Alaska Workers' Compensation Appeals Commission

Martin Church,
Appellant,

vs.

Arctic Fire and Safety and Alaska National Insurance Co.,
Appellees.

Final Decision
Decision No. 126 December 31, 2009

Appeal No. 09-013
AWCB Decision No. 09-0051
AWCB Case No. 200224913

Appeal from Alaska Workers' Compensation Board Decision No. 09-0051, issued at Fairbanks, Alaska, on March 12, 2009, by northern panel members Fred Brown, Chair, Debra Norum, Member for Industry, and Jeff Pruss, Member for Labor.

Appearances: Martin Church, *pro se,* appellant. Theresa Hennemann, Holmes, Weddle & Barcott, PC, for appellees Arctic Fire and Safety and Alaska National Insurance Co.

Commission proceedings: Appeal filed April 13, 2009. Request for extension of time to file transcript granted on May 26, 2009. Appellant's request for extension of time to file brief granted on July 1, 2009. Oral argument on appeal presented November 10, 2009.

Appeal Commissioners: Philip Ulmer, Jim Robison, Kristin Knudsen.

By: Jim Robison, Appeals Commissioner.

Martin Church suffered an injury while lifting a fire extinguisher at his job for Arctic Fire and Safety. Church appeals the board's decision denying his claim for temporary total disability, permanent partial impairment, transportation costs, medical costs, attorney fees and costs, all of which were related to surgery to remove a bone spur (osteophyte) from his thoracic spine.

The board concluded that Church's 2002 work injuries were not "a substantial factor" in his need for thoracic surgery. On appeal, Church contends that his work injuries caused the thoracic spur either to develop or to become symptomatic, necessitating the surgery. Church argues that the board improperly concluded that Dr. John Swanson's Employer Medical Evaluation (EME) constituted substantial evidence that permitted Arctic Fire and Safety to rebut the compensability presumption, applied

the wrong test of causation to his claim, and lacked substantial evidence to conclude that Church failed to prove his case by a preponderance of the evidence. He also argues that the board abused its discretion in limiting a Second Independent Medical Examination (SIME) to a records review only.

Arctic Fire and Safety counters that Dr. Swanson relied on the correct causation standard in his report and considered whether Church's work injuries caused his underlying condition to become symptomatic. Arctic Fire argues the board correctly applied the "a substantial factor" test to Church's claim and had "overwhelming" evidence to support that Church failed to prove his claim. Lastly, Arctic Fire argues the board did not abuse its discretion in limiting the SIME to a file review.

The parties' contentions require the commission to decide whether the board applied the correct legal standards and whether the board had substantial evidence to conclude that (1) the employer rebutted the compensability presumption and (2) Church did not prove his claim by a preponderance of the evidence. Because we conclude substantial evidence supports the board's decision, the board applied the proper standard of causation, and the board did not abuse its discretion in limiting the SIME, we affirm.

1. Factual background and proceedings.

Martin Church injured his right shoulder lifting a fire extinguisher while working for Arctic Fire and Safety.[1] He filed a claim indicating he was injured on December 10, 2002,[2] but he testified that the initial shoulder injury occurred on August 15, 2002[3] and that the shoulder slipped out again at work on December 10, 2002.[4] Church testified that the injury was "underneath his shoulder blade,"[5] and that "[i]t felt like something

---

1 R. 0001.

2 R. 0001.

3 Hrg. Tr. 68:3-5.

4 Church Dep. 16:7-10.

5 Hrg. Tr. 65:6.

was out in my back."[6]

Dr. Robert McAfee, a chiropractor, initially treated Church by adjusting a rib that kept slipping out, but the rib continued to pop out again.[7] McAfee also noted in December 2002 that Church had continuing pain in his "right mid back" and neck.[8]

McAfee eventually referred him to Dr. George Vrablik for an orthopedic evaluation after Church reported that he had "no lasting relief" from the chiropractic treatment.[9] Michael Weber, a certified physician's assistant, treated Church at Dr. Vrablik's office.[10] According to Weber's notes, Church described the injury as a pop in his upper back and explained that the pain radiates up his neck and down his right arm.[11] Over the next few months, a variety of medications and cervical epidurals did not provide lasting pain relief for Church.[12] In March 2003, Weber's notes indicated that "Church's pain still goes through the posterior shoulder down along the medial scapular border and he feels some tingling in the biceps with a heavy feeling in the right arm."[13]

On June 17, 2003, Church reported two incidents to Weber in which he felt a popping in his upper thoracic spine region, once while changing his daughter and once while golfing. The pain after these popping incidents was described as "radiating . . . through the axilla under the nipple line around to the anterior chest. . . . any kind of deep breathing or any kind of motion with the right shoulder causes increased discomfort."[14] Weber ordered an MRI (magnetic resonance imaging scan) of his

---

6 Hrg. Tr. 66:14-15. Church had previously injured his right shoulder, neck, and back while working as a mover in 1998. R. 0448, 0452, 0462-64.

7 Church Dep. 15:16-22.

8 R. 0489.

9 R. 0497.

10 R. 0499, 0504.

11 R. 0499.

12 R. 0510, 0515-16.

13 R. 0510.

14 R. 0520.

thoracic spine, which was done in July 2003.[15] Weber noted the MRI "shows normal anatomy throughout the entire thoracic spine. No source for the patient's pain."[16]

Church was referred to Dr. Nancy Cross in September 2003 to help pinpoint and manage the source of his ongoing pain complaints.[17] She described his chief complaints as "right neck, scapula and rib pain."[18] In her initial assessment, she diagnosed degenerative disc disease of the thoracic spine, possible slipped rib syndrome and thoracic facet symptoms.[19] Under her care, Church tried physical therapy, a thoracic epidural, pain medications, and other treatments.[20]

Dr. Cross eventually ordered a thoracic MRI done in April 2004 that showed an osteophyte[21] at level T6-T7 that was putting pressure on a nerve root.[22] The physician that interpreted the April 2004 MRI, Dr. Jeffery Zuckerman, also looked at the film from the July 2003 thoracic MRI and concluded that the osteophyte was visible in 2003 but was not read out, i.e., not identified in the report.[23] Church also had a thoracic CT (computed tomography scan) done in July 2004 that confirmed the findings in the April 2004 MRI.[24]

