

Alaska Workers' Compensation Appeals Commission

Ralph P. Moore,
Appellant,

vs.

Afognak Native Corp. and Zurich
American Insurance Co.,
Appellees.

Final Decision

Decision No. 087 August 25, 2008

AWCAC Appeal No. 07-041

AWCB Decision No. 07-0299

AWCB Case Nos. 200320198M, 200324429

Appeal from Alaska Workers' Compensation Board Decision No. 07-0299, issued at Anchorage on September 28, 2007, by southcentral panel members Darryl Jacquot, Chair, Linda Hutchings, Member for Industry, and David Robinson, Member for Labor.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, for appellant Ralph Moore. Jeffrey Holloway, Holmes Weddle & Barcott, for Afognak Native Corporation and Zurich American Insurance Co.

Commission proceedings: Oral argument on appeal presented May 16, 2008. Additional briefing requested and filed. The record closed May 23, 2008.

Commissioners: David W. Richards, Stephen T. Hagedorn, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Stephen T. Hagedorn, Appeals Commissioner.

1. Introduction.

Ralph Moore appeals the board's decision denying his claim for continuing benefits associated with 2003 injuries to his left knee. The board found that Moore suffered at most a temporary aggravation of longstanding preexisting knee conditions. Moore contends that the board's decision is not supported by substantial evidence because none of the physicians relied on by the board gave an opinion addressing the causation test set out in *DeYonge v. NANA/Marriott*.¹ Moore contends the board failed to apply *DeYonge* properly because Moore's increased pain after the injury triggered

¹ 1 P.3d 90 (Alaska 2000).

Moore's decision to have knee replacement surgery. Moore contends that the board's decision does not show the board fully reviewed the evidence and made specific findings regarding each physician's testimony. Finally, Moore maintains that the board found that he lacked credibility, but this finding was based on an improper understanding of events and his statements. Appellees, Afognak Native Corporation and its insurer, oppose and argue that the board's findings are supported by substantial evidence in light of the whole record. Appellees contend the commission is bound by the board's credibility findings, which were based on contradictions between Moore's testimony and other evidence.

The parties' contentions require the commission to determine if the board made adequate findings of fact, and if the board had substantial evidence in light of the whole record to support its findings, that Moore's need for knee replacement surgery was not a result of an injury derived from work for Afognak. The commission also must decide if the board properly applied the aggravation rule in *DeYonge*.

The commission concludes that the board made adequate findings of fact, supported by substantial evidence in light of the whole record. The commission determines that, although brief, the board's decision reflects a consideration of the Supreme Court's ruling in *DeYonge*. The commission concludes the board's comment regarding Dr. Tallerico is harmless error and that the board adequately identified the evidence it relied upon. The board did not make explicit credibility findings regarding Moore's testimony so the commission need not address Moore's argument that the board made improper findings. Therefore, the board's decision is affirmed.

2. Factual background.

Ralph Moore worked in the timber and logging industry in Alaska and Washington for 35 years.² In 1987, he suffered serious injury in Washington when a tree fell and hit both his legs.³ The injury to his legs included a chondral fracture of the

² Tr. 17:24,18:17-22.

³ R. 0220.

left knee.⁴ Surgery was performed at that time and it was discovered that Moore had degenerating cartilage and early osteoarthritis.⁵ Moore was rated with a 15% permanent partial impairment.⁶ In December 1998 Moore was diagnosed with “approaching” end-stage osteoarthritis in both knees.⁷

For the next five years, Moore continued to work as a logger in Washington and Alaska, and he continued to aggravate his knees.⁸ While working for Afognak Native Corporation in October 2003, Moore slipped getting out of a skiff, falling on both his knees and hitting his elbow.⁹ He was treated at a Kodiak clinic. The clinic chart notes indicated, “He may experience a slight flare-up in his knees over the next day or two but then should subside. . . . Return to work and increase duties as he tolerates.”¹⁰ He continued to work though he was experiencing pain and mild effusion in both knees.¹¹

In December 2003, Moore slipped on fresh snow and fell off a dock. His pant leg was caught on a spike on the dock, and his body swung off the dock, putting strain on the left knee.¹² He did not seek care in Kodiak for this accident, and he continued to work.¹³

After he returned home to Washington in December 2003, he again saw Dr. Partlow, who diagnosed end-stage degenerative joint disease (also known as osteoarthritis) in both knees and recommended knee replacement surgery.¹⁴ In May 2006, Dr. Partlow answered “no” when asked whether either or both of the 2003

⁴ R. 0220-21.

