

Alaska Workers' Compensation Appeals Commission

Robert J. Wood,
Appellant,

vs.

Grant Aviation,
Appellee.

Final Decision

Decision No. 289

June 28, 2021

AWCAC Appeal No. 20-017
AWCB Decision No. 20-0075
AWCB Case No. 201804879

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 20-0075, issued at Anchorage, Alaska, on August 31, 2020, by southcentral panel members Jung M. Yeo, Chair, Nancy Shaw, Member for Labor, and Randy Beltz, Member for Industry.

Appearances: J. C. Croft, The Croft Law Office, LLC, for appellant, Robert J. Wood; Colby J. Smith, Griffin & Smith, for appellee, Grant Aviation.

Commission proceedings: Appeal filed September 29, 2020; briefing completed March 22, 2021; oral argument was not requested.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Robert J. Wood claimed an injury while working for Grant Aviation as a helicopter pilot/mechanic in 2018. He asserted his right knee began swelling and ultimately caused him too much pain to work. He sought treatment for the knee with Jesse J. Foster, D.C., his treating chiropractor in February 2018. He eventually received stem cell treatment with Dr. Larry Miggins at Northwest Pain Clinic. The Alaska Workers' Compensation Board (Board) heard his claim on July 22, 2020. The issues were whether Mr. Wood exceeded the allowed number of treating physicians and whether his work with Grant Aviation was

the substantial cause of his need for medical treatment. The Board denied his claim¹ and he timely appealed the matter to the Alaska Workers' Compensation Appeals Commission (Commission). Neither party requested oral argument. The Commission now affirms the Board.

2. *Factual background and proceedings.*²

Mr. Wood has a prior history of right knee problems for which, in 1994, he underwent a meniscectomy that removed thirty percent of his right knee medial meniscus.³ He reported no knee problems from 1994 through January 2018.⁴

In January 2018, Mr. Wood began working for Grant Aviation as a helicopter pilot/mechanic.⁵ Subsequently, he started to have some issues with his right knee and on February 20, 2018, began chiropractic treatment with Dr. Foster at Mulholland Chiropractic Center, LLC (Mulholland).⁶ He reported on March 28, 2018, that he injured his right knee on February 18, 2018.⁷ While he could not "pinpoint an acute event," after doing some research, he came to believe going up and down the airplane ladder forced his right knee to be deeply flexed and repetitively twisted, causing the injury.⁸ His symptoms included swelling and reduced range of motion without any pain; he did not

¹ *Wood v. Grant Aviation*, Alaska Workers' Comp. Bd. Dec. No. 20-0075 (Aug. 31, 2020) (*Wood*).

² We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

³ R. 086.

⁴ Hr'g Tr. at 28:16-19, July 22, 2020.

⁵ Hr'g Tr. at 27:14-21.

⁶ Hr'g Tr. at 35:8-11; R. 331-32; R. 334-35; R. 336-45; R. 352-58.

⁷ *Wood* at 3, No. 4.

⁸ Robert Wood Dep., Oct. 31, 2018, at 31:4 – 32:6.

remember when he first noticed the symptoms.⁹ Mr. Wood did not work from March 30, 2018, through October 27, 2018.¹⁰ Mr. Wood returned to work on October 27, 2018.¹¹

On April 4, 2018, Jesse J. Foster, D.C., at Mulholland Chiropractic Center referred Mr. Wood to Algone Interventional Pain Clinic (Algone) to receive stem cell treatment.¹² Mr. Wood on April 9, 2018, saw Dr. Peterson at Algone who diagnosed (1) right knee pain, (2) instability of right knee joint, and (3) primary osteoarthritis of right knee. Mr. Wood reported “the pain started after taking a large step out of a plane. Pain constant dull/aching, throbbing, tightness. Associated symptoms include joint swelling/stiffness, clicking.”¹³ The Board found that Mr. Wood could not obtain stem cell treatment from Algone due to costs.¹⁴ However, in his deposition Mr. Wood stated that he went to U. S. Stem Cell for the adipose stem cell treatment, having determined it was a better procedure than the bone aspirate procedure used by Algone.¹⁵

On April 10, 2018, a right knee magnetic resonance imaging (MRI) showed (1) horizontal cleavage tear of the posterior horn of the medial meniscus, (2) mild medial and patellofemoral compartment osteoarthritis, and (3) large joint effusion and synovitis.¹⁶

Matthew Peterson, M.D., on April 20, 2018, saw Mr. Wood and diagnosed (1) tear of medial meniscus of right knee, (2) instability of right knee joint, and (3) right knee pain.¹⁷ He wrote a “To Whom It May Concern” letter stating, “Robert Wood is currently a patient at Algone Regenerative Medicine. Based on patient[']s physical, ultrasound,

⁹ Wood Dep. at 32:7-16; R. 084-85.

