Alaska Workers' Compensation Appeals Commission

Uresco Construction Materials, Inc. and Liberty Mutual Insurance Company, formerly Employers Insurance Company of Wausau, Appellants, vs. Franz Porteleki, Appellee.	Final Decision Decision No. 152 May 11, 2011 AWCAC Appeal No. 09-032 AWCB Decision No. 09-0179 AWCB Case No. 200720587

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 09-0179, issued at Fairbanks on November 30, 2009, by northern panel members William Walters, Chair, Damian J. Thomas, Member for Labor, Debra G. Norum, Member for Industry.

Appearances: Tasha M. Porcello, Law Offices of Tasha M. Porcello, for appellants, Uresco Construction Materials, Inc., and Liberty Mutual Insurance Company, formerly Employers Insurance Company of Wausau; Robert M. Beconovich, The Law Office of Robert M. Beconovich LLC, for appellee, Franz Porteleki.

Commission proceedings: Statement of Grounds filed December 30, 2009, Notice of Appeal filed January 5, 2010; Motion to Accept Amended Statement of Grounds and Amended Statement of Grounds filed January 7, 2010; Motion for Stay of Compensation Order Payments Including Attorney's Fees and Costs Pending Appeal filed January 8, 2010; Opposition to Motion for Stay filed January 15, 2010; Order on Motion to Accept Amended Statement of Grounds issued on January 19, 2010; hearing on motion for stay held April 15, 2010; Order on Motion for Stay issued April 20, 2010; briefing completed October 4, 2010; oral argument on appeal held February 17, 2011.

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

By: Laurence Keyes, Chair.

1. Introduction.

Uresco Construction Materials, Inc. (Uresco) and its workers' compensation insurer appeal the decision of the Alaska Workers' Compensation Board (board) that Franz

Porteleki (Porteleki) suffered a work-related injury that was the substantial cause of his need for knee surgery.[1] Uresco argues both that the board's findings are inadequate and that substantial evidence does not support the decision. Porteleki disagrees.

The Alaska Workers' Compensation Act (Act), AS 23.30.001 — .395, as amended in 2005, applies to Porteleki's claim because the incident giving rise to it occurred in 2007.[2] As we decided in *City of Seward v. Hansen*,[3] the amendments to AS 23.30.010 changed the legal standard for causation. It was whether the work-related injury was "a substantial factor" in creating the need for medical treatment, etc. It is now whether the work-related injury was "the substantial cause, in relation to other causes" in creating the need for such treatment. Moreover, in the commission's recent decision in *Runstrom v. Alaska Native Medical Center*[4] we held that the amendments to AS 23.30.010 modified the second and third steps of the three-step presumption of compensability analysis.

We infer from the record that the board decided Porteleki's claim by applying the new, statutory standard for causation,[5] although it is not totally clear to us whether it did. Second, because the board's decision antedated our decision in *Runstrom*, the board had no basis in precedent to apply a modified presumption of compensability analysis. Third, rather than the issue of the work-relatedness of Porteleki's knee surgery, the board appears to have considered whether that medical treatment was reasonable and necessary.[6] In order to ensure that the board properly analyzed the work-relatedness issue under the causation standard provided for in AS 23.30.010(a) and the modified presumption of compensability analysis set forth in *Runstrom*, we vacate the board's

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[1] *See Franz Porteleki v. Uresco Constr. Materials, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 09-0179 (Nov. 30, 2009) (*Porteleki*).

[2] Porteleki was injured on December 27, 2007. R. 001.

[3] Alaska Workers' Comp. App. Comm'n Dec. No. 146 (Jan. 21, 2011).

[4] Alaska Workers' Comp. App. Comm'n Dec. No. 150 (Mar. 25, 2011).

[5] *Porteleki*, Bd. Dec. No. 09-0179 at 13.

[6] *Id.* at 13-14 (where the board analyzed the reasonableness and the necessity of Porteleki's medical treatment in accordance with the holding in *Philip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999) (*Hibdon*)).

decision on medical benefits and remand to the board.

Uresco also contends that even if the board properly decided that Porteleki proved his claim for medical benefits, the board erred (1) by awarding attorney fees under both AS 23.30.145(a) and (b), and (2) by not reducing the fee award for the time spent on Porteleki's unsuccessful claim for unfair or frivolous controversion. Porteleki argues the board's fee award was proper because the fees were not duplicative, and the time counsel devoted to the unfair controversion claim was *de minimis* since the evidence needed for this claim was indistinguishable from the evidence developed in pursuing the medical benefits claim.

The commission disagrees with Uresco's arguments regarding the fee award. We see no evidence in the record that the board abused its discretion in awarding attorney fees under AS 23.30.145. We conclude that if the board decides that Porteleki prevails on his medical benefits claim on remand, it may exercise its discretion in awarding attorney fees under either AS 23.30.145(a) or (b), and in not reducing the fee award to account for the unsuccessful unfair controversion claim.

