Alaska Workers' Compensation Appeals Commission

Frank Gonzales, Appellant, vs. Bethel Native Corporation and Commerce and Industry Insurance Company, Appellees.	Final Decision Decision No. 266 September 3, 2019 AWCAC Appeal No. 18-018 AWCB Decision Nos. 18-0093, 18-0096 AWCB Case No. 201615627

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0093, issued at Anchorage, Alaska, on September 13, 2018, by southcentral panel members Ronald P. Ringel, Chair, Pamela Cline, Member for Labor, and David Kester, Member for Industry; and, Final Decision and Order on Reconsideration No. 18-0096, issued at Anchorage, Alaska, on September 26, 2018, by southcentral panel members Ronald P. Ringel, Chair, Pamela Cline, Member for Labor, and David Kester, Member for Industry.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, for appellant, Frank Gonzales; Krista M. Schwarting, Griffin & Smith, for appellees, Bethel Native Corporation and Commerce and Industry Insurance Company.

Commission proceedings: Appeal filed October 8, 2018; briefing completed April 30, 2019; oral argument held June 13, 2019.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Frank Gonzales sustained a work injury while working for Bethel Native Corporation (BNC) in 2016 when he fell approximately 20 to 30 feet off scaffolding. The Alaska Workers' Compensation Board (Board) heard the merits of his claim for ongoing benefits related to his left knee, which he asserted was either injured in the fall or the fall made his pre-existing condition so symptomatic he is now unable to work. The Board found

his claim for benefits related to ongoing problems with the left knee not compensable, holding the substantial cause for his problems was his pre-existing osteoarthritis and osteomyelitis.[1] The Board did not consider the increase in symptoms as a possible substantial cause because the Alaska Supreme Court (Court) had not issued *Morrison* at the time of the hearing.[2] Mr. Gonzales timely appealed the decisions to the Alaska Workers' Compensation Appeals Commission (Commission). The Commission heard oral argument on June 13, 2019, and now remands the matter to the Board for further consideration in light of the holding in *Morrison* that an increase in symptoms may be the substantial cause of the need for medical treatment and other benefits.

2. Factual background and proceedings.[3]

Prior to the work injury on October 18, 2016, Mr. Gonzales had a history of injury to his left leg. At the age of nine, Mr. Gonzales suffered a gunshot wound to his left femur.[4] Then, in 1980, when he was in high school, Mr. Gonzales tore his left anterior cruciate ligament (ACL) playing football.[5] The surgery to repair Mr. Gonzales's ACL in 1980 used an older technique, a periarticular or extra-articular reconstruction. Using that technique, rather than repairing the tear in the ACL, another ligament was fastened around the outside of the joint, restoring stability to the knee.[6]

In 2008, Mr. Gonzales fell from a second story deck, fracturing both heels and breaking his left tibia and fibula.[7] The tibial fracture involved the tibial plateau in

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[1] *Gonzales v. Bethel Native Corp.*, Alaska Workers' Comp. Bd. Dec. No. 18-0093 (Sept. 13, 2018)(*Gonzales I*); *Gonzales v. Bethel Native Corp.*, Alaska Workers' Comp. Bd. Dec. No. 18-0096 (Sept. 26, 2018)(*Gonzales II*).

[2] *Morrison v. Alaska Interstate Constr., Inc.*, 440 P.3d 224 (Alaska 2019)(*Morrison*).

[3] 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.

[4] Frank Gonzales Dep., Aug. 2, 2017, 24:1-15.

[5] Gonzales Dep. at 24:18-19.

[6] John Lapkass, M.D., Dep., Jul. 23, 2018, at 11:1-10; 16:8-12.

[7] Gonzales Dep. at 16:24 – 18:6.

Mr. Gonzales's left knee.[8] On July 24, 2008, Mr. Gonzales underwent surgery in which an intramedullary rod was used to stabilize his tibia.[9] Because one of the fractures failed to heal, on November 6, 2008, the intramedullary rod was removed and a plate and screws were implanted.[10]

There is a gap in the medical records from November 2008 until Mr. Gonzales's fall in October 2016, a period of eight years.[11]

