Alaska Workers' Compensation Appeals Commission

Alaska Interstate Construction, LLC, Appellant, vs. Theodore D. Morrison and ASRC d/b/a SKW Eskimos, Inc., Appellees.	Final Decision Decision No. 243 January 25, 2018 AWCAC Appeal No. 17-007 AWCB Decision No. 17-0012 AWCB Case Nos. 201414925, 200419949,

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 17-0012, issued at Fairbanks, Alaska, on January 27, 2017, by northern panel members Robert Vollmer, Chair, Jacob Howdeshell, Member for Labor, and Julie Duquette, Member for Industry.

Appearances: Michelle M. Meshke, Russell Wagg Meshke & Budzinski, PC, for appellant, Alaska Interstate Construction, LLC; Joseph A. Kalamarides, Kalamarides & Lambert, for appellee, Theodore D. Morrison; Colby J. Smith, Griffin & Smith, for appellee, ASRC d/b/a SKW Eskimos, Inc.

Commission proceedings: Appeal filed February 27, 2017; briefing completed August 14, 2017; oral argument held on November 3, 2017.

Commissioners: James N. Rhodes, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Theodore Morrison injured his right knee while working for ASRC d/b/a SKW Eskimos, Inc. (SKW) in 2004. He subsequently reinjured his right knee in 2014 while working for Alaska Interstate Construction, LLC (Alaska Interstate). The Alaska Workers' Compensation Board (Board) heard his claim on December 15, 2016, to determine which employer should be liable for Mr. Morrison's need for on-going medical treatment related to his knee. The 2004 injury falls under the prior definition that work must be a substantial factor in the need for medical treatment, and the 2014 injury falls under the

2005 definition that work must be the substantial cause. The Board found Alaska Interstate to be liable for ongoing medical benefits under both the last injurious exposure doctrine and the substantial cause definition.[1] Alaska Interstate appealed to the Alaska Workers' Compensation Appeals Commission (Commission) and the Commission heard oral argument on November 3, 2017. The Commission now remands the matter to the Board for additional consideration of the substantial cause for any ongoing medical benefits Mr. Morrison might need.

2. Factual background and proceedings.[2]

In March of 2004, Mr. Morrison was working as a carpenter on Saint Paul Island for SKW when he slipped and fell on the ice, injuring his right knee. Following his slip and fall, Mr. Morrison "had good and bad days," until he re-injured his right knee while pushing a wheelbarrow of cement.[3]

On October 18, 2004, Adrian Ryan, M.D., evaluated Mr. Morrison's right knee. A magnetic resonance imaging (MRI) study showed a tear of the posterior horn of the medial meniscus, small joint effusion with early chondromalacia of the medial tibial femoral and patellofemoral joints, and a small tear of the posterior horn of the lateral meniscus. Dr. Ryan recommended a right knee arthroscopy and meniscectomy with possible joint debridement. This surgery was performed the next day.[4]

Mr. Morrison followed up with Dr. Ryan on December 6, 2004, and reported overall improvement in his knee. He had returned to work, but still had pain when bending his knee, along with some stiffness and pain when twisting the knee. Dr. Ryan stated Mr. Morrison was doing "fairly well" overall and found him medically stable. Dr. Ryan

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[1] *Morrison v. Alaska Interstate Construction and ASRC d/b/a SKW Eskimos,* Alaska Workers' Comp. Bd. Dec. No. 17-0012 (Jan. 27, 2017) (*Morrison*).

[2] 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.

[3] *Morrison* at 3, No. 1.

[4] *Id.*, No. 2.

gave Mr. Morrison a four percent permanent partial impairment rating and instructed Mr. Morrison to continue with his normal occupation.[5]

On February 11, 2005, Mr. Morrison saw Dr. Ryan for a follow-up evaluation and reported some aching discomfort when he bent his knee or twisted it quickly. Dr. Ryan discussed posttraumatic osteoarthritis risks with Mr. Morrison and offered to re-check him in four to six months for a possible cortisone injection. Otherwise, Dr. Ryan's plan was to see Mr. Morrison in October or November for repeat bilateral knee x-rays.[6] SKW paid benefits relating to the 2004 injury.[7]

There is a gap in Mr. Morrison's medical record between February 11, 2005, and August 30, 2014.[8]

On August 30, 2014, Mr. Morrison, while working for Alaska Construction, reported stepping off a ladder and onto a piece of angle iron three days earlier, which rotated his right knee outward. He was experiencing sharp pains just above his knee when climbing ladders and was unable to kneel. Colleen O'Sullivan, PA-C, evaluated Mr. Morrison, prescribed ice, ibuprofen, gentle stretches, and elevation. Mr. Morrison was released to return to work as tolerated.[9] On September 7, 2014, Mr. Morrison returned to see PA-C O'Sullivan and reported some improvement, but he still could not kneel on the knee and it hurt when raising his knee. He also stated he was able to perform his work duties without pain. She recommended Mr. Morrison have an orthopedic evaluation before returning to work.[10]

On September 30, 2014, Mr. Morrison sought a return-to-work authorization from Dale Trombley, M.D., and reported occasional aches and discomfort in his right knee.

