to any higher level of scrutiny or punishment. Indeed, attorneys who commit perjury are just as subject to criminal prosecution as non-attorneys who commit perjury.

4. Was it an abuse of discretion to permit Employer to use a computer and video monitors to display evidence?

Claimant further alleges it was prejudicial to permit Employer to utilize a computer and video monitors to display evidence over Claimant's objections. As an initial matter, the record does not reflect Claimant objecting to Employer's use of a computer and video monitor to display evidence. However, had such an objection been lodged, it would not have been error to overrule the objection. It is undisputed the evidence in this case, and the agency's file, are voluminous. The oral hearing alone took 14 hours over two days. Including deposition testimony, the parties presented more than 20 witnesses. Employer used a computer to marshal and present its evidence. Employer provided individual video display monitors to all participants. Claimant does not explain in what manner she was prejudiced by Employer's reliance on a computer to organize its exhibits, or on its use of video monitors to display exhibits, other than to aver "many [claimants] are not computer literate." Claimant's Request for Reconsideration and Request for Modification, at 7. Claimant does not argue *she* is computer illiterate, or she was unable to view exhibits displayed on the video monitor provided for her use. Indeed, her claim is based in part on her allegation she was not provided an ergonomic computer work station. Claimant was not

prejudiced by Employer's use of a computer and video display monitors, and there is no merit to Claimant's assertion of error.

5. Did the Division engage in ex parte communication with Employer's counsel?

Claimant asserts an unlawful *ex parte* communication occurred when a Workers' Compensation Officer II, after the record closed, requested from Employer's counsel's office transmission of an electronic transcript of the depositions of SIME physicians Wilson and Ling, and of the Report of Occupational Injury, all of which were already on file with the Board, but had been temporarily misplaced. Employer contends the request was not an improper *ex parte* communication because it did not include any comment or argument, but involved simply the transmission of an electronic copy of already-filed deposition transcripts; the transcripts had already been received into evidence; and Claimant relied on those deposition transcripts in her case in chief.

Employer's points are well-taken. Moreover, Employer's response, which conveyed the requested information to the Division, *was* simultaneously copied to Claimant's representative. However, while Employer is technically correct, and the concept of *ex parte* contact does not apply to mere "housekeeping" matters, the better practice would have been for the Division's request to have been directed toward both parties. Claimant neither alleges nor suffered prejudice from this communication. Only evidence in Claimant's agency file, and arguments and evidence presented at hearing, were relied upon in formulating the final decision.

6. Was it a mistake of law to appoint a new designated chair to hear the merits of the claim?

There have been eight prior hearings (including written record hearings) in this case since the first hearing in December, 2007. All prior hearings involved procedural matters and resulted in written Decisions and Orders, described more fully at footnote 1 in AWCB Decision No. 09-0195. In all prior hearings the panel consisted of Member from Industry, Linda Hutchings; Member from Labor, Patricia Vollendorf; and now Chief of Adjudications Janel Wright, as Chair. The hearing on the claim's merits was heard on September 16-17, 2009, with a panel consisting of Member from Industry, Linda

Hutchings; Member from Labor, Patricia Vollendorf; and Hearing Officer Linda Cerro, as Chair.

Claimant argues it was a violation of the law's requirement a claim be heard by only one panel, for the chair to have been changed without prior notice to the parties, when the original chair was still employed by the State. Claimant is in error. Only one panel heard Claimant's petitions, and only one panel heard her claim.

The law mandates formation of three southern, three northern and five southcentral Board panels, each panel consisting of three members. Each panel is comprised of the Commissioner of Labor and Workforce Development or his hearing officer designee, one member from industry, and one member from labor. The Commissioner or his designee must act as the chair of each panel.

The panels of all eight previous hearings, as well as the panel hearing the merits of the claim in September, 2009, have been the same, consisting of (1) the Commissioner of Labor and Workforce Development or his designee; (2) member from industry Linda Hutchings; and (3) member from labor Patricia Vollendorf. However, even if the statute were interpreted as requiring the same designee at *every* hearing in a particular case, the composition of the September panel, with Linda Cerro as Chair, was not unlawful. A member of one panel may serve on another panel when the Commissioner considers it necessary for the prompt administration of the Act. Transfers to panels are allowed, so long as a labor or management representative replaces a counterpart. The assignment of Hearing Officer Linda Cerro as chair, on behalf of the Commissioner, did not abrogate this rule. Indeed, not only was there no interchange of labor or management representatives, the same labor and management representatives, Ms. Hutchings and Ms. Vollendorf, have participated in all prior hearings in this case, as well as the hearing on the merits of the claim. Two members of a panel constitute a quorum for hearing claims, and the action taken by a quorum of a panel is considered the action of the full board.

7. Was it error to "rely . . . on multiple predictions of medical stability, which turned out to be incorrect?"

Citing *Wollaston v. Schroder Cutting Inc.*, 42 P.3d 1065 (Alaska 2002), and *Thoeni v. Consumer Electronic Services,* 151 P.3d 1249 (Alaska 2007), Claimant contends it was error to rely on multiple predictions of medical stability, which turned out to be incorrect. Claimant does not explain to what "predictions" of medical stability she is referring, or how they "turned out to be incorrect." Claimant's allegation is without merit.