Mr. Gonzales testified that on October 18, 2016, he was working for BNC as a carpenter on a school building in Kwethluk.[12] While working on the roof he needed to descend for more materials, and he returned to the scaffolding to descend. He disconnected his fall protection, but as he climbed onto the scaffolding, his harness caught on something. The next thing he recalls is that he was lying on temporary wooden stairs at ground level.[13] According to the witness statement of Michael Fisher, Mr. Gonzales fell from the top of the scaffold to the roof, slid down the roof, and fell 25 to 30 feet, landing on temporary wooden stairs.[14]

Co-workers took Mr. Gonzales to the Kwethluk Clinic.[15] Although there is no record of his treatment at the clinic, Mr. Gonzales stated he was given pain medication.[16] He was then medevaced to the Yukon-Kuskokwim Delta Regional Hospital in Bethel where he was seen by Lisa Evans, M.D. Mr. Gonzales provided a history of his fall and described his symptoms. Regarding his left knee, Dr. Evans noted, "He does endorse some pain over his left knee, but he has prior injury of this knee. This is not new." Mr. Gonzales's

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8 Exc. 209.

9 R. 1375-1377.

10 R. 1327-1329.

11 Record.

12 Gonzales Dep. at 10:14 – 11:7; Hr'g Tr., Aug 7, 2018, at 27:3-4; 32:7-10.

13 Hr'g Tr. at 34:6-25.

14 R. 433; R. 690-693.

15 Hr'g Tr. at 37:25 – 38:6.

16 Hr'g Tr. at 38:9-11.

head wound was bandaged and computed tomography (CT) scans were done. Mr. Gonzales was diagnosed with a large scalp laceration, multiple right-sided rib fractures, a comminuted fracture of the T7 vertebrae, disruption of ligaments at T7–T8, fractures of the L1–L4 transverse processes, fluid in the lungs, fracture of the nasal bone, and right elbow and left knee contusions.[17]

Subsequently, Mr. Gonzales was transferred to Alaska Regional Hospital (ARH) in Anchorage.[18] Mr. Gonzales's scalp wound was closed surgically on October 19, 2016, and on October 21, 2016, Mr. Gonzales underwent thoracic spine stabilization surgery with fixation from T5–T9.[19] On October 19, 2016, Mr. Gonzales reported to Benjamin Rosenbaum, M.D., that he had chronic leg pain, but there had been no change.[20]

On October 21, 2016, while in the hospital, Mr. Gonzales was asked about non-healing wounds on his left leg. He reported they had occurred after the surgeries for his 2008 fractures. X-rays taken the same day showed a plate at the proximal end of the tibia with pins across the tibial plateau. The X-rays showed advanced degenerative changes in the knee.[21]

Robert Bundtzen, M.D., an infectious disease specialist, on October 22, 2016, saw Mr. Gonzales for the chronic wounds on his left knee. Mr. Gonzales reported that the wounds disappeared when he took antibiotics, but reappeared when he stopped. Dr. Bundtzen noted the wounds were within the incision line of the surgery to repair the fracture, and he diagnosed infected hardware. He stated that from an infection standpoint nothing could be done until the hardware was removed. Mr. Gonzales did not report any pain in his knee at the time of the examination.[22] When examined on

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17 Exc. 219-221; Exc. 001-006.

18 Exc. 223-226.

19 Exc. 228-230; Exc. 231-235; Exc. 245-247.

20 Exc. 231.

21 Exc. 237; Exc. 248.

22 Exc. 255.

October 25, 2016, Mr. Gonzales denied any significant pain.[23] Mr. Gonzales was discharged from ARH on November 2, 2016.[24]

On November 18, 2016, Mr. Gonzales reported to BNC's case manager that his left knee had been excruciatingly painful ever since his injury.[25] On December 1, 2016, Mr. Gonzales reported to Audrey Kelley, PA-C, at Anchorage Neurosurgical Associates that he had left knee pain since his fall.[26] X-rays and a magnetic resonance imaging (MRI) of Mr. Gonzales's left knee on December 8, 2016, revealed severe arthritis and a "chronically torn" ACL.[27]

On December 13, 2016, Mr. Gonzales saw Tonja Hotrum, PA-C, who reviewed the December 8, 2016, x-ray with him and noted the significant protrusion of hardware into Mr. Gonzales's knee joint. She discussed the possibility of removing the hardware and recommended he follow up in one month.[28] On January 19, 2017, PA-C Hotrum referred Mr. Gonzales to John Lapkass, M.D.[29]

On January 23, 2017, Mr. Gonzales saw Dr. Lapkass and complained of knee pain since the October 18, 2016, injury. Dr. Lapkass noted the complex history of Mr. Gonzales's left knee, including the torn ACL and the 2008 surgery, but he also noted Mr. Gonzales had returned to hard work after the 2008 surgery. Mr. Gonzales was "fairly adamant" that before his fall from the roof his knee was functioning nicely with minimal pain. Dr. Lapkass reviewed the MRI and noted the chronically torn ACL, but explained that only meant the ACL had been torn more than six weeks before the MRI. The ulcers on Mr. Gonzales's left knee continued to drain. Dr. Lapkass stated that it would be a

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23 R. 1199-1206.