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[5] *Morrison* at 3, No. 3.

[6] *Id.* at 3-4, No. 4.

[7] *Id.* at 4, No. 5.

[8] *Id.*, No. 6.

[9] *Id.*, No. 7.

[10] *Id.*, No. 8 (There is a typographical error in the Board's fact. The report actually states, "Knee has improved but still cannot kneel on knee . . . ."); R. 000895-896.

Mr. Morrison was concerned because he had no problems with his right knee since his 2004 meniscus surgery. Dr. Trombley approved Mr. Morrison returning to work on a trial basis and instructed Mr. Morrison to report back to him after three weeks if he still had right knee discomfort.[11]

On November 4, 2014, Mr. Morrison returned to Dr. Trombley and reported his knee was getting better. Mr. Morrison could "do" stairs better, but still had some discomfort. Dr. Trombley thought Mr. Morrison could return to work with no restrictions, but warned him, months or even years from now, his pain might return and his range of motion might be limited as a result of this injury.[12]

Approximately five months later, on March 31, 2015, Mr. Morrison returned to Dr. Trombley and reported his right knee was not well. He had started to walk with a limp and was having discomfort in his hips and back. Mr. Morrison stated his knee ached with normal activity and with rest. Dr. Trombley noted tenderness on the medial aspect, especially with outward twisting, as well as upon abduction of the leg at the knee. A plain x-ray showed no bony abnormalities.[13] On April 6, 2015, John McCormick, M.D., interpreted a right knee MRI as showing a tear of the posterior horn of the medial meniscus with a loss of overlying cartilage at the femoral condyle with associated subcortical degenerative cysts. The anterior horn of the medial meniscus subluxed away from the joint and was not interposed between articulating surfaces.[14] On April 8, 2015, based on the results of Mr. Morrison's April 6, 2015, MRI, Dr. Trombley decided to refer Mr. Morrison to an orthopedist of his choice.[15]

On April 13, 2015, Richard Garner, M.D., reviewed Mr. Morrison's April 6, 2015, MRI and thought it showed images of "what appears to be a degenerative tear of the medial meniscus without bucket-handle components." Dr. Garner thought it was highly

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[11] *Morrison* at 4, No. 9.

[12] *Id.*, No. 10.

[13] *Id.* at 4-5, No. 11.

[14] *Id.* at 5, No. 12; R. 000860-861.

[15] *Id.*, No. 13.

likely Mr. Morrison would require debridement of the right medial meniscus. Mr. Morrison desired to proceed with the surgery as soon as possible so he could undertake gainful employment through the summer work season.[16]

On April, 23, 2015, and November 8, 2015, Charles Craven, M.D., performed an employer's medical evaluation (EME) on behalf of Alaska Interstate. Mr. Morrison's chief complaint was a stabbing pain in the anterior aspect of the right knee, as well as an aching pain in the lower back and right lateral hip. He reported having some discomfort on most days, and some days that were "really bad." Mr. Morrison also reported discomfort when he walked for long distances and after standing all day. Dr. Craven diagnosed 1) right knee strain, which he thought was substantially caused by the August 27, 2014, injury, and he opined would have resolved within six weeks; and 2) right knee osteoarthritis, which preexisted the August 27, 2014, injury and was not symptomatically aggravated by it. Dr. Craven also was unable to identify a symptomatic right knee medial meniscus tear. Instead, Dr. Craven opined the April 6, 2015, MRI showed postsurgical change of a surgically altered meniscus, and Mr. Morrison's history, examination findings, and imaging studies were "classic" right knee osteoarthritis. Dr. Craven thought Mr. Morrison's right knee condition, medial chondromalacia, preexisted the 2004 work injury, but the meniscal tear in 2004, and the subsequent necessity for debridement of 40 to 50 percent of the meniscus, had hastened the degenerative decline of Mr. Morrison's right medial knee. The 2004 injury and surgery was "a substantial factor" in Mr. Morrison's current need for surgery; however, Dr. Craven "strongly advised against" Dr. Garner's proposed arthroscopic knee surgery, stating such a procedure might make Mr. Morrison's right knee condition worse because of his preexisting osteoarthritis.[17]

On May 12, 2016, Floyd Pohlman, M.D., performed a second independent medical evaluation (SIME). Mr. Morrison reported his knee had been asymptomatic following his 2004 meniscectomy, but he was now experiencing constant pain, which was made worse

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[16] *Morrison* at 5, No. 14.

