

Alaska Workers' Compensation Appeals Commission

Heidi M. Forster (f/k/a Kelley),
Appellant,

vs.

State of Alaska,
Appellee.

Final Decision

Decision No. 216 October 5, 2015

AWCAC Appeal No. 14-030
AWCB Decision No. 14-0146
AWCB Case Nos. 201003982M,
200912215, 201014356, 201014357,
and 201014358

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 14-0146, issued at Anchorage, Alaska, on November 3, 2014, by southcentral panel members Linda M. Cerro, Chair, Rick Traini, Member for Labor, and Michael O'Connor, Member for Industry.

Appearances: Heidi M. Forster (f/k/a Kelley), self-represented appellant; Craig W. Richards, Attorney General, and M. David Rhodes, Assistant Attorney General, for appellee, State of Alaska.

Commission proceedings: Appeal filed November 28, 2014; briefing completed June 15, 2015; oral argument was not requested.

Commissioners: James N. Rhodes, Philip E. Ulmer, Andrew M. Hemenway, Chair.

By: Andrew M. Hemenway, Chair.

1. Introduction.

Heidi M. Forster appeals from a decision of the Alaska Workers' Compensation Board (board) denying her claim for compensation for a disabling condition allegedly resulting from chemical exposure while employed at the Spring Creek Correctional Center (SCCC) by the Department of Corrections.¹ Ms. Forster argued to the board that

¹ *Heidi M. Forster v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 14-0146 (November 3, 2014). For purposes of this decision, we refer to the opposing party as the Department of Corrections (the state agency by which Ms. Forster was employed).

exposure to ethylene glycol fumes from a spill of Dowtherm SR-1 (Dowtherm), an anti-freeze, was the substantial cause of a condition she has which is known as Multiple Chemical Sensitivity (MCS) and which has rendered her disabled.² MCS, as described by Ms. Forster and in exhibits she submitted, is a condition in which an individual has acute reactions to a wide variety of chemicals and substances as a result of exposure to chemicals or other environmental pollutants.³

The case was submitted to the board on the written record, which included deposition testimony from Ms. Forster,⁴ three co-workers present at the time of the spill (Mary Irland, R.N., Jane Schutter, R.N., and Dorothy Locke, R.N.),⁵ her immediate supervisor (David Norcross, P.A.),⁶ and Brent Ursel, P.A.⁷ (who initially diagnosed Ms. Forster with MCS). In addition, Ms. Forster supported her claim with a medical report and deposition testimony from her attending physician, Michael Lax, M.D.,⁸ and

² Ms. Forster filed a 100-page hearing brief. R. 551-650. She concluded, “the bottom line with this case, is that we were exposed . . . to a known sensitizer, Glycol. . . . My main injury is Chemical Intolerance/MCS. . . .” R. 649.

³ *See, e.g.*, R. 649 (Hearing Brief, p. 99). One medical dictionary defines multiple chemical sensitivity syndrome as:

The association of multiple physical symptoms with prolonged or recurrent exposures to low levels of environmental pollutants. Clinical research has failed to establish the precise nature of the syndrome, its causes, the functional limitations it may cause, or the best course of treatment. Many hypotheses have been suggested. . . . None of these hypotheses has been definitively proven.

Taber’s Cyclopedic Medical Dictionary, p. 1505 (21st ed. 2009).

⁴ R. 44-142 (July 31, 2012).

⁵ R. 10814-10869 (Irland, April 11, 2011), 10870-10977 (Schutter, June 1, 2011), 10779-10813 (Locke, April 18, 2011).

⁶ R. 460-463 (June 3, 2014).

⁷ R. 145-164 (October 24, 2012).

⁸ R. 230-309 (April 29, 2013), 2290-2292 (December 19, 2012).

with expert medical opinions from Kaye Kilburn, M.D.,⁹ and Grace Ziem, M.D.¹⁰ In opposition, the Department of Corrections submitted an expert medical opinion from Dennis Stumpp, M.D.¹¹ The record also includes the opinion of the board's medical expert, Edward Holmes, M.D.¹² The parties also submitted documentary evidence intended to support their respective positions regarding the causal relationship between chemical exposure in the workplace and a diagnosis of MCS.¹³

The board concluded that chemical exposure at her workplace was not the substantial cause of Ms. Forster's disability.¹⁴ On appeal, Ms. Forster argues that the board erred in reaching that conclusion.

*2. Factual background and proceedings.*¹⁵

Heidi (Kelley) Forster was employed as a registered nurse for the Department of Corrections at SCCC in Seward.¹⁶ Ms. Forster reported experiencing physiological symptoms (*e.g.*, burning eyes, nausea, irritated throat, fatigue, and headaches)

⁹ R. 1963-1971.

¹⁰ R. 2078-2084. *See also* R. 2109-2111.

¹¹ R. 3136-3156.

¹² R. 803-845.

¹³ Ms. Forster initially submitted 678 exhibits. After objection by the Department of Corrections she withdrew 305 of them. The remaining 373 exhibits were all admitted. *Heidi M. Forster v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 14-0111 (August 8, 2014) R. 1129-1137. We have reviewed all of her exhibits admitted into evidence. To the extent they are not duplicative of documents that may be found elsewhere in the record, those exhibits vary widely in terms of their relevance and probative value. *See generally*, R. 1028-1044. Many of them bear handwritten interlineations by Ms. Forster commenting on the exhibit's contents. Ms. Forster's comments are not evidence. In addition to exhibits submitted with its hearing brief (largely duplicative of documents found elsewhere in the record), the Department of Corrections submitted two position statements by professional associations addressing MCS. *See* R. 720-975.1 (submitted with hearing brief), 3163-3171.

