

Alaska Workers' Compensation Appeals Commission

City and Borough of Juneau,
Appellant,

vs.

Calli E. Olsen,
Appellee.

Decision on Reconsideration

Decision No. 185 August 21, 2013

AWCAC Appeal No. 12-001

AWCB Decision Nos. 11-0162 and
11-0175

AWCB Case No. 200914290

Decision on Reconsideration of Alaska Workers' Compensation Appeals Commission Final Decision No. 184 issued at Anchorage on July 22, 2013, on appeal of Alaska Workers' Compensation Board Final Decision and Order No. 11-0162, issued at Juneau on November 17, 2011, by southern panel members Marie Y. Marx, Chair, Bradley S. Austin, Member for Labor, and dissent by Charles M. Collins, Member for Industry, and Alaska Workers' Compensation Board Final Decision and Order on Reconsideration No. 11-0175, issued at Juneau on December 13, 2011, by southern panel members Marie Y. Marx, Chair, and Bradley S. Austin, Member for Labor.

Appearances: Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, P.C., for appellant, City and Borough of Juneau;¹ Joseph A. Kalamarides, Law Offices of Kalamarides & Lambert, for appellee, Calli E. Olsen.

Commission proceedings: Appeal filed January 3, 2012, oral argument held July 17, 2013, Final Decision No. 184, issued July 22, 2013; Joint Motion for Reconsideration and Clarification filed August 12, 2013.

Commissioners: David W. Richards, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

In March 2009, the appellee, Calli E. Olsen (Olsen), began working for the appellant, the City and Borough of Juneau (CBJ), as a Senior Wastewater Treatment

¹ At oral argument, attorney Michael A. Budzinski, Russell, Wagg, Gabbert & Budzinski, P.C., appeared on behalf of the appellant.

Plant Operator Level III in its wastewater treatment facility. It is undisputed that Olsen had preexisting arthritis in her right knee, and that, prior to working for CBJ, the knee was asymptomatic. On May 17, 2009, Olsen injured her right knee when she twisted and hyper-extended it while walking down stairs at work. Four months later, on September 17, 2009, she injured her right knee and low back while at work. Owing to an equipment problem at the facility, she had to carry bags of wet organic material weighing 30 to 40 pounds up three flights of stairs, out the building, and across a parking lot. Olsen then lifted the bags over her shoulder and deposited them in a dumpster. While climbing the stairs carrying two bags, she felt her right knee strain and pop, which caused sharp pain in her knee.

When conservative treatment proved ineffective in alleviating Olsen's knee pain, an autologous chondrocyte implantation procedure (implantation procedure) was recommended. CBJ disputed whether it was liable for that treatment, asserting that Olsen's knee pain was primarily attributable to the underlying preexisting arthritis, not the work-related incidents. It controverted all benefits on March 15, 2010. On May 10, 2010, Olsen filed a workers' compensation claim. The claim was heard by the Alaska Workers' Compensation Board (board) on August 16, 2011. In a split decision, the board concluded that Olsen was entitled to medical treatment in the form of the implantation procedure.² CBJ appealed that decision to the Workers' Compensation Appeals Commission (commission).³

² See *Calli E. Olsen v. City and Borough of Juneau*, Alaska Workers' Comp. Bd. Dec. No. 11-0162 (Nov. 17, 2011). In its Final Decision and Order on Reconsideration, the board held in abeyance Olsen's claim for temporary total disability benefits while recovering from the implantation procedure. See *Calli E. Olsen v. City and Borough of Juneau*, Alaska Workers' Comp. Bd. Dec No.11-0175 (Dec. 13, 2011).

³ In the interest of brevity, we address only the contested issue that was preserved on appeal, namely, whether medical treatment for Olsen's right knee injury is compensable. Before the board, Olsen also claimed work-related injuries to her back and right leg, as distinguished from her right knee. There are references to these injuries in the board's decision and Olsen's medical records. Benefits were denied for these injuries.

Following oral argument, the commission issued a Final Decision.⁴ As we stated in that decision, this appeal implicates the well-established principle of Alaska workers' compensation law that a work-related injury that aggravates, accelerates, or combines with a preexisting condition is compensable, provided that certain criteria are met.⁵ However, there is no Alaska Supreme Court (supreme court) authority that discusses and analyzes this principle in light of the 2005 amendments to the Alaska Workers' Compensation Act (Act). Prior to those amendments, any claim, including claims for medical treatment such as the one at issue here, was compensable, provided that employment was **a substantial factor** in bringing about the disability or need for medical treatment.⁶ In 2005, AS 23.30.010 was rewritten to provide in part:

When determining whether or not . . . the need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of . . . the need for medical treatment. Compensation or benefits . . . are payable . . . for medical treatment if, in relation to other causes, the employment is **the substantial cause** of the . . . need for medical treatment.⁷

Olsen's claim needs to be analyzed under this latter standard. Under the circumstances, it falls to the commission, in a case of first impression, to provide guidance to the board when determining, in this case, whether employment was the substantial cause of Olsen's need for medical treatment in the form of the implantation procedure. The analysis may prove helpful to the board in adjudicating similar cases as well.