Dr. Cross referred Church to a couple of neurosurgeons.[25] The first, Dr. Louis Kralick, recommended Church continue conservative treatment, noting:

---

15 R. 0522.

16 R. 0520.

17 R. 0532.

18 R. 0532.

19 R. 0535.

20 R. 0542, 0544-45, 0559-60, 0579-80.

21 Dr. Cross testified that an osteophyte or bone spur is "an overgrowth of bone." Hrg. Tr. 18:11-15.

22 Hrg. Tr. 19:5-10; R. 0610.

23 R. 0613.

24 R. 0634.

25 Hrg. Tr. 19:17-18; 20:23-24.

> Church has continued arm and shoulder pain as his main complaint. These are directly related to the injury he sustained when moving about equipment as a consequence of his job related activities in August 2002. I don't feel that he has any specific findings or symptoms to go along with the degenerative changes noted at the T6-7 foraminal area on CT imaging. These findings are associated with other degenerative changes from T9 to T11 and may have predated his injury.[26]

The second neurosurgeon, Dr. Stephen Papadopoulos in Arizona, recommended surgery to remove the osteophyte.[27] He cautioned Church that the surgery probably would not improve his right shoulder pain, which was "possibly . . . due to pathology in the brachial plexus."[28]

In the meantime, Church filed a claim in June 2004 to receive medical costs, temporary total disability benefits (TTD), permanent partial impairment (PPI) and other benefits related to thoracic surgery.[29] In this claim, Church noted the original injury date was August 15, 2002, the injured body part was the "shoulder," and stated that a "bone chip is causing continuing pain and nerve injury."[30] Arctic Fire and Safety controverted all benefits in June and July 2004, relying on an employer medical evaluation conducted on May 19, 2004, by Dr. John Ballard.[31]

Dr. Ballard stated that Church "seems to have suffered a cervical and thoracic strain as a result of the lifting incident, but when seen by Dr. McAffee [stet] on January 7, 2003, he was noted to have symptoms which had returned to pre-injury

---

[26] R. 0675.

[27] R. 0682.

[28] R. 0682.

[29] R. 0010-11.

[30] R. 0010.

[31] R. 0005, 0007. The first page of Dr. Ballard's report notes that the EME was done on May 19, 2004; however, all subsequent pages of the EME list March 19, 2004 as the date in the header. R. 0615-0682.

status."[32] He diagnosed cervical spondylosis, chronic right posterior scapular pain and T6-T7 right neural foraminal narrowing secondary to facet degenerative changes at T7, all of which pre-existed the 2002 work exposure.[33] Ballard concluded Church's "work simply caused a temporary aggravation of [the] underlying chronic condition which lasted for a three-to-four-month period. Any of his symptoms from that time forward were due to preexisting changes. There is no evidence in any of the workup that was done that showed any acute changes . . . ."[34]

Dr. Papadopoulos operated on Church and removed the osteophyte on November 16, 2004.[35] Church spent six weeks recuperating with family in Arizona before returning to Fairbanks.[36] Church sought transportation costs from Fairbanks to Arizona, medical costs related to the surgery, TTD for the six weeks of recovery time, PPI for the thoracic injury, and attorney fees and costs.[37]

Although Dr. Cross advised that it could take up to two years for the nerve pain to resolve after the surgery, Church had "no pain back there" as of three or four months after the surgery.[38] On June 21, 2005, Church's thoracic condition was rated as a 6 percent whole person impairment.[39]

On March 1, 2006, orthopedic surgeon Dr. John Swanson conducted another employer medical evaluation (EME) based solely on a records review.[40] He diagnosed Church's thoracic condition as "preexisting thoracic spondylosis consisting of arthritis of

---

[32] R. 0626. Dr. McAfee noted on January 7, 2003, that Church reported "his symptoms have returned to pre-injury status." R. 0497.

[33] R. 0627.

[34] R. 0682.

[35] R. 0708-09.

[36] Hrg. Tr. 78:10-12.

[37] R. 0010-0011; *Martin W. Church v. Arctic Fire and Safety*, Alaska Workers' Comp. Bd. Dec. No. 09-0051, 1 (March 12, 2009) (F. Brown, chair).

[38] Hrg. Tr. 81:7-12.

[39] R. 0802.

[40] R. 0804. The employer controverted all Church's benefits again in March 2006 based on Dr. Swanson's EME. R. 0009.

the facet joints and degenerative disc disease."[41] Dr. Swanson stated:

> The claimant, in all probability, had spontaneous increase in symptoms in August of 2002 and December of 2002 from the underlying pre-existing spondylosis of the thoracic spine. He was performing his normal daily activities, lifting up a fire extinguisher on those dates. These fire extinguishers, which weighed up to 50 pounds, were normal for him to be lifting and, therefore, this was not a supraphysiologic stress for this claimant. There is evidence in the record of other times when he would do simple normal daily activities and have increased symptoms such as in the record of 6/17/03. There was report then that he had changed his daughter at home and had increased symptoms; he had also gone golfing and had increased symptoms. These symptoms are typical of the waxing and waning of symptoms due to the underlying pre-existing spondylosis. . . .[42]

Dr. Swanson concluded that Church's work was not a substantial factor in bringing about the need for the surgery to remove the osteophyte, stating, "That bony spur was due to the arthritic changes from the spondylosis. Spurs require months if not years to develop and are not due to an acute traumatic event but are due to an arthritic process."[43] He also implied that Church's work did not cause the spur to become symptomatic, noting:

> A reasonable physician would not ascribe his spondylosis to non-supraphysiologic activities at work in August 2002 and December 2002. But for his pre-existing spondylosis, he would not have had symptoms. Spondylosis is a chronic progressive degenerative arthritis process that gradually worsens over time. . . . This claimant had no evidence on imaging studies to indicate there was a pathological worsening of this pre-existing spondylosis of the thoracic spine due to the work activities in 2002.[44]

Dr. Cross testified that although she agreed with Dr. Swanson that Church had chronic degenerative changes in his thoracic spine, she nevertheless believed Church's