¹⁰ Wood Dep. at 52:7-9.

¹¹ Wood Dep. at 52:10-12.

¹² R. 356.

¹³ R. 269-71.

¹⁴ *Wood* at 3, No. 6; Wood Dep. at 42:19 – 43:16.

¹⁵ Wood Dep. at 41:1 – 43:16.

¹⁶ R. 274.

¹⁷ R. 266-68.

and MRI exam, it is my medical opinion that the substantial cause and need for treatment is directly related to the patient[']s work."¹⁸

The Board found that on April 25, 2018, Mr. Wood sought right knee treatment and an orthopedic referral at the VA.¹⁹ The Board found that he did not have a referral or Grant Aviation's authorization to go to the VA, but did so at his friend's "forceful" insistence.²⁰ The VA referred Mr. Wood to Lawrence Wickler, M.D.²¹ In the VA notes, it states Mr. Wood is seeking the referral at the request of his chiropractor.²² Dr. Wickler, in a letter to Dr. Foster written immediately after seeing Mr. Wood, thanked Dr. Foster for the referral.²³ Therefore, contrary to the Board's finding, the objective evidence is that Dr. Foster referred Mr. Wood to another specialist, Dr. Wickler.

On May 2, 2018, Dr. Wickler saw Mr. Wood and diagnosed complex horizontal tear of the medial meniscus of the right knee.²⁴ He opined Mr. Wood's right knee injury was work-related, permanently aggravated a preexisting condition, and was the substantial cause of his need for medical treatment or disability. Dr. Wickler said Mr. Wood was not medically stable and unable to return to work. He recommended arthroscopy partial meniscectomy.²⁵ Contrary to the Board's report, Dr. Wickler stated in his report that Mr. Wood was referred to him by Dr. Foster.²⁶

¹⁸ R. 0288.

¹⁹ R. 276-77. (In this report, Mr. Wood indicates it is his chiropractor who wants him to see an orthopedic doctor.)

²⁰ Hr'g Tr. at 14:22-24.

²¹ R. 592.

²² R. 276-77.

²³ Exc. 034.

²⁴ Exc. 030.

²⁵ Exc. 031-33.

²⁶ Exc. 030.

Mr. Wood “did not like what Dr. Wickler proposed” because he was not going to have “the meniscus shaved again.” He preferred stem cell treatment, not arthroscopic surgery, based on his own research about his condition.²⁷

On May 22, 2018, Mr. Wood sought treatment with Dr. Larry Miggins at Northwest Pain Clinic. He diagnosed “a mild tear of the lateral aspect of his meniscus, and joint effusion, mild [degenerative joint disease] in his right knee,” and recommended adipose derived stem cell injections.²⁸ The Board found that Mr. Wood did not have a referral or Grant Aviation’s authorization to see Dr. Miggins.²⁹

On June 6, 2018, Mr. Wood received adipose stem cell injections on his bilateral knees and left wrist at Seattle Stem Cell Center.³⁰ He had two more rounds of injections. The Board found that Mr. Wood did not have Grant Aviation’s authorization for this treatment.³¹

On August 21, 2018, David Bauer, M.D., saw Mr. Wood for an employer medical evaluation (EME) and diagnosed “degenerative arthrosis of the right knee without relation to current employment” and “status post prior medical meniscectomy 25 years ago, the substantial cause of the progressive arthritis in his knee.” He opined Mr. Wood had right knee progressive osteoarthritis substantially caused by his 1994 meniscectomy as the “removal of a substantial portion of the meniscus will tend to create accelerated degenerative changes.” Dr. Bauer said, “repetitively getting in and out of the aircraft may make something symptomatic, but does not cause the arthritis or meniscal tear.” He opined the only diagnosis was “arthritic change within the right knee, manifested by the horizontal tear or the medial meniscus and the meniscal extrusion,” and there was “no evidence of any aggravation or acceleration of the degenerative condition,” and Mr. Wood would be “symptomatic at the current time whether he had a sedentary job or

²⁷ Hr’g Tr. at 15:2-7; 16:10-12.

