

# Alaska Workers' Compensation Appeals Commission

Kolleen A. Kessler,  
Appellant,

vs.

State of Alaska,  
Appellee.

## Final Decision

Decision No. 297                      October 19, 2022

AWCAC Appeal No. 20-013  
AWCB Decision No. 20-0055  
AWCB Case No. 201501516

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 20-0055, issued at Anchorage, Alaska, on July 9, 2020, by southcentral panel members Ronald P. Ringel, Chair, Nancy Shaw, Member for Labor, and Randy Beltz, Member for Industry.

Appearances: Kolleen A. Kessler, self-represented appellant, with non-attorney assistant, Barbara Williams; Treg R. Taylor, Attorney General, and Michelle L. McComb, Assistant Attorney General, for appellee, State of Alaska.

Commission proceedings: Appeal filed August 10, 2020; briefing completed October 28, 2021; oral argument held June 29, 2022.

Commissioners: James N. Rhodes, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

### *1. Introduction.*

Kolleen Kessler claimed both physical and mental injuries while working for the State of Alaska, Department of Health and Social Services (SOA). She appealed to the Alaska Workers' Compensation Appeals Commission (Commission) following the denial of her claim by the Alaska Workers' Compensation Board (Board).<sup>1</sup> Oral argument was heard on June 29, 2022. Ms. Kessler represented herself before the Commission although

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<sup>1</sup> *Kessler v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 20-0055 (July 9, 2020) (*Kessler II*). A prior Board decision regarding employment records releases, *Kessler v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 17-0024 (Feb. 28, 2017) (*Kessler I*) is not part of this appeal.

she was assisted by non-attorney Barbara Williams.<sup>2</sup> The Commission now affirms the Board's decision.

*2. Factual background and proceedings.*<sup>3</sup>

When Ms. Kessler began working for SOA as an Adult Probation Officer in 2001, much of her time was spent in the field where she had to wear a Kevlar vest and a heavy belt with handcuffs, pepper spray, and radio. However, in May 2005, when she transferred to the Alcohol Safety Action Program (ASAP), her work primarily was office work, monitoring clients, and testifying in court. In December 2008, she transferred to the Anchorage Wellness Court (AWC) and her duties were much like her duties as an adult probation officer, in that she had to make home visits, monitor living conditions, and transport people to court.<sup>4</sup>

Ms. Kessler stated that in 2010 she was the whistleblower in a matter resulting in another probation officer being arrested for sexually abusing female clients and for which the State was sued. She contended her supervisor was friendly with the probation officer who was arrested, and he began retaliating against her. In 2012, she transferred back to ASAP.<sup>5</sup>

Ms. Kessler asserts she had no ergonomic problems before 2008, and no problems with her back, neck, or arms. However, while at AWC she was working in a cramped office and had a poor chair that tilted to the left side. It was then, she claims, she began having problems with her back, legs, and feet. She told her supervisor she was having

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<sup>2</sup> The Commission notes that Ms. Williams has assisted many unrepresented claimants through the years before the Board.

<sup>3</sup> We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

<sup>4</sup> Feb. 12, 2020, Hr'g Tr. at 242:8-25; 245:11 – 246:9; 248:18-20; 248:24 – 249:9; 249:25 – 250:15.

<sup>5</sup> Feb. 12, 2020, Hr'g Tr. at 272:13 – 273:20; 274:24 – 275:18; 278:2-8; 260:7-13.

problems with the chair, but it was never replaced. She also claims that at ASAP files were stored in large file cabinets on tracks that required a hand wheel to move.<sup>6</sup>

Ms. Kessler's medical history shows some instances of back complaints beginning in June 2006, when Ms. Kessler was seen at the Alaska Chiropractic Center for low back pain due to pregnancy.<sup>7</sup> In October 2009, Ms. Kessler returned to the Alaska Chiropractic Center three times for severe low back pain. The chart notes did not indicate what caused the pain.<sup>8</sup>

At other times Ms. Kessler sought treatment, but not specifically for her back. She complained to Michael S. Reeves, M.D., on January 11, 2011, that she was under a great deal of stress at work because of litigation. He diagnosed situational anxiety and prescribed medication. The chart note does not mention low back pain.<sup>9</sup> Ms. Kessler saw Dr. Reeves on February 22, 2011, March 10, 2011, May 10, 2011, and April 11, 2012. Although Ms. Kessler complained of pelvic pain and anxiety regarding litigation, none of the chart notes mention low back pain.<sup>10</sup>

Ms. Kessler reported to Dr. Reeves on May 9, 2012, she was experiencing stress as a result of harassment at work. She also reported she had leg pain, and that she had no history of back pain or back injury. She attributed the pain to her inability to move freely about the office. Dr. Reeves diagnosed back pain and anxiety and possible iliotibial band syndrome.<sup>11</sup> The x-rays of Ms. Kessler's lumbar spine taken on May 9, 2012, showed disc space narrowing at L2 and L5 with small osteophytes throughout, and the report stated she had moderate degenerative changes throughout the lumbar spine.<sup>12</sup>

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<sup>6</sup> Feb. 12, 2020, Hr'g Tr. at 252:17 – 253:22; 255:13 – 256:1; 257:14-15; 315:10 – 316:6.

<sup>7</sup> R. 916-919.

<sup>8</sup> R. 920.

<sup>9</sup> R. 2212-2214.

<sup>10</sup> R. 2220-2222, 2230-2232, 2233-2234, 2238-2240.

<sup>11</sup> R. 1538-1540.

<sup>12</sup> R. 1542.

Dr. Reeves provided Ms. Kessler an accommodation request that stated she was taking medication for anxiety caused by her job, but it did not identify any accommodations that would allow Ms. Kessler to perform her job, and it did not mention her low back.<sup>13</sup>

On May 23, 2012, Ms. Kessler returned to Dr. Reeves who reported the pain in Ms. Kessler's leg was likely lumbar radiculopathy and prescribed physical therapy. A May 30, 2012, magnetic resonance imaging (MRI) showed mild to moderate degenerative disc disease at all levels of Ms. Kessler's lumbar spine.<sup>14</sup>

On September 24, 2012, Ms. Kessler returned to Alaska Chiropractic Center, stating she had woken up with severe low back pain that was exacerbated by sitting for long periods.<sup>15</sup> On September 28, 2012, Richard Ealum, D.C., wrote a letter saying Ms. Kessler was under his care for a low back condition, that she needed to change her posture at least hourly, and requested an ergonomic assessment of her workstation.<sup>16</sup>

In late 2012, Ms. Kessler transferred back to ASAP. She stated she frequently had to transport numerous files to court and she requested a rolling cart, but she was given only a briefcase with wheels that required her to stoop. She reported she again experienced back pain. She also asserted her job required significant computer work, and she often had to cradle the telephone handset between her head and shoulder.<sup>17</sup>

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

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<sup>13</sup> R. 2241-2242.

<sup>14</sup> R. 932-933; 930-931.

<sup>15</sup> R. 922.

<sup>16</sup> R. 2518.

<sup>17</sup> Feb. 12, 2020, Hr'g Tr. at 260:11 – 263:3; 300:20 – 301:1.

existing keyboard tray, and raising the desk.<sup>18</sup> On October 16, 2012, SOA purchased a new office chair and a new keyboard tray for Ms. Kessler's use.<sup>19</sup>

On October 16, 2012, Dr. Ealum wrote a letter stating he still required Ms. Kessler to take frequent breaks, and it was necessary for her to walk during the breaks.<sup>20</sup>

On November 16, 2012, Dr. Reeves wrote a "to whom it may concern" letter stating that while Ms. Kessler had not been diagnosed with back problems on February 22, 2011, the back problems were likely the cause of her pain complaints at that time.<sup>21</sup>

Ms. Kessler saw Larry Kropp, M.D., an interventional anesthesiologist, on February 1, 2013. She reported her symptoms began in 2011 when working at a desk and had worsened lately. Dr. Kropp referred her for a lumbar MRI.<sup>22</sup> The MRI showed annular disk tears at every level, particularly at L3, L4, and L5, any of which could produce nerve root irritation and back pain. Dr. Kropp, on February 13, 2013, performed a nerve root block at the L4-5 level of Ms. Kessler's spine,<sup>23</sup> which she reported on February 19, 2013, had decreased her pain by more than half. She was interested in repeating the injection, which was performed that day.<sup>24</sup> On February 26, 2013, Ms. Kessler reported that the pain was better, but her spine was still sore. She again asked to repeat the procedure.<sup>25</sup>

On May 10, 2013, Ms. Kessler reported to Dr. Kropp that she was still experiencing a lot of stress and work had become "extremely restrictive with the co-worker situation." He wanted her to be moving around, and he asked Ms. Kessler to bring him the letter

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18 R. 898-900.

19 R. 1452.

20 R. 2252.

21 R. 1551.

22 R. 935-936.

23 R. 1555-1559.

24 R. 1560-1562.

25 R. 1565.

from SOA that restricted her motion throughout the day.<sup>26</sup> The Board found no letter in the record from SOA which stated Ms. Kessler's movements were restricted.<sup>27</sup>

On May 14, 2013, Dr. Kropp wrote a letter to Susan Draveling, Ms. Kessler's supervisor, stating Ms. Kessler had a protruding disc in her low back. He asked that she be allowed to vary her posture throughout the day, including being able to walk around.<sup>28</sup> On May 23, 2013, Dr. Kropp stated Ms. Kessler had a displaced disc at L4-5 and piriformis syndrome. He also stated the June 1, 2011, injury was the substantial cause of her need for treatment because she was ordered not to rise from her desk and was unable to move around.<sup>29</sup>

Dr. Kropp, on September 3, 2013, wrote to SOA requesting another ergonomic evaluation of Ms. Kessler's workspace.<sup>30</sup> On September 17, 2013, Dr. Kropp performed an epidural steroid injection at the L4 level of Ms. Kessler's spine.<sup>31</sup>

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

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<sup>26</sup> R. 1571.