¹⁴ *Forster*, p. 45.

¹⁵ We make no factual findings. We state the facts as set forth in the board's decision, except as otherwise noted.

¹⁶ *Heidi M. Forster v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 14-0146 at p. 2 (No. 1) (November 3, 2014) (*Forster*).

following a series of chemical exposures in the workplace between August 11, 2009, and February 8, 2010.¹⁷

(a) Workplace Chemical Exposures.

(i) Ethylene Glycol (August, 2009).

On Monday, August 10, 2009, a spill occurred during scheduled maintenance of the SCCC boiler system.¹⁸ SCCC maintenance personnel drained several hundred gallons of liquid, consisting of 62% Dowtherm (an ethylene glycol mixture¹⁹) and 38% water,²⁰ from the main SCCC boiler system. After the system was successfully drained, the lines were flushed with cold water to remove all residual glycols. During the flushing process, it was discovered that maintenance personnel had inadvertently left a drain valve open, causing a release of liquids into an overhead crawlspace directly above the patient treatment station in SCCC's medical wing. The total volume of liquid released has been estimated to be from as low as five or ten gallons to as high as 75 gallons.²¹ The liquids migrated into and through ceiling tiles and down walls, subsequently dripping onto a workstation and the floor. Ms. Forster, whose office was in the path of the spill,²² was not at the facility at the time of the spill. She did not

¹⁷ *Forster*, pp. 2, 6-7 (Nos. 1, 17, 20).

¹⁸ Except as otherwise noted, facts stated in this paragraph are set forth in *Forster*, p. 6 (No. 16).

¹⁹ According to Ms. Forster, Dowtherm is 95.4% ethylene glycol, and 4.6% corrosion inhibitors. *See* Appellant's Brief, p. 14.

²⁰ *See Forster*, pp. 8-9 (Nos. 24, 28).

²¹ *See Forster*, pp. 8-9 (Nos. 25, 27).

²² There does not appear to be any dispute about this fact. Ms. Forster's co-workers, who observed the spill, testified that liquid from the spill in one location came out of the ceiling near her office and flowed under the door into the office. R. 10832 (M. Irland), 10918 (J. Schutter). The Department of Corrections did not elicit any testimony or present any evidence to the contrary.

participate in the immediate clean-up on that date.²³ She returned to work the following day, Tuesday, August 11, 2009, and worked until Thursday, August 13, 2009.

From Thursday, August 13, 2009, through Monday, August 17, 2009, Ms. Forster was examined or treated by several medical providers regarding symptoms she attributed to fumes from the August 10, 2009, spill.²⁴ On Monday afternoon, August 17, 2009, Ms. Forster saw physician's assistant (P.A.) Brent Ursel.²⁵ P.A. Ursel ordered an arterial blood gas test "for glycol antifreeze exposure[.]" After her regular days off (Friday through Sunday) and taking three additional days off (Monday, Tuesday, and Wednesday), Ms. Forster again returned to work on Thursday, August 20, 2009.²⁶ There were leaks of Dowfrost 40 (propylene glycol), which had been

²³ *Forster*, p. 9 (No. 25). The board did not make any specific findings regarding the manner in which the cleanup was conducted, or when it occurred. However, evidence in the record indicates that on the date of the spill, maintenance staff initially sucked up about 5-6 gallons of liquid from the floor using a wet vac, and used kitty litter and sawdust to absorb any remaining pools. *See, e.g.*, R. 2413, 9542 ("We sucked up the spilled diluted water/glycol mix with a 12 gallon wet vac.") (C. Higbee). Thereafter, staff used absorbent pads and rags for additional cleanup. *See, e.g.*, R. 2413. One witness testified the initial cleanup was ongoing about three hours after the spill. R. 10833 (M. Irland). About 50 square feet of liquid-saturated ceiling tiles, in six different areas, was removed two or three days later. *See, e.g.*, R. 2413, R. 10837 (M. Irland). On August 17, 2009, a liquid-saturated work station and baseboard was removed. *See, e.g.*, R. 2413, 9324 (AKOSH Inspection Narrative, October 29, 2009) (C. Roy). About two weeks later, ducts and other areas in the crawlspace (reportedly odor free, at the time) were vacuumed. *See, e.g.*, R. 9071, 9073 (H. Forster Memo, September 2, 2009), 9074 (email, J. Blevins to D. Locke, September 2, 2009).

²⁴ *See Forster*, pp. 6-7 (Nos. 17, 20).

²⁵ *Forster*, p. 7 (No. 21).

²⁶ *See Forster*, pp. 6, 7 (Nos. 18, 22); R. 558.

introduced into the HVACC system to replace the Dowtherm, from the HVACC system on August 20 and 22, 2009 (a regular day off for Ms. Forster).²⁷

On August 21, 2009, in response to the August 10, 2009, spill, Nortech Environmental Engineering, Health & Safety (Nortech) performed an Indoor Air Quality Survey and investigation.²⁸ Nortech concluded that contamination on the walls was superficial, migrating down the outside of painted blocks, and that the concrete wall cavities did not appear to be impacted. It found that no additional materials were impacted or required removal or additional cleanup efforts.

