Alaska Workers' Compensation Appeals Commission

City of Seward and Alaska Municipal League/Joint Insurance Association, Appellants, vs. Cuno Hansen, Appellee.	Final Decision Decision No. 146 January 21, 2011 AWCAC Appeal No. 10-012 AWCB Decision No. 10-0036 AWCB Case No. 200801640

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 10-0036, issued at Anchorage on February 17, 2010, by southcentral panel members Linda M. Cerro, Chair, James Fassler, Member for Labor, and Robert Weel, Member for Industry.

Appearances: Robert L. Griffin, Griffin & Smith, for appellants, City of Seward and Alaska Municipal League/Joint Insurance Association; Cuno Hansen, self-represented appellee.

Commission proceedings: Appeal, Motion for Stay, and Motion for Exemption from Requirement of Posting Supersedeas Bond Pursuant to Alaska Rules of Appellate Procedure 204(d) filed February 24, 2010; no opposition to motions filed; Order on Motion for Exemption from Posting Supersedeas Bond issued on March 9, 2010; hearing on motion for stay held March 31, 2010; Order on Motion for Stay on Appeal issued April 2, 2010; briefing completed August 3, 2010; oral argument held November 10, 2010.

Commissioners: Jim Robison, Philip Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

The appellee, Cuno Hansen (Hansen), had right medial unicompartmental knee replacement surgery performed in March 2008. At issue in this appeal is the compensability of that surgery. Following a hearing on January 27, 2010, the Alaska

Workers' Compensation Board (board) concluded that it was compensable.[1] We reverse.

2. Factual background and proceedings.

Hansen injured his right knee in January 1999, while moving furniture in his home, and on March 2, 1999, treated with Richard R. Strohmeyer, M.D. He reported to Dr. Strohmeyer that "the knee swelled a lot right away, he could not walk for two weeks, and the swelling lasted for a month. . . . The knee pops a lot, it hurts in the back, it feels unstable, and it feels like it moves around."[2] Following x-rays, Dr. Strohmeyer diagnosed anterior cruciate ligament (ACL) deficiency right knee and possible mild degenerative joint disease. After Hansen indicated he wanted to avoid surgery and rehabilitate the knee, Dr. Strohmeyer "explained the natural history of the problem and the fact that reconstruction may be necessary."[3]

On January 8, 2007, Hansen consulted Robert J. Hall, M.D.,[4] who recorded that his chief complaint was right knee pain and instability. Hansen provided a history that his knee had been unstable ever since he injured it in the incident Hansen reported to Dr. Strohmeyer. He reported episodes where his knee would give out, especially with pivoting activities. After x-rays were taken, Dr. Hall's diagnosis was ACL deficiency right knee. Dr. Hall "discussed with [Hansen] treatment alternatives of bracing versus reconstruction and the time required for postoperative rehabilitation. [Hansen] indicate[d] he most likely would like to have the knee reconstructed but would probably want to wait until fall."[5]

On January 27, 2008, Hansen had a full body computed tomography (CT) scan performed by his daughter at a hospital in California where she worked as a radiology

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[1] *See Cuno Hansen v. City of Seward, et al.*, Alaska Workers' Comp. Bd. Dec. No. 10-0036, 33 (Feb. 17, 2010)(*Hansen*).

[2] Appellants' Exc. 001.

[3] *Id.*

[4] *Id.* at 002-04.

[5] *Id.* at 003.

technician.[6] With respect to his knee, the findings were "moderate joint space narrowing involving the medial compartment of the right knee. On some images there is a suggestion of a bone-against-bone appearance consistent with moderately advanced degenerative joint disease."[7] On January 31, 2008, Hansen saw his family physician, Robert A. Reeg, M.D., regarding the findings on the CT scan, although Dr. Reeg did not have the result of the CT scan. Hansen reported to Dr. Reeg that he "has chronic right knee pain due to some significant degenerative changes that . . . he would like to discuss at a future visit."[8]