After the commission issued its Final Decision, the parties, together with the Director of the Division of Workers' Compensation, Michael Monagle, filed a Joint Motion

⁴ See *City and Borough of Juneau v. Callie E. Olsen*, Alaska Workers' Comp. App. Comm'n Dec. No. 184 (July 22, 2013)

⁵ See, e.g., *Thornton v. Alaska Workmen's Compensation Bd.*, 411 P.2d 209 (Alaska 1966); *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312 (Alaska 1981); *DeYonge v. NANA/Marriott*, 1 P.3d 90 (Alaska 2000); *Thurston v. Guys With Tools, Ltd.*, 217 P.3d 824 (Alaska 2009).

⁶ See, e.g., *DeYonge*, 1 P.3d at 96.

⁷ (Emphasis added); see also *Rivera v. Wal-Mart Stores, Inc.*, 247 P.3d 957, 959 n.2 (Alaska 2011).

for Reconsideration and Clarification (motion). The motion is well-founded. In response, we issue this Decision on Reconsideration, which is intended to replace and supersede our Final Decision. We reverse and remand.

2. Factual background and proceedings.

For approximately ten years, between 1999 and 2009, Olsen worked in wastewater management, most recently as a lead operator in the state of Washington. Her duties prior to 2005 involved heavy lifting. In 2005, when she became a lead operator, her duties no longer required heavy lifting or carrying heavy items. They did include overseeing three treatment facilities, a laboratory, training new employees, directing work, and operating and maintaining equipment.⁸

In March 2009, Olsen moved to Juneau and began working for CBJ, as described in the Introduction. Her job duties sometimes required her to work as a press operator. When performing press operator duties, she was required to carry 50-pound bags of chemicals up stairs, up a portable ladder, and then dump the bags in a hopper. Olsen repeated this chore approximately three to four times a day when it was her turn to perform it, which was for a total of approximately 30 days, between March 2009, and September 2009.⁹

On May 17, 2009, Olsen injured her right knee, as mentioned previously.¹⁰ That same day, she treated with Stephen Cameron, M.D. Thereafter, Olsen returned to work, but continued to treat her knee with anti-inflammatory medication and ice for the next two months.¹¹

On September 17, 2009, Olsen again injured her right knee, as set forth in the Introduction. Two days later, on September 19, 2009, Norvin Perez, M.D., treated her for complaints of right knee pain and restricted Olsen from returning to work.¹² On

⁸ Hr'g Tr. 15:8-12, Aug. 16, 2011.

⁹ Hr'g Tr. 17:7-13, 22:2-14.

¹⁰ Hr'g Tr. 15:15-23; R. 0111, 0295.

¹¹ Hr'g Tr. 25:21-26:2; R. 0111, 0295, 0292.

¹² R. 0290-94.

September 24, 2009, Dr. Perez extended her restriction from returning to work and referred Olsen for right knee magnetic resonance imaging (MRI).¹³ On October 1, 2009, the right knee MRI showed moderate patellofemoral joint space osteoarthritis and magnetic susceptibility artifact distal fibers of the patellar tendon.¹⁴ On October 6, 2009, Dr. Perez referred Olsen to physiatrist John P. Bursell, M.D., for treatment of her knee pain.¹⁵

On October 15, 2009, Olsen saw Dr. Bursell, reporting right knee pain, among other complaints. He treated her with a steroid injection, however, Olsen's knee pain persisted. She was referred to physical therapy.¹⁶ On October 21, 2009, Dr. Bursell diagnosed a right knee strain and released Olsen to light duty work, imposing limits on her climbing, bending, and stooping, with no lifting, pushing, or pulling over 15 lbs.¹⁷

On October 30, 2009, Olsen began physical therapy. Between the end of October 2009 and January 12, 2010, she was released to work with various restrictions.¹⁸

On January 26, 2010, orthopedic surgeon John W. Thompson, M.D., examined Olsen in connection with an employer's medical evaluation (EME). Dr. Thompson diagnosed patellofemoral arthritis right knee idiopathic in nature and right knee strain superimposed on the patellofemoral arthritis. Regarding the onset of her knee pain, he stated: "With the type and severity of the patellofemoral arthritis that she has it is going to begin to be symptomatic at some point in time and it would be my opinion that that is what happened in May."¹⁹ He commented: "There is a note stating that the knee symptoms had persisted to some degree from May until September when the work activity

¹³ R. 0284-87, 0276-77, 0273-74.