Nortech collected air samples for ethylene glycol analysis in ten locations, including treatment rooms, offices, the corridor, and overhead crawlspaces.²⁹ Airborne concentrations of ethylene glycol were not detected at nine of the ten sampling locations. At one location, the main patient treatment room, ethylene glycol was present at a level of less than two percent of the industry standard recommended ceiling limit for exposure.

(ii) X-Ray Chemicals (September, 2009; January 14, 2010).

In mid-September 2009, chemicals utilized in the x-ray lab at SCCC were reportedly spilled.³⁰ A second spill of x-ray chemicals occurred on January 14, 2010.³¹

²⁷ Ms. Forster asserted before the board that two additional leaks had occurred. R. 558. She and her co-workers testified as to one or two additional spills. *See* R. 82 (H. Forster), 10926-10929 (J. Schutter), 10837-10838 (M. Irland), 10792-10793 (D. Locke). Although the board made no findings with respect to whether additional leaks occurred, it does not appear that the Department of Corrections contested their occurrence, as there is no reference to them in either the Department of Corrections' hearing brief or its brief on appeal. The undisputed evidence is that maintenance staff reported spills of Dowfrost 40 (Dowfrost), which had been introduced into the HVACC system after the Dowtherm was drained out, on August 20 and 22, 2009. R. 9486, 9553, 9558. The first leak was estimated at one gallon. *See* R. 9553. The later spill, estimated to affect only 100 square feet, was estimated at 25 gallons, and reportedly occurred in the SCCC kitchen. *See* R. 9558.

²⁸ Facts stated in this paragraph are set forth in *Forster*, pp. 7-8 (No. 23).

²⁹ Facts stated in this paragraph are set forth in *Forster*, p. 9 (No. 26).

³⁰ *Forster*, pp. 9-10 (No. 30).

³¹ *Forster*, p. 10 (No. 33).

Laboratory analysis of air samples taken on September 30, 2009, showed airborne concentrations of chemicals used in x-ray development to be below detectable levels.³²

Ms. Forster did not report an injury from the September exposure,³³ but she was seen at First Care on September 17, 2009.³⁴

(iii) Diamond Germicide (January, 2010).

On January 21, 2010, Ms. Forster reported experiencing burning nose and irritated eyes and throat in reaction to the use of Diamond Germicide, a chemical cleaner, in the nearby prison pharmacy.³⁵ She visited Brent Ursel, P.A., who diagnosed "multiple chemical sensitivity syndrome" (MCS).³⁶

(iv) Unspecified Chemical Exposure (February, 2010).

On February 5 and 8, 2010, Ms. Forster complained of symptoms resulting from an unspecified exposure at work,³⁷ and she expressed a belief that there may have been another release of ethylene glycol.³⁸

(b) Disabling Conditions.

Ms. Forster did not return to work for the Department of Corrections after February 11, 2010.³⁹ Ms. Forster contends she has disabling reactions to a myriad of common chemicals, and to electro-magnetic fields created by computers, cellphones, and landline telephones, in the form of eye pain, swelling eyes, blurry vision, raspy

³² See *Forster*, p. 10 (No. 31).

³³ See *Forster*, p. 10 (No. 32).

³⁴ See *Id.*

³⁵ *Forster*, p. 10 (No. 35). Ms. Forster filed a report of injury regarding this incident, which was filed as Alaska Workers' Comp. Bd. Case No. 201014357 (January 21, 2010).

³⁶ *Forster*, pp. 10-11 (No. 36).

³⁷ *Forster*, p. 11 (No. 39).

³⁸ *Forster*, p. 11 (No. 40).

³⁹ See *Forster*, pp. 12-13, 14 (Nos. 43-45, 51).

throat, burning lungs, memory and concentration problems, fatigue, right arm and leg weakness, hair thinning, stuffy nose, and skin abscesses or infections.⁴⁰

3. *Standard of review.*

The board's findings regarding the weight to be accorded to witnesses' testimony, including medical testimony and reports, is conclusive, even if the evidence is conflicting or susceptible to contrary conclusions.⁴¹ We must uphold the board's factual findings if they are supported by substantial evidence in light of the whole record.⁴²

On questions of law, we do not defer to the board's conclusions. We exercise our independent judgment.⁴³

4. *Discussion.*

Ms. Forster submitted a lengthy hearing brief.⁴⁴ In it, she characterized ethylene glycol as a sensitizer⁴⁵ and asserted that exposure to ethylene glycol fumes had induced

⁴⁰ *Forster*, p. 3 (No. 8).

⁴¹ AS 23.30.122.

⁴² AS 23.30.128(b).

⁴³ AS 23.30.128(b).

⁴⁴ R. 551-650.