Hansen telephoned Dr. Reeg on February 6, 2008, to request an orthopedic referral to W. Laurence Wickler, D.O. Dr. Reeg noted that Hansen "has a history of significant right knee pain. The patient has not been formally evaluated for this, however, he did bring a full body CT scan in the other day which does reveal significant joint space disease in the right knee."[9] Hansen saw Dr. Wickler on February 22, 2008, at which time, according to Dr. Wickler's medical records, Hansen reported "having difficulty with his knee intermittently now for about ten years. Over the ensuing ten years, he has had increasing pain [and] swelling with activity[.]"[10] After a physical examination and review of x-rays, Dr. Wickler diagnosed "[s]evere osteoarthritis, medial compartment, [right] knee."[11] As treatment options, Dr. Wickler recommended "arthroscopic lavage [flushing of the knee] as opposed to total knee arthroplasty [knee replacement surgery]" and referred Hansen to Timothy S. Kavanaugh, M.D., for further recommendations.[12]

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6 Appellants' Exc. 005.

7 *Id.*

8 *Id.* at 006.

9 *Id.* at 012.

10 *Id.* at 013.

11 *Id.*

12 *Id.*

Hansen saw Dr. Kavanaugh on March 3, 2008.[13] Dr. Kavanaugh's chart note from that visit reads, in relevant part:

> [Hansen] presents today with a history of right knee pain that is fairly severe in nature. He attributes it all to an injury that occurred at work on 2/5/08. He apparently twisted the knee in a fall and he has had severe pain ever since. Prior to this, he states that he did have about a ten year history of knee pain, but it was nothing that he could not deal with with simple anti-inflammatories.
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> X-rays taken today . . . of the right knee, show fairly severe degenerative changes of the right knee, as evidenced by severe joint space narrowing, subchondral sclerosis and osteophyte formation. It appears isolated to the medial compartment.[14]
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> IMPRESSION: Osteoarthritis, right knee, medial compartment, with work-related acceleration of the condition.[15]

Hansen had filed a Report of Occupational Injury or Illness in which he claimed "he twisted his right knee on 2/5/08 while in the course and scope of his employment as a lineman for the City of Seward."[16] On March 11, 2008, Dr. Kavanaugh responded to a written inquiry from the adjuster for the appellant, the City of Seward (Seward), filling in a form indicating that the February 5, 2008, work incident was the substantial cause of Hansen's right knee condition and need for treatment.[17]

On March 14, 2008, John Ballard, M.D., performed an Employer's Medical Evaluation (EME) of Hansen.[18] In his report of the same date, Dr. Ballard noted "Dr. Kavanaugh's impression was osteoarthritis of the right medial compartment, with work-related acceleration of the condition."[19] Elsewhere in his report, he indicated: "Mr. Hansen denies previous injuries to his right knee. He states that ten years ago he

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13 Appellants' Exc. 015-17.

14 *Id.* at 015.

15 *Id.* at 016.

16 *Id.* at 018.

17 *Id.* at 018-19.

18 *Id.* at 020-28.

19 *Id.* at 022.

saw a doctor for his right knee which was painful and it was better after two days."[20] Dr. Ballard stated: "I believe the injury of February 5, 2008, was a right knee strain which has combined with his underlying arthritic condition to cause a temporary aggravation of his underlying medial joint arthritis."[21] Later in his report, Dr. Ballard opined:

> I believe that after four to six weeks and after appropriate treatment, any effects of the knee strain will have dissipated and the substantial cause of his right knee condition at that time will go back to his pre-existing osteoarthritis for which he had sought symptomatic treatment in the past, as documented in Dr. Wickler's note and also on x-rays taken in January 2007.[22]

Dr. Ballard concluded: "I do not believe the recommended [knee replacement] surgery by Dr. Kavanaugh is reasonable or necessary at this time. I would recommend, as it relates to the effects of this injury, that Mr. Hansen have a course of physical therapy over a three to four week period, along with a trial of anti-inflammatory medications and possibly viscosupplementation [gel injections to treat osteoarthritis]."[23]