---

41 R. 0820.

42 R. 0822-23.

43 R. 0824.

44 R. 0823.

work injury led to his thoracic spine condition becoming symptomatic and therefore his need for thoracic surgery was work-related.[45] She stated:

> He had a sudden onset of pain after lifting a heavy object. . . . [A]ll of us can turn our thoracic spine to some degree, and now knowing that there was a huge osteophyte, it makes sense that if you turn in that direction and have a straining stance that, in fact, you have a good chance of making a painful situation arise that was not there before.[46]

However, Dr. Cross did not review the medical records prior to when he began seeing her,[47] instead relying on Church's description of the work injury and his pain at his first appointment with her in September 2003.[48]

Jim Stowe, Church's co-worker, witnessed the lifting incident in August 2002 and testified that when the incident occurred, Church "couldn't move his right side, his shoulder" and that he was unable to work that day.[49] Stowe also testified that Church's personality drastically changed after the injury, that he was grumpy and irritable and appeared to be in pain until after he returned from having the thoracic surgery.[50]

The board heard the case on March 30, 2006, and May 25, 2006, issuing a decision on July 26, 2006.[51] The board concluded that Church had attached the presumption of compensability and that his employer had rebutted the presumption with Dr. Swanson's EME.[52] However, the board decided that it needed "additional evidence to determine whether the employee's condition, which generated the need for

---

45 Hrg. Tr. 27:1-24.

46 Hrg. Tr. 27:5-6; 27:19-24.

47 Hrg. Tr. 32:18-20, 33: 8-11.

48 Hrg. Tr. 32:24 – 33:6.

49 Hrg. Tr. 55:15-21.

50 Hrg. Tr. 57:10 – 58:21.

51 *Martin W. Church v. Arctic Fire and Safety*, Alaska Workers' Comp. Bd. Dec. No. 06-0204, 1 (July 24, 2006) (F. Brown, chair).

52 *Id.* at 5-6.

surgery, was substantially caused by his work."[53] In light of the medical dispute between Dr. Swanson and Dr. Cross, the board ordered an SIME under AS 23.30.095(k).[54]

On November 16, 2006, a prehearing officer ordered the SIME to include both a physical examination and a records review. Arctic Fire and Safety petitioned the board to limit the SIME to a records review.[55] Church argued a physical examination was necessary so that he could explain how the thoracic condition developed.[56] In a decision issued on February 16, 2007, the board agreed to limit the SIME to a records review, concluding:

> [W]e find an extensive record exists regarding how the employee's alleged thoracic spine condition developed. Additionally, we find the employee's treatment for his condition is complete and is no longer at issue and a physical examination might not assist in a determination of causation. Further, we find . . . a records review SIME is a cost effective means of obtaining the requested information. . . . Upon review of the records, in the event that the SIME physician requests a physical examination, a physical examination may then be conducted.[57]

Almost a year later, on January 6, 2008, Dr. Fred Blackwell submitted his SIME report.[58] He concluded:

> [T]he spur as described is an abnormality that takes years to develop and evolve. It did not occur as a result of the injury of December 10, 2002. I am also not of the opinion that it became symptomatic secondarily to the injury of December 10, 2002. By that I mean this is not a matter of compensatory consequence. From my perspective, the injury this patent sustained at work with Artic [stet] Fire and Safety was a musculoligamentous

---

53 *Id*. at 7.

54 *Id*. at 6-7.

55 *Martin W. Church v. Arctic Fire and Safety*, Alaska Workers' Comp. Bd. Dec. No. 07-0024 (Feb. 16, 2007) (F. Brown, chair).

56 *Id*. at 3.

57 *Id*. at 4.

58 R. 0847.

> strain and sprain type injury and not one that induced a spur, that preexisted, to become symptomatic.[59]

The board heard the claim again on January 22, 2009.[60] Although the board found Church and his co-worker Stowe credible, it nevertheless concluded Church had not proved his case by a preponderance of the evidence "based on our review of the entire record":

> On further reflection we cannot discount the value of those medical opinions offered in this case which state the employee's work for the employer was not the legal cause of the employee's need for treatment. We find these opinions do adequately take into account the symptoms the employee and Mr. Stowe described, and which we have considered under *[DeYonge]*. Indeed, Mr. Blackwell agreed that employee suffered an injury at work, but concluded it was "a reoccurrence of the injury he sustained earlier in 1998, and did not serve as the basis for the need for surgery in November 2004 by Dr. Papadopoulos." We note the record reflects repeated shoulder and back treatments since 1998. Therefore, based on the majority of medical evidence, including the medical opinion of Dr. Blackwell, we find the employee's osteophyte caused the need for his surgery. We further find the surgery did not arise as a consequence of the employee's work for the employer, but as a result of a preexisting abnormality which took years to develop.[61]

The board denied Church's claim for six weeks of TTD benefits, associated medical and transportation costs, PPI, and attorney fees and costs.[62]

---

59 R. 0867.

60 *Church,* Bd. Dec. No. 09-0051 at 1.

61 *Id*. at 9.

62 *Id.* The record does not explain why the board could not have decided this claim on the merits much sooner. Church filed his claim for benefits related to thoracic surgery in June 2004. The board did not hear the claim until hearings in March 2006 and May 2006, ordered an SIME that was not submitted until nearly one and half years later, and did not issue a final decision on the merits until January 2009, one year after receiving the SIME. Thus, this claim, limited to one issue, took a total of four and a half years for the board to decide on the merits. However, we cannot conclude from the record that due process was denied or that the parties are blameless in perpetuating this delay.

Church appeals.

2. Standard of review.

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[63] The commission examines "the evidence objectively so as to determine whether a reasonable mind could rely upon it to support the board's conclusion."[64] However, the commission "will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the board."[65] Because the commission makes its decision based on the record before the board, the briefs, and oral argument, no new evidence may be presented.[66]

The questions whether the quantum of evidence is substantial enough to support a conclusion of a reasonable mind and whether the board applied the correct legal standard are questions of law.[67] The commission independently examines questions of law and procedure.[68]

The commission reviews for abuse of discretion the board's decision to limit the SIME to a records review. Abuse of discretion may occur when a decision "is arbitrary,

---

[63] AS 23.30.128(b).

[64] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. Appeals Comm'n Dec. No. 054, 6 (August 28, 2007) (citation omitted).

