

Alaska Workers' Compensation Appeals Commission

Michele A. Buchinsky,
Appellant,

vs.

The Arc of Anchorage and Seabright
Insurance Company,
Appellees.

Final Decision

Decision No. 189 December 2, 2013

AWCAC Appeal No. 12-027
AWCB Decision No. 12-0183
AWCB Case No. 200721769

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 12-0183, issued at Anchorage, Alaska, on October 19, 2012, by southcentral panel members Ronald P. Ringel, Chair, Rick Traini, Member for Labor, and Robert Weel, Member for Industry.

Appearances: Michele A. Buchinsky, self-represented appellant; Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, The Arc of Anchorage and Seabright Insurance Company.

Commission proceedings: Appeal filed November 19, 2012; briefing completed August 9, 2013; oral argument was not requested by either party.

Commissioners: James N. Rhodes, S. T. Hagedorn, Laurence Keyes, Chair.

By: S. T. Hagedorn, Commissioner.

1. Introduction.

Appellant, Michele A. Buchinsky (Buchinsky), was employed by appellee, the Arc of Anchorage (the Arc), in its local office. On December 20, 2007, Buchinsky was injured when a two-drawer filing cabinet that she was opening fell forward, causing a drawer to come out and strike her knees.¹ On April 15, 2008, Buchinsky filed a workers' compensation claim (claim) seeking temporary total disability (TTD) benefits,

¹ Buchinsky's Report of Occupational Injury or Illness (injury report) dated February 20, 2008, indicated she had injured her left and right "Legs/knees." R.0001.

permanent partial impairment (PPI) benefits, medical costs, transportation costs, reemployment benefits, compensation rate adjustment, penalty, interest, and costs. As distinguished from her injury report, the claim stated she had injured both knees and her left shoulder, and she alleged a second incident had occurred on December 26, 2007.² On May 2, 2008, the Arc, through its workers' compensation insurer, appellee, Seabright Insurance Company (Seabright), filed its Answer to Buchinsky's claim and a controversion notice. All benefits were controverted except medical costs.³

The Alaska Workers' Compensation Board (board) held a hearing on Buchinsky's claim on September 18, 2012.⁴ Denying her claim, it concluded that Buchinsky's work injuries were not the substantial cause of her disability and need for medical treatment.⁵ Buchinsky appealed the board's decision to the Workers' Compensation Appeals Commission (commission). After reviewing the record, we affirm the board's decision.

2. Factual background and proceedings.

Buchinsky was injured while working for the Arc on December 20, 2007, when, after opening a file drawer in a two-drawer file cabinet, the cabinet fell forward and the drawer came out hitting her knees and knocking her to the floor.⁶ On December 26, 2007, the filing cabinet again fell and the drawer came out, hitting Buchinsky's left shoulder as she reacted to avoid another impact to her knees.⁷

Prior to these work incidents, on February 10, 2006, Buchinsky had magnetic resonance imaging (MRI) of both knees. The MRI of the left knee showed changes consistent with multicompartamental osteoarthritis. There was also significant irregularity of the articular cartilage. The MRI of the right knee showed medial and

² R. 0021-22.

³ R. 0026-29, 0002-03.

⁴ *See Michele A. Buchinsky v. The Arc of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 12-0183 at 1 (Oct. 19, 2012)(*Buchinsky*).

⁵ *See Buchinsky*, Bd. Dec. No. 12-0183 at 12.

⁶ Buchinsky Dep. 23-24, 26-39; Hr'g Tr. 34:23-35:20, September 18, 2012.

⁷ Buchinsky Dep. 38-41; Hr'g Tr. 41:21-42:9.

lateral compartmental osteoarthritis with marginal spurs and a loss of articular cartilage.⁸

On March 22, 2007, Buchinsky was seen by David L. Barnes, D.O. On reviewing her medical history, Dr. Barnes noted she had a laminectomy in 1981, although he did not identify the level of the spine where the laminectomy was performed.⁹ Buchinsky reported to Dr. Barnes she had recently suffered left arm paresthesias. Dr. Barnes noted she had suffered multi-trauma in a motor vehicle accident in 2005, resulting in multiple surgeries. He also noted she was wearing a brace on her right knee. Dr. Barnes reviewed the February 2006 MRIs of both knees.¹⁰