On March 31, 2008, Dr. Kavanaugh performed medial unicompartmental knee replacement surgery on Hansen's right knee.[24]

Dr. Ballard performed a post-operative, follow-up EME on May 30, 2008.[25] In his report of even date, he concluded:

> I believe the substantial cause of [Hansen's] condition and complaints is the underlying osteoarthritis in his right knee. That osteoarthritis has been present for many years and also was giving him symptoms prior to [the February 5, 2008] incident. The osteoarthritis is the reason that he underwent his most recent surgery. His work injury of February, 5, 2008 is not the substantial cause of his current condition and complaints. The

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20 Appellants' Exc. 022.

21 *Id.* at 025.

22 *Id.* at 026.

23 *Id.* at 028.

24 *Id.* at 029-30.

25 *Id.* at 031-43.

> work injury would have been for a four to six-week period, after which time the effects of the strain would have resolved.[26]

Dr. Ballard concluded that "[t]he substantial cause of his need for treatment is the underlying medial osteoarthritis."[27]

A Second Independent Medical Evaluation (SIME) was performed by Thomas L. Gritzka, M.D., on October 30, 2008.[28] In his report, he noted that Hansen had pre-existing osteoarthritis in his right knee and opted for the surgery rather than conservative treatment consisting primarily of anti-inflammatory medications and physical therapy. It was Dr. Gritzka's opinion that, while the February 5, 2008, injury could "not be ruled out as the substantial cause in the aggravation . . . of the preexistent condition[,] . . . [Hansen] might have recovered without the need for surgery."[29] Dr. Gritzka was deposed on March 18, 2009. His testimony confirmed that Hansen had a pre-existing right knee condition, namely degenerative arthritis in the medial compartment.[30] In summation, Dr. Gritzka testified: "I think it is correct to say that the substantial cause for his need for treatment . . . the . . . compartmental knee replacement was the narrowing that he already had in his knee before . . . he had the [work-related] incident."[31]

Dr. Kavanaugh provided a signed written statement dated October 6, 2009,[32] which indicated that he had reviewed Hansen's pre-injury records that were previously unavailable to him. In the statement, Dr. Kavanaugh noted that Dr. Hall had reported on January 8, 2007, that Hansen had an unstable knee since he first injured it in 1999, with episodes where the knee gave out with pivots. He acknowledged being made aware of Dr. Gritzka's opinion, in his deposition, and Dr. Ballard's opinion, in his report,

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26 Appellants' Exc. 037.

27 *Id.* at 038.

28 *Id.* at 044-52.

29 *Id.* at 051.

30 *See* March 18, 2009, Gritzka Dep. 11:3-7.

31 March 18, 2009, Gritzka Dep. 21:20-25.

32 Appellants' Exc. 053-56.

that Hansen's February 5, 2008, injury was not the substantial cause of his need for knee replacement surgery.[33] As a result, Dr. Kavanaugh provided his opinion in terms of the substantial cause of Hansen's need for knee replacement surgery, stating:

> It is my opinion, to a reasonable degree of medical probability, based on the new records and deposition testimony which I have now had an opportunity to review, that [Hansen's] February 5, 2008 on-the-job injury was not the substantial cause of the employee's need for a right unicompartmental knee replacement, and the resultant disability and associated medical treatment. It is my opinion that Mr. Hansen already needed a medial unicompartmental right knee replacement at the time the January 27, 2008 CT scan was performed, which revealed bone-on-bone advanced degenerative joint disease of the knee. The February 5, 2008 on the job injury did *not* impact the timing of the need for the medial unicompartmental right knee replacement.[34]

The board held a hearing on Hansen's claim on January 27, 2010. Hansen testified that he slipped on February 5, 2008, and injured his previously injured right knee.[35] Dr. Ballard testified that the underlying arthritis was the substantial cause of Hansen's need for medial unicompartmental knee replacement surgery.[36] Seward appeals the board's conclusion that the surgery is compensable.[37]

3. Standard of review.

Pursuant to the provisions of AS 23.30.128(b), the commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the record as a whole. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[38] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation

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33 *See* Appellants' Exc. 055.