[65] *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 952 (Alaska 2005) (quoting *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 493 (Alaska 2003)). *See also* AS 23.30.122 (providing "[t]he board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions."); AS 23.30.128(b) (providing the "board's findings regarding the credibility of testimony of a witness before the board are binding on the commission.").

[66] AS 23.30.128(a).

[67] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[68] AS 23.30.128(b).

capricious, manifestly unreasonable, or which stems from an improper motive,"[69] or when a decision leaves the reviewing body with "a definite and firm conviction based on the record as a whole that a mistake has been made."[70]

3. The board applied the correct legal standards.

The Alaska Workers' Compensation Act presumes that an employee's claim is compensable.[71] The application of the compensability presumptions involves a three-step process. To attach the presumption of compensability, the employee must first establish a "preliminary link" between his or her alleged injury and his or her employment.[72] Arctic Fire and Safety does not dispute that Church attached the compensability presumption to his claim that his work brought about the need for thoracic surgery.

Next, the employer must overcome the presumption by coming forward with substantial evidence that the injury was not work-related.[73] "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to

---

[69] *Sheehan v. Univ. of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985) (citation omitted). An abuse of discretion occurs when the board commits an error of law by not considering appropriate factors or when substantial evidence, in light of the whole record, does not support the board's factual findings, because decisions not based on law or substantial evidence are arbitrary. *See Voorhees Concrete Cutting v. Monzulla*, Alaska Workers' Comp. App. Comm'n Dec. No. 114, 10, 2009 WL 2462533 *6 (Aug. 6, 2009); *Alaska R & C Communications, LLC, v. State of Alaska, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 102, 6, 2009 WL 781330 *3 (Mar. 18, 2009).

[70] *Black v. Municipality of Anchorage*, *Bd. of Equalization*, 187 P.3d 1096, 1099 (Alaska 2008).

[71] AS 23.30.120(a)(1) provides that "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."

[72] *E.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999); *Grainger v. Alaska Workers' Comp. Bd.*, 805 P.2d 976, 977 (Alaska 1991); *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981).

[73] *E.g., Tolbert*, 973 P.2d at 611; *Grainger*, 805 P.2d at 977; *Smallwood*, 623 P.2d at 316.

support a conclusion.[74] "The employer's substantial evidence must either (1) provide an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the disability; or (2) directly eliminate any reasonable possibility that the employment was a factor in causing the disability."[75] In addition, when employment aggravates, accelerates or combines with a pre-existing condition, the disability is compensable so long as the employment is "a substantial factor" in bringing about the harm.[76]

Therefore, to rebut the presumption in Church's case, Arctic Fire and Safety must produce substantial evidence that either (1) Church's work was not "a substantial factor" in causing Church's thoracic osteophyte either to develop or to become aggravated to the extent that he required surgery; or (2) there was no reasonable possibility that Church's work was a factor in the development or aggravation of his thoracic condition such that he needed surgery.[77] If Arctic Fire and Safety meets this burden, the presumption disappears and Church must prove all elements of his case by a preponderance of the evidence.[78]

a. Dr. Swanson's EME report is adequate to rebut the presumption of compensability.

Church argues that Dr. Swanson's EME report is insufficient to rebut the presumption of compensability because his report was based on "but for" causation, rather than considering whether the work was "a substantial factor" in bringing about his need for thoracic surgery.[79] However, but-for causation is a part of, rather than

---

[74] *E.g., Tolbert*, 973 P.2d at 611.

[75] *Cowen v. Wal-Mart,* 93 P.3d 420, 424 (Alaska 2004) (citation omitted). *E.g., DeYonge v. NANA/Marriott*, 1 P.3d 90, 96 (Alaska 2000) (citation omitted); *Fox v. Alascom, Inc.*, 718 P.2d 977, 984 (Alaska 1986) (citation omitted).

[76] *See United Asphalt Paving v. Smith*, 660 P.2d 445, 447 (Alaska 1983); *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 597-98 (Alaska 1979).

[77] *See DeYonge*, 1 P.3d at 96.

[78] *See, e.g., Tolbert*, 973 P.2d at 611; *Smallwood*, 623 P.2d at 316.

[79] Appellant's Br. 9-10. Church also argues Swanson's opinion is flawed because it was based on the "erroneous injury date of 12/10/02. . . ." Reply Br. of

distinct from, determining whether work is "a substantial factor" in the need for medical treatment. An aggravation or acceleration to a pre-existing condition "is a substantial factor in the disability if it is shown that (1) 'but for' the employment the disability would not have occurred, and (2) reasonable persons would regard the employment as a cause and attach responsibility to it."[80]

Nevertheless, Church argues the but-for test does not apply, relying on *Tolbert v. Alascom*, which he correctly observes rejected the but-for test in cases in which "two or more forces operate to bring about an injury and each of them, operating alone, would be sufficient to cause the harm."[81] In *Tolbert*, the Court did not apply the but-for test because "it would tend to absolve all forces from liability" when either the claimant's work activities or her home activities would have been sufficient by themselves to aggravate her tendonitis.[82] The Court concluded that in such situations, the employment should be found a substantial factor in bringing about the disability.[83]

Church's case can be distinguished from the circumstances in *Tolbert*. In Church's case, Dr. Swanson was asked to evaluate whether Church's work injuries either caused or aggravated his thoracic condition such that he required medical

---

Appellant 8. This argument is groundless because Swanson acknowledged that Church was injured at work in both August 2002 and December 2002 in his report. R. 0822-23.

[80] *Williams v. State of Alaska, Dep't of Revenue*, 938 P.2d 1065, 1072 (Alaska 1997). *See also Fairbanks North Star Borough v. Rogers and Babler*, 747 P.2d 528, 532 (Alaska 1987).

[81] 973 P.2d at 611-12.

[82] *Id*.