<sup>27</sup> *Kessler II* at 5, No. 27.

<sup>28</sup> R. 2519.

<sup>29</sup> R. 1569-1570.

<sup>30</sup> R. 1581.

<sup>31</sup> R. 1582-1585.

<sup>32</sup> R. 901-904.

On November 6, 2013, Ms. Kessler returned to Dr. Kropp and reported left shoulder pain in addition to her low back pain. Dr. Kropp ordered an MRI of her left shoulder.<sup>33</sup>

On December 31, 2013, the MRI of Ms. Kessler's left shoulder showed a partial thickness tear of the supraspinatus tendon and tendinopathy of the supraspinatus and infraspinatus tendons.<sup>34</sup> On January 22, 2014, Ms. Kessler was seen by Elisha T. Powell, M.D., an orthopedic surgeon. Ms. Kessler did not recall a specific incident, but her shoulder had become increasingly painful over the last year. Dr. Powell found Ms. Kessler had full range of motion and good strength in her left shoulder, and he diagnosed a minimal partial thickness rotator cuff tear. He advised physical therapy and a possible steroid injection.<sup>35</sup>

On March 6, 2014, Ms. Macchello performed another ergonomic assessment. She noted Ms. Kessler was now spending about four hours per week at a desk in the lobby, but the time she spent on the computer, paperwork, and the telephone remained unchanged. The lobby had an adjustable desk, but with a standard keyboard and mouse, and the monitors and customer service window were to the right. Additionally, because she was required to type while on the telephone, Ms. Kessler had to cradle the telephone between her neck and ear. Ms. Macchello adjusted the monitor, moved the desk to reduce neck strain, and identified a particular cart that Ms. Kessler could use to move files to and from the file room. She recommended a pillow be purchased for the chair, a headset for the telephone, and a wireless keyboard for the computer.<sup>36</sup> On May 2, 2014, SOA purchased two wireless headsets for Ms. Kessler's use.<sup>37</sup>

On March 7, 2014, Ms. Kessler returned to Dr. Reeves and reported she had sprained her ankle at work in November. Dr. Reeves referred her to physical therapy.<sup>38</sup>

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<sup>33</sup> R. 1597-1598.

<sup>34</sup> R. 944-945.

<sup>35</sup> R. 946-947.

<sup>36</sup> R. 905-907.

<sup>37</sup> R. 1456-1457.

<sup>38</sup> R. 1630-1631.

X-rays of Ms. Kessler's right ankle taken on March 7, 2014, showed an osteophyte on the navicular, but no other abnormalities.<sup>39</sup> The x-ray on June 11, 2014, of Ms. Kessler' neck showed degenerative changes with evidence of muscle spasm.<sup>40</sup>

On August 8, 2014, Ms. Kessler had an MRI of her cervical spine that showed degenerative disc disease at C3-4 and C6-7 with small disc protrusions at both levels. The protrusion at C3-4 caused some foraminal narrowing, but the protrusion at C6-7 did not.<sup>41</sup> On August 12, 2014, Dr. Ealum referred Ms. Kessler to Dr. Kropp for neck and left shoulder treatment.<sup>42</sup> On August 15, 2014, Dr. Kropp performed a selective nerve root block and diagnostic epidurogram at C6-7. The epidurogram showed osteophytes and severe degenerative changes.<sup>43</sup>

On September 2, 2014, Ms. Kessler reported to Dr. Kropp that the nerve root block had taken away most of her symptoms. She explained she still had to move her neck to one side at work, and Dr. Kropp wrote to SOA to see if the office could be arranged differently.<sup>44</sup> Ms. Kessler returned to Dr. Kropp on September 29, 2014, who explained that Ms. Kessler had some work restrictions, but he did not believe she was disabled. He performed a diagnostic epidurogram and selective nerve root block at the L4-5 level. The epidurogram showed osteophytes and severe degenerative changes.<sup>45</sup>

On October 1, 2014, Ms. Draveling emailed Ms. Kessler stating she had received the doctor's letter regarding Ms. Kessler's workstation. Ms. Draveling had checked the workstation and found the monitors were centered on the desk, and she told Ms. Kessler they could be reconfigured to change the primary screen, but Ms. Kessler declined saying her desk needed to be moved. Ms. Draveling explained moving the desk would do

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39 R. 2272.

40 R. 1652.

41 R. 950-951.

42 R. 949.

43 R. 1669-1671.

44 R. 1674-1676.

45 R. 1677-1679.



nothing to affect how Ms. Kessler moved her neck as it would be the same desk in a different location. Ms. Draveling stated she was willing to rearrange the desk to help, but all of the recommendations by the ergonomic assessors had been put into place.<sup>46</sup>

Ms. Kessler returned to Dr. Kropp on October 6, 2014, saying SOA refused to move her desk, and Ms. Kessler did not believe SOA had complied with the ergonomic assessments. Dr. Kropp stated it would be beneficial to have the ergonomic specialist review the situation again.<sup>47</sup>

On November 6, 2014, Ms. Kessler saw Charles Craven, M.D., for an employer's medical evaluation (EME). He reviewed her medical records from May 9, 2012, through September 29, 2014, and examined her. Ms. Kessler explained she began having back and hip pain in 2010 after using a chair that tilted to the side. Dr. Craven diagnosed cervical and lumbar strains caused by prolonged sitting at work and a left shoulder strain also caused by work. He diagnosed cervical and lumbar degenerative spondylosis, left shoulder tendinopathy, and a partial thickness rotator cuff tear that were unrelated to Ms. Kessler's work. Dr. Craven explained that the degenerative changes to Ms. Kessler's back were preexisting and due to age, and her work was not the substantial cause. He acknowledged that repetitive activities could lead to a left shoulder strain, but the activities would not cause a partial thickness rotator cuff tear. He found Ms. Kessler's left shoulder was medically stable as of June 25, 2014, when she was seen by Dr. Powell, and she was able to return to work without restrictions.<sup>48</sup>

Ms. Macchello, on November 26, 2014, performed another ergonomic assessment. Ms. Kessler explained she had to constantly turn to the left when people approached her desk, which exacerbated her neck and shoulder pain. Ms. Macchello noted the ergonomic keyboard ordered in the last assessment was being used, but the document holder and cushion were not. Ms. Kessler said the headset was broken, but she had not informed SOA. Ms. Kessler continued to hand carry files to the file room although the

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<sup>46</sup> R. 1898.

<sup>47</sup> R. 1681-1682.

<sup>48</sup> R. 969-990.

recommended cart was available. Ms. Macchello recommended Ms. Kessler's desk in the lobby be turned 90 degrees so that she would not have to turn to the left to address people.<sup>49</sup>

On December 9, 2014, Dr. Kropp released Ms. Kessler to full duty with no restrictions as of January 5, 2015.<sup>50</sup> On January 21, 2015, Ms. Kessler reported to SOA that she was experiencing headaches and pain in her right arm due to repetitive movement.<sup>51</sup>

On January 26, 2015, Ms. Kessler returned to Dr. Kropp, explaining another ergonomic assessment had been done, and SOA had moved her desk. However, it seemed incorrect to Ms. Kessler and she had filed an appeal with the union.<sup>52</sup> She returned to Dr. Kropp on February 24, 2015, with new symptoms of numbness in her right hand and Dr. Kropp referred her to a neurologist.<sup>53</sup>

Neurologist Marci L. Troxell, D.O., on May 18, 2015, saw Ms. Kessler who explained she had worked at a desk job that caused lower back and neck pain because of postural misalignments and frequent telephone use. Although ergonomic assessments had been done, not all the recommended equipment was provided. Dr. Troxell recommended EMG and nerve conduction studies.<sup>54</sup> The EMG and nerve conduction study were done on July 2, 2015, and the results were normal. Dr. Troxell also ordered a brain MRI.<sup>55</sup> The MRI of Ms. Kessler's brain was done on July 22, 2015, and it revealed no abnormalities.<sup>56</sup>

On November 5, 2015, Ms. Kessler reported to Dr. Reeves that she had four ergonomic assessments, but none of the recommendations had been followed. The

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<sup>49</sup> R. 908-909.

<sup>50</sup> R. 1719-1720, 1904.

<sup>51</sup> R. 14-15.

<sup>52</sup> R. 1721-1722.

<sup>53</sup> R. 1723-1724.

<sup>54</sup> R. 1728-1730.

<sup>55</sup> R. 1731-1737.

<sup>56</sup> R. 1908.

telephone headset had broken, and she had neck pain from cradling the receiver. She had to move a heavy desk at her secondary worksite and had been told by her supervisor she could not ask for help. Ms. Kessler also brought Dr. Reeves a copy of Dr. Craven's EME report, which he stated he would review in detail.<sup>57</sup>

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

I have known Ms. Kolleen Kessler since 2012, when I evaluated her for back pain which she attributed to ergonomic problems in her work space. Since that time I have seen the patient on multiple occasions for problems primarily attributable to the same condition. The patient states that her ergonomic evaluations have been done, however, she feels that the recommendations in those evaluations were not followed.

I do not have access to those recommendations, however the patient brings in an independent medical evaluation from August 10th [sic] 2015 and photographs of her work space, which appear to be in two separate locations.