¹⁴ R. 0276-77.

¹⁵ R. 0268-69, 0275.

¹⁶ R. 0266-67, 0385, 0387.

¹⁷ R. 0385-86.

¹⁸ R. 0383, 0382, 0362, 0355.

¹⁹ R. 0345.

of that day did aggravate the underlying patellofemoral arthritis.”²⁰ Elaborating further, Dr. Thompson stated:

The work activity of 09/17/09 was in a sense the substantial cause of the development of her worsening symptomatology, i.e. . . . increased pain in the patellofemoral joint, but that work activity did not cause the underlying condition. In the sense of “the substantial cause” the work activity did play a significant role in the increase in symptoms, but in my opinion the pre-existing condition[] played the greatest role in bringing about this symptomatology.

. . . .

. . . With the degree of patellofemoral arthritis she has in her right knee this is really the main reason for her ongoing symptomatology.

. . . .

I believe that . . . the right knee complaints . . . are largely due to the natural progression of the pre-existing disease with the work activities superimposed on the[] pre-existing condition[]. She has enough patellofemoral arthrosis in the right knee to explain the onset of her symptoms in May and her continued problems to this day.²¹

In Dr. Thompson’s opinion, Olsen was unable to return to work as a wastewater utility operator without restrictions; he attributed the need for work restrictions to her non-work-related preexisting condition, not the work injury.²² He considered her to be medically stable with respect to her work injury and not medically stable in terms of her preexisting condition. Dr. Thompson did not provide a permanent partial impairment (PPI) rating, stating that no permanent impairment resulted from the work injury and any permanent impairment would be due to Olsen’s preexisting condition.²³ Dr. Thompson did not specifically address whether the implantation procedure was reasonable or necessary to treat her pain symptoms; however, he agreed Olsen’s past treatment was reasonable and necessary to try to reduce her pain.²⁴

²⁰ R. 0345.

²¹ R. 0346.

²² R. 0347.

²³ R. 0348.

²⁴ R. 0347.

On February 9, 2010, Dr. Bursell restricted Olsen from returning to work.²⁵ On February 23, 2010, Dr. Thompson, in response to CBJ's request for clarification of his report, remarked that Olsen's preexisting condition is the substantial cause of her need for treatment of her knee.²⁶ On March 2, 2010, Olsen was again restricted from returning to work.²⁷

CBJ paid Olsen temporary total disability (TTD) benefits from September 21, 2009, through March 10, 2010.²⁸

On March 11, 2010, Dr. Bursell released Olsen to work without restrictions at her request. CBJ had informed Olsen that all benefits would cease based on Dr. Thompson's report. Olsen needed to return to work because she would otherwise have no income. She returned to work in the laboratory, where her duties primarily included collecting samples and transporting the samples to the laboratory. Olsen did not seek or obtain a modification of this release.²⁹

On March 15, 2010, CBJ controverted all benefits based on Dr. Thompson's EME report.³⁰ On March 17, 2010, Dr. Bursell noted he disagreed with Dr. Thompson regarding causation of Olsen's injury. He concluded the work injury caused her current symptoms, stating: "Certainly the underlying degenerative changes are a factor in the ongoing symptoms, but if it were not for the injury she would likely be asymptomatic as she was prior to the injury."³¹ Dr. Bursell indicated Olsen was able to work with the pain and had returned to work, although she needed to be cautious.³²

²⁵ R. 0337.

²⁶ R. 0332.

²⁷ R. 0330.

²⁸ R. 0038-39.

²⁹ R. 0329; Hr'g Tr. 23:7-14, Aug. 16, 2011; R. 0232-33.

³⁰ R. 0020-21.

³¹ R. 0328.

³² R. 0328.