24 Exc. 264-275.

25 R. 282-286.

26 R. 1044-1048.

27 Exc. 276.

28 R. 698.

29 R. 699.

waste of time to do an ACL reconstruction in such an arthritic knee, and to fix fully Mr. Gonzales's knee would require a total knee replacement.[30]

On February 18, 2017, Mr. Gonzales was seen by Charles Craven, Jr., M.D., for an employer's medical evaluation (EME). Dr. Craven reviewed Mr. Gonzales's medical records since the October 2016 injury and examined Mr. Gonzales. Mr. Gonzales told Dr. Craven about his 2008 surgery and that he had knee pain since the fall in October 2016. Dr. Craven diagnosed several conditions relating to Mr. Gonzales's left knee, but determined that he had only suffered a contusion as the result of the fall. He explained that Mr. Gonzales's prior surgical procedures, age, and genetics contributed to end-stage arthritis, which preexisted the October 18, 2016, injury. Dr. Craven noted that the emergency department notes refer to chronic left knee pain, as did the neurologist who examined him on October 19, 2016. Dr. Craven concluded the October 18, 2016, work injury was not the substantial cause of Mr. Gonzales's disability or need for medical treatment to Mr. Gonzales's knee.[31]

James F. Scoggin, III, M.D., saw Mr. Gonzales on September 20, 2017, for a board-ordered second independent medical evaluation (SIME). Dr. Scoggin examined Mr. Gonzales and reviewed his medical records. Mr. Gonzales told Dr. Scoggin that at the time of the accident he had been taking ibuprofen for foot pain at a level far exceeding the maximum recommended dose. Dr. Scoggin made a number of diagnoses related to Mr. Gonzales's left knee, all of which were preexisting except for the contusion. He opined the substantial cause of Mr. Gonzales's need for continued medical treatment and disability was his preexisting knee condition, not the October 2016 work injury.[32]

On October 23, 2017, Dr. Scoggin reviewed five discs of x-ray, MRI, and CT scan images relating to Mr. Gonzales's left knee dating from 2004 through October 2016. The

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30 R. 700-701.

31 Exc. 0009-0044.

32 Exc. 0051-0120.

images confirmed the seriousness of Mr. Gonzales's preexisting knee conditions, and Dr. Scoggin confirmed his previous opinion.[33]

Dr. Scoggin was deposed on February 12, 2018. He noted that the x-rays taken three days after the work injury only showed degenerative changes with no evidence of an acute injury. He stated that it was extraordinarily improbable that Mr. Gonzales was asymptomatic prior to the fall, and disregarding Mr. Gonzales's other injuries, if he was able to work with the knee before the work injury, he should be able to work with it after the work injury.[34]

Dr. Craven was deposed on May 14, 2018. He reviewed Mr. Gonzales's medical records since his February 18, 2017, evaluation. Dr. Craven stated he had reviewed all of the records from Mr. Gonzales's hospitalization, and did not find any notation regarding a complaint of left knee pain. He explained that the ulcers on Mr. Gonzales's knee and the radiographic imaging strongly suggested osteomyelitis, a chronic bone infection, which would cause pain. Dr. Craven reviewed the December 8, 2016, MRI, stating it showed a full-thickness tear of the ACL as well as signs of severe, chronic arthritis. While Dr. Craven was not familiar with the procedure used in 1980 to repair Mr. Gonzales's ACL, he explained the ACL itself was not repaired, and the torn ACL would remain visible on an MRI. He agreed Mr. Gonzales was a candidate for a total knee replacement after the osteomyelitis was cured, but based on the lack of documentation of an injury to the knee or increased pain while hospitalized, Dr. Craven concluded the work injury was not the substantial cause of Mr. Gonzales's need for medical treatment. He stated he did not consider an increase in pain without an objective worsening of an underlying condition to be an aggravation of the preexisting condition. Dr. Craven discounted the likelihood that the fall caused a laxity in the tendon used in the ACL repair based on the fact that the

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[33] Exc. 278-285.