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

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

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

The patient is basically requesting documentation of the above by me today. The patient attributes her anxiety to stressful work environment and stress from working in an uncomfortable position.<sup>58</sup>

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<sup>57</sup> R. 1744-1746.

<sup>58</sup> R. 2296.

On January 13, 2016, Ms. Kessler returned to Dr. Reeves complaining of left hip and leg pain, shoulder pain, low back pain, right foot pain, headaches, and pain in her face, all of which she attributed to her workplace environment. Dr. Reeves told Ms. Kessler it was not possible to address all of her complaints in one visit, and he focused on her back and shoulder pain.<sup>59</sup>

Ms. Kessler returned to Dr. Kropp on January 28, 2016, for shoulder and neck pain and indicated it was a new workers' compensation injury. He administered a diagnostic epidurogram and selective nerve root block at L4-5. Osteophytes and severe degenerative changes were noted.<sup>60</sup> Ms. Kessler next saw Dr. Kropp on April 21, 2016, reporting the nerve root block had provided relief for a few days, but the pain returned. However, her neck was bothering her more. Dr. Kropp ordered another cervical MRI,<sup>61</sup> which showed a large protrusion at C6-7 affecting the left C7 nerve, an annular tear at C2-3, and a mild annular bulge at C3-4 that did not affect the nerves.<sup>62</sup> Dr. Kropp reviewed the MRI on May 10, 2016, and referred Ms. Kessler to Louis L. Kralick, M.D., a surgeon.<sup>63</sup>

Ms. Kessler saw Dr. Kralick on May 20, 2016, explaining her neck pain had significantly worsened over the last year and attributing her pain to ergonomic deficiencies that required her to enter and exit her workstation from only one side, but the problem had recently been corrected. Dr. Kralick recommended surgery to remove the disc and osteophyte and fuse the C6 and C7 vertebrae.<sup>64</sup>

John M. Ballard, M.D., on June 3, 2016, saw Ms. Kessler for an EME. When asked about the January 21, 2015, and July 21, 2015, injury dates, Ms. Kessler explained there had not been a new injury, but she had filed the paperwork so she could get care.

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<sup>59</sup> R. 1747-1749.

<sup>60</sup> R. 1750-1753.

<sup>61</sup> R. 1754-1755.

<sup>62</sup> R. 1756-1757.

<sup>63</sup> R. 1758-1759.

<sup>64</sup> R. 1760-1762.

Dr. Ballard opined there was no indication Ms. Kessler's workstation or the faulty chair were the substantial cause of her low back or neck symptomology. Her complaints were all secondary to pre-existing degenerative changes in her back and cervical spine. Dr. Ballard agreed with Dr. Kralick about the need for the C6-7 surgery, but he stated the need for treatment was not related to any work exposure.<sup>65</sup>

On June 30, 2016, Dr. Reeves responded to questions from SOA's adjuster. In answer to a question asking whether work conditions were the substantial cause of the need for treatment of Ms. Kessler's low back, neck, hip, leg, and left shoulder conditions, Dr. Reeves responded, "unknown." In response to a question about the reasonableness and necessity of the surgery proposed by Dr. Kralick, Dr. Reeves responded it was "absolutely necessary," but the cause was unknown.<sup>66</sup>

On July 7, 2016, Dr. Kralick performed a discectomy, osteophyte excision, spinal canal and foraminal decompression, and fusion at C6-7.<sup>67</sup> On July 19, 2016, Ms. Kessler returned to Dr. Kralick for a checkup stating she still had pain in her neck and shoulders.<sup>68</sup> On August 23, 2016, Ms. Kessler was seen by PAC Darcie Sorensen in Dr. Kralick's office and reported she was doing well with a significant improvement in her pain.<sup>69</sup> Also on August 23, 2016, Dr. Kralick wrote a letter to SOA saying Ms. Kessler was concerned about returning to work because the position of her desk required her to look constantly in one direction, and he recommended her desk arrangement be changed so that she could look straight forward.<sup>70</sup>

On September 14, 2016, Ms. Kessler reported to Dr. Kropp that she had pain in her low back extending into her hips and calves. Dr. Kropp ordered another lumbar

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<sup>65</sup> R. 998-1019.

<sup>66</sup> R. 1261-1262.

<sup>67</sup> R. 1859-1861.

<sup>68</sup> R. 2179-2181.

<sup>69</sup> R. 2185-2187.

<sup>70</sup> R. 2201.

MRI.<sup>71</sup> On September 29, 2016, the MRI showed mild degenerative changes at L3-4 and L4-5 without central canal or foraminal stenosis and a tiny annular fissure at L4-5, along with degenerative facet changes throughout.<sup>72</sup> On November 9, 2016, Dr. Kropp reviewed the MRI, stating it showed some minor degenerative changes with an annular tear at L2-3. Ms. Kessler expressed her concerns to Dr. Kropp that SOA was requiring her to do work in excess of his work restrictions.<sup>73</sup>

On December 14, 2016, Dr. Kropp performed a selective nerve root block at L2-3.<sup>74</sup> On January 12, 2017, Dr. Kropp performed a selective nerve root block at L4-5.<sup>75</sup> On January 26, 2017, Ms. Kessler reported to Dr. Reeves that the last two injections by Dr. Kropp had provided no relief.<sup>76</sup>

On February 14, 2017, Ms. Kessler was seen by FNP Jennifer A. McGrath in Dr. Kralick's office. Ms. Kessler reported numbness and tingling in her left hand and forearm and was referred for EMG and nerve conduction velocity studies.<sup>77</sup> The EMG and nerve conduction studies on Ms. Kessler left arm were normal.<sup>78</sup>

On February 1, 2018, Dr. Ballard reviewed additional medical records and issued an addendum to his June 3, 2016, EME report, specifically in regard to the January and July 2015 injuries reported by Ms. Kessler. He diagnosed multilevel degenerative disc disease, spondylosis, annular tears in her low back, a post-surgery disc protrusion at C6-7, degenerative disc disease in her cervical spine, and a partial rotator cuff tear in her left shoulder. Dr. Ballard stated the type of work Ms. Kessler did in January and July 2015 was not the substantial cause of her conditions. He pointed out that Ms. Kessler could

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<sup>71</sup> R. 2195-2196.

<sup>72</sup> R. 939-940.

<sup>73</sup> R. 2316-2317.

<sup>74</sup> R. 2326-2328.

<sup>75</sup> R. 2339.

<sup>76</sup> R. 2340-2342.

<sup>77</sup> R. 2345-2347.

<sup>78</sup> R. 2361-2363.

not recall an injury to her left shoulder and concluded the rotator cuff tear was most likely degenerative. Similarly, there was no indication of an injury to her low back or neck, and the repetitive type of work she did was not a factor in causing the degenerative disease. He explained the changes were idiopathic and related to genetics and aging.<sup>79</sup>

On March 21, 2018, Dr. Ballard reviewed affidavits of Ms. Draveling and Ms. Kessler's prior supervisor as well as additional medical records, and issued a second addendum to his EME report. As to Ms. Kessler's low back, he diagnosed multilevel degenerative disc disease and facet arthrosis based on her MRIs in May 2012 and February 2013. He also diagnosed C6-7 degenerative disc disease based on the May 2016 and August 2014 MRIs. He again stated the January and July 2015 work injuries were not the substantial cause of Ms. Kessler's disability or need for medical treatment.<sup>80</sup>

On August 6, 2018, Ms. Kessler was seen by Bruce M. McCormack, M.D., for a second independent medical evaluation (SIME). Dr. McCormack examined Ms. Kessler and reviewed her medical records. Ms. Kessler explained to Dr. McCormack that before 2012 she had a broken office chair. Then in 2010, she had been the whistleblower that had resulted in a coworker being fired, had cost the State a lot of money, and was the basis for retaliatory efforts against her, specifically. She no longer did field work and had to remain in an office with a poor ergonomic after 2012. She had four ergonomic assessments, but nothing was done. Dr. McCormack noted Ms. Kessler had treated for low back pain in 2006, before any reported work injury, which combined with the MRI findings would account for the symptoms without any repetitive trauma from a poorly designed workstation. Dr. McCormack agreed with Dr. Ballard that Ms. Kessler may have had a temporary shoulder strain from working in the file room that would have resolved within a few days to weeks. As part of the examination, Ms. Kessler completed a pain diagram showing pain in the top of her head, left eye, right shoulder, both elbows, forearms, fingers, waist, thighs, knees, calves, and feet, as well as her left shoulder blade

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<sup>79</sup> R. 1020-1040.

<sup>80</sup> R. 1041-1048.

and low back. Dr. McCormack stated complaints in all of these body parts were likely constitutional.<sup>81</sup>

On November 4, 2018, David T. Roberts, M.D., completed an Americans with Disabilities Act (ADA) accommodation request for Ms. Kessler. He explained better lighting could reduce Ms. Kessler's migraines.<sup>82</sup> The Board noted that Dr. Roberts practiced in Anchorage, Alaska.<sup>83</sup>

At the September 18, 2019, prehearing conference, the parties stipulated to a December 11, 2019, hearing on Ms. Kessler's October 31, 2016, claim. The issues for hearing were identified as temporary total disability (TTD), permanent partial impairment (PPI), medical and transportation costs, interest, and attorney fees and costs.<sup>84</sup>

On October 17, 2019, Ms. Macchello performed another ergonomic assessment. Ms. Kessler stated she had developed migraine headaches over the last two years which she attributed to lighting. Ms. Kessler's workspace had been modified by installing a nylon "leaf" over her desk to filter some of the light. Ms. Kessler also reported bilateral hand numbness and tingling and a history of lumbar disc herniations. Ms. Kessler's desk was positioned so there was no direct glare from windows. Ms. Kessler was not using the document holder that had been supplied, but she had fashioned one that would hold legal folders. The document holder and computer monitors were repositioned to the center of Ms. Kessler's desk to avoid neck rotation. Although the light level was within the acceptable range, Ms. Macchello recommended the leaf be removed, some bulbs be removed from the overhead fixture, and the remaining bulbs be replaced with warmer color bulbs.<sup>85</sup>

During her employment with SOA, Ms. Kessler filed at least seven complaints or grievances. The Board found that none of the complaints or grievances were resolved in

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<sup>81</sup> R. 1049-1082.