⁴⁵ *See, e.g.*, Appellant's Brief p. 19, citing Exc. 1731 (Exh. 352, R. 9846). The document cited for this characterization is the Centers for Disease Control and Prevention's pocket guide to ethylene glycol, which states that one of the symptoms of the chemical is "skin sensitization[.]" One medical dictionary provides this definition of "sensitizer": "In allergy and dermatology, a substance that makes the susceptible individual react to the same or other irritants." *Taber's Cyclopedic Medical Dictionary*, p. 2099 (21st ed. 2009). Ms. Forster submitted an exhibit providing a definition similar to the medical dictionary's. *See* R. 9849 (Exh. 355).

in her in a condition known as Multiple Chemical Sensitivity (MCS) (or another name)⁴⁶ that has left her completely disabled due to her reaction to a wide variety of substances.⁴⁷

In its decision, the board appears to have accepted that Ms. Forster is disabled by her condition (without characterizing that condition as MCS).⁴⁸ However, it concluded that her workplace exposure to chemicals was not the substantial cause of that condition.⁴⁹

Ms. Forster's brief on appeal raises a plethora of objections to the board's decision. Her objections pertain to the board's conclusion that chemical exposure in the workplace was not the substantial cause of Ms. Forster's disabling condition. We are

⁴⁶ Ms. Forster stated she preferred to use the term Chemical Injury to describe this condition. R. 567. More formally, the condition has been identified by a variety of other names, including idiopathic environmental intolerances, environmental illness, and clinical ecological illness, among others. *See, e.g.*, R. 3169 (Council on Scientific Affairs, American Medical Association) (1992); 3163 (AAAAI Board of Directors Position Statement 35). Exhibit 71, submitted by Ms. Forster, includes a list of nineteen alternative names proposed for MCS. R. 6791.

⁴⁷ *See* R. 567, 601 ("we breathed glycol, a sensitizer. . . . And . . . part of what happened to me, is that I am sensitized to everything."), 606.

⁴⁸ *See Forster*, p. 45 ("[Ms. Forster] appears incapable of returning to employment at this time. . . ."). It does not appear that the Department of Corrections contested the existence of a disabling condition due to her reaction to chemicals (if not electromagnetic forces). The Department of Corrections' hearing brief does not assert that Ms. Forster is not disabled due to her reaction to chemicals. *See* R. 700-719. Prior to the hearing, the Department of Corrections had offered her an accommodation for a disability under the Americans With Disabilities Act. R. 10639-10649 (Exh. 492-494). *See also, e.g.*, R. 10642-10643, 10644-10653 (Exh. 494, 495); R. 3152 ("Ms. [Forster] probably meets diagnostic criteria for MCS as proposed by Cullen. . . .") (Dr. Stumpp); R. 807 ("I believe Ms. Forster's symptoms are very real and that she has a real impairment; I do not believe she is 'making this up.'") (Dr. Holmes).

⁴⁹ *Id.*

able to discern three primary reasons⁵⁰ why, as set forth in her brief, Ms. Forster believes that the board erred in ruling that chemical exposure in the workplace was not the substantial cause of her disabling condition: (1) the board characterized the initial spill as a small, transient release of highly diluted Dowtherm SR-1 liquid, when according to Ms. Forster it was a large spill that included not only Dowtherm, but also TSP (trisodium phosphate) and caustic soda (sodium hydroxide), and which resulted in a prolonged exposure to ethylene glycol vapor;⁵¹ (2) the board erred in giving more weight to the opinions of Drs. Stumpp and Holmes (and other doctors) than to the opinions of Drs. Kilburn, Ziem, and Lax (and other doctors),⁵² and in disregarding evidence that MCS is a diagnosis that has been accepted in many jurisdictions;⁵³ and (3) the board wrongly found that her disability was the result of a pre-existing mental health condition.⁵⁴

a. Ethylene Glycol Spill.

The board found that Nortech's assessment that the August 10, 2009, spill involved the release of up to 10 gallons was more reliable than the estimate of two nurses present at the time of the spill,⁵⁵ and it characterized the spill as involving

⁵⁰ In addition to these main points, and apart from myriad tangential objections, Ms. Forster argues that the board could not have reviewed the entire record in the seven business days from the date the record closed (September 23, 2014) to the date the decision was issued (October 1, 2014). *See*, Statement of Grounds, p. 2; Appellant's Brief, p. 1. However, Ms. Forster's evidence was submitted to the board on June 16, 2014. *Forster*, Bd. Dec. No. 14-0111 at p. 2 (No. 3). The board had sufficient time to review all of that evidence, and there is no evidence that it did not. We find no merit in this contention.

Ms. Forster also argues that the board was biased. Her argument is based on her disagreement with the board's findings and analysis. We see no evidence of bias.

⁵¹ Statement of Grounds, pp. 5-8; Appellant's Brief, pp. 4-6, 8-9, 12-13, 14-21, 37-48.

⁵² Appellant's Brief, pp. 20-21, 24-37.

⁵³ Appellant's Brief, pp. 13-14, 37-48.

⁵⁴ Statement of Grounds, pp. 8-11; Appellant's Brief, pp. 3-4, 6-8, 19-24.

⁵⁵ *Forster*, p. 9 (No. 27).

“hyper-diluted ethylene glycol” at or below room temperature.⁵⁶ Ms. Forster argues that the board understated and minimized the scope of the spill. She asserts that the board’s findings do not reflect (1) the actual size of the spill, (2) the quantity of Dowtherm involved, (3) the additional presence in the spill of TSP and caustic soda, and (4) the release of ethylene glycol vapor.⁵⁷

(1) Size of Spill.