34 Appellants' Exc. 055.

35 *See* Jan. 27, 2010, Hr'g Tr. 13:14–14:4.

36 *Id.* at 39:11-14.

37 *See Hansen*, Bd. Dec. No. 10-0036 at 33.

38 *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Const. & Erectors,* 948 P.2d 454, 456 (Alaska 1997)) (internal quotation marks omitted).

of a reasonable mind is a question of law"[39] and therefore independently reviewed by the commission.[40] The commission exercises its independent judgment in reviewing questions of law.[41]

4. Discussion.

a. Applicable law.

This appeal presents a single issue: Was the February 5, 2008, work-related injury the substantial cause of Hansen's need for medical treatment in the form of medial unicompartmental right knee replacement surgery?[42] When the board addressed this issue, it applied the three-step presumption of compensability analysis provided for by statute and refined through case law.[43] Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable.[44] To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment.[45] If the employee establishes the link, the presumption may be overcome when the employer presents substantial evidence that the injury was not work-related.[46] Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's

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[39] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

[40] *See* AS 23.30.128(b).

[41] *Id*.

[42] Our decision that the knee surgery is not compensable moots the issue whether Seward must reimburse the Alaska Electrical Trust Fund, which paid for that procedure after the February 5, 2008, work-related injury.

[43] *See Hansen*, Bd. Dec. No. 10-0036 at 13-16.

[44] *See, e.g., Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996).

[45] *See, e.g., Tolbert v. Alascom, Inc.,* 973 P.2d 603, 610 (Alaska 1999).

[46] *See Tolbert*, 973 P.2d at 611 (explaining that to rebut the presumption "an employer must present substantial evidence that either '(1) provides an alternative explanation which, if accepted, would *exclude* work-related factors as a substantial cause of the disability; or (2) directly eliminates *any reasonable possibility* that employment was a factor in causing the disability.'") (italics in original, footnote omitted); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978).

rebuttal evidence, credibility of the parties and witnesses is not examined at this point.[47] If the board finds that the employer's evidence is sufficient, then the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence.[48] This means that the employee must "induce a belief" in the minds of the board members that the facts being asserted are probably true.[49] At this point, the board weighs the evidence, determines what inferences to draw from the evidence, and considers the question of credibility.

Notably, since the foregoing cases were decided, the Alaska Workers' Compensation Act (Act), AS 23.30.001 — AS 23.30.395, has been amended, most recently in 2005. The 2005 amendments to the Act apply to claims for injuries occurring on or after November 7, 2005, that is, injuries such as Hansen's, which occurred on February 5, 2008. Prior to the 2005 amendments, AS 23.30.010, in its entirety, read: "**Sec. 23.30.010. Coverage**. Compensation is payable under this chapter in respect of disability or death of an employee."

When amended in 2005, AS 23.30.010 was divided into subsections (a) and (b). AS 23.30.010(a) reads:

> **Sec. 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or 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 of the disability or death or the

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47 *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

48 *See Miller*, 577 P.2d at 1046.

49 *See Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

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

As explained below, of interest in this appeal are the last two sentences of AS 23.30.010(a). The Alaska Supreme Court has not, as yet, had occasion to interpret any part of subsection .010(a). Therefore, it is appropriate for the commission to interpret the statute and adopt the rule of law that is most persuasive in light of precedent, reason, and policy.[50] In doing so, we are mindful of the supreme court's directions that, when interpreting a statute, a court, or in this instance, the commission, should "consider its language, its purpose, and its legislative history, in an attempt to give effect to the legislature's intent."[51] With this guidance, we undertake to construe the last two sentences of AS 23.30.010(a). However, before the commission attempts that interpretive exercise, a brief digression is needed to provide context to our discussion.