<sup>82</sup> R. 2592-2595.

<sup>83</sup> *Kessler II* at 15, No. 93.

<sup>84</sup> R. 3935-3938.

<sup>85</sup> R. 1444-1448.



Ms. Kessler's favor.<sup>86</sup> In 2016, Ms. Kessler appealed a denial of a performance incentive pay increase, and the matter proceeded to arbitration. The arbitrator denied the appeal noting:

[T]he apparent animosity that exists between [Ms. Kessler] and supervisor Susan Draveling. It appears that [Ms. Kessler] does not understand who is in charge. The State of Alaska has the right to establish work place rules, regulations and standards of conduct. It appears that Draveling has taken steps to convince [Ms. Kessler] of this, but to no avail.<sup>87</sup>

On December 4, 2019, Ms. Kessler filed a notice stating one of her witnesses, Dr. Roberts, was unavailable for the December 11, 2019, hearing because he had been in an automobile accident. She asked that the hearing record be left open until he was available.<sup>88</sup> At the December 11, 2019, hearing, SOA did not object to leaving the record open so that Dr. Roberts could testify by deposition. Because not all witnesses were able to testify, at the conclusion of the hearing, the parties agreed to continue the hearing until February 12, 2020.<sup>89</sup>

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

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<sup>86</sup> R. 602-604, 753, 757-761, 787-788, 791-804, 810-813, 819-821; *Kessler II* at 16, No. 96.

<sup>87</sup> R. 812-813.

<sup>88</sup> R. 1496-1497.

<sup>89</sup> *Kessler II* at 16, No. 99.

description of her work environment and he was not familiar with the “the substantial cause” standard in workers’ compensation.<sup>90</sup>

Robin Schmid testified she worked at ASAP from December 2016 to September 2017 as a probation officer like Ms. Kessler. She explained that five people worked in one room. Ms. Schmid could see Ms. Kessler’s workstation and Ms. Kessler was seated with her back to the door. She could not see any action behind her, and phone calls often required Ms. Kessler to turn around to ask other probation officers questions. Ms. Schmid explained most files were stored in another room, and not all of the rolling file shelves worked properly and some were difficult for her to move. They often moved boxes of files that weighed 20 or 30 pounds. She stated Ms. Kessler was not allowed to move freely about the room, but she was not aware of a “stay in place order.”<sup>91</sup>

John Crouphen was a Criminal Justice Technician I at ASAP from March 2016 until 2019. His work required him to be in the probation officers’ office three to five times a day, and he would regularly talk to Ms. Kessler. It was a cramped office. He didn’t observe Ms. Kessler having difficulties with her workstation, but she told him about them. He observed Ms. Kessler using a headset while at her workstation and moving around to help clients. He observed the interactions between Ms. Draveling and Ms. Kessler were antagonistic. Another coworker told him to be cautious helping Ms. Kessler with various tasks because if they did things for her, Ms. Kessler would stop doing them and they would be stuck doing the tasks.<sup>92</sup>

Dee Savage worked at ASAP as a Criminal Technician I and saw Ms. Kessler on a daily basis. Ms. Savage observed Ms. Kessler having difficulties with her workstation because it was not compatible with her workers’ compensation injuries, and Ms. Draveling would complain about having to make changes to the workstation. Ms. Kessler was not

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<sup>90</sup> Dec. 11, 2019, Hr’g Tr. at 12:12 – 13:22; 30:17 – 31:3; 28:25 – 30:16; 31:15 – 32:25; 36:18-20.

<sup>91</sup> Dec. 11, 2019, Hr’g Tr. at 63:15-20; 64:23-25; 65:1-4; 66:6-10; 68:17 – 69:24; 71:5-21; 72:13 – 73:17; 80:17-22; 81:1-3; 86:13-15.

<sup>92</sup> Dec. 11, 2019, Hr’g Tr. at 104:1-4, 11-13; 105:19-25; 106:16 – 107:14; 110:15 – 111:1; 113:20 – 114:12; 117:25 – 118:6.

allowed to move freely as she was monitored by Ms. Draveling. Ms. Savage concluded there was a “stay at station” rule for Ms. Kessler because every time she saw Ms. Kessler she was at her workstation unless she was on a break. Ms. Savage admitted that she had never seen Ms. Kessler and Ms. Draveling interact, but Ms. Draveling’s interactions with Ms. Kessler were often not professional.<sup>93</sup>

Sunny Hefley worked at ASAP for about five years as a Criminal Justice Technician when Ms. Kessler was there. Ms. Draveling made Ms. Kessler a persona non grata. Ms. Hefley stated Ms. Kessler was having back pain and needed a higher desk, and she believed Ms. Kessler had to buy the desk herself. Ms. Hefley was 72 years old and 5 feet 2 inches tall, and she found the movable file shelves difficult to move, but she was able to do so.<sup>94</sup>

Lauri Macchello is a licensed physical therapist and certified ergonomist. Ms. Macchello performed four ergonomic assessments of Ms. Kessler’s workstation, and Rina Luban performed one assessment in response to Ms. Kessler’s complaints of low back and leg pain. She recommended a proper chair, an adjustable desk, and the use of a document holder. All of the recommendations were followed, and SOA provided Ms. Kessler with an electric desk. The second assessment was done in September 2013 by Ms. Luban because Ms. Kessler continued to complain of low back pain. At that point, Ms. Kessler had begun working at another desk in addition to her primary workspace. Ms. Kessler had not been using her adjustable desk at the proper height and she had not been using the document holder. Her desk and chair were repositioned and a new keyboard was recommended. A different type of document holder was also recommended. The third assessment was done in March 2014 when Ms. Kessler reported her work at the second workstation was causing left shoulder issues. The second workstation had an adjustable desk, and Ms. Macchello recommended the desk be turned and that Ms. Kessler use a headset, a different keyboard, and a wrist support. She

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<sup>93</sup> Dec. 11, 2019, Hr’g Tr. at 192:9-14; 192:20 – 193:21; 195:8 – 196:17.

<sup>94</sup> Dec. 11, 2019, Hr’g Tr. at 204:16 – 206:9; 206:22 – 207:4; 208:16 – 209:13; 218:2-7.

observed Ms. Kessler getting files from the file room and using the movable file shelves. The force to move the files was “pretty negligible,” but she did recommend Ms. Kessler use a cart with four articulating wheels to transport the files. The fourth assessment was done in December 2014 because Ms. Kessler felt having to turn when people approached her was exacerbating her shoulder pain and she had developed tingling in both hands. Ms. Kessler was still not in proper position and was not using the wrist support that had been provided after the March 2014 assessment. Ms. Kessler was also not using the headset at both stations because she felt it was too fragile to move, but Ms. Kessler had not told Ms. Draveling of that fact. Ms. Macchello recommended Ms. Kessler’s desk be turned and that she use a headset at both locations. The fifth evaluation in October 2019 was done because Ms. Kessler had developed migraines and felt the lighting was contributing. Although SOA had provided a shade, Ms. Macchello recommended bulbs be removed from the overhead fixtures instead. Ms. Macchello found Ms. Draveling to be very concerned about Ms. Kessler’s complaints as she promptly requested an evaluation every time symptoms arose.<sup>95</sup>

Susan Draveling has been the ASAP coordinator since 2012. She did not consider Ms. Kessler to be a good employee because she did not follow instructions or procedures, the quality and quantity of her work was not up to par, she was chronically late, and any attempts to improve were short-lived. Ms. Draveling never restricted Ms. Kessler from walking or talking to others, although she had directed new employees to seek advice from other probation officers. She further stated that she would have implemented whatever recommendations were made. There were no movement restrictions in place. When she was on light duty, certain employees were designated to help Ms. Kessler when needed. She instructed the office manager to order anything recommended in the ergonomic assessments, but some items, such as the copy holder disappeared.

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<sup>95</sup> Dec. 11, 2019, Hr’g Tr. at 127:2-5; 135:1-8; 136:11-16; 137:4-25; 138:1 – 139:3; 139:14-21; 140:15-21; 140:23 – 141:21; 141:23 – 142:10; 143:5-12; 144:4 – 145:11; 146:3-23; 147:6 – 149:3; 149:16 – 150:1; 150:11-16; 157:5-21; 158:23 – 159:9; 160:13-21; 164:10-24.