[17] *Id.* at 5-6, No. 15.

by walking and kneeling. Dr. Pohlman could not identify a posterior meniscal tear from the April 6, 2015, MRI, but rather thought the study showed a lesion. Dr. Pohlman diagnosed 1) right knee strain, and 2) moderate degenerative right knee arthritis. After evaluating the relative contributions of these two diagnoses, Dr. Pohlman opined the August 27, 2014, injury was "the substantial cause" of Mr. Morrison's ongoing disability.[18] He thought the August 27, 2014, injury had combined with Mr. Morrison's preexisting arthritis to produce a permanent change to Mr. Morrison's knee. Dr. Pohlman found Mr. Morrison medically stable, but was unable to perform an impairment rating because weight-bearing x-rays are required to evaluate arthritis changes. Dr. Pohlman opined invasive treatments such as injections and visco-supplementation were "probably" indicated, but surgical intervention was not, although it could be in the future.[19]

In his SIME report, Dr. Pohlman responded to the following question posed by Alaska Interstate Construction:

> Q For all *diagnosed* right knee complaints, please identify all causes contributing to any disability or need for medical treatment for any such *conditions*. Please include any relevant pre-existing or co-morbid *conditions*, any prior or subsequent employment activities or incidents, and any other contributing causes of medical significance.
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> A The main cause of his disability is the pre-existing osteoarthritis in the right knee. This was aggravated by the twisting injury he sustained at work.[20]

On June 12, 2015, Dr. Trombley authored a letter providing a summary of Mr. Morrison's medical treatment for his right knee, and opining the August 27, 2014, injury was the substantial cause of Mr. Morrison's need for treatment.[21]

On October 8, 2015, and again on October 20, 2016, the parties deposed Mr. Morrison. Mr. Morrison described installing pilings at the Brooks Range Camp in 2014,

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[18] *Morrison* at 6, fn. 1 (At his deposition, Dr. Pohlman later acknowledged he was unaware Mr. Morrison had not missed any work following the 2014 injury).

[19] *Id.*, No. 17.

[20] *Id.*, No. 18 (emphasis in Decision).

[21] *Id.* at 7, No. 19.

which involved putting six inch pipe 35 feet into the ground and then pouring slurry solution so the pipes would freeze in place. Prior to freezing, the pipes would be lifted one to two feet from the bottom of the hole, and held in place by 2-by-2 angle iron welded to pipe, so it would "freeze back better." Later, the welder would go around and cut the pipe, and then Mr. Morrison would grind the pipe. Because the pipes were five to six feet above the ground, Mr. Morrison would lean a ladder against the pipes to grind them. He injured his right knee when he was coming back down the ladder and his foot hit what he thought was the ground, but it was the angle iron that had been welded to the pipe. Mr. Morrison was wearing "big lug boots," and his foot did not turn with him as he spun off the ladder. He continued to work other jobs after injuring his knee, but had "good days" and "bad days" with his knee. His knee pain also caused him to suffer low back pain and left hip pain on bad days when he would limp. He also testified regarding his 2004 injury with SKW and the meniscus surgery by Dr. Ryan following that injury.[22]

Mr. Morrison stated he did not seek any treatment for his right knee between 2005 and 2014, because "there was nothing wrong with it as far as [he] was concerned.[23]" He repeatedly testified his right knee was symptom-free until the 2014 work injury. "It was fine. I don't recall any problems.[24]" Mr. Morrison reported he did not experience any pain, locking, or clicking before the 2014 work injury.[25] "I don't recall any problems with it at all.[26]" "I was pain-free. Nothing was wrong with my knee until 2014, the way I remember it.[27]"

On October 28, 2016, the parties deposed Dr. Pohlman, where he reiterated opinions expressed in his May 12, 2016, report. Although Dr. Garner interpreted

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[22] *Morrison* at 7, No. 21.

[23] *Id.*, No. 22.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

Mr. Morrison's April 6, 2015, MRI as showing a medial meniscus tear, Dr. Pohlman thought that study might show "pseudomeniscus" instead. Although Dr. Pohlman thought the 2004 work injury was a substantial cause of Mr. Morrison's arthritic changes, he also thought the 2014 work injury permanently aggravated his preexisting arthritis, causing it to become symptomatic, an opinion he based on Mr. Morrison's lack of symptoms prior to the 2014 injury. Dr. Pohlman explained, not all people with osteoarthritic knees require treatment. The reasons an orthopedic physician would provide medical treatment to a person with osteoarthritic knees are pain and disability. In Dr. Pohlman's opinion, the symptoms that arose in Mr. Morrison's arthritic right knee, requiring treatment, were caused by the 2014 work injury.[28]

Dr. Pohlman also explained:

> I've seen people that have bone-on-bone contact come in to see me that twisted their knee, didn't have any symptoms of osteoarthritis at all, and were ready for a total knee replacement because . . . the knee is so damaged. But, they were not aware of it until something happened.[29]

At another point in Dr. Pohlman's deposition, the attorney for one of the parties explored the causation issue with Dr. Pohlman by using the following analogy:

> Q Okay. Well, let me – I'm going to give an analogy. And nobody's going to like it, people are going to object, but let's talk about a wooden bridge, okay. Let's say there's a wooden bridge, and it's a hundred years old, and cars have been driving over it a bunch of times.
>
> A Uh-huh.
>
> Q If a car drives over it, you know, last week, and the bridge breaks and falls apart, what is the substantial cause of the bridge falling down? Is it the underlying structure of the bridge or is it the car that went -- the last car that went by?
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> A I don't know if you can say. I mean, you got – I guess – I would say the car.
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> Q The car? And it was because it was the last car that did it?
>
> A Yeah.
>
> Q Okay.