Olsen continued to have right knee pain and swelling, reporting only temporary relief from the steroid injections. On April 19, 2010, Dr. Bursell referred her to Daniel Harrah, M.D., for a surgical consultation.³³ On April 29, 2010, after an evaluation, Dr. Harrah diagnosed right knee patellofemoral arthrosis and recommended an arthroscopic evaluation.³⁴

On May 10, 2010, Olsen filed a workers' compensation claim. She did not specifically request any benefits, although she indicated she disagreed with Dr. Thompson's EME report.³⁵

On June 2, 2010, Dr. Harrah performed the first of a two-part procedure; specifically, a right knee arthroscopy, chondroplasty of the lateral tibial plateau, patella, and trochlea, and intercondylar notch articular cartilage biopsy. Dr. Harrah found patellar and trochlear defects. The cartilage biopsy was for an autologous cartilage implantation procedure to be done at a later date. During the first surgery, Dr. Harrah examined Olsen's knee arthroscopically, cleaned up any arthritis or torn cartilage around her knee joint, and then extracted some cartilage cells to grow new cartilage cells in a laboratory. In the second part of the procedure, Dr. Harrah would inject the new cartilage cells into her knee, which would grow, eliminating the need for a future knee replacement.³⁶

In June 2010, Olsen quit working for CBJ on account of disagreements over employment practices and because her knee pain was worsening.³⁷

On August 5, 2010, Dr. Harrah indicated that Olsen's preexisting condition caused her cartilage abnormality, however, the cause of her pain related entirely to her work injury. His opinion was based in part on Olsen's "twisting injury to the knee" and her

³³ R. 0300, 0298.

³⁴ R. 0298.

³⁵ R. 0040-41.

³⁶ R. 0453-54, 0464-67; Hr'g Tr. 19:4-24, Aug. 16, 2011.

³⁷ Hr'g Tr. 31:1-13, Aug. 16, 2011.

reporting “no symptoms whatsoever prior to her injury on 09/17/09.”³⁸ Dr. Harrah reiterated his recommendation for an implantation procedure, explaining conservative treatment had not been effective for alleviating Olsen’s pain and the procedure should obviate the need for joint replacement surgery.³⁹

On February 12, 2011, Olsen saw orthopedic surgeon John J. Lipon, D.O., for a board-ordered second independent medical evaluation (SIME). Dr. Lipon diagnosed right knee strain related to her work injury and right knee degenerative changes preexisting her work injury.⁴⁰ In Dr. Lipon’s opinion, the substantial cause of Olsen’s immediate right knee pain and swelling was her work-related strains, however, her current pain symptoms were unrelated to her work injury.

Specifically, he concluded that the substantial cause of Olsen’s current disability and need for medical treatment was “the normal progression” of the preexisting degenerative changes in her right knee.⁴¹ According to Dr. Lipon, her preexisting knee condition was not aggravated, accelerated, or “lit up” by the September 17, 2009, work injury or occupational duties.⁴² He stated: “Her underlying pre-existing condition[] w[as a] concurrent condition[] at the time of the industrial event, and [it] ha[s] continued to be symptomatic.”⁴³ In his view, Olsen’s work injury did not produce either a temporary or permanent change in her preexisting right knee degenerative changes and her complaints and symptoms “are related in whole” to the progressive right knee degenerative changes.⁴⁴ He continued: “Post employment, she most probably has had age related worsening of those pre-existing degenerative changes, with concurrent symptoms secondary to her occupational duties with the industrial claim date of

³⁸ R. 0446.

³⁹ R. 0446.

⁴⁰ R. 0717-18.

⁴¹ R. 0721.

⁴² R. 0717.

⁴³ R. 0720

⁴⁴ R. 0720-21.

September 17, 2009.”⁴⁵ According to Dr. Lipon, “[t]he right knee pain and swelling was most probably related to the strain from the work activities with the claim date of September 17, 2009, and her pre-existing degenerative changes of the right knee.”⁴⁶

With respect to Olsen’s work-related strains, Dr. Lipon thought she could return to work without restrictions, and her inability to return to work since December 2, 2009, was not the result of her work-related injuries. In his opinion, Olsen reached medical stability with respect to her work-related strains no later than December 2, 2009, and she had no permanent impairment attributable to the work injury.⁴⁷ Dr. Lipon declined to provide a PPI rating for Olsen’s current right knee condition because further treatment had been recommended.⁴⁸ Dr. Lipon based his opinion in part on Olsen’s records documenting knee complaints prior to her September 2009 injury.⁴⁹ He stated:

Ms. Olsen said that there was an industrial event that occurred in either April or May 2009 which caused her to have right knee pain . . . she stated her right knee never recovered.

. . . .

Considering the above information, she probably had symptomatic degenerative changes of the right knee which predated this industrial claim of September 17, 2009.”⁵⁰

He noted the September 17, 2009, work injury did not involve any direct trauma such as a fall.⁵¹ Dr. Lipon recommended no further treatment for the work injury and stated

⁴⁵ R. 0720.

⁴⁶ R. 0718.

⁴⁷ R. 0723-24.

⁴⁸ R. 0726.

⁴⁹ R. 0717, 0721.

⁵⁰ R. 0717.