Ms. Forster argues that the board erred by discrediting the testimony of two nurses present at the time of the spill who estimated that the spill involved a release of 50-75 gallons of liquid.⁵⁸ She adds that the amount of saturated ceiling tiles (50 square feet, according to the Nortech report),⁵⁹ the distance the liquid travelled,⁶⁰ and other physical evidence is inconsistent with the size of the spill as found by the board.⁶¹ She asserts that the Nortech assessor did not interview either of the nurses who observed the spill, and that it unquestioningly accepted Mr. Norcross’s and other supervisory personnel’s report of the size of the spill.⁶²

The board noted the nurses’ estimates, but found the post-spill estimate of Nortech (consistent with the testimony of Mr. Norcross) more reliable.⁶³ The board’s

⁵⁶ *Forster*, p. 9 (No. 28).

⁵⁷ Statement of Grounds, p. 6; Appellant’s Brief, pp. 5-6, 8-9, 12-13.

⁵⁸ Appellant’s Brief, p. 8.

⁵⁹ R. 2415.

⁶⁰ According to the Nortech report, the spill originated at an open valve “in the overhead crawlspace, directly over the patient treatment station, within the medical wing.” R. 2410. From there, Nortech reported, “[t]he liquids migrated into and through ceiling tiles, subsequently dripping onto a workstation.” *Id.* In addition, according to Nortech, liquid “migrated down the walls”. R. 2415. *See also* R. 9250 (“My understanding [is] that the spill was estimated at 5 gallons, but [that] does not appear accurate given the distance that it travelled.”) (H. Cavitt, September 1, 2009).

⁶¹ *See* Appellant’s Brief, p. 8, *citing* Exc. 843-895, 1995, 2018, 2036-2037, R. 572, 595, 613-614, 9413-9472.

⁶² *See* Exc. 2018, 2036-2037 (Forster Hearing Brief, pp. 45, 63-64), R. 595, 613-614.

⁶³ *Forster*, pp. 8-9 (Nos. 25, 27).

decision to give less weight to the nurses' testimony than to the Nortech report and Mr. Norcross's testimony is conclusive.⁶⁴ However, there is substantial evidence that the actual amount of liquid spilled may have been as much as 50-75 gallons.⁶⁵

(2) Ethylene Glycol Concentration.

The board did not specify the percentage of ethylene contained in the spill. The board characterized the spill as containing "hyper-diluted ethylene glycol," and while Ms. Forster contests that characterization she has presented no evidence to dispute the underlying facts: that the spill was not of a 62/38 ethylene/water mixture, but rather a combination of flush water mixed with the residual 62/38 ethylene/water mixture.

(3) Presence of TSP and Caustic Soda; Acidity.

The board made no finding regarding the presence or absence of TSP or caustic soda in the liquid spilled, or as to whether the spill was acidic. Ms. Forster contends

⁶⁴ See AS 23.30.122 ("A finding by the board concerning the weight to be accorded a witness's testimony . . . is conclusive even if the evidence is conflicting or subject to contrary conclusions.").

⁶⁵ The testimony of three nurses who actually observed the spill is suggestive of a spill substantially larger than ten gallons in total. See R. 10832-10833 (M. Irland), 10918-10919 (J. Schutter), 10790-10791 (D. Locke). See also, Exc. 820; R. 8951 (S. Appel email, August 12, 2009); R. 9277 (Locke Incident Report, August 31, 2009).

Mr. Higbee (maintenance supervisor) submitted a written report estimating the size of the spill as five or six gallons. R. 9542. However, the report suggests that this represents the amount suctioned up from the floor by maintenance staff, rather than the amount of the spill, and that it does not include liquid that saturated into ceiling tiles or other areas. See *id.* ("We sucked up the spilled diluted water/glycol mix with a 12 gallon wet vac."). Mr. Norcross testified he was at the public library when the spill occurred, was called by medical records staff, and "decided to go immediately to the workplace." R. 462. He was not asked to estimate the size of the spill, but was asked, "How many gallons of fluid did you see spill?" he answered, "Maybe five gallons." R. 463. It is unclear from his testimony how long after the spill he arrived on the scene, and whether the initial cleanup efforts had already taken place.

that the spill included not only ethylene glycol, but also TSP,⁶⁶ caustic soda,⁶⁷ and was acidic.

The potential presence of TSP and caustic soda in the liquid spill was the subject of a complaint filed by Ms. Forster regarding the investigation of the spill by the state, filed with the federal Occupational Safety and Health Administration (OSHA).⁶⁸ OSHA's regional administrator ultimately concluded that it was "likely that trisodium phosphate was used in cleaning the boiler piping" but found "no indications that caustic soda (sodium hydroxide) been used in cleaning the boiler."⁶⁹ Notwithstanding the federal official's conclusion, state officials who conducted the state's investigation remained of the view that TSP had not been used as a cleaning agent when maintenance staff drained the HVACC system of Dowtherm.⁷⁰ Ms. Forster's contention that the liquid was acidic appears to be based on a statement reportedly made by maintenance staff to an investigator from the Department of Environmental Conservation during a site visit on August 21, 2009.⁷¹

⁶⁶ See R. 551. Trisodium phosphate, when mixed with water, produces an alkaline solution used in industrial solvents. It can produce some symptoms similar to those reported by Ms. Forster. See R. 9486 (Exh. 319).

⁶⁷ See Appellant's Brief at 5, 8, 10 referencing Exc. 35, 929, 945, 1126, 1712, 1871-1872, 1904; R. 6407, 9305, 9582, 2148, 9486, 73-74, 134.