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[28] *Morrison* at 7-8, No. 23.

[29] *Id.*, No. 24.

A	If no other cars went over it, it would probably still be standing.

Q	Well, but the next car would do it?

A	What?

Q	What about the next car that goes by?

A	Then that would be the cause.

Q	So it's whatever – whatever triggers it then is like the final straw for you, that's what the cause is; is that right?

A	In this – in this case, okay, okay, the bridge was asymptomatic, the bridge was fine.

Q	Well, was it? I mean it doesn't look like on –

A	Meaning you can walk across it and be fine, okay. . . . But, when the car went over it, the car went over it in a such a way that caused it to fail at that point in time.[30]

Later, Dr. Pohlman summarized his opinion: "From a medical standpoint, I'd have to say yes, that he was asymptomatic, he didn't need any treatment until after he twisted his knee, which aggravated the condition.[31]"

On December 9, 2016, the parties deposed Dr. Craven, who repeated the diagnosis set forth in his EME report: right knee strain, substantially caused by the 2014 work injury and would have resolved in six to 12 weeks; and pre-existing, symptomatic, right knee osteoarthritis, which was not symptomatically aggravated by that same injury. He thought Mr. Morrison had nearly recovered from his knee strain by the time of his November 4, 2014, appointment with Dr. Trombley, and thought Mr. Morrison's return to Dr. Trombley several months later was on account of his arthritic symptoms. Dr. Craven testified the April 6, 2015, MRI shows Mr. Morrison had severe arthritis, which would have taken years to develop, and repeatedly attributed Mr. Morrison's lack of reported symptoms between 2005 and 2014 to Mr. Morrison being a "stoic" individual living with the aches and pains of daily life, but who did not "perceive" these aches and pains as being associated with arthritic progression. In Dr. Craven's experience, very stoic patients do not perceive minor aches and pains as "symptoms" until they mentally ascribe them

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[30] *Morrison* at 8-9, No. 25.

[31] *Id.* at 9, No. 26.

to some injurious event. The "more medically astute" question in Mr. Morrison's case, according to Dr. Craven, was not what caused Mr. Morrison's symptoms, but rather what caused the underlying pathologic process of Mr. Morrison's arthritis, which Dr. Craven opined was the 2004 surgical removal of one-half Mr. Morrison's meniscus. Dr. Craven acknowledged not everyone with osteoarthritis of the knee needs treatment.[32]

At the December 15, 2016, hearing, Dr. Pohlman testified the 2004 meniscus removal was "a substantial cause" of Mr. Morrison's underlying arthritis, and the 2014 injury was "the substantial cause" of aggravating the underlying arthritis, causing it to become symptomatic. Mr. Morrison was still symptomatic at the time of his SIME evaluation and Dr. Pohlman thought his symptoms would be permanent. Based on a "pathological approach," Dr. Pohlman apportioned the relative contributions of the two injuries as 10 to 20 percent for the 2014 injury, and 80 to 90 percent for the 2004 injury. When asked to evaluate and weigh the contributions of Mr. Morrison's knee pathology versus his knee symptoms, Dr. Pohlman agreed with Dr. Craven to an extent Mr. Morrison would have recovered from the 2014 injury, if he had a "normal" knee, but given his preexisting arthritis, the 2014 injury hastened Mr. Morrison's need for treatment. He also explained, not all patients with arthritis require treatment because symptoms dictate the need for treatment, and he has seen some patients with worn out knees that did not need treatment. Dr. Pohlman was not aware of Mr. Morrison having any right knee symptoms or seeking any right knee treatment between 2005 and 2014, nor was he aware of any medical records in this timeframe.[33]

At the December 15, 2016, hearing, Mr. Morrison testified concerning details of the 2004 injury, the 2004 meniscus surgery with Dr. Ryan, as well as details of the 2014 injury. After having surgery for a meniscus tear with Dr. Ryan in 2004, he returned to work approximately eight or nine days after surgery. Between 2005 and 2014, Mr. Morrison did not have any pain or other problems with his right knee. He was prescribed no medications for his right knee, and he continued to work as a carpenter

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[32] *Morrison* at 9-10, No. 27.