²⁸ Exc. 036.

²⁹ *Wood* at 18.

³⁰ Exc. 038-41; *Wood* Dep. at 47:9-12.

³¹ *Wood* at 18.

an active job.” Dr. Bauer concluded Mr. Wood’s “knee is symptomatic because of the progression of arthritis, not because of any injurious change,” and his employment with Grant Aviation was not the substantial cause of his need for medical treatment or disability.³²

On October 18, 2018, Mr. Wood returned to work full-time without any restrictions.³³ On October 31, 2018, Mr. Wood testified that he tore his meniscus, but did not recall any specific incident while working for Grant Aviation. Rather he attributed his symptoms to his going up and down the ladder to the cockpit. His primary symptom was the swelling in his right knee which became more and more painful.³⁴

Another right knee MRI, on April 15, 2019, showed (1) vertical tear through the body of the posterior third of the medial meniscus – additional undersurface tear versus degenerative change was noted for the middle third of the medial meniscus, and (2) mild scuffing of articular surfaces of the medial femoral condyle and lateral patellar facet.³⁵

On January 6, 2020, Peter E. Diamond, M.D., saw Mr. Wood for a second independent medical evaluation (SIME) and diagnosed “history of prior medial meniscectomy, right knee, and subsequent development of degenerative joint disease” and “work-related stress, right knee, causing symptomatic aggravation underlying degenerative joint disease and horizontal cleavage plane tear, medial meniscus.” Dr. Diamond said there was a permanent aggravation, “specifically, quadriceps atrophy – not previously documented.” He said he would like an opportunity to further review Mr. Wood’s previous records. Dr. Diamond opined the substantial cause of Mr. Wood’s disability or need for medical treatment was “the pre-existent degenerative joint disease and degenerative-type horizontal cleavage plane tear of the medial meniscus.” He said although it was possible that the activities Mr. Wood described, ascending and descending an aircraft ladder, would cause further tearing of the right knee meniscus, the April 10,

³² Exc. 042-54.

³³ Exc. 073-110.

³⁴ Wood Dep. at 30:21 – 33:18.

³⁵ R. 367-68.

2018, MRI showed chronic degenerative tearing and was most consistent with post-surgical change rather than an acute injury. Dr. Diamond said Mr. Wood became medically stable on February 18, 2019, and is able to work without any restrictions. He gave a one percent permanent partial impairment (PPI) rating.³⁶

Dr. Diamond testified by deposition, on July 9, 2020, that Mr. Wood had synovitis along with degenerative joint disease. Synovitis is an inflammation of the lining of the joint, an inflammation in the knee, which causes pain in the knee. The MRI scan indicated Mr. Wood had a tear of the meniscus, specifically a horizontal cleavage tear which is a degenerative tear. A horizontal cleavage tear is a tear that occurs parallel to the joint line in the meniscus which he said is, in essence, a flap that doesn't move around, but the meniscus is no longer one solid piece. The morphology of a degenerative tear is different from traumatic tear which is typically vertical and results in a mobile fragment. He agreed with Dr. Bauer that the preexisting arthritis was a substantial cause of his symptoms. However, he added that the work activities had produced a symptomatic aggravation of that underlying arthritis, although not the substantial cause. The symptoms were aggravated by the patient's work activities. The underlying problem which produced the symptoms was the preexisting degenerative horizontal – degenerative condition of the knee. There were several causes including the previous medial meniscectomy and the subsequent development of degenerative joint disease in the right knee. The repetitive loading, axial loading, which along with rotational stress and flexion of the knee on a repetitive basis twenty to forty times a day going up and down that ladder also was a cause, which produced a symptomatic aggravation of the underlying condition. Dr. Diamond opined that had there not been an underlying condition, it was unlikely, to a reasonable degree of medical probability, that Mr. Wood would have developed symptoms and required treatment.³⁷

³⁶ Exc. 073–110.

³⁷ Peter Diamond, M.D., Dep., July 9, 2020, at 12-38.