[83] *Id.* ("If one or more possible causes of a disability are work-related, benefits will be awarded where the record establishes that the work-related injury is a substantial factor in the employee's disability regardless of whether a non-work-related injury could *independently* have caused disability.") (citations omitted). *See also State v. Abbott*, 498 P.2d 712, 727 (Alaska 1972) ("[I]f two forces are operating to cause the injury, one because of the defendant's negligence and the other not, and each force by itself is sufficient to cause the injury, then the defendant's negligence may be found to be a substantial factor in bringing about the harm.") (citation omitted).

treatment, including thoracic surgery.[84] Thus, rather than a theory that two or more independent causes operating alone would be sufficient to cause a disability, the theory is that the aggravation of a pre-existing condition caused a need for medical treatment. The Supreme Court has held the but-for test applies when the theory of liability is aggravation of a pre-existing condition:

> [T]he Borough argues that the "but for" cause-in-fact test is inapplicable in the present context because there are several forces operating to bring about Odom's disability: the original injury and the subsequent aggravations. We have on many occasions recognized that when two or more forces operate to bring about an injury and each of them, operating alone, would be sufficient to cause the harm, the "but for" test is inapplicable because it would tend to absolve all forces from liability. The difficulty with the Borough's argument, however, is that it fails to recognize that we are not here dealing with two independent causes each of which could have brought about . . . disability. Rather, we are confronted with a preexisting condition and an aggravation. The exception noted above is thus inapplicable to this case because application of the "but for" test will not tend to relieve all forces from liability.[85]

Therefore, Dr. Swanson properly analyzed both prongs of the "a substantial factor" test when considering Church's theory of liability:

---

[84] R. 0823-24. Swanson was not asked to consider whether the alleged diaper changing and golfing incidents in June 2003, rather than the work incidents in 2002, were a substantial factor in bringing about Church's thoracic condition. If he had, this scenario would arguably be the similar to the facts in *Tolbert*. One could argue that *if* evidence was presented that either the two non-work-related incidents *or* the two work injuries may have led to the thoracic condition, then the but-for test would not apply because it would tend to absolve both potential causes from liability.

[85] *Rogers and Babler*, 747 P.2d at 532 (citations omitted). The Supreme Court observed in this case that "Where, as here, a claimant has a degenerative injury, the claimant can be expected to experience some degree of disability regardless of any subsequent trauma. It can thus never be said that "but for" the subsequent trauma the claimant would not be disabled. The proof required, however, is not so difficult. Rather, the claimant need only prove that "but for" the subsequent trauma the claimant would not have suffered disability at this time, or in this way, or to this degree." *Id.* at 533.

> The claimant in all probability had spontaneous increase in symptoms in August of 2002 and December of 2002 from the underlying preexisting spondylosis of the thoracic spine. He was performing his normal daily activities, lifting up a fire extinguisher on those dates. These fire extinguishers, which weighed up to 50 pounds, were normal for him to be lifting and therefore this was not a supraphysiologic stress for this claimant. . . . These symptoms are typical of the waxing and waning of symptoms due to the underlying preexisting spondylosis.
>
> * * *
>
> The claimant's work at Arctic Fire and Safety was not a substantial factor in bringing about the diagnosed condition. He fails both the "but for" and "reasonable physician" tests for substantial factor. His spondylosis is present due to genetic inheritance. The claimant's symptoms at that time, as noted by his chiropractor, were no worse than they had been before [the December 2002] events at work. A reasonable physician would not ascribe his spondylosis to non-supraphysiologic activities at work in August 2002 and December 2002. But for his pre-existing spondylosis, he would not have had symptoms.[86]

Church also argues that Dr. Swanson impermissibly distinguishes between a worsening of symptoms and a worsening of the underlying condition when, under *DeYonge v. NANA/Marriott*, either type of worsening is compensable if work is a substantial factor in bringing about the aggravation of symptoms or worsening of the condition.[87] But Dr. Swanson's report complies with *DeYonge* as Dr. Swanson specifically addressed whether Church's increased symptoms were related to his work.[88]

Moreover, at the presumption rebuttal stage, Dr. Swanson's statements are not

---

[86] R. 0822-23.

[87] 1 P.3d at 96.

[88] R. 0822 (stating "The claimant in all probability had spontaneous increase in symptoms in August of 2002 and December of 2002 from the underlying preexisting spondylosis of the thoracic spine.").

weighed against other testimony nor evaluated for credibility.[89] Instead, the relevant inquiry is whether the employer presented evidence that, if true, a reasonable person might accept as adequate to support a contested conclusion.[90] Dr. Swanson concluded that Church's work was not a substantial factor in aggravating his thoracic condition because a non-work-related cause – the natural waxing and waning of his preexisting spondylosis – was the sole reason that Church's symptoms increased.[91] Furthermore, Dr. Swanson attributed the bony spur "to the arthritic changes from the spondylosis. Spurs require months if not years to develop and are not due to an acute traumatic event but are due to an arthritic process."[92] Thus, Dr. Swanson concluded that Church's work was not a substantial factor in causing the osteophyte because "an arthritic process" was the exclusive cause for the bone spur's growth. The commission believes these statements are adequate to support the conclusion in a reasonable mind that Church's work was not a substantial factor in bringing about his need for thoracic surgery to remove the bone spur. Therefore, we agree with the board that Arctic Fire and Safety presented substantial evidence to rebut the compensability presumption.

b. The board correctly applied the "a substantial factor" test to Church's claim.

Church argues that the board erroneously required a more demanding test for causation than the "a substantial factor" test. The board stated, "Unless the aggravation is *a* substantial factor in bringing about the benefits sought by the

---

[89] *See Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *McGahuey v. Whitestone Logging*, Alaska Workers' Comp. Appeals Comm'n Dec. No. 118, 13 (October 23, 2009).

[90] *Norcon*, 880 P.2d at 1054. *See also Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007) (noting that "there is a distinction between devaluing testimony because it has no probative value, even if true, and deciding that testimony is not credible.").

[91] R. 0822-23.

[92] R. 0824.

claimant, the aggravation is not *the* legal cause of the problem."[93] The board then concluded, "On further reflection we cannot discount the value of those medical opinions offered in this case which state the employee's work for the employer was not the legal cause of the employee's need for treatment."[94] Church argues that using the phrase "the legal cause" indicates the board was applying the AS 23.30.010(a) causal standard that was not in effect at the time of his injury. This standard, effective in 2005, requires the employment to be "*the* substantial cause" of the need for medical treatment, a more demanding standard than requiring the work to be *a* substantial factor or cause.[95]

We agree the board should have stated the "a substantial factor" test more carefully in Church's case. Specifically, an aggravation of or acceleration to a pre-existing condition "is *a* substantial factor in the disability if it is shown that (1) 'but for' the employment the disability would not have occurred, and (2) reasonable persons would regard the employment as *a* cause and attach responsibility to it." [96] The Supreme Court has held that "under the 'last injurious exposure' rule, an employee

---

[93] *Church*, Bd. Dec. No. 09-0051 at 8-9 (citing *Tolbert*, 973 P.2d at 612) (emphasis added).