Ms. Draveling observed Ms. Kessler made changes to the settings or adjustments recommended by the assessor.<sup>96</sup>

At the beginning of the February 12, 2020, hearing, Ms. Kessler stated Dr. Roberts was again unable to testify, but she did not know the reason why.<sup>97</sup> She asked that the record be left open after the hearing so that he could be deposed. SOA objected to leaving the record open, pointing out there was no evidence Ms. Kessler had contacted Dr. Roberts to arrange his testimony until right before the hearing.<sup>98</sup> By an oral ruling, the record was left open for thirty days to allow Ms. Kessler to depose Dr. Roberts, and the parties were to file written closing arguments within seven days after Dr. Roberts' deposition transcript was filed.<sup>99</sup> On March 16, 2020, SOA filed its closing arguments.<sup>100</sup>

On April 6, 2020, Ms. Kessler's attorney filed a petition to stay the case until the COVID-19 crisis was resolved. He had been diagnosed with pneumonia on March 16, 2020, and he had been unable to file Ms. Kessler's closing argument. He did not address Dr. Roberts' testimony.<sup>101</sup> On the same day, SOA objected to an indefinite stay noting Dr. Roberts had not been deposed. SOA acknowledged personal illness and the COVID-19 pandemic warranted some leeway in filing deadlines, but an indefinite stay prevented a timely resolution of the case.<sup>102</sup>

On June 1, 2020, the designated chair wrote to Ms. Kessler's attorney stating it appeared the COVID-19 crisis was likely to persist for several months, and he asked what efforts had been made to depose Dr. Roberts since the February 12, 2020, hearing.<sup>103</sup>

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<sup>96</sup> Feb. 12, 2020, Hr'g Tr. at 423:12-14; 431:16 – 432:3; 432:25 – 433:5; 433:13 – 434:12; 435:1 – 436:24; 444:10 – 445:2; 446:7-19; 451:18-25; 453:19-23; 461:5-7.

<sup>97</sup> Feb. 12, 2020, Hr'g Tr. at 226:2-22; 227:2-8.

<sup>98</sup> Feb. 12, 2020, Hr'g Tr. at 227:12-15; 228:13-23.

<sup>99</sup> Feb. 12, 2020, Hr'g Tr. at 490:10-17.

<sup>100</sup> R. 1519-1525.

<sup>101</sup> R. 1529-1530.

<sup>102</sup> R. 1526-1528.

<sup>103</sup> R. 3967.

The Board found that no response to the June 1, 2020, letter had been received.<sup>104</sup> The Board also noted that on June 4, 2020, Ms. Kessler's attorney participated in a prehearing conference in another case.<sup>105</sup>

The Board held that Ms. Kessler's statements to her doctors were not credible. She repeatedly told her medical providers that SOA had not provided the equipment or made the adjustments recommended in the ergonomic assessments despite clear evidence SOA had done so. In some cases, after SOA had provided the equipment or made the adjustments, Ms. Kessler failed to use the equipment or changed the adjustments.<sup>106</sup> The Board then held that it would thereby give less credence to the statements of her doctors, including those of Drs. Kropp, Reeves, and Ealum, since they relied on her misstatements about the ergonomic assessments and SOA's ordering of equipment and rearrangements of her workspace. The Board relied on the reports of Drs. Craven, Ballard, and McCormick since they had all the medical records in addition to their examinations of Ms. Kessler.<sup>107</sup>

### *3. Standard of review.*

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.<sup>108</sup> Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>109</sup> "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind

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<sup>104</sup> *Kessler II* at 19, No. 112.

<sup>105</sup> *Id.*, No. 113.

<sup>106</sup> *Id.*, No. 114.

<sup>107</sup> *Id.* at 30.

<sup>108</sup> AS 23.30.128(b).

<sup>109</sup> *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994) (*Norcon, Inc.*).

is a question of law.”<sup>110</sup> The weight given to witnesses’ testimony, including medical testimony and reports, is the Board’s decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.<sup>111</sup> The Board’s conclusions regarding credibility are binding on the Commission since the Board has the sole power to determine credibility of witnesses.<sup>112</sup>

On questions of law and procedure, the Commission does not defer to the Board’s conclusions, but exercises its independent judgment.<sup>113</sup> Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.<sup>114</sup>

#### 4. Discussion.

Ms. Kessler raised several points in her appeal of the Board’s decision and order. She states (1) the Board erred in denying her an indefinite stay of the proceedings due to COVID-19, (2) the Board erred in finding SOA had rebutted the presumption of compensability, (3) the Board erred in failing to allow more time to depose Dr. Roberts, (4) the Board erred in finding that her claims were not compensable, (5) the Board erred in dismissing her claims, and (6) Ms. Kessler was represented at the Board by an incompetent attorney. While not an explicit point on appeal, Ms. Kessler also asserted the Board failed to follow the prehearing conference summary (PHCS) at hearing by allowing argument on causation, and then deciding the claim based on lack of causation between employment and her alleged injuries. The PHCS listed specific benefits which Ms. Kessler sought: TTD, PPI, medical and transportation costs, and attorney fees.

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<sup>110</sup> *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-1189 (Alaska 1984)).

<sup>111</sup> AS 23.30.122.

<sup>112</sup> AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013) (*Sosa de Rosario*); *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

<sup>113</sup> AS 23.30.128(b).

<sup>114</sup> *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

Ms. Kessler contends that because causation was not expressly listed it should not have been considered by the Board. She made a claim for both physical injuries and mental injury due to job stress. She contends the Board erred in finding her not credible and in dismissing her claims.

SOA asserts the Board's decision is supported by substantial evidence in the record as a whole and must be affirmed. SOA relies, as did the Board, on the reports of the EME doctors Craven and Ballard, and the SIME report of Dr. McCormack, all of whom said that Ms. Kessler's sedentary work for SOA did not cause, nor aggravate, nor accelerate, nor combine with her pre-existing degenerative disc disease to make her condition worse. Furthermore, SOA points to the credibility findings of the Board which are binding on the Commission. SOA states the Board found Ms. Kessler not credible and, therefore, discounted the reports of her treating physicians which were based on Ms. Kessler's misstatements of the facts of her working conditions. The Board also found Ms. Draveling, Ms. Kessler's supervisor, credible and relied on her testimony. SOA contends that the Board has the authority to choose which witnesses, including medical providers, upon which to rely. The Commission is to review the Board's findings to ascertain if the record supports the Board's findings with substantial evidence. SOA asserts the record here shows substantial evidence in support of the Board's findings of fact and conclusions of law.

*a. Should a stay have been granted?*

Ms. Kessler believes the Board should have granted her petition for an unlimited stay of proceedings due to COVID-19. She contends that had the Board granted the request for an indefinite stay, the deposition of Dr. Roberts could have been obtained. She does not provide any evidence to support this contention on appeal. Dr. Roberts' inability to testify at hearing, in her opinion, constituted good cause for an indefinite stay. She contends it was important for her to have the deposition of Dr. Roberts.<sup>115</sup>

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<sup>115</sup> The Commission takes note of the fact that Dr. Roberts passed away in March 2021 and, therefore, the taking of his deposition is now moot.



On the other hand, SOA asserts there was no reason for a stay, let alone one of an indefinite duration. First, SOA states that a full hearing on the merits of the claim was heard by the Board over two days, and then further noted the Board kept the record open from the end of the hearing for thirty days to allow Ms. Kessler to arrange the deposition of Dr. Roberts. Then, the record remained open until the Board issued its decision denying Ms. Kessler's request for an open-ended stay. SOA states the Board correctly denied the petition and issued its decision.

In April 2020, Ms. Kessler's attorney requested a stay of the Board proceedings until the COVID-19 crisis was resolved and stated he had been diagnosed with pneumonia in March 2020.<sup>116</sup> The pneumonia diagnosis had rendered him unable to file his closing argument.<sup>117</sup> SOA objected to an indefinite stay, but agreed that the personal illness of opposing counsel merited some leeway in filing deadlines.<sup>118</sup>

The Board did not rule on the request for the stay until it issued its decision in the matter on July 9, 2020.<sup>119</sup> However, the Board did contact Ms. Kessler's attorney on June 1, 2020, requesting information about the deposition of Dr. Roberts.<sup>120</sup> The Board recorded it did not hear back from Attorney Cavanaugh, although the Board noted he had participated in a prehearing conference in another case.<sup>121</sup>

The Board has broad authority to manage its hearings.

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

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<sup>116</sup> *Kessler II* at 19, No. 109.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*, No. 110.

<sup>119</sup> *Id.* at 1.

<sup>120</sup> *Id.* at 19, No. 111.

<sup>121</sup> *Id.*, Nos. 112, 113.

received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.<sup>122</sup>

Further the Board's regulations allow for a continuance of a hearing in progress.

If the hearing is not completed on the scheduled hearing date and the board determines that good cause exists to continue the hearing for further evidence, legal memoranda, or oral arguments, the board will set a date for the completion of the hearing.<sup>123</sup>

The Board utilized this regulation when it continued the December 11, 2019, hearing to February 12, 2020, and then kept the record open until March 13, 2020, to allow for the deposition of Dr. Roberts.<sup>124</sup> The transcript of the deposition was to be filed by March 13, 2020, and the parties had additional time to file their closing arguments.<sup>125</sup> SOA filed a closing brief, but Ms. Kessler did not.

Ms. Kessler does not provide any evidence showing how the failure to grant the stay has prejudiced her claim. She contends the deposition of Dr. Roberts was not taken, but she does not address how a continuance beyond that already allowed by the Board would have helped. Moreover, since Dr. Roberts is deceased this issue is now moot. Moreover, his medical records were in the Board file.<sup>126</sup> The Board was able to review his reports. One record from Dr. Roberts was an ADA Accommodation Request which addressed lighting as a possible source for her migraines. As the Board found, an ergonomic evaluation was performed on October 17, 2019, and recommendations were made to remove some light bulbs. Prior to this evaluation, SOA had installed a "leaf" over her desk in an attempt to mitigate the problem. Another medical record did not ascribe work as a cause for slight nerve slowing in the wrists, but did recommend an ergonomic change of desk for optimal wrist and elbow positioning along with sleep posture adjustment. The other record recommended a reduced schedule due to various

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<sup>122</sup> AS 23.30.135(a).