3. *Standard of review.*

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.³⁸ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.³⁹ "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."⁴⁰ The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.⁴¹ On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment.⁴² However, the Board's conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine credibility of witnesses.⁴³

4. *Discussion.*

The Board found that Mr. Wood had several excessive changes in treating physicians. The Board agreed that Dr. Foster referred Mr. Wood to Dr. Peterson at Algone, but decided this was a change in treating physician rather than a referral to a specialist. The Board also found that Mr. Wood did not have a referral to Dr. Wickler through the VA. The Board then determined that Mr. Wood, on his own, sought treatment from Dr. Miggins at the Northwest Pain Clinic and then received treatment at the Seattle

³⁸ AS 23.30.128(b).

³⁹ See, e.g., *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁴⁰ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

⁴¹ AS 23.30.122.

⁴² AS 23.30.128(b).

⁴³ AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P. 3d 139, 146 (Alaska 2013).

Stem Cell Center. Mr. Wood did not seek authorization from Grant Aviation for either the treatment with Dr. Miggins or at the Seattle Stem Cell Center. The Board stated the purpose of requiring either a referral or advance consent of the employer is to prevent doctor-shopping. Grant Aviation asserts the Board's findings were correct.

Mr. Wood contends the "referral" from Dr. Foster presented at hearing cured any defect in the change from one treating doctor to another. Mr. Wood also contends the Board's regulations are invalid, but does not address the foundational requirement of how the regulation was improperly enacted. Mr. Wood also asserts without evidence that the only kind of doctor-shopping the statute meant to address was the kind where one party or the other is seeking a better opinion in support of the party's position. Nonetheless, Mr. Wood was doctor-shopping, the very issue the statute and regulation were attempting to address. Mr. Wood admits he was seeking a particular kind of treatment which he thought would help him get better. He could have gone through several more doctors before he found one who suited him.

The Board also relied on the employer's medical evaluation (EME) report of Dr. Bauer to support its conclusion that the job with Grant Aviation was not the substantial cause of his need for treatment because the symptoms were actually the progression of the arthritis from the long-ago meniscectomy and the subsequent degenerative disease. The Board has the right to determine which medical testimony to accept.⁴⁴

a. Did Mr. Wood have an excessive change in his treating physician?

The Alaska Workers' Compensation Act (Act) provides a limitation on the number of treating doctors an injured worker may see without consent of the employer.

When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the

⁴⁴ See, e.g., *Morrison v. Alaska Interstate Constr. Inc.*, 440 P.3d 224, 238 (Alaska 2019).

selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.⁴⁵

The Board found that Mr. Wood changed treating doctors beyond the prescribed number without permission from Grant Aviation.

Mr. Wood initially saw his treating chiropractor, Dr. Foster, with whom he had a longstanding relationship. Because Mr. Wood wanted a specialized stem cell treatment which Dr. Foster did not offer, Dr. Foster referred Mr. Wood to a specialist, Dr. Peterson at Algone. The Board found that "a chiropractor at Mulholland referred [Mr. Wood] to Algone to receive stem cell treatment."⁴⁶ This referral was a referral from his treating doctor to a specialist and was not a change in treating physician. However, Mr. Wood decided he did not want the kind of stem cell treatment offered by Dr. Peterson and returned to Dr. Foster. Mr. Wood was under no requirement to undergo treatment he did not want or feel comfortable receiving.⁴⁷

On the advice of either a friend or Dr. Foster, Mr. Peterson next saw an orthopedist, another specialist, at the VA. Mr. Wood stated he sought review by an orthopedist on the advice of a friend. The objective evidence is that Dr. Foster referred Mr. Wood to another specialist, Dr. Wickler, based on Dr. Wickler's letter thanking Dr. Foster for the opportunity to evaluate Mr. Wood.⁴⁸ Dr. Wickler was a specialist who saw Mr. Wood for an evaluation for Dr. Foster. This was not a change in treating doctor.

However, Mr. Wood decided he did not want another meniscectomy or a knee replacement. Dr. Wickler did agree Mr. Wood was not medically stable from a work-related aggravation of a preexisting condition which was substantially caused by his work.⁴⁹

⁴⁵ AS 23.30.095.

⁴⁶ *Wood* at 3, No.5.

⁴⁷ *Fluor Alaska, Inc. v. Mendoza*, 616 P.2d 25 (Alaska 1980).

⁴⁸ Exc. 034.