⁵¹ R. 0717.

the implantation procedure⁵² recommended by Dr. Harrah was relatively new, not widely utilized, and not to be used for generalized osteoarthritis.⁵³ He stated if the procedure was done, the treatment would be unrelated to Olsen's work injury.

On April 25, 2011, Olsen amended her claim to include a request for TTD benefits from January 7, 2010, and ongoing, PPI, medical costs, reemployment benefits, and attorney fees and costs.⁵⁴

On June 15, 2011, Dr. Harrah was deposed and testified that the reason Olsen's arthritis became symptomatic was because of what she was doing at work.⁵⁵ He explained:

Most likely, and I can say with pretty much certainty, that at some point in her life that arthritis would have become symptomatic if she hadn't had this injury. But obviously, in this case, the arthritis was not symptomatic prior to her carrying the heavy bags up and down stairs at work.⁵⁶

He stated, "In her case, she was doing work that puts a lot of pressure on the knee. Lifting heavy bags certainly puts a lot of pressure on the joints, and therefore, it's more likely for arthritis to become symptomatic as a result of that."⁵⁷

In his opinion, "[Olsen's] need for medical treatment when it occurred was caused by the activity that she did at work."⁵⁸ He testified that if she had a relatively sedentary job where she sat in a chair most of the time and walked around a little bit but did not carry anything heavy, she may not have had symptoms for quite some

⁵² The board thought it was significant that Dr. Lipon misidentified the procedure as an "implementation" procedure. *See Olsen*, Bd. Dec. No. 11-0162 at 31. We note that recently, in *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139, 149 (Alaska 2013), the supreme court cautioned against placing undue emphasis on a witness saying "the magic word," when reviewing the evidence.

⁵³ R. 0722.

⁵⁴ R. 0744-45.

⁵⁵ Harrah Dep. 16:17-19, June 15, 2011.

⁵⁶ Harrah Dep. 16:19-24.

⁵⁷ Harrah Dep. 18:4-8.

⁵⁸ Harrah Dep. 17:3-5.

time.⁵⁹ Dr. Harrah agreed that if Olsen did not have arthritis in her knee, she would not have any pain or need for treatment. He stated that the underlying cause of her knee problem was her arthritis and the arthritis was not caused by the work injury.⁶⁰ He explained, however, that Olsen's need for medical treatment when it occurred was caused by the activity that she did at work.⁶¹

Dr. Harrah stated that the reason Olsen needed the recommended surgery was because of her pain, stating arthritis is not the same in everyone and pain is not necessarily related to the amount of arthritis.⁶² He testified that the amount of pressure she put on her arthritic knee caused the abnormal cartilage to break apart, causing Olsen's knee to go from asymptomatic to symptomatic.⁶³ Although Dr. Harrah based his opinion on the September 17, 2009, work injury and the fact Olsen was asymptomatic prior to this injury, he asserted that his opinion would not change even though Olsen's symptoms began while working for CBJ in April or May 2009, explaining that the work activity of lifting heavy bags put pressure on Olsen's knee, which in turn made her arthritis symptomatic.⁶⁴ He stated:

[T]here is obviously preexisting arthritis, which was not symptomatic since she reported no symptoms prior to the injury. So it's clear that the injury was sufficient to make her arthritis symptomatic. We know that the arthritis was preexisting because the injury that she had or just carrying things up and down the stairs with a minor little twisting to the knee, that's not sufficient to damage the cartilage. But if she had preexisting damage to the cartilage, it certainly would be sufficient to make it symptomatic.

When you have arthritis, you start out with degradation in the cartilage and initially it's not symptomatic. Once you get to a certain point, which is different in different patients, they -- the pain will become

⁵⁹ Harrah Dep. 18:9-12.

⁶⁰ Harrah Dep. 24:8-14.

⁶¹ Harrah Dep. 17:3-5.

⁶² Harrah Dep. 24:17-25:7.

⁶³ Harrah Dep. 25:14-26:1.

⁶⁴ Harrah Dep. 17:25-18:18.

symptomatic. I have seen people that have bone-on-bone arthritis that have very little pain, as an example.