<sup>123</sup> 8 AAC 45.070(j).

<sup>124</sup> *Kessler II* at 27.

<sup>125</sup> *Id.*

<sup>126</sup> R. 2592-2594, 2654, 2659-2663.

complaints. It is not clear from the record what additional information Dr. Roberts would have been able to provide that differed in any significant way from the medical opinions of Drs. Ealum, Kropp, and Kralick. The Board discounted the records and testimony of these doctors because their opinions were based on Ms. Kessler's statements about her work environment, which the Board found not credible and distorted. In any event, the question of Dr. Roberts' deposition is moot due to his death. A continuance would not have helped Ms. Kessler.

Moreover, there is no evidence that the Board abused its discretion in denying the unlimited stay. The Board granted Ms. Kessler sufficient time to arrange the deposition of Dr. Roberts. She had thirty days after the end of the hearing in February 2020 to see if he was available for deposition. In fact, the Board did not issue its decision until July 2020, allowing her ample time to arrange his deposition if he was available, or to advise the Board of his continuing unavailability. The Board did not act in a manner that could be described as arbitrary, capricious, manifestly unreasonable, or stemming from an improper motive. Furthermore, an indefinite stay is contrary to the requirement in the Alaska Workers' Compensation Act (Act) to ensure "the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . ."127 The decision to deny the request for an unlimited stay was correct.

*b. Credibility.*

While Ms. Kessler does not contend explicitly that the Board erred in its credibility findings, she has asserted the Board erred in finding SOA rebutted the presumption of compensability and erred in dismissing her claims. The Board, in reaching its conclusions, made several findings regarding Ms. Kessler's credibility, including finding that "[Ms. Kessler's] statements to her doctors are not credible."<sup>128</sup> The Board added "[h]er reports to her physicians were false."<sup>129</sup> The Board also found Ms. Draveling credible in

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<sup>127</sup> AS 23.30.001(1).

<sup>128</sup> *Kessler II* at 19, No. 114.

<sup>129</sup> *Id.* at 30.

her testimony.<sup>130</sup> The Board chose to believe her statements that there was no “stay in place” order that restricted Ms. Kessler’s movements in the office.

The Board gave the most weight to Dr. McCormack, the SIME physician, as he had examined Ms. Kessler and reviewed her medical records, including those from 2006. The Board also discounted the testimony and medical reports of Ms. Kessler’s treating doctors because their opinions and reports were based on Ms. Kessler repeatedly telling her doctors the ergonomic assessments had not been followed “despite clear evidence [SOA] had done so.”<sup>131</sup> The Board found Dr. McCormack’s report was supported by the reports of Drs. Craven and Ballard, who performed EMEs on Ms. Kessler.

The Act designates the Board as the entity to make credibility determinations. “The board’s findings regarding the credibility of testimony of a witness before the board are binding on the commission.”<sup>132</sup> The Court, in *Sosa de Rosario v. Chenega Lodging*, stated, “[t]he legislature requires the Commission to defer to the Board’s credibility findings.”<sup>133</sup> The Court continued, “[w]e construe AS 23.30.128(b) to mean that the Commission must follow the Board’s credibility determination” and these determinations are binding on the Commission.<sup>134</sup>

Here, the Board found Ms. Kessler not credible and her misstatements to her doctors led to their reports and opinions being not credible as well. Further, the Board, as fact finder, has the authority to decide upon which doctors’ opinions it finds the most persuasive and the weight to be given to those opinions.<sup>135</sup> Having found Ms. Kessler not credible, the Board gave the most weight to the opinions of Drs. Craven, Ballard, and McCormack, giving the greatest weight to the opinion of Dr. McCormack.<sup>136</sup> The Board

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<sup>130</sup> *Kessler II* at 29.

<sup>131</sup> *Id.* at 19, No. 114.

<sup>132</sup> AS 23.30.128(b).

<sup>133</sup> *Sosa de Rosario*, 297 P.3d 139, 146.

<sup>134</sup> *Id.*

<sup>135</sup> *See, Traugott v. ARCTEC Alaska*, 465 P.3d 499, 514 (Alaska 2020).

<sup>136</sup> *Kessler II* at 30.

chose to give the least weight to the reports and opinions of Drs. Ealum and Kropp.<sup>137</sup> This is the Board's province.

These decisions are binding on the Commission, which also finds the Board's reliance on the opinions of Drs. McCormack, Craven, and Ballard is supported by substantial evidence in the record.

*c. Compensability – Presumption of Compensability.*

Ms. Kessler contends that the Board erred in determining the causation of her physical and mental injuries because the PHCS listed the issues for hearing only as compensation and medical benefits. The PHCS controls the issues for hearing.<sup>138</sup> Therefore, Ms. Kessler contends, because the PHCS did not list explicitly causation as a matter for hearing, the Board erred in finding that her work was not the substantial cause of her physical and mental complaints, thus, denying her any benefits. According to Ms. Kessler, the only specific issues listed for hearing were TTD and PPI benefits, medical and transportation costs, interest, and attorney fees and costs. Because the PHCS did not list causation, the Board should not have considered it. Her argument seems to be that SOA had explicitly or implicitly accepted her claim as occurring within the course and scope of her employment, and, so, only the amounts of the benefits sought should have been addressed by the Board.

SOA asserts that, based on the controversions filed in this case, Ms. Kessler was well aware SOA had not accepted that her claim arose out of the course and scope of her employment. Furthermore, SOA contends that in order to address her entitlement, if any, to TTD, PPI, and medical benefits, the Board had to consider how she might be entitled to these benefits, which included determining whether and how her work with SOA gave rise to the claimed benefits.

The Board record contains nine controversions filed by SOA:

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<sup>137</sup> *Kessler II* at 30.

<sup>138</sup> 8 AAC 45.065(c); *See, e.g., Alaska State Comm'n for Human Rights v. United Physical Therapy*, 484 P.3d 599, 603 (Alaska 2021).

1. Filed July 15, 2015, in AWCB Case No. 201408170: denied all benefits related to claim for neck injury based on Dr. Craven's EME that her condition was unrelated to the February 6, 2014, date of injury;
2. Filed July 15, 2015, in AWCB Case No. 201406154: denied all benefits related to the left shoulder based on Dr. Craven's EME statement that her rotator cuff tear did not arise out of her work activities;
3. Filed July 15, 2015, in AWCB Case No. 201502481: denied all benefits related to the lumbar back based on Dr. Craven's EME that her condition was not related to her work but due to natural degeneration;
4. Filed August 17, 2015, in AWCB Case No. 201501516: denied all benefits related to a specific medical bill from Dr. Reeves because treatment was to lower back and the claim for injury was to the right arm and head;
5. Filed February 1, 2016, with no case number identified: denied all benefits because Ms. Kessler had not signed and returned the required medical releases;
6. Filed June 14, 2016, in AWCB Case No. 201501516: denied all benefits based on the EME of Dr. Ballard that "the diagnosis is not the result of a work related injury or exposure;"
7. Filed June 14, 2016, with no case number: denied all benefits based on the EME of Dr. Ballard that the diagnosis was not related to her work;
8. Filed October 24, 2018, in AWCB Case No. 201501516: denied reimbursement for ground travel to SIME based on the advanced payment for ground transportation and for which the receipts provided did not exceed; and
9. Filed April 17, 2019, in AWCB Case No. 201501516: denied specific medical bill as being received more than 180 days after date of service and, thus, barred by AS 23.30.097(h).

Of the above nine controversions, six denied all benefits as not being the result of Ms. Kessler's work with SOA. SOA asserts she was on notice that she not only needed to prove her claims for specific benefits, she knew she needed to prove her physical problems arose out of the course and scope of her work with SOA.

The Board's regulations state that a PHCS issued will govern the issues heard by the Board.<sup>139</sup> The specific regulation states:

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<sup>139</sup> 8 AAC 45.065(c).

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

The question, then, is whether the listing of specific benefits sought obviates the need to show that the benefits sought arose out of and in the course and scope of work.

The PHCS listed specific benefits, but also included among the important documents SOA's answer to Ms. Kessler's October 31, 2016, Workers' Compensation Claim (WCC).<sup>140</sup> Ms. Kessler listed the specific benefits in her WCC the Board noted in the PHCS. SOA, in its answer, denied these benefits and stated, "In order to be compensable, the reported work injury must be the substantial cause of the Employee's need for treatment and/or disability."<sup>141</sup>

The PHCS also showed the SIME as part of the record for hearing. The SIME report of Dr. McCormack, upon which the Board relied, provided the questions asked of Dr. McCormack.<sup>142</sup> Under Ms. Kessler's questions, the second question is, "Is Ms. Kessler's work-related injuries the substantial cause in her need for her medical treatment and any resulting disability?"<sup>143</sup> Dr. McCormack answered, "No" as he did to the question whether work-related injuries aggravated, accelerated, exacerbated, or combined with any pre-existing condition to make her condition worse.<sup>144</sup> SOA asked specific questions regarding "causation" to which Dr. McCormack stated, "The reported work injuries are not the substantial cause of any of these complaints. Medical records don't substantiate a clear injury due to her work station."<sup>145</sup> He did posit that it was

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<sup>140</sup> R. 225-228, 214.

<sup>141</sup> R. 227.

<sup>142</sup> R. 1049-1082.

<sup>143</sup> R. 1075.

<sup>144</sup> R. 1076.