2. Factual background and proceedings.

Porteleki had a history of left knee problems. He injured his left knee in August 2002 when he tripped walking up stairs.[7] A September 27, 2002, magnetic resonance imaging (MRI) study revealed a tear in the medial meniscus and degenerative changes in the patellofemoral and medial compartments of the left knee.[8] This MRI showed that the anterior cruciate ligament (ACL) was intact.[9] On November 8, 2002, Mark A. Wade, M.D., operated on the knee, confirming his preoperative diagnosis of a medial meniscus tear and noting the ACL "was normal."[10]

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7 R. 164.

8 SIME medical records 097.

9 *Id*.

10 R. 166-67.

An MRI performed on August 1, 2003, indicated, among other changes, an "[i]nterstitial tear of the [ACL] is suggested."[11] A few weeks later, Dr. Wade documented a phone call with Porteleki in which they discussed Porteleki's options for ACL surgery and Porteleki related that his knee "constantly pops and clicks now[.]"[12] Porteleki apparently never had the surgery but he did visit Dr. Wade's office again, on October 26, 2004, complaining of pain when he locked his left knee while standing on the hard floor at work.[13] X-rays showed "advanced changes of the patellofemoral joint consistent with arthritis in the patellofemoral joint."[14] Dr. Wade attributed his pain either to possible scarring related to the "history of . . . [ACL] rupture" or to the arthritis and prescribed a brace.[15]

On December 27, 2007, Porteleki injured his left knee while at work for Uresco. He slipped on snow on the flatbed of his truck, heard a "snap" and felt a "burning" in his knee.[16] That same day, Matthew W. Raymond, D.O., diagnosed a likely lateral collateral ligament (LCL) sprain based on x-rays.[17] The radiographic report noted a "[s]mall effusion" and "[e]arly osteoarthritic change medial compartment."[18]

Five days later, Porteleki followed up with Dr. Raymond because he was still experiencing pain.[19] Dr. Raymond noted Porteleki's knee "now has an effusion over the lateral aspect[,]" describing it as "mild."[20] An MRI performed on January 4, 2008,

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11 R. 172.

12 R. 103.

13 *Id*.

14 *Id.*

15 R. 102.

16 R. 001.

17 R. 106-07.

18 R. 228.

19 R. 113.

20 *Id*.

revealed that the ACL was nearly completely torn with only a few fibers intact.[21] The MRI also showed degenerative damage to the lateral meniscus without focal tear and degenerative change in the medial and lateral compartments with loss of articular cartilage.[22] Dr. Raymond referred Porteleki to Cary S. Keller, M.D.,[23] who prescribed physical therapy and advised that Porteleki would likely need ACL surgery.[24]

Uresco accepted compensability and paid medical benefits.[25]

To evaluate the contribution of the 2007 work injury to Porteleki's knee problems, John W. Joosse, M.D., performed an employer's medical evaluation (EME) on October 27, 2008.[26] He noted that he would expect the injection performed during the procedure for the 2008 MRI to pull out bloody fluid if the ACL tear was recent, but instead the report describes the fluid as straw-colored.[27] Dr. Joosse stated:

> There is no evidence that the [ACL] tear occurred at this injury. There was no hemarthrosis, there was no dramatic swelling. A soft effusion developed over the period of about a week. The knee was never unstable and is not unstable to stress testing by this examiner today.
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> It is my opinion that Mr. Porteleki's current symptoms are those of progressive degenerative arthritis of the left knee. . . .
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> . . . [I]t is clear that Mr. Porteleki did sustain an injury to the left knee involving its lateral aspect, . . .
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> . . . [I]t is my opinion that Mr. Porteleki became medically stable with regard to his lateral knee sprain as of March 27, 2008.[28]

Dr. Joosse opined that only the left knee sprain was related to Porteleki's December 27,

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21 R. 039.

22 *Id.*

23 R. 038.

24 Oct. 15, 2009, Hr'g Tr. 16:25, R. 202. On the board's physician reporting form, Dr. Keller did not check either "yes" or "no" in response to the question asking whether the injury was work-related. R. 202.