[33] *Id.*, No. 31; Hr'g Tr. at 27:4 – 30:15, Dec. 15, 2016.

and welder. The 2014 injury was not as "bad" as the 2004 injury, but his knee was swollen. Mr. Morrison explained Dr. Trombley diagnosed knee sprain, and Mr. Morrison returned to work, but his knee was still painful. He continued to seek treatment in January and February of 2015, and returned again to seek treatment again on March 15, 2015, because he had a "bad limp" and his knee was very painful. After an MRI showed a meniscus tear, Dr. Ryan was not available, so he saw Dr. Garner. Mr. Morrison clarified he is seeking an order for him to receive medical treatment for his knee. He has not turned down any work since the 2014 injury, and he has still been able to engage in recreational activities. Mr. Morrison is aware some doctors have opined an additional surgery may make his knee worse. Mr. Morrison last worked in September of 2016, and he sometimes voluntarily takes time off work. He explained he was "very happy" with the way his 2004 surgery went, and he does not recall any problems with his right knee until the 2014 injury.[34]

The Board found both Dr. Pohlman[35] and Mr. Morrison to be credible.[36]

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.[37] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[38] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[39] The weight given to witnesses' testimony, including medical

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34 *Morrison* at 11, No. 33.

35 *Id.* at 10, No. 32.

36 *Id.*, No. 34.

37 AS 23.30.128(b).

38 *See*, *e.g.*, *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

39 *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).

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.[40] The Board's findings regarding credibility are binding on the Commission as the Board is by statute granted the sole power to determine the credibility of a witness.[41]

On questions of law and procedure, the Commission does not defer to the Board's conclusions but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."[42]

4. Discussion.

The Alaska Workers' Compensation Act (Act) requires the Board, for any injury occurring after November 7, 2005, to look at all relevant causes. "When determining whether or not the death or disability or need for medical treatment arose out of and in the course of employment, the board must evaluate the relative contribution or 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 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."[43] For injuries occurring prior to November 2005, the test for whether a disability or need for medical treatment arose out of and in the course of employment was whether the employment was "a substantial factor."[44] How does the new test apply where there is a pre-existing condition?

In *City of Seward v. Hansen*, the Commission reviewed in detail the 2005 change in the Act which changed the test for liability from "a substantial factor" to "the substantial cause of the disability . . . or need for medical treatment."[45] The Commission stated it

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[40] AS 23.30.122.

[41] AS 23.30.122.

[42] AS 23.30.128(b).

[43] AS 23.30.010(a).

[44] *DeYonge v. NANA/Marriott,* 1 P.3d 90, 96 (Alaska 2000), quoting *Hester v. State, Pub. Employees' Retirement. Bd.,* 817 P.2d 472, 476 n. 7 (Alaska 1991).

[45] *City of Seward v. Hansen*, Alaska Workers' Comp. App. Comm'n Dec. No. 146 (Jan. 21, 2011) (*Hansen*).

was "appropriate . . . to interpret the statute and adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[46] In statutory construction, the Alaska Supreme Court (Court) has said the Commission should "consider its language, its purpose, and its legislative history, in an attempt to give effect to the legislative intent."[47] The Commission noted that the Court had routinely imposed liability on an employer "whenever employment is established as a causal factor in the disability." A "causal factor is a legal cause if 'it is a substantial factor in bringing about the harm'" at issue.[48]

However, the 2005 revision now requires the Board "to evaluate the relative contribution of different causes of disability, death, or need for medical treatment, and award benefits if employment is, in relation to other causes, 'the substantial cause' of the disability, death, or need for medical treatment."[49] Does this language signal a legislatively-mandated standard for coverage under the Act that differs from the case law standard?[50]

In construing the last two sentences of AS 23.30.010(a), the first consideration is only the language in those sentences. The penultimate sentence indicates that the Board is to determine "the relative contribution of different causes" of the disability, death, or need for medical treatment, that is, the statutory language provides that the Board is to compare causes. Furthermore, the legislature's use of the word "the" in the phrase "the

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[46] *Hansen* at 10, citing *Rivera v. Wal-Mart Stores, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 122 at 7 (December 15, 2009).

[47] *Id.*, citing *Ranney v. Whitewater Eng'g,* 122 P.3d 214, 217 (Alaska 2005).

[48] *Id.*, citing *Doyon Universal Servs. v. Allen,* 999 P.2d 764, 770 (Alaska 2000) (citations omitted).

[49] *Id.* at 10-11.