So in her case, the reason that the arthritis became symptomatic was because of what she was doing at work.⁶⁵

Dr. Harrah recommended surgery because Olsen “had previously been through everything that we can offer her without doing surgery.”⁶⁶ Dr. Harrah thought that the implantation procedure was reasonable and necessary because it is the only procedure which would work for Olsen short of knee replacement surgery, which is not a good option for young patients. Dr. Harrah stated that studies have shown the procedure is long-lasting, durable and successful the vast majority of the time. Moreover, the procedure has been done for at least ten-to-fifteen years and has at least a decade of research showing it works, expressing the view that it is no longer considered an experimental procedure by orthopedic surgeons.⁶⁷

Olsen was prepared to undergo the implantation procedure in mid-2010; however, because CBJ controverted her claim, she did not go forward with the procedure.⁶⁸

At the hearing, Olsen testified that her right knee pain had become more severe since her June 2010 knee surgery. Although the damaged cartilage around her knee joint was cleaned up, she will continue to have severe knee pain until she undergoes the second part of the implantation procedure. Olsen’s right knee condition is not yet medically stable, however, it is anticipated that the recommended implantation procedure would return her to her pre-injury asymptomatic condition.⁶⁹ The board found Olsen credible.⁷⁰

⁶⁵ Harrah Dep. 15:25–16:19.

⁶⁶ Harrah Dep. 6:20-22.

⁶⁷ Harrah Dep. at 7:19–8:15.

⁶⁸ Hr’g Tr. 20:6-10, Aug. 16, 2011.

⁶⁹ Hr’g Tr. 20:14-22; Harrah Dep. 11:1–12:1, June 15, 2011.

⁷⁰ *See Olsen*, Bd. Dec. No. 11-0162 at 12.

Ultimately the board found that Olsen's work activities carrying heavy chemical loads and wet debris up stairs between March 2009, and September 2009, put pressure on her knee, causing it to become increasingly symptomatic, culminating on September 17, 2009, when she felt a strain, pop and then sharp pain through her right knee. It concluded the work-related incident was the substantial cause of Olsen's past need for medical treatment and current need for the implantation procedure.⁷¹

Olsen's attorney submitted two attorney fee affidavits. Total attorney fees and costs equal \$18,937.03. CBJ did not object to her attorney's hourly rate, hours, or costs. The board found that, although Olsen only prevailed on her claim for medical costs and attorney fees and costs, the time spent on the unsuccessful claims was *de minimis*. The primary issue in this case was whether Olsen's work injury was the substantial cause of medical treatment for her right knee, and especially whether the implantation procedure is compensable. She was successful on this main issue. A significant portion of these fees relate to Dr. Harrah's deposition, which was crucial to Olsen's successful claim for medical benefits.

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.⁷² 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.⁷³ We exercise our independent judgment when reviewing questions of law and procedure.⁷⁴ The board's credibility findings are binding on the commission.⁷⁵

⁷¹ See *Olsen*, Bd. Dec. No. 11-0162 at 12.

⁷² See, e.g., *Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁷³ *Wasser & Winters Co., Inc. v. Linke*, Alaska Workers' Comp. App. Comm'n Dec. No. 138, 5 (Sept. 7, 2010).

⁷⁴ See AS 23.30.128(b).

⁷⁵ See AS 23.30.128(b).

4. Discussion.

a. Applicable law.

In certain respects, the law applicable to Olsen's claim is well-settled. In cases like this one and *DeYonge*, for example, the board is to apply the three-step presumption of compensability analysis.⁷⁶ The first step in that analysis requires the employee to demonstrate a preliminary link between employment and injury. Some evidence that the claim arose out of employment is sufficient for that purpose.⁷⁷ As for the second step, "to rebut the presumption of compensability, the employer must produce substantial evidence that the injury was not work related."⁷⁸ Here, the parties conceded, the board decided, and we concur, that Olsen attached the presumption and CBJ rebutted it.⁷⁹ Furthermore, the parties, and the board,⁸⁰ do not dispute that, in the third step of the presumption of compensability analysis, the burden shifts to the employee to prove his or her claim by a preponderance of the evidence.⁸¹ The question then becomes: What showing is required of an employee to meet this burden in the context of an "aggravation" claim or a "combination" claim subject to the 2005 amendments to the Act?

b. *Did the work incidents aggravate, accelerate, or combine with Olsen's arthritis to bring about the need for the implantation procedure?*

As stated above, we believe this appeal presents the issue whether Olsen's work-related knee injury aggravated, accelerated, or combined with her preexisting arthritis to make medical treatment in the form of the implantation procedure compensable. The board, in its decision, never indicated whether it considered the incidents at work

⁷⁶ See *DeYonge*, 1 P.3d at 94-97.

⁷⁷ See *id.*, 1 P.3d at 94 (citing *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999)(footnote omitted)).

⁷⁸ *Id.*, 1 P.3d at 95 (citing *Tolbert*, 973 P.2d at 611).

⁷⁹ See *Olsen*, Bd. Dec. No. 11-0162 at 22-23.

⁸⁰ See *id.*, Bd. Dec. No. 11-0162 at 23.