⁵ R. 0221.

⁶ R. 0301.

⁷ R. 0303.

⁸ Tr. 36-38.

⁹ Tr. 22:13-14; R. 0001.

¹⁰ R. 0304.

¹¹ Tr. 23:8-20; R. 230.

¹² Tr. 24:14, 26:9-28:10; R. 0002.

¹³ Tr. 29:24-25.

¹⁴ R. 0232, 0238.

injuries were “a substantial factor” in the need for total knee replacements.¹⁵ Dr. Partlow stated that Moore’s knee pain was due to arthritis, noting that the injuries caused the arthritis to flare up.¹⁶ In an April 2007 letter, Dr. Partlow acknowledged that one of the 2003 work injuries “was a cause of the need for further treatment to his knee” but did not elaborate on what this further treatment entailed.¹⁷

Dr. Mark Leadbetter performed employer medical evaluations on behalf of Afognak in July 2004 and May 2005.¹⁸ He opined that the work injuries produced only a strain to the knees, and produced temporary aggravations of Moore’s preexisting condition.¹⁹ He agreed with Dr. Partlow that a total knee replacement may be required “at some point in time,” but concluded that this was due to osteoarthritis that had been first discovered in 1987, and not due to the 2003 work injuries.²⁰

Moore saw two other doctors in 2005. Twice in January 2005, Dr. Louis Kretschmer examined him.²¹ Dr. Kretschmer’s notes do not address the role, if any, the 2003 work injuries played in Moore’s current knee conditions.²² But during both visits, Dr. Kretschmer gave steroid injections and recommended total knee replacement, noting a diagnosis of “degenerative disease of the left knee.”²³ In July 2005, Dr. Stephen Snow expressed a similar opinion after examining Moore. Referring to X-rays “going back to 1998” showing osteoarthritis of both knees, he stated, “To me it appears fairly straight-forward that his initial injuries sustained in 1987 have caused a

¹⁵ R. 0266-67.

¹⁶ R. 0232, 0265.

¹⁷ R. 0268.

¹⁸ R. 0234, 0242.

¹⁹ R. 0239, 0245-46.

²⁰ R. 0240, 0246.

²¹ R. 0398-99.

²² *Id.*

²³ *Id.*

natural progression of osteoarthritis. He is in need of bilateral total knee replacements."²⁴

In June 2006, Dr. Brian Tallerico performed an employer medical examination (EME) on behalf of Moore's previous employer, Silver Bay Logging Company.²⁵ Dr. Tallerico opined that the December 2003 dock incident while Moore was working for Afognak was a substantial factor in Moore's need for knee replacement and his disability.²⁶

Because there was a medical dispute, Dr. John McDermott performed a Second Independent Medical Examination (SIME) on behalf of the board.²⁷ Dr. McDermott concluded that the October and December 2003 injuries were not a substantial factor in Moore's current status or his need for future treatment.²⁸ He considered the two 2003 incidents to be temporary aggravations and that Moore would have needed knee replacements regardless of the 2003 work injuries.²⁹

3. Proceedings before the board.

Before the board, Moore argued that the 2003 injuries aggravated his preexisting knee condition to the extent that he required knee replacement surgery and that his claim was supported by Dr. Tallerico's evaluation. The employer argued Moore suffered only a temporary aggravation of a longstanding condition and that these minor aggravations would have long since resolved.³⁰

²⁴ R. 0337.

²⁵ R. 0248, 0258.

²⁶ R. 0256.

²⁷ R. 0259.

²⁸ R. 0263.

²⁹ *Id.*

³⁰ *Ralph P. Moore v. Afognak Native Corp.*, Alaska Workers' Comp. Bd. Dec. No. 07-0299, 9 (Sept. 28, 2007) (D. Jacquot).