[50] A principle of statutory construction provides that "pertinent court decisions may be consulted in the interpretation of statutes which restate decisional law." 2A Norman J. Singer, *Sutherland Statutory Construction* § 48:03 (6th ed. 2002). In this case, the statute does not restate decisional law; rather, it departs from it. We think the legislature's conscious decision to use the phrase "the substantial cause" in AS 23.30.010(a), instead of the decisional law phrase "a substantial factor," is significant in construing the statute. To us, it portends a change in the law. The legislative history of AS 23.30.010(a) supports this view. *See* discussion at 14-17, *infra*.

substantial cause," is suggestive of a limitation. Typically, the definite article "the" particularizes the subject which it precedes and "is a word of limitation as opposed to the indefinite or generalizing force of [the indefinite articles] 'a' or 'an.'"[51] Also, the legislature's inclusion of the phrase "in relation to other causes" in the last sentence, preceding the phrase "the substantial cause," imparts the concept that, when causes are compared, only one cause can be "the substantial cause." Thus, the language in the last two sentences of AS 23.30.010(a) connotes that compensation or benefits are payable under the Act if, in comparing the relative contribution of different causes, the employment, in relation to other causes, is the substantial cause of the employee's disability, death, or in the circumstances of this case, the need for medical treatment.

Then the statute's purpose must be considered in construing the language. Generally, the purpose of Senate Bill 130 (SB 130), the proposed legislation to amend the Act in 2005, was to lessen the threat to jobs and workers' benefits caused by workers' compensation "insurance premiums increasing at intolerable rates."[52] In connection with a proposed amendment to the statutory definition of "injury" under the Act, AS 23.30.395(17), that particular amendment's purpose was identified as "decreasing the cost of insurance premiums."[53] Elsewhere, a member of the House stated that the high cost of workers' compensation insurance would be addressed by SB 130.[54] Although the 2005 amendments to the Act may have had other purposes, the keeping workers' compensation insurance premiums affordable for employers was an important purpose. As a means to that end, the legislature intended SB 130 to narrow the scope of coverage under the Act.

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51 *American Bus Ass'n v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000).

52 Senate Judiciary Committee Minutes at 4, April 5, 2005, summary by Paul Lisankie, director, Division of Workers' Compensation.

53 Senate Judiciary Committee Minutes at 16, April 7, 2005, remarks by Paul Lisankie, director, Division of Workers' Compensation.

54 *See* House Special Session Tr. at 16-17, May 20, 2005, remarks by Rep. Jay Ramras.

A review of the legislative history of SB 130 is utilized to determine, with as much precision as possible, what the Legislature intended to accomplish in amending AS 23.30.010 as it did. In the process, it is important to note that the Legislature's ultimate inclusion of the phrase "the substantial cause" in the last sentence of AS 23.30.010(a) is tied to its consideration and abandonment of the aforementioned amendment of the definition of "injury" in AS 23.30.395(17). The proposed amendment to §.395(17) would have added the following sentence to the definition: "'injury' does not include aggravation, acceleration or combination with a pre-existing condition unless the employment is the major contributing cause of disability or need for medical treatment[.]"[55]

Near the end of the 2005 legislative session, on May 20, 2005, a House committee considered deleting the foregoing quoted language from the definition of injury in conjunction with including that language in the Act as a limitation on benefits under AS 23.30.010.[56] That same day, May 20, 2005, the amendments in SB 130 were discussed during a special session of the House. Representative Eric Croft, who opposed SB 130, voiced his understanding that the standard embodied in the phrase "the substantial cause" was a compromise between two standards, the higher one being "the major contributing factor" and the lower being "a substantial factor."[57] "*The major* is the predominant one . . . . *A substantial* is anything that rises above sort of a minimum level. And *the substantial* has to fall somewhere in between."[58] Representative Jay Ramras, who supported SB 130, commented anecdotally:

> And when we get into . . . *a substantial cause* and *the substantial cause*, I've got a 19 year old healthy kid, had a snowboarding accident the year before he came to work for us. Had a slip and fall on my kitchen floor, $45,000 knee rebuild. And I was helpless, as an employer. And so, we just

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55 Senate Judiciary Committee Minutes at 15-16, April 7, 2005.

56 *See* House Free Conference Committee Minutes at 20-22, May 20, 2005, statement of David D. Floerchinger, Assistant Attorney General.

57 House Special Session Tr. at 6-7, May 20, 2005, remarks by Rep. Eric Croft.

58 *Id.* (italics added).

> bellied-up and the cost of his knee replacement, you know, will be reflected in my workers' comp[ensation] rate for the ensuing three years.
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> Our workers' comp[ensation] is out of control. And this bill looks like it's a fix. It looks better. . . . But from what I know and what I've read and -- it looks like it's better. We've got to start down this road.[59]

The following day, May 21, 2005, a witness before the same House committee indicated that use of the word "the" in the phrase "the substantial cause," "constitute[d] a change from current law."[60] Representative Croft observed that the language "clearly contemplates that one cause will be compared to another" and the ensuing discussion confirmed to him that employment cannot be "the substantial cause" if something else is more of a cause.[61] He concluded "that when one cause is determined to be greater than the other, the other is not the substantial cause anymore."[62] The committee discussed the adoption of AS 23.30.010(a), with the last sentence of that subsection reading as it currently does in the statute as enacted.[63]