For many years, the supreme court has routinely held "that workers' compensation liability is to be imposed 'whenever employment is established as *a* causal factor in the disability.' A 'causal factor' is a legal cause if 'it is *a* substantial factor in bringing about the harm' at issue."[52] The court has applied the same standard where, as here, employer liability for medical treatment was the issue.[53] In contrast, the language in the last two sentences of AS 23.30.010(a) provides that the board evaluate the relative contribution of different causes of the disability, death, or need for medical treatment, and award benefits if employment is, in relation to other causes,

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[50] *See Rivera v. Wal-Mart Stores, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 122, 7 (Dec. 15, 2009).

[51] *Ranney v. Whitewater Engineering*, 122 P.3d 214, 217 (Alaska 2005) (internal quotation marks and footnote omitted).

[52] *Doyon Universal Services v. Allen*, 999 P.2d 764, 770 (Alaska 2000) (citing and quoting *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 597-98 (Alaska 1979)) (italics in original).

[53] *See, e.g., Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495-96 (Alaska 2003).

"the substantial cause" of the disability, death, or need for medical treatment. In the process of interpreting AS 23.30.010(a), we must decide whether this language signals a legislatively-mandated standard for coverage under the Act that differs from the case law standard.[54]

Construing the last two sentences of AS 23.30.010(a), we first consider only the language in those sentences. The penultimate sentence indicates that the board is to determine "the relative contribution of different causes" of the disability, death, or need for medical treatment, that is, the statutory language provides that the board is to compare causes. Furthermore, the legislature's use of the word "the" in the phrase "the substantial cause," is suggestive of a limitation. Typically, the definite article "the" particularizes the subject which it precedes and "is a word of limitation as opposed to the indefinite or generalizing force of [the indefinite articles] 'a' or 'an.'"[55] Also, the legislature's inclusion of the phrase "in relation to other causes" in the last sentence, preceding the phrase "the substantial cause," imparts to us the concept that, when causes are compared, only one cause can be "the substantial cause." Thus, the language in the last two sentences of AS 23.30.010(a) connotes to the commission that, compensation or benefits are payable under the Act if, in comparing the relative contribution of different causes, the employment, in relation to other causes, is the substantial cause of the employee's disability, death, or in the particular circumstances of this case, the need for medical treatment in the form of knee replacement surgery.

Second, we are to consider the statute's purpose in construing it. Generally, the purpose of Senate Bill 130 (SB 130), the proposed legislation to amend the Act in 2005,

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[54] A principle of statutory construction provides that "pertinent court decisions may be consulted in the interpretation of statutes which restate decisional law." 2A Norman J. Singer, *Sutherland Statutory Construction* § 48:03 (6th ed. 2002). In this case, the statute does not restate decisional law; rather, it departs from it. We think the legislature's conscious decision to use the phrase "the substantial cause" in AS 23.30.010(a), instead of the decisional law phrase "a substantial factor," is significant in construing the statute. To us, it portends a change in the law. The legislative history of AS 23.30.010(a) supports this view. *See* discussion at 12-14, *infra*.

[55] *American Bus Ass'n v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000).

was to lessen the threat to jobs and workers' benefits caused by workers' compensation "insurance premiums increasing at intolerable rates."[56] In connection with a proposed amendment to the statutory definition of "injury" under the Act, AS 23.30.395(17), that particular amendment's purpose was identified as "decreasing the cost of insurance premiums."[57] Elsewhere, a member of the House stated that the high cost of workers' compensation insurance would be addressed by SB 130.[58] Although the 2005 amendments to the Act may have had other purposes, we conclude that keeping workers' compensation insurance premiums affordable for employers was among them. As a means to that end, as the ensuing discussion reveals, the legislature intended SB 130 to narrow the scope of coverage under the Act.