⁶⁸ See R. 9485. In federal OSHA terminology, this was a CASPA (Complaint About State Program Administration). See 29 C.F.R. §1954.20. The record contains correspondence outlining the Ms. Forster's complaint, the state's response, and the federal disposition. See R. 9567 (Letter, D. Ikeda to Commissioner Bishop, February 18, 2011), 9573-9575 (Letter, D. Ikeda to Commissioner Bishop, July 22, 2011), 9577-9579 (Letter, G. Mitchell to D. Ikeda, August 8, 2011), 9485-9488, 9581-9584 (Letters, D. Ikeda to H. Forster, Commissioner Bishop, September 2, 2011), 9563-9564 (Letter, D. Ikeda to Commissioner Bishop, October 22, 2010).

⁶⁹ R. 9487.

⁷⁰ See R. 9486.

⁷¹ See Appellant's Brief, p. 10 (citing Exc. 929, 945, 1712; R. 9305, 9582, 9486).

The primary significance of the presence of TSP, caustic soda, and acidity, according to Ms. Forster, is that the combination could have resulted in an increase in the heat of the spilled liquid, thus contributing to the release of ethylene glycol fumes.⁷²

*(4) Presence of Ethylene Glycol Fumes.*⁷³

Ms. Forster was not present at the time of the spill and, unlike nurses present who were in direct contact with the spilled liquid, she did not have any physical contact with any of the spilled liquid. Her exposure, at most, was to ethylene glycol fumes.⁷⁴ Ms. Forster argues that she was exposed to ethylene glycol fumes for at least three weeks after the August spill, and for months afterwards through February, 2010.⁷⁵

The board made no specific findings regarding the presence of ethylene glycol fumes in the immediate aftermath of the spill, or regarding the length of time Ms. Forster was exposed to such fumes (if there were any). It did note, however, that Nortech's air quality testing some eleven days after the spill did not detect ethylene glycol vapors, except for a low-level at one of ten locations.⁷⁶

⁷² See, e.g., Appellant's Brief at 10, citing R. 551-552 (Exc. 1974-1975; Hearing Brief pp. 1-2). The primary basis for this argument, it appears, is a statement in the MSDS for caustic soda that "[m]ixing with water, acid or incompatible materials may cause splattering and release of heat." See *id.*; R. 9844 (Exh. 350). Ms. Forster concedes that the persons who had physical contact with the released liquid reported that it was "lukewarm" and she asserts (without referencing any basis for her assertion) this was sufficient to release fumes. See R. 552 (Hearing Brief, p. 2).

⁷³ According to evidence submitted by Ms. Forster, "Inhalation [of ethylene glycol] is generally not associated with toxicity" but can cause upper respiratory irritation in varying degrees depending on the level of the fumes. R. 9807, 9812 (Exh. 347).

⁷⁴ See, e.g., R. 70 (H. Forster Dep., p. 27, line 19).

⁷⁵ See, e.g., Appellant's Brief pp. 5, 10-11, 14, citing Exc. 687, 689, 692, 693, 728-795, 1295, 1303-1305, 1321, 1322, 1547, 1551, 1718-1722, 1845, 1974-1975, 1981-1982, 1984, 1986, 2000-2001. R. 9238, 9240, 9243, 9244, 9294-9361, 10793, 10837-10839, 10926, 10927, 8966, 9018, 9846-9850, 734, 76-77, 83-84, 103, 105, 577-578.

⁷⁶ *Forster*, p. 9, No. 26.

Dowtherm's safety data sheet states that "At room temperature, exposure to vapor is minimal due to low volatility."⁷⁷ However, it adds, "If material is heated or areas are poorly ventilated, vapor/mist may accumulate and cause respiratory irritation and symptoms such as headache and nausea."⁷⁸ It is undisputed that the area where the spill occurred was poorly ventilated, and that ceiling tiles and a workstation saturated with liquid from the spill were not removed until several days and one week after the spill, respectively.⁷⁹ Ms. Forster worked two or three days while those saturated materials were still in place, and was exposed to any ambient fumes that were present during that time. The evidence she relies on to establish exposure to ethylene glycol fumes after she returned to work on August 20, 2009, is largely speculative.⁸⁰

(5) The Board's Findings Are Adequate.

As we have observed, the board did not make specific factual findings regarding the size of the spill, the presence of TSP or other chemicals, or the existence of ethylene glycol fumes. If factual findings regarding those specific issues are necessary in order for us to adequately review the board's decision, we must remand this case to the board to make the necessary findings. In considering whether additional findings are needed, we look to the significance of absent facts with respect to the board's determination. In that regard, we do not see that the board's decision rests in any substantial degree on the size of the spill, whether it included other chemicals, or whether Ms. Forster was exposed to ethylene glycol fumes. Rather, the board's

⁷⁷ R. 9843, Exh. 349. A safety data sheet (SDS), formerly known as a material safety data sheet (MSDS), is a document prepared by the producer of a substance, in conformity with applicable OSHA regulations. See 29 C.F.R. §1900.1200(c), (g).

⁷⁸ *Id.*

⁷⁹ See *supra*, note 23.

⁸⁰ See *supra*, note 75.

decision rests primarily on the medical opinions as to causation.⁸¹ Given the board's reasoning, we do not see that it is necessary to remand the case for further factual findings.

b. Expert Medical Opinions and Documentary Evidence.