An issue at hearing was whether Claimant's employment caused her to suffer right de Quervain's (DQ) tenosynovitis, right lateral epicondylitis, right medial epicondylitis, ganglion cyst, complex regional pain syndrome, neuroma, neuritis or injury-related mood disorder. Claimant's employment caused only a temporary exacerbation of her pre-existing DQ tenosynovitis, which resolved with conservative treatment in September, 2003. *Rockstad v. CESS*, AWCB Decision No. 09-0195 (December 16, 2009). Claimant's employment caused only a brief episode of right lateral epicondylitis in February, 2003, which resolved. *Id.* Claimant's employment was not a substantial factor in bringing about any persistent right lateral epicondylitis, or any right medial epicondylitis, ganglion cyst, complex regional pain syndrome, neuroma, neuritis or injury-related mood disorder. *Id.* Claimant attained medical stability with respect to her DQ tenosynovitis following the conservative treatment efforts initiated by ANP Dana Campbell in August, 2003, and continued by Dr. Kase in September, 2003, after which she returned to her pre-injury status of transient episodes of right thumb and wrist pain, which pre-dated by as much as 10 years her report of right wrist pain to Dana Campbell in August, 2003. *Id*. This finding of medical stability was not based upon a "prediction" of medical stability, but was based on Dr. Fuller's medical opinion Claimant attained medical stability from the August, 2003 episode of DQ tenosynovitis in September, 2003. Because Claimant's other reported conditions were found not work-related, no findings or conclusions were made concerning medical stability of any other conditions.

8. Was the "remote site doctrine" incorrectly applied?

Claimant does not explain her assertion "the remote site doctrine" was incorrectly applied, but simply cites four Alaska Supreme Court cases, which she neither compares nor contrasts with the instant case. The Court summarized the remote site doctrine in *Doyon Universal Services v. Allen*, 999 P.2d 764 (Alaska 2000), where it affirmed a finding an employee's intestinal obstruction occurred as a result of his eating Brussels sprouts served in the employer's remote site mess hall:

> The crux of this doctrine is that everyday activities that are normally considered non-work-related are deemed a part of a remote site employee's job for workers' compensation purposes because the requirement of living at the remote site limits an employee's activity choices. *Id*. at 769.

A review of the cited cases does not reveal what Claimant's argument may be; the cases cited appear inapposite. In *Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145 (Alaska 1989) the Court upheld the decision the employee's neck injury, sustained in an automobile accident when he was returning to his home in Wasilla from an EME appointment in Anchorage, was non-compensable, because the employee, for purely personal reasons, delayed his return trip for five days. Although the court affirmed the tenet medical travel for treatment of work-related injuries is covered under the Alaska Workers' Compensation Act, the employee's five-day delay represented a non-compensable deviation from an otherwise compensable trip under the "deviation exception" to coverage under the Act for travel to receive medical treatment for a work-related injury. *Id.* at 1149.

The facts in *Malone v. Lake and Peninsula Borough School Dist*., 977 P.2d 733 (Alaska 1999) are similarly dissimilar to the instant case. Mrs. Malone was injured, and her husband killed, in an airplane accident when the couple sought to visit a school in a remote Alaska village where they had been hired as new teachers. The Court held the "special-hazard" exception to the "going and coming rule" did not apply to injuries sustained by the teachers on a trip to visit the school, where the injuries occurred before they took up their teaching duties; the teachers had been discouraged by the school district from visiting the prospective schools before the beginning of the school

year, yet did so against the advice of and without notice to the school principal; and traveled a route a school teacher would not normally take to and from school. The Court held the injuries sustained did not occur during "employer-required or supplied travel to and from a remote job site," or while engaged in "activities performed at the direction or under the control of the employer," nor did the injuries result from "employer-sanctioned activities at employer-provided facilities." *Id.* at 738-739.

Compensability was found in *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413 (Alaska 2004), where the employee died while awaiting employer-required travel from the worksite. The injuries in the instant case did not result from or occur during Claimant's travel to or from her remote work site in Shemya, or while engaged in employer-sanctioned activities at employer-provided facilities, as occurred in the cited cases.

If, in citing these cases, Claimant is arguing error in finding Claimant's right lateral epicondylitis non-compensable, because it may have resulted from her use of Nautilus machines at an employer-provided facility, Claimant misunderstands the decision in this case. For the numerous reasons cited at pages 59-61 of the December 16, 2009 D & O, and not due to a misapplication of the remote site doctrine, Claimant failed to prove by a preponderance of the evidence her employment was a substantial factor in her need for medical treatment for right lateral epicondylitis after February 6, 2003.