Third, we must review the legislative history of SB 130 to determine, with as much precision as possible, what the legislature intended to accomplish in amending AS 23.30.010 as it did. In the process, it is important to note that the legislature's ultimate inclusion of the phrase "the substantial cause" in the last sentence of AS 23.30.010(a) is tied to its consideration and abandonment of the aforementioned amendment of the definition of "injury" in AS 23.30.395(17). The proposed amendment to subsection .395(17) would have added the following sentence to the definition: "'injury' does not include aggravation, acceleration or combination with a pre-existing condition unless the employment is the major contributing cause of disability or need for medical treatment[.]"[59]

Near the end of the 2005 legislative session, on May 20, 2005, a House committee considered deleting the foregoing quoted language from the definition of injury in conjunction with including that language in the Act as a limitation on benefits

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[56] Appellants' Exc. 096, Senate Judiciary Committee Minutes at 4, April 5, 2005, summary by Paul Lisankie, director, Division of Workers' Compensation.

[57] *Id.* at 133, Senate Judiciary Committee Minutes at 16, April 7, 2005, remarks by Paul Lisankie, director, Division of Workers' Compensation.

[58] *See* Appellants' Exc. 161, House Special Session Tr. at 16-17, May 20, 2005, remarks by Rep. Jay Ramras.

[59] Appellants' Exc. 132-133, Senate Judiciary Committee Minutes at 15-16, April 7, 2005.

under AS 23.30.010.[60] That same day, May 20, 2005, the amendments in SB 130 were discussed during a special session of the House. Representative Eric Croft, who opposed SB 130, voiced his understanding that the standard embodied in the phrase "the substantial cause" was a compromise between two standards, the higher one being "the major contributing factor" and the lower being "a substantial factor."[61] "*The major* is the predominant one. . . . *A substantial* is anything that rises above sort of a minimum level. And *the substantial* has to fall somewhere in between."[62] Ironically, given the injury and issue in this case, Representative Jay Ramras, who supported SB 130, commented anecdotally:

> And when we get into . . . *a substantial cause* and *the substantial cause*, I've got a 19 year old healthy kid, had a snowboarding accident the year before he came to work for us. Had a slip and fall on my kitchen floor, $45,000 knee rebuild. And I was helpless, as an employer. And so, we just bellied-up and the cost of his knee replacement, you know, will be reflected in my workers' comp[ensation] rate for the ensuing three years.
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> Our workers' comp[ensation] is out of control. And this bill looks like it's a fix. It looks better. . . . But from what I know and what I've read and -- it looks like it's better. We've got to start down this road.[63]

The following day, May 21, 2005, a witness before the same House committee indicated that use of the word "the" in the phrase "the substantial cause," "constitute[d] a change from current law."[64] Representative Croft observed that the language "clearly contemplates that one cause will be compared to another" and the ensuing discussion confirmed to him that employment cannot be "the substantial cause"

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[60] *See* Appellants' Exc. 187-189, House Free Conference Committee Minutes at 20-22, May 20, 2005, statement of David D. Floerchinger, Assistant Attorney General.

[61] Appellants' Exc. 159, House Special Session Tr. at 6-7, May 20, 2005, remarks by Rep. Eric Croft.

[62] *Id.* (italics added).

[63] *Id.* at 161, House Special Session Tr. at 16-17, May 20, 2005, remarks by Rep. Jay Ramras (italics added).

[64] *Id.* at 206, House Free Conference Committee Minutes at 7, May 21, 2005, statement of Kristin S. Knudsen, Assistant Attorney General.

if something else is more of a cause.[65] He concluded "that when one cause is determined to be greater than the other, the other is not the substantial cause anymore."[66] The committee discussed the adoption of AS 23.30.010(a), with the last sentence of that subsection reading as it currently does in the statute as enacted.[67]

In view of the language in the last two sentences of AS 23.30.010(a), the purpose of SB 130, that is, to try to control workers' compensation insurance premiums, and the legislative history pertaining to the amendment of AS 23.30.010, which reflects a deliberate attempt to limit benefits, the commission concludes that the legislature's intent was to contract coverage under the Act. Accordingly, we interpret the last two sentences in AS 23.30.010(a) as requiring employment to be, more than any other cause, the substantial cause of the employee's disability, death, or need for medical treatment. It no longer suffices that employment is a substantial factor in bringing about the harm. Applying the foregoing interpretation of the statute in the context of this case, Seward can rebut the presumption of compensability with substantial evidence that the pre-existing osteoarthritis/degenerative joint disease in Hansen's knee, not the February 5, 2008, work injury, was the substantial cause of his need for medical treatment in the form of knee replacement surgery. To the extent that they are inconsistent with this conclusion, we distinguish the holdings in cases such as *Tolbert*,[68] insofar as the showing required to rebut the presumption of compensability is concerned.

b. Seward produced substantial evidence to rebut the presumption that the work-related injury was the substantial cause of Hansen's need for right knee replacement surgery.