In concluding that chemical exposure in the workplace was not the substantial cause of Ms. Forster's condition, the board relied primarily on the expert medical opinion offered by Dr. Holmes,⁸² while noting that his opinion was essentially the same as that provided by Dr. Stumpp and several of Ms. Forster's treating physicians,⁸³ and that P.A. Ursel, who initially diagnosed MCS, was no longer comfortable with that diagnosis.⁸⁴

Much of Ms. Forster's brief is devoted to criticism of the board's decision to give more weight to the opinions of Drs. Stumpp and Holmes than to the opinions of Drs. Kilburn, Ziem, and Lax.⁸⁵ Ms. Forster argues that Dr. Holmes was "biased, with a predetermined view against MCS" and that Dr. Stumpp was similarly "biased against MCS[.]"⁸⁶ In fact, to the extent that Dr. Holmes or Dr. Stumpp had preexisting opinions about MCS, those opinions simply reflect one side of an ongoing debate within the medical community, just as the opinions of Drs. Kilburn, Ziem, and Lax represent another point of view in that ongoing debate. These opposing points of view are amply

⁸¹ The Department of Corrections argues that the size of the spill is immaterial. Appellee's Brief, pp. 3-4. Dr. Lax testified that because individuals' responses to exposures are variable, the precise amount of the spill would not be a good predictor of a particular person's reaction to a given spill. See R. 239-240 (Lax Depo., pp. 10-11).

⁸² See *Forster*, p. 43.

⁸³ *Id.*

⁸⁴ *Forster*, p. 41. See *id.*, p. 11, Nos. 37-38; Ursel deposition at 29:5-7, R. 153; *Ireland v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 13-0078 (July 8, 2013), Finding of Fact 34.

⁸⁵ Appellant's Brief, pp. 20-21, 24-37.

⁸⁶ Appellant's Brief, p. 31, 32, *citing* Exc. 1192-1193, 1770 (Dr. Stumpp), 2039-2046 (Dr. Holmes), R. 10130-10131, 10113, R. 616-623).

reflected in the evidence submitted by the parties.⁸⁷ On the one side of that debate are those who assert that MCS is psychogenic in origin, and on the other are those who assert that it has a physiological basis. It is not the function of the board, or of this Commission, to resolve that ongoing debate, and for a physician to subscribe to one side or another of that debate is not to exhibit a disqualifying bias:⁸⁸ it is simply the manifestation of a difference of opinion. Ms. Forster has not identified any disqualifying bias on the part of either Dr. Holmes or Dr. Stumpp.

Absent a showing of a disqualifying bias, by law, “[a] finding by the board concerning the weight to be accorded a witness’s testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions.”⁸⁹ Accordingly, absent any basis for disqualifying an expert as

⁸⁷ See, e.g., Exh. 407, R. 10052; Exh. 408 (draft chapter on MCS for General and Applied Toxicology, 3rd Ed., M. Pall, 2009) (R. 10056-10109, 10109) (concluding, “claims that MCS is produced by some sort of psychogenic mechanism have multiple flaws”), Exh. 475 (A Close Look at Multiple Chemical Sensitivity, S. Barrett, 1998) (R. 10607-10637, 10631) (concluding, “‘Multiple chemical sensitivity’ is not a legitimate diagnosis.”); Lax Dep., pp. 33-34, 42-43, 48, (R. 262-263, 271-272, 277).

⁸⁸ See generally, *Olafson v. State, Department of Transportation and Public Facilities*, Alaska Workers' Comp. App. Comm'n Dec. No. 061 (October 25, 2007).

⁸⁹ AS 23.30.122.

biased, we cannot reweigh the various opinions provided, as Ms. Forster would have us do.⁹⁰

In addition to criticizing the board's weighing of the expert medical opinions and reports, Ms. Forster asserts that the board disregarded documentary evidence she submitted to support her position that workplace chemical exposure may be a cause of MCS. The documentary evidence that Ms. Forster submitted is of widely varying relevance and persuasiveness.⁹¹ It includes documentation that MCS has been

⁹⁰ With respect to Dr. Stumpp, Ms. Forster's primary objection is that he was formerly employed by Boeing Corporation as its Manager of Occupational Medicine, and in that capacity worked to discredit and defeat claims filed against his employer alleging they had MCS as a result of exposure to chemicals at Boeing. *See generally*, Exh. 412 (R. 10117-10136). With respect to Dr. Holmes, Ms. Forster argued, among other things, that he lacks expertise as a toxicologist, that his degree is the product of an online program lacking in rigor, that he lacks experience as a treating physician, and that he advocates discrediting claimants on grounds that are not reliable indicators of credibility. R. 617-621. *See, e.g.*, R. 10343-10350 (Exh. 433) (re online degree), 10357-10388 (Exh. 435) (re grounds for discrediting claimants). These arguments concern the weight to be afforded Dr. Stumpp's and Dr. Holmes's opinions. The board's reasons for affording less weight to the opinions of Drs. Kilburn, Ziem and Lax are set forth at length in the board's decision. The board's decision regarding the weight of these various opinions is conclusive. AS 23.30.122.