The board analyzed Moore's claim for knee surgery under the three-step presumption analysis.³¹ It found that the presumption of compensability attached to Moore's claim but that Afognak rebutted the presumption based on the opinions of Drs. Leadbetter, McDermott, Kretschner and Partlow.³² The board noted that it found the presumption was rebutted "without weighing credibility."³³

The presumption dissolved and the board found that Moore had not proven his claim by the preponderance of evidence.³⁴ The board stated, "We give little weight to the opinion of Dr. Tallerico, a physician hired by a third employer, not associated with the current dispute, therefore the Board finds his opinion may be biased."³⁵ The board found the overwhelming medical evidence, including the opinions of Drs. Partlow, Kretschner, Leadbetter and McDermott, supported that Moore's 2003 injuries were temporary aggravations of a preexisting knee condition and not a substantial factor in Moore's current need for treatment.³⁶ The board gave the "most weight" to the opinion of the employee's treating physician, Dr. Partlow.³⁷ The board denied and dismissed Moore's claims.³⁸ Moore appeals.

4. *Standard of review.*

"The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."³⁹ Because the commission makes its

³¹ *Id.* at 10-12.

³² *Id.* at 11.

³³ *Id.*

³⁴ *Id.* at 12.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 13.

³⁹ AS 23.30.128(b).

decision based on the record before the board, the briefs, and oral argument, no new evidence may be presented to the commission.⁴⁰

A board determination of the credibility of a witness who testifies before the board is binding on the commission.⁴¹ “The board has the sole power to determine the credibility of a witness” and to weigh the evidence from a witness’s testimony, including medical testimony and reports.⁴²

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers’ Compensation Act.⁴³ 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.⁴⁴ The commission “do[es] not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of weight to be accorded evidence is the task assigned to the board The commission will not reweigh the evidence or choose between competing inferences, as the board’s assessment of the weight to be accorded conflicting evidence is conclusive.”⁴⁵

5. *Discussion.*

a. *The board did not err in its application of the presumption; substantial evidence supports the board’s findings of fact.*

The primary issue is whether substantial evidence supports the board’s decision to deny Moore’s claim based on the opinions of the physicians that treated, examined or viewed his medical records from 1987 to 2007. Moore argues that the board erred in finding that Afognak rebutted the presumption of compensability and in concluding that

⁴⁰ AS 23.30.128(a).

⁴¹ AS 23.30.128(b).

⁴² AS 23.30.122.

⁴³ *Id.*

⁴⁴ *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

⁴⁵ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 054, 6 (August 28, 2007) (citing AS 23.30.122).

Moore did not prove his case by a preponderance of the evidence.⁴⁶ He asserts that Afognak did not produce substantial evidence to rebut the presumption.⁴⁷ Moore argues that the board relied on the opinion of physicians who misunderstood Alaska law and that the board misapplied *DeYonge v. NANA/Marriott*.⁴⁸

The Alaska Workers' Compensation Act presumes that an employee's claim is compensable.⁴⁹ Applying the presumption requires first that the employee establish a preliminary link between the employment and the injury.⁵⁰ The parties do not dispute that Moore established such a link.

Next, the employer must rebut the presumption with substantial evidence that the injury was not work-related.⁵¹ The employer can either "(1) provide an alternative explanation for the injury that, if accepted, would exclude work-related factors as a substantial cause of the disability or (2) directly eliminate any reasonable possibility that employment was a factor in causing the disability."⁵²

Under *DeYonge*, "the employment need only have been a substantial factor in bringing about the disability."⁵³ In *DeYonge*, a housekeeper sought *temporary* total disability and medical benefits, claiming that her job aggravated her preexisting arthritis in her knees to the point that she could not work.⁵⁴ The Supreme Court rejected the board's conclusion that the work must worsen the employee's underlying condition,

⁴⁶ Appellant's Br. 3.

⁴⁷ Appellant's Br. 3; Appellant's R. Br. 3.

⁴⁸ Appellant's Br. 22-24; Appellant's R. Br. 3.

⁴⁹ AS 23.30.120(a).