Here, the board concluded that Seward, the employer, had not presented substantial evidence to rebut the presumption of compensability, and even if it did,

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[65] Appellants' Exc. 204, House Free Conference Committee Minutes at 5, May 21, 2005, remarks by Rep. Eric Croft.

[66] *Id*. at 207, House Free Conference Committee Minutes at 8.

[67] *See id*. at 200-209, House Free Conference Committee Minutes at 1-10.

[68] *See Tolbert*, 973 P.2d at 611 and n.46, *supra*.

Hansen met his burden of proof by a preponderance of the evidence.[69] For the following reasons, we conclude that the board erred in these respects.

There is substantial evidence, and the parties do not dispute, that Hansen had severe osteoarthritis/degenerative changes in his right knee that pre-existed the February 5, 2008, work-related injury. Hansen's chosen physicians, Drs. Wickler and Kavanaugh, acknowledged as much.[70] There is also consensus among the doctors that the work-related injury aggravated or accelerated that pre-existing condition.[71] There are even concessions by the EME physician, Dr. Ballard, and the SIME physician, Dr. Gritzka, that the work-related injury combined with the pre-existing osteoarthritis to produce the substantial cause of Hansen's need for *some* medical treatment.[72] But the precise issue before us is whether the work injury was the substantial cause of his need for knee replacement surgery.

With respect to this issue, there is no dispute that the presumption of compensability attached. On March 11, 2008, Dr. Kavanaugh affirmatively responded to the adjuster's inquiry whether the February 5, 2008, work incident was the substantial cause of an exacerbation of Hansen's right knee condition and need for treatment.[73] Moving to the second phase of the presumption analysis, for the reasons which follow, we find that Seward provided substantial evidence to rebut the presumption.

In the first place, prior to the 2005 amendment to AS 23.30.010(a), the Alaska Supreme Court had consistently held that the presumption of compensability is rebutted by presentation of a qualified expert's opinion that the claimant's work was probably

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[69] *See Hansen*, Bd. Dec. No. 10-0036 at 23 and 29. The board's analysis was conducted in the context of the work injury aggravating Hansen's pre-existing condition. AS 23.30.010(a), as we have interpreted it, would apply in that context.

[70] *See* Appellants' Exc. 013 and 015-16.

[71] *Id.* at 016, 025, 027, and 051.

[72] *Id.* at 026 and 051.

[73] *Id.* at 018.

not *a* substantial cause of his or her disability, death, or need for medical treatment.[74] In accordance with the standard set forth in AS 23.30.010(a), as amended, Drs. Ballard and Gritzka both testified, the former at hearing and the latter in deposition, that the February 5, 2008, work-related injury was not *the* substantial cause of Hansen's need for knee replacement surgery. Dr. Gritzka stated that "the substantial cause for [Hansen's] need for . . . compartmental knee replacement was the narrowing that he already had in his knee[.]"[75] At hearing Dr. Ballard was asked: "What was the substantial cause of [Hansen's] need for surgery?" He replied: "[T]he underlying arthritis [in] the medial compartment of the knee."[76] Considering this evidence in isolation, as we must, we find that these qualified experts' opinions satisfy the standard for rebutting the presumption of compensability according to our interpretation of AS 23.30.010(a).[77]

Nevertheless, the board cites case law that it will not rely on inconclusive medical evidence or speculation to rebut the presumption.[78] We infer from these citations that the board found the testimony of Drs. Ballard and Gritzka inconclusive or speculative. It is neither. Their evidence, as expressed in their testimony, is both specific and conclusive. It speaks authoritatively to the very narrow issue we have before us, whether the substantial cause of Hansen's need for knee replacement surgery is the work-related injury. Other considerations discussed by the board, for example, Hansen's inability to work following the February 5, 2008, incident and the absence of

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[74] *See, e.g., Cowen v. Wal-Mart,* 93 P.3d 420, 424-25 (Alaska 2004); *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003).