When Buchinsky saw Dr. Barnes on April 10, 2007, he noted she continued to complain of neck and left shoulder pain and asked to try physical therapy.¹¹ On May 4, 2007, Dr. Barnes stated that Buchinsky reported worsening left arm pain despite physical therapy and a "pins-and-needles" and burning pain radiating down to her left hand. Her bilateral knee pain was worsening as well.¹² Dr. Barnes ordered x-rays.¹³ The x-rays revealed degenerative arthritis of the left knee and advanced degenerative arthritis of the right knee. In both knees, the medial compartment was more severely affected.¹⁴

On September 18, 2007, Buchinsky reported to Dr. Barnes that her neck pain was causing paresthesias in her left arm all the way to her fingers.¹⁵ He referred her for a cervical MRI.¹⁶ Although Buchinsky's knee pain remained a problem, she was not

⁸ R. 1291-93.

⁹ R. 0860.

¹⁰ R. 0862.

¹¹ R. 0867.

¹² R. 0871.

¹³ R. 0874.

¹⁴ R. 1309-10.

¹⁵ R. 0879.

¹⁶ R. 0881-82.

ready to consider surgery.¹⁷ A cervical MRI on September 26, 2007, revealed multilevel spondylitic changes with spinal and foraminal stenosis. The foraminal stenosis was severe on the left at the C5-6 and C6-7 levels.¹⁸ On October 18, 2007, Buchinsky reported to Dr. Barnes that both knees continued to hurt, however, she was still not ready to consider surgery.¹⁹

On October 23, 2007, Buchinsky began physical therapy.²⁰

On November 26, 2007, Buchinsky saw Erik Kohler, M.D., a neurosurgeon, for a consultation.²¹ She was wearing a brace on her right knee.²² Dr. Kohler diagnosed severe left-side cervical stenosis throughout, most likely from two significant motor vehicle accidents. He recommended decompressive surgery.²³

Following the work incidents, on December 27, 2007, Buchinsky saw Gregory M. Culbert, D.C., who took her off work until December 31, 2007.²⁴ The nature of Dr. Culbert's treatment on December 27th is unknown, as his chart or notes for that day are not included in the record.²⁵ Buchinsky took personal leave after Dr. Culbert authorized her to return to work. When she returned to work on January 3, 2008, she was terminated.²⁶

On January 24, 2008, Buchinsky went to the emergency room with pain in her right knee. She reported that a file cabinet had fallen on her knee twice in December,

¹⁷ R. 0879.

¹⁸ R. 1322-23.

¹⁹ R. 1325.

²⁰ R. 1332.

²¹ R. 0655.

²² R. 0658.

²³ R. 0655.

²⁴ R. 1342.

²⁵ Record.

²⁶ Hr'g Tr. 43:6-44:2.

but it had “seemed to heal.”²⁷ She reported the pain began the day before, but did not recall a specific incident that may have caused it. X-rays revealed a possible tibial plateau fracture and moderate degenerative joint disease of her knee. Buchinsky was placed on crutches and given a prescription for hydrocodone.²⁸

On January 30, 2008, Buchinsky was seen by Jeffrey S. Moore, M.D., and reported she “first injured both of her knees back at the end of December when a filing cabinet fell on them.” She “felt a popping sensation, especially in the right knee, and this occurred again on December 26, 2007.” “Prior to this time she denies any significant pain or discomfort in the knee.” Dr. Moore ordered x-rays, which showed medial compartment arthrosis with a loss of approximately half the joint space in the medial compartment of her right knee and early degenerative changes in both knees.²⁹ On February 21, 2008, Dr. Moore provided Buchinsky with an injection in her left knee, which provided a few days’ relief.³⁰

On April 15, 2008, Buchinsky filed a claim seeking TTD, PPI, medical costs, transportation costs, reemployment benefits, compensation rate adjustment, penalty, interest, and costs. She stated she had injured both knees and her left shoulder.³¹ On May 2, 2008, the Arc and Seabright filed an Answer to her claim and a Controversion Notice. All benefits sought in the claim were controverted except medical costs.³²

Buchinsky continued to treat with Dr. Culbert, however, she sought a second opinion from Gary E. Benedetti, M.D., on May 12, 2008. Dr. Benedetti reviewed her history, including the motor vehicle accidents, and the work incidents in December 2007. He also reviewed Buchinsky’s recent x-rays and an “older” MRI. Dr. Benedetti

²⁷ Exhibit C of Appellees’ Exc.

²⁸ R. 0621.

²⁹ R. 1356.

³⁰ R. 1359, 1370.