⁹¹ For example, Ms. Forster submitted copies of a number of adjudicative decisions (including one prior decision by the Alaska Workers' Compensation Board) in which, she asserts, chemical exposure in the workplace has been found compensable. *See* Exhs. 3-9, R. 6465-6554. Those cases are not binding precedent for proceedings before the board. In any event, the testimony, evidence, and opinions expressed in those cases are distinguishable from those of this case, and there are any number of cases coming to a different conclusion, some of them cited by the Department of Corrections. *See, e.g., Potter v. Department of Labor and Industries*, 289 P.3d 727 (Wash. App. 2012); *Kuxhausen v. Tillman Partners, L.P.*, 241 P.3d 75 (Kan. 2010); *Elshaug v. Workforce Safety and Insurance*, 671 N.W.2d 784 (N.D. 2003); Appellee's Brief, p. 17, notes 25-26. As another example, Ms. Forster submitted exhibits detailing the recognition of MCS (or related diagnoses) by a variety of institutions, expenses she has incurred, the widespread use of non-toxic substances or environments, and a variety of anti-toxicity measures that can be taken, none of which bears in any significant way on the causation issue in this case. *See, e.g.,* Exhs. 142-289, R. 7374-8818.

recognized as a disability,⁹² and that MCS is a recognized diagnosis in various institutions and countries.⁹³ However, at issue in this case is not the existence of a disabling condition, or recognition of MCS as a valid diagnosis, but causation. On the whole, the evidence Ms. Forster submitted is consistent with various professional organizations' position statements in the record to the effect that the causal relationship between MCS and chemical exposure has not been established to a reasonable degree of medical certainty,⁹⁴ as well as with her own concession that MCS "is a new injury, . . . with people fighting to get it recognized in the courts, media, and fighting for ADA protection. . . [T]he science will be there to back it up one day. It is just not there yet."⁹⁵ The evidence submitted by Ms. Forster does not compel a result contrary to the board's decision.

c. Pre-Existing Mental Health Condition.

Ms. Forster asserts that the board wrongly found that a pre-existing condition was the substantial cause of her disabling condition.⁹⁶ To the extent there is not substantial evidence to support such a finding, this would be harmless error, because the board's determination that chemical exposure was not the substantial cause of

⁹² See, e.g., Exhs. 12, 33, 492-494; R. 6559-6569, 6650-6651, 10639-10649.

⁹³ See, e.g., Exhs. 75-79, R. 6824-6856.

⁹⁴ See R. 835 ("ACOEM continues to support the position that the relationship of MCS to environmental contaminants remains unproven.") (American College of Occupational and Environmental Medicine) (1999); R. 3165 ("A causal connection between environmental chemicals, foods, and/or drugs and the patient's symptoms continues to be speculative and cannot be based on the results of currently published scientific studies.") (American Academy of Allergy, Asthma and Immunology); R. 3171 ("there are no well-controlled studies establishing a clear mechanism or cause for MCSS [Multiple Chemical Sensitivity Syndrome]) (American Medical Association, Council on Scientific Affairs) (1992).

⁹⁵ Employee Exhibit 382, R. 9957-9960.

⁹⁶ Statement of Grounds, pp. 8-11; Appellant's Brief, pp. 6-8, 19, 21-24.

Ms. Forster's condition made it unnecessary for the board to make a specific finding regarding other factors' contribution to her disabling condition.⁹⁷

That being said, there is substantial evidence that Ms. Forster's pre-existing psychological condition was the substantial cause of her disability. As Dr. Holmes observed, Ms. Forster's ongoing worsening despite removal from work exposures, and her progressive fears and anxieties over virtually all odors, electricity, and magnetic fields, could indicate that a psychogenic cause is a more substantial causal factor than her workplace chemical exposures. In addition, there is evidence that Ms. Forster had several other pre-existing medical and psychological conditions with similar symptoms to those she complained of following the exposures.⁹⁸

5. Conclusion.

Ms. Forster claimed that chemical exposure in the workplace was the substantial cause of disabling reactions to a multitude of common chemicals and materials, as well as to electromagnetic fields. The board denied her claim based on medical opinions that chemical exposure in the workplace was not the substantial cause of her disability. Ms. Forster argues on appeal that the board mischaracterized the nature of the chemical exposure she incurred, that it gave too little weight to her experts' opinions and too much to those of her employer, and that it wrongly attributed her disability to a pre-existing condition. We conclude that she has not shown that the board erred in

⁹⁷ We note that in two prior cases involving the same constellation of spills and symptoms, the board ruled that chemical exposure was not the substantial cause, without addressing any possible psychogenic cause. *See Irland v. State, Dep't of Corrections*, Alaska Workers' Comp. Bd. Dec. No. 13-0078 at 45 (July 8, 2013); *Schutter v. State, Dep't of Corrections*, Alaska Workers' Comp. Bd. Dec. No. 13-0089 at 26 (July 31, 2013).

⁹⁸ *See, e.g., Forster*, pp. 3-5 (Nos. 9, 12, 13).

denying her claim. There is substantial evidence to support the board's decision, and the board's decision is therefore AFFIRMED.

Date: October 5, 2015 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Andrew M. Hemenway, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the supreme court must be filed no later than 30 days after the date shown in the commission's notice of distribution (the box below).

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

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the date shown in the commission's notice of distribution (the box below).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 216, issued in the matter of *Heidi M. Forster (f/k/a Kelley) vs. State of Alaska*, AWCAC Appeal No. 14-030, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 5, 2015.

Date: October 8, 2015



Signed

K. Morrison, Appeals Commission Clerk