[34] James F. Scoggin, III, M.D., Dep., Feb. 12, 2018, at 21:17 – 22:7; 43:5-8.

December 8, 2016, MRI showed a wear pattern on the tibia that indicated a chronic ACL deficiency.[35]

Dr. Lapkass was deposed on July 23, 2018. He stated that when he examined Mr. Gonzales, he noted a misalignment of his left leg due to arthritis, the chronic ulcers over the knee, and instability consistent with chronic ACL deficiency. He characterized Mr. Gonzales's knee as a "complex situation," noting the three prior surgeries and the ulcerations. Were it not for Mr. Gonzales's arthritis, Mr. Gonzales's ACL could be treated nonsurgically or with an ACL reconstruction, but either approach was unlikely to be successful given the arthritis. He described the need for ACL repair to be "the straw that broke the camel's back" in that the fall combined with the preexisting arthritis to cause the need for a total knee replacement. Early in his career, Dr. Lapkass had observed the older procedure used to repair Mr. Gonzales's torn ACL, but had never done one. Mr. Gonzales most likely exacerbated his ACL in the fall, given the absence of problems before the fall and the instability after, but he was relying on Mr. Gonzales's statement he had not had any instability before the fall. He explained that the lack of any record of new knee pain in the hospital records would not be uncommon because patients focus their attention on major injuries, such as Mr. Gonzales's spine fractures.[36]

The Board held that while Dr. Lapkass had been provided medical records related to Mr. Gonzales's injury, it was unclear whether he had all of the medical records, and, if so, whether he had reviewed all of them. Dr. Lapkass testified that he had received and reviewed a large stack of medical records. Dr. Lapkass also testified he had received Dr. Craven's deposition testimony and Dr. Scoggin's report and deposition testimony, but had not reviewed them. He was unaware of the gunshot wound to Mr. Gonzales's thigh.[37]

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[35] Charles Craven, Jr., M.D., Dep., May 14, 2018, at 7:6-8; 7:19-22; 8:18-25; 10:10 – 11:8; 11:14 – 12:22; 13:7-25; 16:8-15; 37:15-18; 38:3-4; 38:17-20; 49:7-10.

[36] John Lapkass, M.D., Dep., July 23, 2018, at 7:13 – 8:11; 9:18 – 10:1; 11:18 – 12:13; 13:18 – 14:9; 15:11 – 16:12; 24:18 – 25:8; 25:23 – 26:23.

[37] *Gonzales I* at 6-7, No. 26; Lapkass Dep. at 17:5 – 18:15; 21:7-10.

Michael Selhay was the project manager at the Kwethluk School when Mr. Gonzales was injured in a fall at the construction site, but he was not present at the time of the injury.[38] Mr. Selhay spoke to Mr. Gonzales at the hospital "two or three or four days after he got to Anchorage."[39] Mr. Gonzales told Mr. Selhay "his back was hurt. He said his leg was hurt. I mean, his head." When asked if Mr. Gonzales had said anything about his knee, Mr. Selhay answered, "Yeah, I think he said his knee – I mean, his leg, his knee."[40] When asked if he had seen Mr. Gonzales at a later time, Mr. Selhay responded, "Have I seen any time after that? Yeah, I did see him in Anchorage. I can't remember, like he came to the office. I couldn't tell if it was 10 months later, or six months later, or a year later, or a year and a half later. I don't know."[41]

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.[42] 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."[43] The Board's findings of credibility are binding on the Commission because the Board "has the sole power to determine the credibility of a witness."[44] Such a determination by the Board is conclusive "even if the evidence is conflicting or susceptible to contrary conclusions."[45]

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38 Michael Selhay Dep., July 23, 2018, at 4:8 – 5:8.

39 Selhay Dep. at 5:14-19.

40 Selhay Dep. at 6:4-13.

41 Selhay Dep. at 7:1-7.

42 AS 23.30.128(b).

43 AS 23.30.128(b).

44 AS 23.30.122.

45 AS 23.30.122.

4. Discussion.

Mr. Gonzales asserts his left knee now has an instability which he did not have prior to the work injury. He further states he has additional pain that he did not have prior to the work injury in 2016. He notes he complained about knee pain to hospital staff, but while in the hospital he also indicated the pain was not substantially different from that which he had prior to the work injury. He also sustained a contusion in the fall, which seems to be an indication that he hit the left knee in the fall. BNC asserts that Mr. Gonzales did not injure his knee in the fall, based largely on the fact that he did not complain of increased knee pain while in the hospital, the x-rays of the left knee taken at the hospital showed no new injury, and he, at most, sustained a contusion now healed. Therefore, BNC contends the need for a total knee replacement is due solely to his pre-existing arthritis and osteomyelitis. BNC contends the Board properly denied Mr. Gonzales any benefits related the knee condition.