³¹ R. 0021-22.

³² R. 0026-29, 0002-03.

diagnosed degenerative meniscus tears in both knees with osteoarthritis and referred her for MRIs before making a recommendation as to surgery.³³

On May 16, 2008, after reviewing the MRIs, Dr. Benedetti noted the MRI showed degenerative arthritis in Buchinsky's left knee with thinning and spurring of the cartilage. He found no evidence of blunt trauma. Dr. Benedetti also noted arthritis in the right knee with loose bodies. He diagnosed bilateral knee osteoarthritis and explained to Buchinsky that arthroscopic surgery was not a good option and recommended anti-inflammatories.³⁴

On May 19, 2008, Dr. Culbert referred Buchinsky to Larry A. Levine, M.D. at the Alaska Spine Institute.³⁵ On May 29, 2008, Dr. Levine evaluated her. She presented with "marked almost whole body pain complaints," as well as what Dr. Levine thought was significant depression and anxiety.³⁶ He ordered a cervical MRI. The MRI showed significant multilevel changes, with large disc protrusions at C6-7 and C7-T1, as well as some neural foraminal encroachment on the left at C6-7 and C7-T1 with neural foraminal encroachment at multiple additional levels, particularly at C-5 on the left.³⁷ On June 5, 2008, Dr. Levine referred Buchinsky to James M. Eule, M.D., for a surgical consult.³⁸ Dr. Eule examined her on June 20, 2008. He noted she "has a very difficult and complex problem," and recommended fusion and decompression at the C5-6, C6-7, and C7-T1 levels.³⁹

On June 27, 2008, Buchinsky saw John Ballard, M.D., for an employer's medical evaluation (EME). She described both incidents with the filing cabinets, stating the first time her knees were impacted when the entire cabinet fell on her and the second time

³³ R. 0488-89.

³⁴ R. 0486.

³⁵ R. 1090.

³⁶ R. 0772.

³⁷ R. 0542.

³⁸ R. 0530.

³⁹ R. 0582.

her left arm and shoulder were involved. After examining her and following an extensive review of her medical records, Dr. Ballard diagnosed bilateral osteoarthritis of the knees, multi-level degenerative disc disease of the cervical spine, with stenosis at multiple levels and disc protrusions at C6-7 and C7-T1, and chronic low back and left leg pain, which in his opinion were not caused by the work injury. He also diagnosed bilateral knee contusions from the December 2007 work incidents. Dr. Ballard's opinion was that the work incidents were the substantial cause of the contusions, but none of the other conditions. He determined the contusions had resolved, were medically stable, and needed no further medical treatment. While Dr. Ballard found Buchinsky to be disabled and in need of further medical treatment, he stated the work injuries were not the cause of the disability or the need for treatment.⁴⁰

On July 16, 2008, the Arc and Seabright controverted all benefits based on Dr. Ballard's EME.⁴¹

On July 18, 2008, Dr. Eule stated that he would assume the injury in December 2007 would be "a substantial factor in her current [neck] condition and need for surgery" because Buchinsky "has never experienced any problems previously and never received any treatment for any neck problem in the past." Dr. Eule restricted his comments to Buchinsky's cervical spine.⁴²

On July 8, 2011, Buchinsky saw Edward Tapper, M.D., for a board-ordered second independent medical evaluation (SIME). Dr. Tapper doubted Buchinsky's recollections concerning the filing cabinet incidents because her medical records documented only contusions to her knees. "Whether the filing cabinet actually landed on her left shoulder and neck is debatable. There is no timely reporting of such." Dr. Tapper diagnosed cervical and lumbar multilevel degenerative disc disease and spinal stenosis, three-compartment osteoarthritis in both knees, and psychological decompensation. In Dr. Tapper's opinion, Buchinsky's motor vehicle accidents, not the

⁴⁰ R. 0405-423.

⁴¹ R. 0019-20.

⁴² R. 0751.

work incidents, were the cause of the degenerative disc disease, spinal stenosis, and arthritis in her knees. He deferred an opinion on the psychological decompensation to a psychiatrist or psychologist. Dr. Tapper found she was medically stable as to the work incidents and had no ratable impairment because of them.⁴³

There are no medical reports in the record dated after Dr. Tapper's SIME report.⁴⁴

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record. Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion.⁴⁵ The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.⁴⁶ We exercise our independent judgment when reviewing questions of law and procedure.⁴⁷ The board's findings concerning the weight to be accorded witnesses' testimony, including medical testimony and reports, are conclusive.⁴⁸

4. Discussion.

a. Applicable law.