<sup>145</sup> R. 1078.

possible her workstation caused “temporary postural” strains.<sup>146</sup> He ascribed her complaints to the degenerative changes shown on the MRI.<sup>147</sup> In addition, the Board posed its own questions and asked Dr. McCormack to “list all causes of Kolleen A. Kessler’s disability, or need for medical treatment.”<sup>148</sup> He answered that “[h]er work station did not substantially cause these MRI findings or her symptoms.”<sup>149</sup> He also found no specific injury to aggravate a pre-existing condition.<sup>150</sup> He also found “no industrial injury” and no aggravations of the pre-existing degenerative conditions.<sup>151</sup> Causation, thus, was a predominant feature of his analysis of Ms. Kessler’s complaints.

The Board, in its decision, framed two issues for hearing: (1) whether a requested stay until COVID-19 had resolved was necessary, and (2) were the work activities and workstations the substantial cause of Ms. Kessler’s disability or need for medical treatment. While SOA made an opening statement and filed a brief with its closing argument, Ms. Kessler’s attorney did not make an opening statement and did not file a brief with her closing argument. He did, however, file an opening brief with the Board stating Ms. Kessler’s position.<sup>152</sup> In that brief, Ms. Kessler discussed the presumption of compensability and acknowledged that benefits are not due if the employee does not prove her claim once an employer rebuts the presumption.<sup>153</sup> She then identifies the medical records that supported her contention that the benefits sought were the result of the work environment. She cited to AS 23.30.010(a):

Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the

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<sup>146</sup> R. 1079.

<sup>147</sup> R. 1079.

<sup>148</sup> R. 1072.

<sup>149</sup> R. 1072.

<sup>150</sup> R. 1072.

<sup>151</sup> R. 1073.

<sup>152</sup> R. 1094-1113.

<sup>153</sup> R. 1105-1108.



employee's need for medical treatment *arose out of and in the course of the employment*. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the *employee must establish a causal link between the employment and the disability or death or the need for medical treatment*. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the *board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment*. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.<sup>154</sup>

Contrary to the assertions of Ms. Kessler, prior to the Board finding her entitled to TTD and medical benefits, the Board necessarily had to determine if the need for those benefits arose out of and in the course of her employment.

The Board then applied the analysis for the presumption of compensability. The Board's investigation into the causation of Ms. Kessler's work injury is supported by substantial evidence in the record as a whole. The Board did not abuse its discretion in deciding to analyze whether her claim for benefits arose out of her work with SOA.

*i. Did Ms. Kessler sustain a physical injury while working for SOA?*

Ms. Kessler asserts she sustained numerous lumbar and cervical injuries as well as shoulder and hand problems from her desk arrangement while working for SOA. She told her doctors that none of the ergonomic recommendations were followed by SOA and her condition continued to deteriorate from "stay-in-place" orders.

SOA maintained there was no "stay-in-place" order and Ms. Kessler failed to produce any evidence of one. SOA relied on the medical opinions of Drs. Craven, Ballard, and McCormack that Ms. Kessler's work, at most, produced temporary aggravations which resolved, and that her long-term problems were the result of her pre-existing degenerative back condition.

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<sup>154</sup> AS 23.30.010(a) (emphasis added).

To evaluate Ms. Kessler’s claims for TTD and medical benefits, the Board properly applied the three-step analysis to determine compensability of a claim. The Act states that a claim is presumed to be compensable if

(a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

- (1) the claim comes within the provisions of this chapter;
- (2) sufficient notice of the claim has been given;

. . . .

(c) The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress.<sup>155</sup>

To make the determination required by AS 23.30.120, a three-step analysis has been developed. In the first step, an injured worker must show a preliminary link between the claimed disability and the work.<sup>156</sup> This link may be established by the worker’s statements alone, although in highly technical medical cases, medical testimony may be needed.<sup>157</sup> Credibility is not weighed at this stage.<sup>158</sup> Here, the Board found that Ms. Kessler raised the presumption through her own testimony and that of Dr. Kropp.<sup>159</sup>

Once an employee has established the necessary link between disability and employment, an employer must overcome this presumption with substantial evidence.<sup>160</sup> Substantial evidence is that which establishes that work is not the substantial cause of the disability, or that something other than work is the substantial cause of the

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<sup>155</sup> AS 23.30.120.

<sup>156</sup> See, e.g., *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987).

<sup>157</sup> See, *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981).

<sup>158</sup> See, *Resler v. Universal Serv., Inc.*, 778 P.2d 1146, 1148-1149 (Alaska 1989).

<sup>159</sup> *Kessler II* at 29.

<sup>160</sup> AS 23.30.010(a); see, e.g., *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 919 (Alaska 2016) (*Huit*).

disability.<sup>161</sup> Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>162</sup> This evidence is viewed in isolation and credibility and evaluation of weight to be given to this evidence is deferred until it can be determined if there is sufficient evidence to rebut the presumption.<sup>163</sup>

If the employer’s evidence is not sufficient to rebut the presumption, the injured worker’s claim is granted.<sup>164</sup> If the employer’s evidence is sufficient to rebut the presumption, then the burden of proof shifts to the claimant who must prove all the elements of the claim by a preponderance of the evidence.<sup>165</sup> It is at this stage of the analysis that the credibility and weight of the evidence are evaluated. To prevail, the claimant must produce a belief in the Board that the facts being asserted are probably true.<sup>166</sup>

Here, the Board found that Ms. Kessler raised the presumption through her own testimony that her workstation and environment produce low back, cervical, shoulder, and other body pains. Her statement was supported by the reports of Dr. Kropp that work was the substantial cause for her medical treatment.<sup>167</sup> Dr. Ealum also testified that work was the substantial cause of her neck and low back pain.<sup>168</sup>

Since Ms. Kessler raised the presumption that work was the substantial cause of her neck and back problems, and possibly her shoulder pain, SOA was required to rebut the presumption. The Board found that the reports of Drs. Craven, Ballard, and McCormack all stated work was not the substantial cause and that her condition was

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<sup>161</sup> *Huit*, 372 P.3d 904, 919.

<sup>162</sup> *See, Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-612 (Alaska 1999).

<sup>163</sup> *Norcon, Inc.*, 880 P.2d 1051, 1054.

<sup>164</sup> *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997).

<sup>165</sup> *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991).

<sup>166</sup> *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

<sup>167</sup> R. 1569-1570.

<sup>168</sup> Dec. 11, 2019, Hr’g Tr. at 12:22 – 13:20; 24:17-19; 31:21 – 32:5.

entirely related to pre-existing degenerative disc disease. They also stated work did not cause the rotator cuff injury.

Ms. Kessler then had the obligation to prove her claim by a preponderance of the evidence. This she was unable to do because the Board found her statements about the work environment not credible. Since her statements to Drs. Kropp and Ealum in particular were not credible (the Board found them to be untrue), the Board gave little weight to their opinions.

The Board instead chose to rely on the medical reports of Drs. Craven, Ballard, and McCormack, who the Board found to have been thorough. Dr. Craven stated prolonged sitting and work activities could have caused a strain, but the doctors treated Ms. Kessler for degenerative disc disease. The treating doctors' treatments were based, in part, on Ms. Kessler's erroneous statements that she was not allowed to move and that her workstation was not ergonomically correct. Dr. Ballard stated in his reports that her physical complaints were due to degeneration and not to a faulty chair or workstation.

Dr. McCormack was the Board's SIME physician, and his report was given the most weight. He reported that as early as 2006 Ms. Kessler was being treated for degenerative disc disease. The 2012 MRI showed preexisting mild to moderate degenerative disc disease at all levels of her lumbar spine. This degenerative disc disease was the substantial cause of her discomfort and not any trauma from a poorly designed workstation. His ultimate conclusion was that her condition was constitutional and not the result of her employment.

The amount of weight to be given to the medical reports is the province of the Board. The Board found that based on the weight given to Drs. Craven, Ballard, and McCormack, Ms. Kessler was unable to prove her claims by a preponderance of the evidence. The Board denied her claim finding work was not the substantial cause of her need for medical treatment. The Board's decision is supported by substantial evidence in the record and the Board's finding that Ms. Kessler was not credible. Since Ms. Kessler was not credible, the Board could not give weight to the reports of Drs. Kropp, Ealum, Kralick, and others because their diagnoses and treatments were based on Ms. Kessler's erroneous statements about her work environment. The Board, as trier of fact,

determines which medical reports it will find the most persuasive. Here, it was the report of Dr. McCormack. The Board's denial of the claimed benefits is affirmed.

*ii. Did Ms. Kessler sustain a mental injury while working for SOA?*

Ms. Kessler further asserts her interactions with her supervisor and the restrictions on her movements at work caused her to suffer under stress that was extraordinary and unusual and was greater than that suffered by her co-workers.

SOA contends that Ms. Kessler is not entitled to the presumption of compensability for her claims of work-related stress. She was obligated to show that "the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment. . . ." <sup>169</sup> Work stress is measured by actual events and is not work-related when it is the result of work actions taken in good faith. <sup>170</sup>

The presumption of compensability in AS 23.30.120 does not apply to a mental injury. "The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress." <sup>171</sup> The Act specifically details the standard for evaluating a claim of mental stress at AS 23.30.010(b). The statute states:

Compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer. <sup>172</sup>

In *Williams v. State, Department of Revenue*, the Alaska Supreme Court (Court) held this statute to be constitutional. <sup>173</sup> Acknowledging that mental injuries are "real

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<sup>169</sup> AS 23.30.010(b).

<sup>170</sup> AS 23.30.010(b).

<sup>171</sup> AS 23.30.120(c).

<sup>172</sup> AS 23.30.010(b).