The Board found that Mr. Gonzales, through his own testimony about the worsening of his left knee since the injury and the testimony of his treating physician, Dr. Lapkass, raised the presumption of compensability, found in AS 23.30.120(a), that his worsening knee condition is the result of the work injury. BNC was, thus, required to rebut the presumption with substantial evidence the work injury was not the substantial cause of the worsening knee condition. The Board relied on the EME report of Dr. Craven that the fall had only caused a contusion on the knee (which had healed) and the SIME report of Dr. Scoggin that the knee was not significantly injured in the fall. The Board then relied on both Dr. Craven and Dr. Scoggin in reaching its conclusion that the preexisting arthritis and osteomyelitis were the substantial causes of Mr. Gonzales's worsening knee condition, and not the work injury.

In reaching its decision, the Board gave greater weight to the opinions of Drs. Craven and Scoggin. Dr. Scoggin opined the x-ray taken three days after the injury showed no acute injury to the left knee. Dr. Craven stated the December 2016 MRI showed a wear pattern that indicated a chronic ACL deficiency, suggesting no injury to the knee in the fall. Both doctors also relied on a lack of reference in the hospital records to any new knee pain. The Board gave less weight to the testimony of Dr. Lapkass that

the lack of knee pain while Mr. Gonzales was in the hospital was due to the masking effect of Mr. Gonzales's significant and more serious injuries. The Board reached this conclusion because it did not believe Dr. Lapkass reviewed all of the hospital and other medical records thoroughly, while Drs. Craven and Scoggin had done so.

After the Board decision, and prior to the appeal to the Commission, the Alaska Supreme Court (Court), in *Morrison*, clarified that the legislature did not "abrogate *De Yonge* when it amended the compensability standard in 2005."[46] Indeed, the Court stated, "[s]ymptoms frequently prompt people to seek medical care, and an increase in symptoms may be a reason medical treatment is necessary – indeed the doctors in this case agreed that symptoms are the only reason doctors treat osteoarthritis."[47] In *DeYonge,* the Court held that worsened symptoms may be compensable.[48] The Court there stated, "[n]oting the difficulty in separating an aggravation of symptoms from aggravation of the underlying disability, we observed that 'increased pain or other symptoms can be as disabling as deterioration of the underlying disease itself.'"[49] In *Rivera*, the Court had signaled that an increase in symptoms might still be compensable under the 2005 revisions to the Alaska Workers' Compensation Act.[50] The Court, in a footnote, stated, "[w]e observe . . . that the 2005 amendments did not prohibit an award of benefits based on increased symptoms."[51]

In *Morrison,* the Court stated that osteoarthritis is usually only treated when it becomes symptomatic. Here, the Board did not look at whether the work injury is what prompted Mr. Gonzales to seek treatment for the increased knee symptoms and increased pain. The Board relied on the EME and SIME physicians in finding the pre-existing condition was the substantial cause for the now needed knee replacement. However,

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46 *Morrison*, 440 P.3d 224, 233.

47 *Id.*

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

49 *Id.* (citation omitted).

50 *Rivera v. Wal-Mart Stores, Inc.*, 247 P.3d 957, 966, fn. 18 (2011).

51 *Id.*

these doctors did not consider whether the work injury was the substantial cause of the increase in symptoms.

Ordinarily, the Commission must accept the credibility findings of the Board. However, if those opinions are based on an invalid or incorrect statement of the law, the credibility findings of the Board must be set aside. Drs. Craven and Scoggin, upon whom the Board relied, did not address the effect of the injury on the increase in symptoms, including the instability of the knee and the increased pain, nor did the doctors opine as to the cause of the increase in symptoms. In fact, Drs. Craven and Scoggin testified that an increase in symptoms without a change in the underlying condition meant the work injury could not be the substantial cause for the need for medical treatment. Therefore, since the opinions of Drs. Craven and Scoggin did not reflect consideration of the effect of the injury on Mr. Gonzales's increased symptoms, those opinions did not rebut the presumption of compensability, pursuant to *Morrison*.