The relevant subsections of AS 23.30.010, are at the center of the parties' dispute whether Buchinsky's claim "arose out of and in the course of her employment." AS 23.30.010 provides in relevant part:

When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes to the disability

⁴³ R. 0424-452.

⁴⁴ Record.

⁴⁵ *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁴⁶ *See Wasser & Winters Co., Inc. v. Linke*, Alaska Workers' Comp. App. Comm'n Dec. No. 138, 5 (Sept. 7, 2010).

⁴⁷ *See* AS 23.30.128(b).

⁴⁸ *See* AS 23.30.122.

. . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment.

The parties do not dispute that the board properly applied the presumption of compensability under AS 23.30.120(a)(1)⁴⁹ and concluded that it dropped out. Next, the board evaluated whether Buchinsky proved by a preponderance of the evidence that employment was the substantial cause of Buchinsky's current disability or need for medical treatment. The board concluded that it was not. We agree the board properly applied the causation standard of AS 23.30.010.

b. The board properly found Buchinsky's work injuries were not the substantial cause of her current disability and need for medical treatment.

Buchinsky contends that her work injuries, suffered in December 2007, affected her knees, left shoulder, back, and neck. As chronicled in the factual background, preceding the work incidents, Buchinsky had a prior medical history of bilateral knee and spinal issues, and medical treatment. Following the work incidents, she was seen by her own physicians, as well as an EME and an SIME physician. Although there was some disagreement among the medical professionals that examined Buchinsky, the board relied on Drs. Ballard and Tapper, as their opinions were based on their extensive review of the medical records, as well as physical examinations of Buchinsky. The board discredited Dr. Eule's letter because his opinion on the work-relatedness of her neck condition was based on an erroneous belief that she had no prior treatment for neck problems. It is the board's role to assign weight to the evidence.⁵⁰ To the extent that the commission can discern her arguments, Buchinsky devotes her brief primarily to assert her view of the evidence. The commission cannot reevaluate the evidence but

⁴⁹ It provides in relevant part: "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; . . ."

⁵⁰ See AS 23.30.122.

considers only whether the board's conclusions are based on substantial evidence,⁵¹ which is evidence that a reasonable mind might accept as adequate to support a conclusion.⁵² We conclude Dr. Ballard's and Dr. Tapper's reports constitute substantial evidence on which the board could – and did – rely to reject employment as the substantial cause of Buchinsky's current disability or need for medical treatment.

Buchinsky also contends that her active lifestyle prior to the work incidents, as contrasted with her present disability, establishes that the work incidents caused her current disability and need for medical treatment. After the Arc rebutted the presumption of compensability, Buchinsky had to prove her case by a preponderance of the evidence. "When the key controversy centers on the *medical evidence* of causes of the employee's conditions, timing alone is not enough to satisfy this burden and establish causation of the disabling condition."⁵³ In other words, the fact that Buchinsky injured her knees at work and thereafter, as she contends, had a string of worsening medical problems does not prove that the work, rather than her preexisting conditions, was the substantial cause of the disability and need for medical treatment.

Because the board's decision on the compensability of Buchinsky's claim was based on substantial evidence, we affirm.

⁵¹ See AS 23.30.128(b), AS 23.30.122.

⁵² See, e.g., *Norcon*, 880 P.2d at 1054.

⁵³ *Abonce v. Yardarm Knot Fisheries*, Alaska Workers' Comp. App. Comm'n Dec. No. 111, 13 (June 17, 2009) citing *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 954 (Alaska 2005) (rejecting claimant's *post hoc, ergo propter hoc* argument and concluding that the board could rely on a physician's opinion that even though the claimant was diagnosed with asthma after her workplace exposure to toxins, that exposure did not cause her asthma).

5. Conclusion.

The board's decision is AFFIRMED.

Date: 2 December 2013 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).⁵⁴ For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed⁵⁵ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

⁵⁴ A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

⁵⁵ *See id.*

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

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

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

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. 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 for correction of typographical errors, this is a full and correct copy of Final Decision No. 189 issued in the matter of *Michele A. Buchinsky vs. The Arc of Anchorage and Seabright Insurance Company*, AWCAC Appeal No. 12-027, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 2, 2013.

Date: December 3, 2013



Signed

K. Morrison, Appeals Commission Clerk