⁵⁰ *Cowen v. Wal-Mart*, 93 P.3d 420, 424 (Alaska 2004); *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000).

⁵¹ *E.g.*, *Cowen*, 93 P.3d at 424; *DeYonge*, 1 P.3d at 94.

⁵² *E.g.*, *Cowen*, 93 P.3d at 424; *DeYonge*, 1 P.3d at 96.

⁵³ 1 P.3d at 96 (citations and quotations omitted).

⁵⁴ *Id.* at 92, 97.

rather than merely aggravate her symptoms, to result in compensable temporary disability.⁵⁵

The Court held in *DeYonge* that the employer failed to rebut the presumption of compensability by presenting an alternative explanation for the injury because, although the employee's arthritis was preexisting, her doctor agreed that "the type of duties which she performed as a housekeeper . . . would have been a substantial factor in increasing her symptoms."⁵⁶ The Court explained that the board erred in requiring a permanent aggravation of the housekeeper's knee condition when she was not claiming permanent total disability, but rather temporary total disability and medical benefits.⁵⁷

Moore's reliance on *DeYonge* is misplaced. Afognak paid the *temporary* disability compensation due for the period of time when Moore's 2003 work injuries aggravated his left knee condition. The board noted that Moore's attending physician expressed the opinion that "the most recent injury did not materially affect the arthritis in his leg aside from symptomatically."⁵⁸ While the Supreme Court has rejected the "distinction between worsening of the underlying disease process and worsening of the symptoms of the disease,"⁵⁹ the presumption in a claim for permanent replacement of a joint may be rebutted by evidence that the need for the joint replacement surgery is not the result of a temporary exacerbation of the pre-existing condition. Notwithstanding that Moore's 2003 injuries brought about temporary disability and required medical treatment to return him to pre-injury status, the board had substantial evidence in the medical records and physician opinions to find that the 2003 injuries were not a

⁵⁵ *Id.* at 96-98.

⁵⁶ *Id.* at 96-97.

⁵⁷ *Id.* at 97 ("The Board erred by focusing on whether DeYonge suffered "a permanent aggravation or acceleration" and a "permanent worsening" of her knee condition, for DeYonge did not bring a claim for permanent total disability. DeYonge only brought claims for medical benefits and temporary total disability (TTD). And with respect to both of these claims, we only require that the employment cause a temporary increase in symptoms aggravating the disability.").

⁵⁸ *Ralph P. Moore*, Bd. Dec. No. 07-0299 at 6.

⁵⁹ *Steffey v. Municipality of Anchorage*, 1 P.3d 685, 690 (Alaska 2000).

substantial factor in bringing about the need for surgery to permanently replace the left knee joint.⁶⁰

The Supreme Court “held that presentation of a qualified expert who testifies that, in his or her opinion, the claimant’s work was probably not a substantial cause of the disability rebuts the presumption of compensability.”⁶¹ This is precisely what the board found Afognak did in this case. Drs. Paltrow, Leadbetter and McDermott agreed that the 2003 work injuries were not a substantial factor in the current condition of Moore’s knees.⁶²

After the employer rebuts the presumption, the presumption dissolves and the employee must prove his case by a preponderance of the evidence.⁶³ “The injury (in this case, the need for knee replacement surgery) is compensable if the employee’s work is a substantial factor in causing it.”⁶⁴ The board has the sole discretion to

⁶⁰ All the doctors attributed Moore’s need for bilateral knee replacement surgery to the permanent damage to his knees caused by his pre-existing arthritis. The question for the board was not whether treatment of a temporary symptomatic aggravation was covered by the Alaska Workers’ Compensation Act, but whether *replacement of one of two permanently damaged joints* was required by a knee injury that arose out of and in the course of Moore’s employment. The board noted that Moore, who was 58 years old at the time of the injury in 2003 (R. 0001), was laid off because logging operations shut down. Moore does not dispute the reason for his lay off, but claims his increased symptoms after the injuries caused him to make the decision to have the knee replacements that his physician had been recommending. Because the doctors did not respond to Dr. Tallerico’s statement that a decision when a joint replacement is done rests with the patient, and that many patients choose to put off the replacement as long as possible, Moore asserts that their opinions do not rebut the presumption. However, Dr. Partnow’s reports and Dr. Leadbetter’s testimony establish that the 2003 work injuries did not cause the “lasting and severe pain” that require the knee replacement; they are sufficient to overcome the presumption. *Lopez v. Adm’r, Pub. Employees’ Ret. Sys.*, 20 P.3d 568, (Alaska 2001).