9. Did Employer unlawfully change EME physicians?

Claimant argues Dr. Joella Beard "became the Employer's physician effective January 5, 2006," and the Board "unlawfully permitted Employer to change physicians from Dr. Beard to Impartial Medical Opinions (IMO) on February 20, 2006, back to Dr. Beard on April 7, 2006, and then back to IMO on April 23, 2008." Dr. Beard did not become the Employer's physician, thereby causing an unlawful change of physicians from IMO, when the adjuster asked questions of her. It is common for an adjuster, gathering information for purposes of evaluating any claim, to pose written questions to the employee's treating physicians. That the treating physician's responses to those questions may be more supportive of an employer's controversion than of an

employee's claim, does not transform the treating physician into an EME physician in violation of AS 23.30.095(e).

10. Were the facts misrepresented in a manner most favorable to Employer, such that the Board's factual findings are not supported by substantial evidence?

Claimant contends a multitude of the Board's factual findings were not supported by substantial evidence, and the Board misrepresented evidence in a manner most favorable to the Employer.

Most of Claimant's allegations reflect an effort to re-argue facts decided contrary to Claimant's interpretation of the facts. Some of Claimant's arguments repeat those made and resolved in previous decisions in this case. Under the law, a Request for Modification due to an allegation of mistake of fact is inappropriate where it is an attempt to retry a case in an effort to make a better showing on the second attempt.

Some of Claimant's arguments allege facts not in evidence. Other allegations of mistakes of fact are actually quotations from medical reports, presented as such in the findings, and are not, in fact, findings. In other words, some alleged mistakes are set forth in the decision as found to have been stated in a medical report by a doctor, as a point of comparison with other opinions, and not accepted as fact, *per se*. Claimant further argues facts were omitted. Findings of fact, however, are not intended as a regurgitation of every piece of evidence presented. The record, consisting of the agency file and the hearing recording or transcription, serves that purpose. Findings are made after a review of the record as a whole, and contain relevant findings made after a winnowing of all the evidence. Claimant's allegations of mistakes of fact, if any exist, are harmless. That the finders of fact evaluated the evidence in a manner different from the manner in which Claimant sought to present it does not constitute bias or mistake of fact subject to modification. It is the province of the Alaska Workers' Compensation Appeals Commission to determine if the decision's factual findings are supported by substantial evidence. AS 23.30.128.

11. Did Employer withhold evidence?

Claimant alleges Employer, through counsel, intentionally withheld evidence, specifically, emails dated August 4, 2005, and September 28, 2005, as well as the attachment to the September 28, 2005 email, which is Claimant's written request to Employer for a copy of her personnel file. The August 4, 2005, email is Employer's internal policy memorandum notifying recipients of the established procedure to employ upon receipt of requests for personnel files. It instructs that the request, along with the personnel file, be sent to CESS "Corporate Legal (ATTN: Tom Jodwalis)." The email is a generic instruction to personnel. Claimant is not mentioned, and substantively the email has no relevance to her claim. Indeed, Claimant did not request her personnel file until September 25, 2005, which precipitated the September 28, 2005, email to Mr. Jodwalis, which notifies him the personnel file pertaining to Claimant's attached request will be forwarded to his attention in accordance with the procedures noted in the August 4, 2005 policy memo. It is a transmittal email only, conveying nothing more than the attachment of Claimant's request for her personnel file, and notifying him the file will follow. The email contains nothing of substance pertaining to Claimant's employment, her injury or her claim. The attached request, Claimant complains, was not provided to her during discovery was written by Claimant herself. Claimant's assertions of error pertaining to these documents are without merit.

Claimant further argues Employer withheld from her a copy of the October 12, 2002, report concerning an alleged assault upon her by CESS employee Don DeArmoun. This incident report, however, was authored by Claimant. It was considered in connection with earlier petitions in this case. The incident is also the subject of a Report of Occupational Injury in AWCB Case No. 200226274. At the start of the hearing Ms. Thoeni, upon a request for clarification from Employer, assured that although she entered an appearance on Claimant's behalf in the case arising from the 2002 incident, she had not filed an Affidavit of Readiness for Hearing, and it was not her intent to argue that incident as a part of this claim.

Finally, Claimant alleges she was not provided with medical records from Shemya Clinic after her August 4, 2003 visit, when she was diagnosed with exacerbation of her

pre-existing DQ tenosynovitis, right wrist. This is apparently the crux of Claimant's argument pertaining to allegedly withheld records. If understood correctly from Claimant's January 20, 2010, Reply, Claimant avers Employer's failure to provide her with two documents she authored, a generic company email explaining the procedure to follow upon receipt of requests for personnel files, and an email transmitting Claimant's request for a copy of her personnel file to CESS' legal department, in conjunction with the depositions of co-workers Sharry Christiansen and Mary McCully, constitute substantial evidence Employer intentionally and knowingly withheld from Claimant and the Board medical records from continuing care Claimant alleges she received at Shemya Clinic after August 4, 2003. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). Given the testimony of Christiansen and McCully, and considering the allegations made here, there is no substantial evidence Shemya Clinic medical records were withheld from Claimant.

Dated at Anchorage, Alaska, this 22[nd] day of January, 2010.

ALASKA WORKERS' COMPENSATION BOARD

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