[94] *Id*. at 9.

[95] *See Marsh Creek, LLC, v. Benston*, Alaska Workers' Comp. Appeals Comm'n Dec. No. 101, 24-25 (March 13, 2009). At the time Church was injured in 2002, AS 23.30.010 provided in whole that "Compensation is payable under this chapter in respect of disability or death of an employee." The Alaska Supreme Court developed the "a substantial factor" test under this provision. But the amended AS 23.30.010, which applies to injuries after its effective date of November 7, 2005, now provides in part that "Compensation or benefits under this chapter are payable for . . . the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the . . . need for medical treatment."

[96] *Williams*, 938 P.2d at 1072 (Alaska 1997) (emphasis added). *See also Rogers and Babler,* 747 P.2d at 532. The board cited to *Tolbert* as support for its statement that "Unless the aggravation is a substantial factor in bringing about the benefits sought by the claimant, the aggravation is not the legal cause of the problem," but *Tolbert* requires an aggravation to be only a legal cause. 973 P.2d at 612 (rejecting the but-for test in Tolbert's case because it conflicts with the "a substantial factor" test by requiring "Tolbert to prove that her work-related injury was the sole cause of-and not merely a substantial factor in causing-her disability.").

need not show that employment with the last employer was the legal cause of disability, only a legal cause of the disability."[97] Moreover, the Court has noted that "application of the 'but for' test does not indicate *the* legal cause, but merely indicates the range of causes which may be considered legal causes."[98]

However, we believe the board's use of the phrase "the legal cause" does not demonstrate a misunderstanding or misapplication of the "a substantial factor" test in Church's case. The board correctly noted that it was looking for whether his employment was "a substantial factor," not *the* substantial factor, in Church's need for treatment for his thoracic condition.[99] We conclude that the board's use of "the legal cause" was intended to demonstrate the legal conclusion or consequence that the board was drawing in Church's case from its application of the "a substantial factor" test. In other words, when a particular employment is *a* legal cause of a disability, then *the* legal consequence of liability may be imposed on that employer. Church's case differs from cases in which two or more employers are disputing liability for workers' compensation benefits. In those cases, one or more of the employers may be "a legal cause" of disability but only the last employer suffers *the* legal consequence of having liability imposed under the last injurious exposure rule. By contrast, in Church's case, the board had only one employer before it as a possible legal cause of Church's need for thoracic surgery. We believe the board's use of "the legal cause" in Church's case was a reference to this sole employer who might bear the legal consequence of liability for benefits.

The board concluded that "based on our review of the entire record, . . . the employee has not submitted sufficient evidence to prove his claim by a preponderance of the evidence,"[100] and, therefore, the legal consequence of liability should not be imposed on Arctic Fire and Safety. We conclude the board properly applied the "a

---

[97] *Peek v. SKW/Clinton*, 855 P.2d 415, 419 (Alaska 1993) (citing *Saling*, 604 P.2d at 598).

[98] *Rogers and Babler*, 747 P.2d at 532 (citation omitted).

[99] *Church*, Bd. Dec. No. 09-0051 at 8-9.

[100] *Id.* at 9.

substantial factor" test to Church's claim.

4. Substantial evidence supports the board's decision that Church's work was not a substantial factor in bringing about his need for thoracic surgery.

In Church's case, the parties dispute whether there is a connection between Church's job and the need for surgery to remove his thoracic osteophyte. If Church's work either caused the osteophyte to develop or "aggravated, accelerated or combined" with his underlying condition of spondylosis or accelerated the growth of the osteophyte such that he needed thoracic surgery,[101] then his thoracic surgery is work-related.

Church makes a number of related arguments that the board mischaracterized his injury and the evidence. We reject these arguments because the board has the sole power to weigh conflicting evidence and draw inferences from it.[102] Even if we agreed with Church's characterization of the evidence, we cannot set aside the board's conclusions so long as substantial evidence supports the board's decision.[103] We note that evidence that is deemed sufficient to rebut the presumption of compensability is also sufficient to support a determination that an employee failed to show by a preponderance of the evidence that the work was "a substantial factor" in the need for treatment.[104] Thus, Dr. Swanson's EME report is "enough evidence to decide the case in favor of the employer if it is not outweighed by contrary evidence."[105]

Specifically, Church argues the board mischaracterized his injury as a bone spur when in fact it was a bone chip. This argument lacks merit because Church concedes

---

101 *See DeYonge*, 1 P.3d at 96.

102 AS 23.30.122; *Lindhag*, 123 P.3d at 952.

103 AS 23.30.122, 23.30.128(b); *Lindhag*, 123 P.3d at 952; *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6, 2007 WL 2588247 *2 (Aug. 28, 2007) (citations omitted).

104 *See Cowen*, 93 P.3d at 426; *Fred Meyer, Inc., v. Updike*, Alaska Workers' Comp. App. Comm'n Dec. No. 120, 9 (Oct. 29, 2009).

105 *Updike*, App. Comm'n Dec. No. 120 at 9.

that he could not find medical evidence in the record stating that he had a bone chip,[106] and he fails to explain why this difference would have led the board to conclude his need for thoracic surgery was work-related.

Church also argues the board mischaracterizes his condition as "arthritic and preexisting," when in fact it was "traumatic in origin."[107] Church and Stowe both testified that Church suffered a traumatic injury at work on August 15, 2002,[108] but no one disputes that Church was injured and required medical treatment. Church's claim is that his work injury either caused an osteophyte to grow or become symptomatic. Because this claim is based on "highly technical medical considerations," medical evidence was necessary to prove his claim.[109] The board acknowledged that Church and Stowe were credible witnesses, but Church's and Stowe's lay testimony lacked probative value as to the cause of the osteophyte because they are not orthopedic surgeons. Moreover, no medical evidence in the record supported that a traumatic injury can cause an osteophyte to grow. Drs. Swanson and Blackwell both opined that a traumatic injury cannot cause a spur to grow and that spurs take months or years to develop.[110] Therefore, the commission concludes the board had substantial evidence to reject Church's argument that his work injuries caused the osteophyte to grow.