⁶¹ *Cowen*, 93 P.3d at 424 (quotations and citations omitted).

⁶² R. 0240, 0246, 0263, 0266-67.

⁶³ *E.g.*, *Cowen*, 93 P.3d at 426; *DeYonge*, 1 P.3d at 94.

⁶⁴ *Cowen*, 93 P.3d at 426. Because Moore was injured before Nov. 7, 2005, the amendments to AS 23.30.010 do not apply to this case.

determine the weight of the medical testimony and reports.⁶⁵ When doctors' opinions disagree, the board determines which has greater credibility.⁶⁶ The "overwhelming medical evidence," including the opinions of Drs. Partlow, Kretschner, Leadbetter and McDermott, convinced the board that the 2003 work injuries were "temporary and transient" and not a substantial factor in Moore's need for left knee replacement.⁶⁷ Moreover, the board attributed the "most weight" to the opinion of Moore's own physician, Dr. Partlow, who concluded that the 1987 injury was the cause of Moore's current condition and his need for a total knee replacement.⁶⁸ The board also found support for its finding that the 2003 injuries were temporary and transient in the fact that Moore did not miss any time from work and did not seek immediate medical attention in Kodiak after the December 2003 injury.⁶⁹ The board weighed this evidence against the opinion of Dr. Tallerico.⁷⁰ If the evidence is adequate to support the

⁶⁵ AS 23.30.122.

⁶⁶ *Id.*, *Cowen*, 93 P.3d at 426.

⁶⁷ *Moore*, Alaska Workers' Compensation Bd. Dec. No. 07-0299 at 12.

⁶⁸ *Id.* Moore claims that Dr. Partlow changed his opinion in 2007 after the *DeYonge* rule was explained to him. Appellant's Br. 16. However, the board could have inferred that Dr. Partlow's statement that the October 2003 work injury "was a cause of the need for further treatment to his knee" was not inconsistent with Dr. Partlow's opinion that that the October 2003 work injury was not a "substantial factor" in the need for knee replacement surgery. R. 267-68. A "need for further treatment" does not necessarily include knee replacement surgery. Dr. Partlow made it clear that Moore's underlying arthritis was "already end stage at the time of injury." R. 0363.

⁶⁹ *Moore*, Alaska Workers' Comp. Bd. Dec. No. 07-0299 at 12. The board chose not to find that Moore would have continued to work if he had not fallen and that Moore's 2003 injuries were the "motivating force [in obtaining knee replacement surgery] and aggravated [Moore's] condition to the point that he could no longer work, and surgery could not be postponed any longer." *Hawkins v. Green Associated*, 559 P.2d 118, 120 (Alaska 1977). When the evidence is susceptible to more than one reasonable inference, the board has the authority to choose which to accept.

⁷⁰ *Moore*, Bd. Dec. No. 07-0299 at 12. Dr. Tallerico agreed that it was reasonable to recommend knee replacement to Moore as early as 1995, Tallerico Depo. 31:1-18, (May 16, 2007), but he also testified that the "only true indication for a joint replacement is pain, and I have offered patients of my own joint replacement because their x-rays look so horrible, but because it's such a big deal and because they are

board's findings of fact, the commission cannot set aside the board's findings just because the commission panel may view the evidence differently.⁷¹

b. The board's comment on Dr. Tallerico was error, but does not require reversal.