Dr. Craven believed an aggravation of the underlying condition was needed for it to be the substantial cause of Mr. Gonzales's need for medical treatment. He further stated, "I do not feel that an (sic) subjective increase in pain in the absence of a definable injury or objective worsening of the condition constitutes an aggravation."[52] He did agree the increased pain was an indicator for knee replacement surgery.[53] Dr. Scoggin found no new injury to the knee from the fall. Dr. Scoggin also doubted Mr. Gonzales was asymptomatic prior to the work injury and, therefore, should now be able to work as he had been able to work prior to the work injury.[54] Dr. Scoggin also stated he did not find evidence of an injury, even if Mr. Gonzales was asymptomatic prior to the work injury. He opined subjective complaints without objective findings of an acute injury would not make the work injury the substantial cause of Mr. Gonzales' instability and increased pain.[55]

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52 Craven Dep. at 38:17-20.

53 Craven Dep. at 39:4-8; 40:16-24.

54 Scoggin Dep. at 42:9-20; 43:5-8.

55 Scoggin Dep. at 44:18-20.

Mr. Gonzales asserts his left-knee osteoarthritis became sufficiently troublesome only after his 20-30 foot fall in 2016. He was able to work as a carpenter before the fall, but the knee instability now precludes his working. He has otherwise recovered from the fall.[56] It is possible Mr. Gonzales might have needed a total knee replacement prior to the work injury, but there is no indication in the medical records and he was able to work in spite of the knee condition and pain. Following the work injury, he had an increase in symptoms sufficient to prevent his return to work as a carpenter. According to Dr. Craven, Dr. Johnston, in 2017, stated he found "[l]eft knee instability with prior extra articular ACL reconstruction and possible worsening instability secondary to recent work-related injury."[57]

Looking at the Court's opinion in *Morrison*, Dr. Craven used the wrong test. He asserted that there had to be an aggravation of the underlying condition. Pursuant to *Morrison*, an increase in symptoms without an aggravation may be sufficient for the work injury to be the substantial cause. Dr. Craven, in his deposition, stated he did not consider an increase in pain without an objective worsening of an underlying condition to be an aggravation of the preexisting condition.[58] He further added that there must be an aggravation of a preexisting condition or an objective worsening of the condition before it is the substantial cause of the need for medical treatment.[59] He found that while Mr. Gonzales had an increase in pain complaints there was no evidence of a new injury or of objective worsening of his preexisting condition.[60] He added that he did not consider an increase in subjective pain alone to be an aggravation.[61]

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[56] Gonzales Dep. at 12:17 – 16:13 (He testified that he had worked steadily over several years, working for GPC, NANA, and Northwest Steel prior to working for BNC).

[57] Craven Dep. at 35:10-12.

[58] Craven Dep. at 26:4-9.

[59] Craven Dep. at 37:2-8.

[60] Craven Dep. at 37:15-18.

[61] Craven Dep. at 38:3-4; 38:17-20.

Since the Board relied equally on the opinions of Drs. Craven and Scoggins, who used the wrong test, the matter must be remanded to the Board to reconsider using the correct test – whether the increase in symptoms is substantially caused by the work injury. The Board is required by AS 23.30.010(a) "to look at the *causes* of the injury or symptoms to determine whether 'the employment' was a cause important enough to bear legal responsibility for the medical treatment needed for the injury."[62] Therefore, this matter must be remanded to the Board to consider Mr. Gonzales's claim in light of the recent Court holding in *Morrison.*

Therefore, the matter is remanded to the Board to consider whether the increase in symptoms, pursuant to *Morrison*, is substantially caused by the work injury or by other factors, including the pre-existing condition.

5. Conclusion.

The decision is REMANDED to the Board for action consistent with this decision.

Date: _____*3 September 2019*____ Alaska Workers' Compensation Appeals Commission

Signed
Michael J. Notar, 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 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).

[62] *Morrison*, 440 P.3d at 233-234 (emphasis in original).

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. 266, issued in the matter of *Frank Gonzales vs. Bethel Native Corporation and Commerce and Industry Insurance Company*, AWCAC Appeal No. 18-018, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 3, 2019.

Date: *September 5, 2019*

Signed
K. Morrison, Appeals Commission Clerk