As to whether the bone spur became symptomatic as a result of Church's work injuries, thus bringing about his need for thoracic surgery, Church argues that the board mischaracterized his work injury as affecting the right shoulder, rather than the thoracic spine, and erroneously accepted evidence that his injury was pre-existing and unstable. Church asserts if the board had properly found that the August 2002 injury was the original injury date, then the board lacked substantial evidence to conclude that

---

106 Appellant's Br. 8.

107 *Id.*

108 Hrg. Tr. 65-66; 55:15-21.

109 *See Burgess Constr. Co.*, 623 P.2d at 316.

110 R. 0824; 0867.

his pre-existing spondylosis was "unstable." We note that Church effectively raised and argued below that the August 2002 injury made his pre-existing condition symptomatic, thus requiring surgery; and that only one condition, pain in his thoracic spine, arose from the work injuries. Nevertheless, the board's review of the "entire record" persuaded the board to reject these arguments and we cannot set aside the board's determination of what medical evidence has greater weight.

Substantial evidence supports the board's rejection of these arguments. Drs. Ballard, Swanson, and Blackwell all opined that Church's 2002 work injuries were not "a substantial factor" in his need for thoracic surgery to remove the osteophyte in 2004. Dr. Ballard stated that Church's "work simply caused a temporary aggravation of [the] underlying chronic condition with lasted for a three-to-four-month period."[111] Dr. Swanson concluded that Church had "a spontaneous increase in symptoms," rather than an increase related to his work injuries because of the natural waxing and waning from the underlying thoracic spondylosis.[112] Dr. Blackwell concluded Church suffered "a musculoligamentous strain and sprain type injury" at work and "not one that induced a spur, that preexisted, to become symptomatic."[113] Drs. Kralick and Papadopoulos also made statements from which the board could infer that Church's work injuries were distinct from the Church's painful bone spur. Dr. Kralick attributed Church's arm and shoulder pain to his work injury in August 2002, but not to the degenerative changes in his thoracic spine.[114] Similarly, Dr. Papadopoulos cautioned Church that the surgery to remove the bone spur might not relieve his right shoulder pain.[115]

The only evidence linking the osteophyte to Church's work injury is Dr. Cross's testimony that Church's twisting to lift the fire extinguisher on August 15, 2002, caused

---

111 R. 0682.

112 R. 0822-23.

113 R. 0867.

114 R. 0675.

115 R. 0682.

the pre-existing osteophyte to become symptomatic.[116] The board alone has the power to choose which competing medical opinions to believe. However, we note that it was reasonable for the board to discredit Cross's testimony because, unlike Drs. Ballard, Swanson, and Blackwell, she did not review all of Church's medical history.[117]

Church believes that his work injuries were "a substantial factor" in his need for thoracic surgery because he had no pain before his work injury of August 15, 2002, but experienced pain after that injury until he had the surgery to remove the thoracic bone spur. This sequence of events, however, is not enough by itself to prove causation.[118] Sequence is not the same as consequence; the medical evidence that the board chose to believe rejected that Church's work injuries were "a substantial factor" in his need for thoracic surgery.

Church nevertheless asserts that had the board found his original date of injury was August 15, 2002, rather than December 10, 2002, the board would have understood that the work injury caused his thoracic condition to become symptomatic and was therefore compensable under *DeYonge*.[119] Church is correct in that the board did not explicitly find that August 15, 2002, was his original date of injury. However, Church never filed a report of injury to establish a case number with that date, despite his representation by counsel before the board; thus, the board properly used on the date stated in his report of injury.[120] In addition, although Church testified that his employer knew of his injury the date it occurred, August 15, 2002,[121] the board was not required to explicitly consider whether August 15, 2002, was the original date of injury

---

116 Hrg. Tr. 27:5-6; 27:19-24.

117 Hrg. Tr. 32:18-20, 33:8-11; *Church*, Bd. Dec. No. 06-0204 at 7.

118 *Lindhag*, 123 P.3d at 954 (noting that just because claimant's asthma diagnosis came after her exposure to a new office building does not prove that exposure caused her asthma and identifying this reasoning as "run[ning] afoul of the *post hoc ergo propter hoc* logical fallacy.").

119 1 P.3d at 96.

120 R. 0001.

121 Hrg. Tr. 65-67.

because Church was not seeking a non-reporting penalty under AS 23.30.070(f).[122] Lastly, the board implicitly accepted that Church suffered a work-related injury on August 15, 2002, by concluding that Church and Stowe were credible.[123]

Moreover, Church's argument fails because he did not demonstrate that the evidence supporting the board's decision depends on the December 10, 2002, date of injury. Two of the doctors, Kralick and Swanson, acknowledged the August date of injury, yet still did not relate Church's need for thoracic surgery to the incidents in which his right shoulder or back popped out while attempting to lift a fire extinguisher at work.[124] Church described the injury on December 10, 2002, as a reoccurrence of the injury he suffered on August 15, 2002.[125] Therefore, because the injuries were the basically the same, referencing an incorrect original date of injury in their reports would not detract from the doctors' opinions on whether that type of injury could be "a substantial factor" in aggravating a thoracic bone spur to the extent that surgery was needed.

Finally, Church misunderstands *DeYonge*, which he characterizes as holding "an aggravation of a pre-existing condition, whatever the source, as long as it's asymptomatic, is a compensable workers compensation situation."[126] Church is correct that *DeYonge* rejected distinguishing between whether employment aggravated the claimant's symptoms or her underlying condition in deciding whether to impose liability

---

[122] *See Church*, Bd. Dec. No. 09-0051 at 1 (the issues listed for the board to decide do not include a non-reporting penalty).