Moore argues that the board inappropriately dismissed Dr. Tallerico's opinion as being biased.⁷² In *BP Exploration Alaska, Inc. v. Stefano*, the commission noted the strong possibility that the board erred in interpreting Alaska Supreme Court decisions as recognizing that "EME physicians are agents of their employers."⁷³ In this case, the board stated it gave "little weight to the opinion of Dr. Tallerico, a physician hired by a third employer, not associated with the current dispute, *therefore the Board finds his opinion may be biased.*"⁷⁴ Moore argues that the board should not presume that a medical expert is biased toward an employer simply because the employer retained him and that the board should explain its reasons for not giving Dr. Tallerico's report weight.⁷⁵

When the board makes a mistake in the application of the law, or lacks substantial evidence to support a finding of fact, the commission must determine if the board's error prejudices the substantial rights of a party before it may reverse the

making a living, they sometimes choose to wait a while." *Id.* at 31:24-32:4. Dr. Tallerico based his opinion on Moore's report that the "injury to the knee that increased the symptomatology to make him basically unable to work, so he had reached a point in his mind subjectively that he needed a knee replacement." *Id.* 32:11-14.

⁷¹ Moore argues that the board could have drawn different inferences from Dr. McDermott's report. Appellant's Br. 17-18. But it is the board's role, not the commission's, to decide what inferences to draw from the evidence. *Brown v. Patriot Maint., Inc.*, 99 P.3d 544 (Alaska 2004). The commission's role is to determine whether substantial evidence supports the board's findings. *See McGahuey*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6.

⁷² Appellant's Br. 15; Appellant's Supp. Br. 3.

⁷³ Alaska Workers' Comp. Appeals Comm'n Dec. No. 076, 15-18 (May 6, 2008).

⁷⁴ *Id.* (emphasis added).

⁷⁵ Appellant's Supp. Br. 3.

board's decision.⁷⁶ Even if a finding of fact or conclusion of law is erroneous, the mistake is not grounds for reversal if the finding or conclusion is not necessary to the board's decision.⁷⁷ This rule restrains the commission from using minor mistakes to change the outcome of a decision because the commission disagrees with the result. It preserves the board's unique role as the "trier of fact" in workers' compensation claims.

The Board did not conclude that Dr. Tallerico was an agent of the employer who hired him. Silver Bay Logging, an employer no longer associated with this litigation, hired Dr. Tallerico to perform an employer medical evaluation in an attempt to shift liability for Moore's injuries to Afognak under a "last injurious exposure" theory.⁷⁸ The board could infer that the *purpose* of the examination was to compare the contributions of Silver Bay Logging and Afognak to Moore's need for bilateral knee replacements. If it were limited to Dr. Tallerico's initial report, the board's statement that Dr. Tallerico's opinion may be biased could be interpreted as a comment that the interests of Silver Bay Logging were served by structuring the questions and information provided to Dr. Tallerico differently than if Dr. Tallerico were asked questions by the parties to the current controversy. A board panel might find that a report is less relevant because it is directed to a different question than the one before the board, and therefore, less

⁷⁶ *Fairbanks No. Star Bor. v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987) (citing *Mattingly v. Charnes*, 700 P.2d 927, 929 (Colo.App.1985); *Survivors of Medeiros v. Maui Land and Pineapple Co.*, 66 Haw. 290, 660 P.2d 1316, 1319 (1983); *Excepticon Midwest, Inc. v. Kansas Department of Health*, 234 Kan. 802, 676 P.2d 107, 110 (1984)).

⁷⁷ *Fairbanks No. Star Bor.*, 747 P.2d at 531 (citing *Branco Eastern Co. v. Leffler*, 173 Colo. 428, 482 P.2d 364, 368 (1971); *Wright v. Wright*, 1 Haw.App. 581, 623 P.2d 97, 100 (1981); *Newcum v. Lawson*, 1 N.M. 448, 684 P.2d 534, 541 (App.1984); *City of Village v. McCown*, 446 P.2d 380, 383 (Okla.1968); *State ex rel. Carriger v. Campbell Food Markets*, 65 Wash.2d 600, 398 P.2d 1016, 1020 (1965)).