In view of the language in the last two sentences of AS 23.30.010(a), the purpose of SB 130, that is, to try to control workers' compensation insurance premiums, and the legislative history pertaining to the amendment of AS 23.30.010, which reflects a deliberate attempt to limit benefits, the Commission concludes that the legislature's intent was to contract coverage under the Act. Accordingly, the last two sentences in AS 23.30.010(a) require employment to be, more than any other cause, the substantial cause of the employee's disability, death, or need for medical treatment. It no longer suffices that employment is a substantial factor in bringing about the harm. Applying the foregoing interpretation of the statute in the context of this case, an employer can rebut

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[59] House Special Session Tr. at 16-17, May 20, 2005, remarks by Rep. Jay Ramras (italics added).

[60] House Free Conference Committee Minutes at 7, May 21, 2005, statement of Kristin S. Knudsen, Assistant Attorney General.

[61] House Free Conference Committee Minutes at 5, May 21, 2005, remarks by Rep. Eric Croft.

[62] House Free Conference Committee Minutes at 8.

[63] *See* House Free Conference Committee Minutes at 1-10.

the presumption of compensability with substantial evidence that the pre-existing condition, and not a work injury, was the substantial cause of an employee's need for medical treatment.

In *DeYonge,* the Court rejected "the distinction between aggravation of symptoms and aggravation of the underlying impairment" and found Ms. DeYonge entitled to benefits for an aggravation of symptoms.[64] However, *DeYonge* was decided prior to the adoption by the Legislature in 2005 of the new test. All causes now must be examined to determine the relative contribution of each cause to an employee's need for medical treatment. Thus, the question now is whether an aggravation of symptoms is sufficient to find an employer liable for ongoing medical benefits. The statute clearly requires the Board to look at and weigh all causes before determining whether the need for medical treatment arose out of and in the course of employment. The employment must now be "the substantial cause" in relation to all causes for an injury arising after November 2005. It is no longer sufficient for employment to be "a substantial factor."

Similarly, the analysis applied regarding the last injurious exposure rule in *Fairbanks North Star Borough v. Rogers and Babler* must be reexamined.[65] There the Court held the subsequent employer would be responsible since the second injury was a substantial factor based on a "but-for" analysis. The resulting disability would not have happened "but-for" the second injury. The Court, in *Fairbanks North Star Borough* recognized that the claimant or injured worker needed to prove not only "but for" the second injury the disability would not be as significant, but that the second injury was a substantial factor in the resulting disability. Now under AS 23.30.010(a) the employment must now be **the** substantial cause, not just a substantial factor.

In *Shea v. State of Alaska*, the Court, in the context of a claim before the Division of Retirement and Benefits, stated "[t]he underlying injury need not be caused by the employment to receive occupational disability benefits. We have explained that '[i]t is

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64 *DeYonge v. NANA/Marriott,* 1 P.3d 90, 96 (Alaska 2000).

65 *Fairbanks North Star Borough v. Rogers and Babler,* 747 P.2d 528, 530 (Alaska 1987).

basic that an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury.' This is because 'increased pain or other symptoms can be as disabling as deterioration of the underlying disease itself.'"[66] "The fact that multiple causes contribute to an injury does not automatically preclude recovery. The substantial factor test requires a claimant to demonstrate that '(1) the disability would not have happened "but for" an injury sustained in the course and scope of employment; and (2) reasonable persons would regard the injury as a cause of the disability and attach responsibility to it.'"[67] However, the Court here was looking at the test of whether work was "a substantial factor" and not at the test of whether work was "the substantial cause."

In *Rivera v. Wal-Mart*, the Court considered a work injury described as a sprain or strain to have been a temporary and transient aggravation of a preexisting and underlying degenerative condition.[68] Rivera, unlike the claimant in *DeYonge* was able to return to work without any significant time loss. In *Rivera* the disputed medical question was whether the underlying condition was the cause of Rivera's chronic pain and the Board found it was the preexisting condition not the work strain. The Court held that the Board's "findings about the weight given to medical testimony are conclusive."[69] However, those conclusions must be reached using the correct analysis.

In *Huit v. Ashwater Burns, Inc.,*[70] the Court specifically did not decide how to apply the presumption analysis when there is another cause involved such as a prior injury. It would appear that the analysis is a two-step operation. First, one must look at the second injury to determine what benefits apply to it. Then any ongoing benefits must be analyzed again to ascertain what is the substantial cause for these future benefits.

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[66] *Shea v State, Dep't of Admin., Div. of Retirement and Benefits*, 267 P.3d 624, 631 (Alaska 2011).

[67] *Id.* at 633.

[68] *Rivera v. Wal-Mart Stores, Inc.,* 247 P.3d 957, 962 (Alaska 2011).

[69] *Id.* at 964.

[70] *Huit v. Ashwater Burns, Inc.,* 372 P.3d 904, 919 (Alaska 2016).