<sup>173</sup> *Williams v. State, Dep't of Revenue*, 895 P.2d 99 (Alaska 1995) (*Williams*).

phenomena and very important to those who suffer from them,” the Court noted that there are real differences that justify differential treatment.<sup>174</sup> The revision to the Act only eliminated from coverage claims based on usual and ordinary pressures and tensions in the workplace.<sup>175</sup> The revision requires a worker alleging workplace stress to show that the stress endured was “extraordinary and unusual” and is measured by actual events.<sup>176</sup> The Court also reviewed this statute in *Thoeni v. Consumer Electronic Services* in deciding that a qualified mental health specialist could be a psychologist among other qualified medical professionals. The Court stated that the specialist must “rule out a work-related genesis for [the] mental injury.”<sup>177</sup>

In *Kelly v. State, Department of Corrections*, the Court held that in deciding if the work events met the criterion of “extraordinary and unusual” the “amount of work stress shall be measured by actual events rather than misperceptions by the employee.”<sup>178</sup> Therefore, the Court added, “a worker’s perception that he feels stress is by itself inadequate to establish ‘extraordinary and unusual’ stress. The perception issue has been framed by other courts as requiring an inquiry into whether the claimed mental injury is the result of ‘actual, not merely perceived or imagined, employment events.’”<sup>179</sup>

The evidence of unusual workplace stress came mainly from Ms. Kessler’s statements that SOA was retaliating against her for her whistleblowing against a coworker in 2010.<sup>180</sup> At that time, she was working at AWC and had not yet transferred to ASAP which she did in 2012.<sup>181</sup> The Board found Ms. Kessler presented no evidence of any

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<sup>174</sup> *Williams*, 895 P.2d 103.

<sup>175</sup> *Williams*, 895 P.2d 104.

<sup>176</sup> *Williams*, 895 P.2d 105.

<sup>177</sup> *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1258 (Alaska 2007).

<sup>178</sup> *Kelly v. State, Dep’t of Corr.*, 218 P.3d 291, 299 (Alaska 2009) (citation omitted) (*Kelly*).

<sup>179</sup> *Kelly*, 218 P.3d 300.

<sup>180</sup> *Kessler II* at 2, No. 2.

<sup>181</sup> *Id.*

actual retaliation by the supervisor at either AWC or ASAP arising out of her alleged whistleblowing activity.<sup>182</sup>

Although several co-workers testified that Ms. Kessler found it difficult to work with Ms. Draveling, they had no personal knowledge of any “stay in place” order. Ms. Schmid assumed Ms. Kessler could not move freely around the room, but knew of no order restricting her.<sup>183</sup> Mr. Croupen did not personally observe Ms. Kessler having workstation problems, but knew of them from Ms. Kessler.<sup>184</sup> Ms. Savage testified that Ms. Kessler’s workstation was not compatible with her injuries, but she never saw any interactions between Ms. Kessler and Ms. Draveling. She thought Ms. Kessler was not allowed to move freely around the office because she always saw Ms. Kessler at her desk.<sup>185</sup> Ms. Hefley thought Ms. Kessler bought her own higher desk.<sup>186</sup> All of these people testified based mainly on what Ms. Kessler told them, and several of their perceptions were simply wrong. None of the reports of her co-workers supported a finding that Ms. Kessler suffered from any extraordinary or unusual stress in the workplace.

Ms. Draveling, her supervisor at ASAP, testified that she did not initially have Ms. Kessler’s prior personnel files and bore no animus towards her. No letter restricting her movements followed Ms. Kessler from AWC. Ms. Draveling testified that she accommodated all the ergonomic recommendations and ordered all the recommended furniture. Her criticisms of Ms. Kessler were based on her work performance and Ms. Kessler’s seeming inability to follow procedures, to be punctual, and to provide the necessary quality and quantity of work. Ms. Draveling did give negative performance evaluations to Ms. Kessler.<sup>187</sup> Critical workplace evaluations, without more, are not

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<sup>182</sup> *Kessler II* at 28.

<sup>183</sup> *Id.* at 16-17, No. 101.

<sup>184</sup> *Id.* at 17, No. 102.

<sup>185</sup> *Id.* at 18, No. 104.

<sup>186</sup> *Id.*, No. 105.

<sup>187</sup> *Id.* at 18-19, No. 106.

extraordinary and unusual occurrences sufficient to support a finding of stress-related mental injury. The Board found Ms. Draveling to be credible and Ms. Kessler not credible.<sup>188</sup>

The Board also reviewed the numerous grievances filed by Ms. Kessler with the Union. These grievances covered periods of employment 2010-2012 and 2013-2016. These recited similar complaints Ms. Kessler made to her treating doctors and to the Board. All of these grievances were denied.<sup>189</sup>

The Board found, and the record supports, that Ms. Kessler presented no evidence she was subjected to any mistreatment as a result of her whistleblowing in 2010 or that she was subjected to any extraordinary or unusual work stress from her workstation or environment. Her allegations of extraordinary and unusual stress must be based on actual events, not her own misperceptions. The credible evidence from Ms. Draveling was that any stress Ms. Kessler might have felt at work was from good faith personnel actions. Ms. Kessler did not prove her mental stress claim was caused by unusual and extraordinary events in comparison to other people in her workplace. The record supports the Board's conclusion.

*d. Alleged incompetence of counsel.*

Ms. Kessler asserts that the Board's decision should be set aside due to the alleged incompetence or malpractice of her attorney at hearing and after. In support of her assertion, she attached to her opening brief before the Commission copies of information regarding disciplinary action taken against her attorney in 1996. This evidence may not be considered by the Commission, because this evidence was not presented to the Board. Pursuant to AS 23.30.128, this material may not be considered by the Commission on appeal. "The matter on appeal shall be decided on the record made before the board, a transcript or recording of the proceedings before the board, and oral argument and

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<sup>188</sup> *Kessler II* at 19, No. 114, 29-30.

<sup>189</sup> *Id.* at 16, No. 96; R. 602-604, 753, 757-761, 787-788, 791-804, 810-813, 819-821.



written briefs allowed by the commission.”<sup>190</sup> Except in certain limited circumstances not applicable to this appeal, “new or additional evidence may not be received with respect to the appeal.”<sup>191</sup> Thus, the Commission may not consider this information, even if it were relevant to her attorney’s representation of her in 2019.

More importantly, the jurisdiction of both the Board and the Commission is limited to workers’ compensation claims raised pursuant to the Act. “The Appeals Commission’s 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. The scope of its jurisdiction is not that different from the Board’s jurisdiction. . . .”<sup>192</sup> The Act does not contain provisions governing alleged malpractice. Therefore, the Commission does not have jurisdiction over the alleged malpractice of her attorney.

Moreover, if her attorney’s representation was flawed, Ms. Kessler has a remedy either through a grievance with the Alaska Bar Association or through a negligence/malpractice action in the Alaska Superior Court.

Ms. Kessler further contends the Board owed a duty to her to advise her of the alleged incompetence of her attorney. While the Board does have a duty to provide some guidance to unrepresented claimants, there is no provision that would allow the Board to oversee the presentation by a licensed attorney of an injured worker’s claim. Litigation decisions are to be made by an attorney and that attorney’s client, i.e., the claimant. The relationship of an attorney and the attorney’s client is a protected one. The cases relied on by Ms. Kessler are not applicable to a claimant represented by an attorney.<sup>193</sup> The cases she cited involved unrepresented claimants and the Board’s responsibility for advising them of the process for pursuing their claims.

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<sup>190</sup> AS 23.30.128(a).

<sup>191</sup> AS 23.30.128(a).

<sup>192</sup> *Alaska Pub. Int. Rsch. Grp. v. State of Alaska*, 167 P.3d 27, 35 (Alaska 2007).

<sup>193</sup> *Bohlmann v. Alaska Constr. and Eng’g, Inc.*, 205 P.3d 316, (Alaska 2009); *Richard v. Fireman’s Fund Ins. Co.*, 384 P.2d 445 (Alaska 1963).

However, if it were to be apparent to either the hearing officer or opposing counsel that a lawyer practicing before the Board or the Commission is impaired so as to fail to be able to satisfy that lawyer’s professional responsibilities, then other lawyers do have an obligation to confer with Bar Counsel.<sup>194</sup> However, no evidence has been presented to the Commission that Ms. Kessler’s attorney was unable to satisfy his professional responsibilities to her or to the Board. The Commission does note that he failed to respond to a request by the Hearing Officer about the deposition of Dr. Roberts and did not file a closing brief. No reason is given for these actions. These actions were post-hearing and there is no evidence in the record that his work during the hearing was in any way impaired. Therefore, the Commission does not have sufficient evidence to decide if the Hearing Officer had sufficient information to consult with Bar Counsel.<sup>195</sup> Moreover, this issue is not an issue to be decided by the Commission.

*5. Conclusion.*

The decision of the Board is AFFIRMED.

Date: 19 October 2022 Alaska Workers’ Compensation Appeals Commission



*Signed*

James N. Rhodes, Appeals Commissioner

*Signed*

S. T. Hagedorn, Appeals Commissioner

*Signed*

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme

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<sup>194</sup> See, Alaska Bar Ass’n Ethics Op. 2022-1; R. Pro. Conduct 5.1, 8.3.

<sup>195</sup> Since oral argument in this appeal, the Court issued an order in Supreme Court No. S-18510 placing Attorney Cavanaugh on disability inactive status effective September 7, 2022. The Commission has no other information about this Order, including whether it addressed his representation of Ms. Kessler before the Board in 2019-2020.

Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

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

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 297 issued in the matter of *Kolleen A. Kessler v. State of Alaska*, AWCAC Appeal No. 20-013, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 19, 2022.

Date: October 25, 2022



*Signed*

K. Morrison, Appeals Commission Clerk