⁴⁹ Exc. 030.

On his own, Mr. Wood sought out treatment from Dr. Miggins who had the specialized stem cell treatment that Mr. Wood had decided he wanted to receive. There was no referral to Dr. Miggins. Mr. Wood had not changed his treating physician since both Dr. Peterson and Dr. Wickler were referrals. Therefore, he still had one change available to him. However, he did not notify Grant Aviation of this decision prior to making the change. Thus, under the statutory language this was an unauthorized change because he did not provide advance notice to Grant Aviation.

Although, Mr. Wood had a change of physician available to him, his decision to begin treatment with Dr. Miggins was in violation of the Act. That statute states clearly “[n]otice of a change in the attending physician **shall** be given before the change.”⁵⁰ Mr. Wood did not alert Grant Aviation to the fact that he wanted to treat with Dr. Miggins and wanted the stem cell treatment offered by Northwest Pain Clinic.

It is his right to seek the treatment he feels will best suit him, but he also must comply with the mandatory requirements of the statute. The statute allows him one change in a treating physician, but requires advance notice to the employer. Mr. Wood did not notify Grant Aviation of his change in physician prior to making the change. Therefore, the Board was right to exclude the medical reports of Dr. Miggins and Northwest Pain Clinic.

b. Is the Board’s decision supported by substantial evidence?

The Board found Mr. Wood’s claim not compensable. The Board relied on the EME report of Dr. Bauer in reaching this determination. The Board found his report more persuasive, finding that the other doctors did not present a basis for their opinions that Mr. Wood’s need for medical treatment was caused by his work with Grant Aviation. The Board also found Dr. Diamond’s opinion confusing and discounted it as well. The reliance on Dr. Bauer is in the Board’s discretion and this finding is binding on the Commission.

The Board did discuss that if work had made his preexisting condition symptomatic, under the Court’s decisions in *DeYonge* and *Morrison*, the symptoms would have been

⁵⁰ AS 23.30.095(a) (emphasis added).

sufficient for his claim to be compensable.⁵¹ The Board discounted Mr. Wood's assertions that the work he was performing for Grant Aviation made his knee symptomatic and it was the symptoms that prompted him to seek medical treatment. The Board also discounted the statements by Drs. Foster, Peterson, and Wickler that the work made his condition symptomatic. The Board has the discretion to determine which medical opinions are the more persuasive.

The Board discussed that the Court, in *Morrison*, held that symptoms arising out of a preexisting condition, which are attributable to work, are compensable even if there is no specific injury and the underlying condition is not permanently aggravated.⁵² While it might appear that work made his knee symptomatic since the swelling started shortly after his employment began and he sought treatment shortly thereafter, both Dr. Diamond and Dr. Bauer pointed to the arthritis as the more likely culprit.

Moreover, the Board found that Dr. Bauer's opinion that it was his arthritis that caused the knee to become symptomatic more persuasive. He said, "because of the progression of arthritis, not because of any injurious change. . . ." Therefore, "his employment with [Grant Aviation] was not the substantial cause of his need for medical treatment or disability."⁵³ Dr. Bauer's opinion is also supported by the objective evidence on the MRI of a horizontal tear on the meniscus which both Dr. Bauer and Dr. Diamond explained is evidence of degenerative change and not work activities. Dr. Bauer stated Mr. Wood would have become symptomatic whether he worked or not. His arthritis was the substantial cause of his need for medical treatment.⁵⁴

The Board's decision is supported by substantial evidence in the record as a whole.

⁵¹ See, *DeYonge v. NANA/Marriott*, 1 P.3d 90 (Alaska 2000); *Morrison v. Alaska Interstate Constr., Inc.*, 440 P.3d. 224, 236 (Alaska 2019).

⁵² *Morrison*, 440 P.3d at 236-237.

⁵³ *Wood* at 21.

⁵⁴ *Id.* at 20.

5. Conclusion.

The Board's decision is AFFIRMED.

Date: 28 June 2021 Alaska Workers' Compensation Appeals Commission



Signed

Michael J. Notar, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Deirdre D. Ford, 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 Alaska 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). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 289 issued in the matter of *Robert J. Wood v. Grant Aviation*, AWCAC Appeal No. 20-017, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 28, 2021.

Date: July 7, 2021



Signed

K. Morrison, Appeals Commission Clerk