⁸¹ See, e.g., *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 621 (Alaska 2011).

to have aggravated, accelerated,⁸² or combined with her preexisting arthritis to bring about the need for the procedure. For the reasons discussed in this and the next subsections of our opinion, we think it matters.

Preliminarily, we again note that prior to the work-related incidents, although she had arthritis, Olsen's knee was asymptomatic. Thereafter, her knee was symptomatic with pain. Given these facts, the work incidents do not appear to have accelerated the rate at which Olsen's underlying condition, her arthritis, developed, in the sense that her arthritis was getting worse at a faster pace than it would have without the work incidents. Similarly, once her pain symptom manifested itself, it is problematic to say that the work incidents accelerated the rate at which her pain developed, that is, made the pain worse than it would otherwise have been at any given time. However, the board, on remand, may ultimately conclude that Olsen's claim is rightfully considered an acceleration claim, in which case it needs to make the appropriate factual findings to support that conclusion.

Despite Dr. Lipon's opinion to the contrary, other available evidence suggests that 1) the work incidents aggravated Olsen's preexisting arthritis, resulting in knee pain, or 2) the work incidents combined with the preexisting arthritis, resulting in knee pain. According to Dr. Harrah's deposition testimony, "the injury was sufficient to make her arthritis symptomatic."⁸³ Furthermore, Dr. Thompson's EME report stated that "the right knee complaints . . . are largely due to the natural progression of the pre-existing disease with the work activities superimposed on the[] pre-existing condition[.]"⁸⁴ These expert opinions are some indication that the work incidents aggravated the underlying arthritic condition or they combined with the preexisting arthritis to produce a symptom

⁸² According to Webster's Third New International Dictionary (2002), "aggravate" means "to make worse, more serious, or more severe" and "accelerate" means "to hasten the ordinary progress or development of" something.

⁸³ Harrah Dep. 16:2-3, June 15, 2011.

⁸⁴ R. 0346.

not previously experienced by Olsen, namely knee pain.⁸⁵ Whatever the case might be, there was medical opinion that Olsen needed medical treatment in the form of the implantation procedure. However, it is not the commission's role to make the necessary findings that would support a decision for or against the compensability of that procedure. It is up to the board to make those findings and draw its own conclusions.

c. The law applicable to the claim, if it can be characterized as an "aggravation" claim.

As previously discussed, in connection with the 2005 amendments, AS 23.30.010(a) was enacted, modifying the standard for compensability. Under prior law, it sufficed for employment to be "a substantial factor" in bringing about the disability or need for medical treatment. Now, compensation or benefits are owed if employment was "the substantial cause" in bringing about the disability or need for medical treatment.

If Olsen's claim can be characterized as an "aggravation" claim, the analysis is less complex than it would be if it were characterized as a "combination" claim.⁸⁶ The starting point is the supreme court's statement, under former law, that "for an employee to establish an aggravation claim under workers' compensation law, the employment need only have been 'a substantial factor in bringing about the [need for medical treatment].'"⁸⁷ Here, it follows that, for Olsen to establish an aggravation claim under the 2005 amendments to the Act, she must show that her employment was the substantial cause in bringing about the need for treatment in the form of the implantation procedure. Second, AS 23.30.010(a) requires the board to evaluate the relative contribution of different causes of the need for medical treatment. Consequently, in the present context, we hold that the board needs to evaluate the

⁸⁵ We are mindful that the supreme court has cautioned that for purposes of a claim such as Olsen's, there is no distinction between the worsening of the underlying condition and the worsening of a symptom. *See, e.g., DeYonge*, 1 P.3d at 96.

⁸⁶ Unlike the analysis for a combination claim, we are unaware of any supplementary criteria when it comes to deciding whether Olsen's work incidents aggravated her preexisting arthritis, resulting in knee pain. *See* Part 4(d), *infra*.

⁸⁷ *DeYonge*, 1 P.3d at 96 (footnote omitted).

relative contribution of the two causes of Olsen's knee pain, the preexisting arthritis and the work incidents. The next step is for the board to apply the presumption of compensability analysis in these specific circumstances. Because there is consensus that Olsen attached the presumption and CBJ rebutted it, this task is made simpler. The only remaining question is whether Olsen can prove by a preponderance of the evidence that employment, that is, the work incidents, were the substantial cause in bringing about her need for the implantation procedure.

d. The law applicable to the claim, if it can be characterized as a "combination" claim.