⁷⁸ The last injurious exposure rule "states that the employer at the time of a worker's most recent injury is liable for the aggravation of an existing injury if the most recent injury bears a causal relation to the disability such that it constitutes the 'last injurious exposure.'" *Lindekugel v. George Easley Co.*, 986 P.2d 877, 880 (Alaska 1999) (citing *United Asphalt Paving v. Smith*, 660 P.2d 445, 447 (Alaska 1983)). *Accord Ketchikan Gateway Borough v. Saling*, 604 P.2d 590 (Alaska 1979).

persuasive. However, such inferences cannot be applied to Dr. Tallerico's opinion testimony in his deposition on May 16, 2007. The attorney for Afognak was present at the deposition and questioned Dr. Tallerico extensively. The opinions expressed by Dr. Tallerico were directed to the issue before the board. Therefore, as there is no evidence on which to base a finding of bias in the sense of being tangential or bias in the sense of being influenced by personal preference, dislike or financial interest in the outcome, the board's comment that Dr. Tallerico's "opinion may be biased" is error.⁷⁹

However, Moore fails to demonstrate that the board's comment that Dr. Tallerico's opinion "may be biased" was prejudicial error. At least three other doctors, including Moore's longstanding treating physician, did not believe that the 2003 injuries were a substantial factor in the need for knee replacement surgery.⁸⁰ Thus, the

⁷⁹ The board's comment that an opinion "may be biased" is also not useful. Any opinion *may be* biased; the board's obligation is to inform the parties and reviewer if it found an opinion *was unfairly biased* in favor of a party, that the opinion *was* the product of unfair personal bias held by the author, or that the author *has* personal or financial connections to a party or the outcome exist that permit the board to assume bias. The reference to the circumstances in which his report was solicited makes it clear that the board was not referring to Dr. Tallerico's personal inclinations or a financial interest in the outcome, and there is no evidence to support a finding of such bias.

⁸⁰ Moore argues that Dr. Leadbetter's opinion did not overcome the presumption because Dr. Leadbetter agreed with counsel's statement that the 2003 injuries "culminated" in Moore's current need for a knee replacement. Leadbetter Depo. 37:3-8 (Apr. 27, 2007). However, Dr. Leadbetter also expressed the opinion that the 2003 injuries created a temporary exacerbation of the employee's condition. Leadbetter Depo. 37:16-17. He agreed that he could rule out the 2003 injuries as a cause of a need for the left total knee replacement. Leadbetter Depo. 20:5-8. The board did not err by reading Dr. Leadbetter's agreement with counsel's characterization of the 2003 injury in the context of his other testimony and his report. Moore also argues Dr. McDermott "did not feel that subjective symptoms had anything to do with the need for surgery unless there was a change in the underlying condition." Appellant's Br. 18. However, Dr. McDermott acknowledged Moore's report to him that he had an increase in symptoms, but, after looking at the records, he wrote, "I am unable to acknowledge more than a temporary subjective aggravation of the condition. No objective evidence is identifiable." R. 0362. In the context of the rest of Dr. McDermott's report, the board could infer that the "objective evidence" meant contemporaneous documentation in the medical reports of the increased symptoms Moore later reported to Dr. McDermott – i.e., objective evidence that the symptoms had increased.

board had substantial evidence to conclude that Afognak should not be held liable for Moore's knee replacement surgery.

c. The board was not required to make an explicit credibility finding as to Moore's testimony.

Lastly, Moore argues that the board erred in finding him not credible because he characterized the 2003 injuries as "minor" and attributed his need for a total knee replacement to the 1987 injury in a January 2007 letter to the Washington Department of Labor and Industries in which he sought to reopen his 1987 claim.⁸¹ Moore suggests that the board unfairly discounted his testimony regarding the impact of the Afognak injury on his decision to obtain a knee replacement because he sought benefits in Washington for the same knee.⁸²

Although the board referred to the January 2007 letter,⁸³ it did not make an express credibility finding as to Moore's testimony. The board did not view Moore's testimony as material to its decision. The board does not need to rely on Moore's testimony, or find another's contradictory testimony more credible, to make a decision whether the injury was a substantial factor in bringing about the knee replacement. The board clearly regarded the medical evidence as most persuasive and relevant to the

⁸¹ Appellant's Br. 22-23; Emp'r Hearing Binder R. 0021 (contained in unnumbered portion of board record).