[75] March 18, 2009, Gritzka Dep. 21:21-24.

[76] Jan. 27, 2010, Hr'g Tr. 39:11-14.

[77] *See* discussion at 10-14, *supra*.

[78] *See Hansen*, Bd. Dec. No. 10-0036 at 16 (citing *Black v. Universal Services, Inc.*, 627 P.2d 1073 (Alaska 1981) and *Wollaston v. Schroeder Cutting, Inc.*, 42 P.3d 1065, 1066 (Alaska 2002)).

any treatment for his right knee between 1999 and 2008,[79] are not particularly probative of that issue.

c. Hansen did not meet his burden of proof by a preponderance of the evidence.

Case law is clear, once the presumption is rebutted, an employee must prove his or her claim by a preponderance of the evidence. The board concluded that Hansen met this burden. We do not agree.

Viewing the record as a whole, the clearest evidence whether or not Hansen's work-related injury was the substantial cause of his need for knee replacement surgery consists of the expert medical opinions of Drs. Ballard, Gritzka, and Kavanaugh. The commission has already quoted the opinions of Drs. Gritzka and Ballard that the work injury was *not* the substantial cause. The limited evidence available that the work injury *was* the substantial cause consists of Dr. Kavanaugh's initial opinion in that respect, as elicited by the adjuster on a form submitted to him.[80] Subsequently, Dr. Kavanaugh retracted that opinion, stating unequivocally that "[Hansen's] February 5, 2008 on-the-job injury was not the substantial cause of the employee's need for a right unicompartmental knee replacement, and the resultant disability and associated medical treatment."[81]

The board's view that the evidence provided by Drs. Ballard and Gritzka is inconclusive and speculative has already been addressed. That view is unfounded. As for Dr. Kavanaugh's evidence, the board discounted his revised opinion, that the work injury was not the substantial cause, because it was elicited in a statement prepared by counsel for Seward.[82] In taking that position, the board overlooks that the only evidence the work injury was the substantial cause was elicited in a statement from Dr. Kavanaugh prepared by the adjuster for Seward. The board's analysis lacks consistency. Moreover, we do not share the board's cynicism that Dr. Kavanaugh's

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79 *See Hansen*, Bd. Dec. No. 10-0036 at 25.

80 *See* Appellants' Exc. 018.

81 Appellants' Exc. 055.

82 *See Hansen*, Bd. Dec. No. 10-0036 at 16.

professionalism and integrity can be so easily influenced. Dr. Kavanaugh's later statement explained that he changed his opinion based on a review of Hansen's medical history and records, which he had not done prior to performing the surgery. The commission believes this is a reasonable basis for him to change his opinion.

In summary, we find substantial evidence is lacking to support the board's conclusion that Hansen proved, by a preponderance of the evidence, that the work injury is the substantial cause of his need for knee replacement surgery. The expert opinions of Drs. Ballard, Gritzka, and Kavanaugh indicate the February 5, 2008, work injury is not the substantial cause.

5. Conclusion.

We REVERSE the board's decision in which it concluded that Hansen's knee replacement surgery is compensable.

Date: *21 January 2011* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission reversed the board's decision in which it concluded the employee's knee replacement surgery is compensable. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) 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 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 and the workers' compensation board are not parties.

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

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

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the Final Decision No. 146 issued in the matter of *City of Seward v. Hansen,* AWCAC Appeal No. 10-012, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 21, 2011.

Date: *January 25, 2011*

Signed
B. Ward, Appeals Commission Clerk