For "combination" claims, *if* Olsen's claim is considered to be one, the supreme court introduced supplementary criteria in terms of the showing an employee must make to satisfy the burden of proof by a preponderance of the evidence. Under pre-amendment law, in order "[t]o prove that a work injury combined with a preexisting condition to produce a [need for medical treatment], the employee must show that '(1) the [need for medical treatment] would not have happened 'but-for' an injury sustained in the course and scope of employment; and (2) reasonable persons would regard the injury as a cause of the [need for medical treatment] and attach responsibility to it.'"⁸⁸ As discussed below, with some revision to reflect the 2005 amendments, including enactment of AS 23.30.010(a), the commission considers it incumbent on Olsen to satisfy these two supplementary criteria in order make the showing that will satisfy her burden of proof by a preponderance of the evidence for a "combination" claim.

As for the first criterion, the medical experts involved in treating and evaluating Olsen agreed that owing to the arthritis, she would probably experience knee pain at some future time. However, until the work incidents, she was asymptomatic. Thus, on this set of facts, although the implantation procedure would someday, in all probability, be necessary, it could be argued that Olsen's immediate need for that procedure would not have happened *but for* the work injury.

⁸⁸ *Thurston*, 217 P.3d at 828 (quoting *Doyon Universal Servs. v. Allen*, 999 P.2d 764, 770 (Alaska 2000)(*Allen*)).

Turning to the second criterion, given the plain language of AS 23.30.010(a),⁸⁹ it no longer suffices that employment be a substantial factor in bringing about the disability or need for medical treatment. To meet the standard for compensability found in subsection .010(a), the employee must show that reasonable persons would regard the injury as *the substantial cause* in bringing about the disability or need for medical treatment. Like the first criterion, it could be argued that reasonable persons would regard Olsen's work injury as the substantial cause in bringing about her need for the implantation procedure.

Neither the parties nor the board cited or referenced the discussions in *Thurston* or *Allen* of the supplementary showing required for "combination" claims quoted above. Under the circumstances, we are concerned that, having apparently never considered this legal standard in making its factual findings and formulating its legal conclusions, the board may have applied an incorrect legal standard when it evaluated Olsen's "combination" claim, *if* that is what it is. The supreme court instructs that the appropriate disposition of a claim where the board applied an incorrect legal standard is to remand the matter to the board.⁹⁰

e. In the proper context, the board must evaluate the relative contributions of the two causes in order to decide which was the substantial cause in bringing about her need for the implantation procedure.

The parties, to their credit, have simplified the issue on appeal. There is no dispute between them that Olsen had preexisting arthritis in her right knee and that her work activities resulted in her knee becoming symptomatic for the first time with pain. CBJ concedes that Olsen satisfied the first step in the presumption of compensability

⁸⁹ Interpretation of a statute starts with its plain language, although statutes are ultimately construed "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1258 (Alaska 2007) (quoting *Native Village of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999)).

⁹⁰ See *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1083 (Alaska 2008).

analysis and Olsen concedes that CBJ rebutted it. Therefore, it falls to Olsen to prove her claim by a preponderance of the evidence.

Summarizing, in order to prove to the board's satisfaction that treatment in the form of the implantation procedure is compensable, Olsen must demonstrate that the work incidents, not the preexisting arthritis, were the substantial cause in bringing about her need for treatment in that form. Finally, *if* Olsen's claim is an "aggravation" claim, it should be analyzed by the board in that context. *If* it is appropriate to characterize her claim as a "combination" claim, Olsen also needs to show that the need for medical treatment would not have happened but for the work incidents and reasonable persons would regard the injury as a cause in bringing about the need for that medical treatment and attach responsibility to it.

5. Conclusion.

For the foregoing reasons, we reverse the board's decision, vacate its order to pay benefits, and remand the matter back to the board with instructions to analyze and decide Olsen's claim in conformity with the guidelines provided in this decision.

Date: 21 August 2013 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Laurence Keyes, Chair

RECONSIDERATION

This is a decision on reconsideration issued under AS 23.30.128(f). Reconsideration of this decision is not available.

PETITION FOR REVIEW

This is a non-final decision as to the appeals commission's reversal and remand to the board. This non-final decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted.

A party may petition the Alaska Supreme Court for review of that portion of the commission's decision that is non-final. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.⁹¹ To see the date of distribution look at the box below.

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition the Alaska Supreme Court for review, 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/>

I certify that, with the exception of changes made in correction of typographical errors, this is a full and correct copy of the Decision on Reconsideration No. 185 issued in the matter of *City and Borough of Juneau vs. Calli E. Olsen*, AWCAC Appeal No. 12-001, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 21, 2013.

Date: August 22, 2013



Signed

K. Morrison, Deputy Commission Clerk

⁹¹ A party has 10 days after the distribution of a non-final decision of the commission to file a petition for review with the Alaska Supreme Court. If the commission's decision was distributed by mail only to a party, then three days are added to the 10 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.