The question that remains is whether an increase in symptoms meets the definition of "the substantial cause" or whether the underlying condition must be changed before the increase in symptoms becomes "the substantial cause." The focus cannot be solely on the last event to have occurred but the last event must be examined in relation to previous events and the underlying condition.

Here, the Board found that the 2014 injury was the cause of Mr. Morrison's ongoing need for medical treatment. Is this finding consistent with the definition of substantial cause and is it supported by substantial evidence in light of the record as a whole?

The Board found Dr. Pohlman to be credible, but ignored his testimony that, based on a "pathological approach," he would apportion the relative contributions of the two injuries as 10 to 20 percent for the 2014 injury, and 80 to 90 percent for the 2004 injury. When asked to evaluate and weigh the contributions of Mr. Morrison's knee pathology versus his knee symptoms, Dr. Pohlman agreed with Dr. Craven to an extent that Mr. Morrison would have recovered from the 2014 injury, if he had a "normal" knee, but given his preexisting arthritis, the 2014 injury hastened Mr. Morrison's need for treatment.

However, hastening the need for treatment does not necessarily make it the substantial cause. Dr. Pohlman seemingly agreed the substantial cause for treatment of the underlying condition was the 2004 injury.

However, Dr. Pohlman also seems to agree with the idea that the last car to drive over a defective bridge would be the substantial cause of the collapse of same bridge. This is not evaluating all relevant causes but merely looking at the last incident and ascribing everything to it without weighing all factors. To look only at the triggering event without properly weighing all factors, destroys any meaning of the change from a substantial factor to the substantial cause. When the Legislature writes a statute, the Board must give effect to every word used. Here, the Board did not properly undertake its role here in weighing all relevant factors. There is no question Mr. Morrison required medical treatment after his 2014 injury and there is no dispute his preexisting osteoarthritis was quiescent for about ten years. Nonetheless, the Board needs to look at the need for ongoing medical treatment without relying solely on the last, triggering event. Would Mr. Morrison need ongoing medical treatment from the 2014 injury absent

the preexisting condition? Would he need ongoing medical treatment from the 2004 injury without the 2014 injury? Dr. Pohlman indicated that he would. Dr. Craven indicated he would. The Board must look at all relevant causes and determine which is the substantial cause. It cannot just look to the last incident and ascribe all ongoing need for medical treatment to it without weighing all causes.

The Court, in *Lindhag v. State, Dep't of Natural Resources*, rejected the *post hoc ergo propter hoc* logical fallacy that just because something arose after an event does not mean the event is the cause.[71] Here, Dr. Pohlman stated the pathological disorder was 10 to 20 percent caused by the 2014 injury and 80 to 90 percent the result of the osteoarthritis from the 2004 injury. He then went on to say that because the 2014 injury was the last event it must be the substantial cause of the need for ongoing medical care, falling into the trap that the straw that broke the camel's back was the substantial cause when it was just the last straw and the overload was the substantial cause. While the Board found Dr. Pohlman credible, it did not weigh nor address his conflicting statements about the origins of Mr. Morrison's current condition.

Furthermore, the Board found Mr. Morrison credible and he testified his 2014 injury was not as "bad" as his 2004 injury. He treated immediately for the 2014 injury through November, continued working, and did not seek treatment for another five months (late March 2015). While Mr. Morrison's osteoarthritis from the 2004 injury may have been aggravated by the 2014 injury, the Board's obligation is to evaluate all the causes leading to Mr. Morrison's need for future medical treatment.

The Board erred in relying on pre-2005 case law for the proposition that an onset of symptoms following the 2014 injury is sufficient to define it as the substantial cause for all ongoing medical treatment without following the requirement of AS 23.30.010(a) to weigh all relevant causes. A remand is necessary for the Board to weigh all factors before determining which injury is the substantial cause of future and ongoing medical treatment.

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[71] *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 954 (Alaska 2005).

5. Conclusion.

The Commission REMANDS this matter to the Board to examine in further detail the relationship between the first (2004) injury and the second (2014) injury to determine the substantial cause for any ongoing medical treatment.

Date: *25 January 2018* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

This is a non-final order remanding the Board's decision so that the Board may examine in further detail the relationship between the first injury and the second injury to determine the substantial cause for any ongoing medical treatment. This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted. For the date of distribution, see the box below.

PETITION FOR REVIEW

A party may file a petition for review of this order with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file a petition for review within 10 days after the date of this order's distribution. You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

This is a not a final decision issued under AS 23.30.128(e), so reconsideration is not available.

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of Final Decision No. 243 issued in the matter of *Alaska Interstate Construction, LLC vs. Theodore D. Morrison and ASRC d/b/a SKW Eskimos, Inc.*, AWCAC Appeal No. 17-007, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 25, 2018.

Date: *January 26, 2018*

Signed

K. Morrison, Appeals Commission Clerk