⁸² Moore referred to this as "keeping his options open." Appellant's Br. 22. A witness's testimony is not necessarily made inconsistent by pleading alternate theories of recovery based on the *same* facts. Moore's statement to the Department of Labor and Industries is an attribution of need for knee surgery to the Washington injury to the exclusion of the later Afognak injury, *based on Washington law*. The board did not discuss whether, under Washington law, Moore would have been barred from recovery if the Afognak injury was more than a "minor" injury. Since Moore also stated that "likely [the Alaska insurer] will not pay . . . even though it would have been the last injurious exposure," Moore was not taking a legal position which was inconsistent with his position before the Alaska Workers' Compensation Board.

⁸³ "We find in his January 31, 2007 letter to Washington Labor and Industries, the employee himself characterized his 2003 injuries as minor and attributed his need for treatment to his 1987 injury; the employee relied on his long term treating physician, who we find knew his condition best, who opined 'all your current knee problems stem from that initial (1987) industrial accident.'" *Ralph P. Moore*, Alaska Workers' Comp. Bd. Dec. No. 07-0299 at 12.

issue before it, rather than Moore's state of mind or his subjective beliefs. It based its decision on "a preponderance of the overwhelming medical evidence, in particular the *substantiated objective* record."⁸⁴ The board's decision reflects that it gave greater weight to the medical evidence than to Moore's statements as to the role of the Afognak injuries in bringing about the knee replacement surgery. Since the question before the board was whether knee replacement surgery was needed to treat the work-related injury, the board's focus on the physician's opinions was not unreasonable.⁸⁵ The evidence in the record is sufficient to support the board's decision.

6. Conclusion.

Substantial evidence supports the board's finding that Moore's 2003 injuries produced a temporary aggravation of a longstanding preexisting knee condition, but were not a substantial factor in Moore's need for knee replacement surgery. All but one doctor, including Moore's treating physician, concluded that his need for a total knee replacement was the result of pre-existing degenerative joint disease and end-stage tricompartmental arthritis and that the 2003 injuries were not a substantial factor in

⁸⁴ *Id.* (emphasis added).

⁸⁵ Although the board framed the claim for knee surgery in the form of the standard presumption analysis, the board could have examined the knee surgery claim under the standard used in *Phillip Weidner & Assoc., Inc. v. Hibden*, 989 P.2d 727 (Alaska 1999). In this case, Moore did not file a claim for medical treatment of his knee injury until Jan. 6, 2006, more than two years after his injury. The board could have determined the specific injury that arose out of and in the course of employment, (applying the presumption), and then determined whether a knee replacement was a reasonable alternative to treat that specific injury. *Id.* at 731. The board applied the presumption to the claim for medical benefits, accepting the employer's concession that the employee suffered a temporary aggravation of a pre-existing condition as a result of the work injury, but decided that the need for surgery was not the result of the work injury. The foundation of the board's conclusion is its determination that the work was not a substantial factor in bringing about the condition that required permanent joint replacement.

bringing about the need for knee replacement surgery. Therefore, the board's decision is AFFIRMED.

Date: August 25, 2008

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Stephen T. Hagedorn, Appeals Commissioner

Signed

David W. Richards, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission affirmed (approved) the board's decision denying Ralph P. Moore's workers' compensation claim. The appeals commission's decision ends all administrative proceedings in Mr. Moore's workers' compensation case nos. 200320198M, 200324429. It is effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date this decision was distributed, look at the Certificate of Distribution in the box below.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. To see the date this decision is mailed, look at the Certificate of Distribution in the box below.

A request for commission reconsideration must be filed within 30 days of the date of mailing of the decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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 this decision 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 appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. A motion for reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

CERTIFICATION

I certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 087, the Final Decision in the appeal of *Ralph P. Moore v. Afognak Native Corp. and Zurich American Ins. Co.*, AWCAC Appeal No. 07-041, dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this 25th day of August, 2008.

Signed

L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision in AWCAC Appeal No. 07-041 was mailed on 8/25/08 to Kalamarides & Holloway at their addresses of record and faxed to Kalamarides, Holloway, Director WCD, & AWCB Appeals Clerk.

Signed

8/25/08

J. Ramsey, Deputy Appeals Commission Clerk Date