AS 23.30.070(a) requires that "[w]ithin 10 days from the date the employer has knowledge of an injury . . . alleged by the employee . . . to have arisen out of and in the course of the employment, the employer shall send to the division a report . . . ." AS 23.30.070(f) provides that "An employer who fails or refuses to send a report required by (a) of this section within the time required shall, if so required by the board, pay the employee . . . an additional award equal to 20 percent of the amounts that were unpaid when due."

[123] Bd. Dec. No. 09-0051 at 9.

[124] R. 0675; 0822-23.

[125] Church Dep. 16:7-10.

[126] Appellant's Br. 9.

for temporary total disability benefits on her employer.[127] However, *DeYonge* does not impose liability for all aggravations of pre-existing conditions, rather the aggravation must be "a substantial factor" in bringing about the disability for which compensation or medical benefits are sought.[128] Church's evidence failed to persuade the board that an aggravation was a substantial factor in bringing about the need for surgery to remove the osteophyte.

Therefore, the commission concludes there was substantial evidence in the record on which the board relied in denying Church's claim for benefits related to his thoracic surgery.

5. The board did not abuse its discretion in limiting the SIME to a records review.

Church argues that the SIME doctor needed to physically exam him in order to "specifically identify the origin of the injury."[129] But we conclude the board did not abuse its discretion in limiting the SIME to a records review.[130]

The purpose of an SIME is to assist the board in rendering its decision; the SIME doctor is the board's expert.[131] Therefore, the board is in the best position to assess what an SIME needs to include in order for the board to fill in any gaps or resolve any disputes in its understanding of the medical evidence. Here, the board concluded that

---

[127] *Id*. at 96-97.

[128] *Id*.

[129] Appellant's Br. 10-11.

[130] Arctic Fire argues that the SIME decision was not properly appealed. However, Arctic Fire concedes that the decision limiting the SIME to a records review was interlocutory, notwithstanding the board's title of "final decision." Because it was interlocutory, the SIME decision could not be appealed until the board reached its final decision on the claim. (The SIME decision might have been reviewed earlier had Church moved for extraordinary review and had the commission decided that the motion met the stringent requirements to grant extraordinary review. *See* 8 AAC 57.076.) Although Church does not specifically identify the SIME decision in his notice on appeal, we conclude that he described the decision adequately in his points of appeal such that we have jurisdiction to consider it.

[131] *Bah v. Trident Seafoods Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 073, 5 (Feb. 27, 2008) (citation omitted).

"an extensive record" already existed on how Church's thoracic spine condition developed.[132] Moreover, the board noted that because Church's surgery was already complete, a physical examination was unlikely to help determine causation,[133] and not requiring a physical examination made the SIME more cost-effective.[134] Lastly, the board left open the possibility of a physical examination if the SIME doctor requested one.[135]

The board's decision was well-reasoned, not "arbitrary, capricious," or "manifestly unreasonable,"[136] and it does not leave us "with a definite and firm conviction . . . that a mistake has been made."[137] Therefore, the commission affirms the board's decision limiting the SIME to a records review.

6. Conclusion.

The board properly analyzed whether Church's work injuries in 2002 were "a substantial factor" in bringing about his need for thoracic surgery, and relied on substantial evidence in concluding that Church's employment was not a substantial factor in bringing about his need for surgery. Moreover, the board did not abuse its discretion in limiting the SIME to a records review. Therefore, the commission AFFIRMS the board's decision denying Church's claim for medical and transportation costs, TTD,

---

[132] *Church*, Bd. Dec. No. 07-0024 at 4.

[133] *See Palmer v. Municipality of Anchorage, Police and Fire Ret. Bd.*, 65 P.3d 832, 845 (Alaska 2003) (upholding board's reliance on SIME doctor's report even though the doctor did not conduct a physical examination to determine whether employee's injury was work-related).

[134] *Church*, Bd. Dec. No. 07-0024 at 4. *See Dwight v. Humana Hosp. Alaska*, 876 P.2d 1114, 1119 (Alaska 1994) (noting "[t]hat such exams are expensive is well understood. That this economic burden was intended by the legislature to be automatically passed to the private sector and the ultimate consumer of goods and services [via the employer] when such exam is unnecessary to the proper performance of the Board's responsibilities seems more than doubtful."); AS 23.30.001(1) (noting intent of legislature is to ensure "quick, efficient, fair and predictable delivery of . . . benefits to injured workers at a *reasonable cost* to employers . . . .") (emphasis added).

[135] *Church*, Bd. Dec. No. 07-0024 at 4.

[136] *Sheehan*, 700 P.2d at 1297.

[137] *Black*, 187 P.3d at 1099.

PPI, and attorney fees and costs related to Church's 2004 thoracic surgery.

Date: *31 Dec. 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

signed
Jim Robison, Appeals Commissioner

signed
Philip Ulmer, Appeals Commissioner

signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final commission decision on the merits of this appeal from the board's decision and order. This decision affirms (approves) the board's decision denying the workers' compensation claim. This decision ends all administrative proceedings in Mr. Church's workers' compensation claim against Arctic Fire and Safety for medical benefits and compensation for thoracic surgery to remove an osteophyte. This decision becomes effective when distributed (mailed) to the parties unless proceedings to reconsider it or seek Supreme Court review are instituted. Find the date of distribution in the box on the last page.

You have a right to appeal this decision to the Alaska Supreme Court. If you want to appeal this decision, proceedings to appeal must be instituted (started) in the Alaska Supreme Court **within 30 days** of the date of distribution of this final decision and be brought by a party in interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure.

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

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

You can find more information online at the Alaska Appellate Courts' website:

http://courts.alaska.gov/appcts.htm

RECONSIDERATION

You may ask the commission to reconsider this decision for reasons listed in AS 23.30.128(f), which are that the commission (1) overlooked, misapplied, or failed to consider a statute, regulation, court or administrative decision, or legal principle directly controlling; (2) overlooked or misconceived a material fact; (3) misconceived a material question in the case; or (4) applied law in the ruling that has subsequently changed. To ask the commission to reconsider, file a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission **within 30 days** after distribution of this decision.

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 the Final Decision No. 126 issued in the matter of *Church v. Arctic Fire and Safety,* AWCAC Appeal No. 09-013, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 31, 2009.

Date: *Jan. 7, 2010*

signed

B. Ward, Appeals Commission Clerk