25 R. 019.

26 R. 050.

27 R. 059, R. 116.

28 R. 065.

2007, work injury.[29] He testified that the different terminology used in the 2003 and the 2008 MRI reports was synonymous; an "interstitial" ACL tear is the same as a "nearly complete" tear. Therefore, he concluded the ACL tear occurred not on December 27, 2007, but rather sometime after the 2002 surgery and before the 2003 MRI.[30]

Based on this EME, Uresco controverted all benefits on November 26, 2008.[31] Porteleki filed a claim in December 2008 seeking medical costs and other benefits.[32] Dr. Keller recommended that he undergo surgery to repair his ACL.[33]

Peter E. Diamond, M.D., conducted a second independent medical evaluation (SIME) on May 1, 2009.[34] He did not initially review any medical records before December 27, 2007,[35] although he noted that Porteleki underwent surgery for his left knee in 2002 and "had not required treatment for 5 years prior to the subject injury."[36] Observing that Dr. Keller noted in 2008[37] that the ACL was intact when the 2002 surgery was conducted, Dr. Diamond concluded that the 2007 injury caused ACL and posterolateral ligamentous damage,[38] stating that:

> It is certainly true that some of the pain complaints would reasonably be related to the pre-existing degenerative arthritis, but this has been significantly and permanently aggravated by the subject 12/27/07 injury.
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> . . . .
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> A numerical apportionment would be estimated at this time as 20% to the pre-existing condition and 80% to the subject injury; however, this is

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29 R. 066.

30 Oct. 15, 2009, Hr'g Tr. 62-64; 80:17-24.

31 R. 002.

32 R. 008-09.

33 R. 041.

34 R. 069.

35 R. 071-72.

36 R. 075. However, medical records show Porteleki did seek treatment for his left knee within this timeframe as he had an MRI done in August 2003 and complained of knee pain to Dr. Wade in October 2004. R. 172 and 102.

37 R. 074.

38 R. 079.

tentative and I would need the previous records to confirm this or alter it.[39]

On May 27, 2009, after reviewing additional medical records from 2002, 2006, 2008, and 2009, including the 2003 MRI,[40] Dr. Diamond stated, "These do not change the opinions expressed in my earlier report."[41] He agreed that Porteleki "does require surgical intervention, most likely arthroscopy and ligamentous reconstruction; however, joint replacement may be an option, depending on the degree of arthritic change."[42]

The board heard the claim on October 15, 2009. It concluded that Porteleki had attached the presumption of compensability with his testimony, and Dr. Raymond's and Dr. Keller's records.[43] Uresco rebutted the presumption by "showing the claimed medical benefits are not reasonable and necessary for the work-related injury" with Dr. Joosse's opinion that "the ACL tear, medial meniscal tear, and osteoarthritis . . . are unrelated to [the] . . . work injury, and are degenerative."[44]

The board then concluded that Porteleki had proven his claim by a preponderance of the evidence that his 2007 work injury was "the substantial cause, in relation to other causes, for his need for continued medical treatment."[45] The board explained its reasoning as follows:

> The Board finds the preponderance of the medical evidence, especially the reports and opinions of the treating physicians Drs. Raymond, Keller, and [the radiologist who analyzed the 2008 MRI], and those of SIME physician Dr. Diamond, indicate the employee's work injury of December 27, 2007, was the substantial cause, in relation to other causes, of the employee's need for continuing medical treatment, under AS 23.30.010. These physicians found objective evidence of mechanical trauma to the employee's knee. Despite the employer's assertions, and despite imprecise language in one of Dr. Diamond's statements, Dr. Diamond eventually reviewed the

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39 R. 079.

40 *See* R. 084-88.

41 R. 089.

42 R. 080. By February 2009, Dr. Keller's office was recommending a total knee replacement as Porteleki's condition was "bone on bone." R. 353-54.

43 *Porteleki,* Bd. Dec. No. 09-0179 at 13.

44 *Id.*

45 *Id.*

> entire relevant medical record. The Board does not find Dr. Diamond confused concerning the imaging studies or the likely cause of the employee's knee injuries.[46]

The board also concluded Uresco's controversions were not unfair or frivolous, and that Porteleki was entitled to interest under AS 23.30.155(p).[47]

Finally the board awarded attorney fees under AS 23.30.145(b),[48] but concluded that "the employer shall pay the employee statutory minimum attorney fees under AS 23.30.145(a) when, and if, the statutory minimum amount based on the payment of past and future medical, indemnity and all other benefits related to the employee's injury, exceeds the attorney fee awarded under AS 23.30.145(b)."[49] The board decided not to reduce the award for time spent on the unsuccessful unfair controversion claim because "this issue was essentially one of legal argument concerning the evidence already developed" and "the time expended arguing this issue in the hearing and brief was *de minimis*."[50]

Uresco appeals.

3. Standard of review.

This appeal requires the commission to determine whether the board applied the causation standard and presumption of compensability analysis as provided in AS 23.30.010(a). These are questions of law to which the commission applies its

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[46] *Porteleki*, Bd. Dec. No. 09-0179 at 13-14. Even though the parties were disputing the work-relatedness of the proposed medical treatment, it was at this point that the board included an analysis of the reasonableness and necessity of Porteleki's medical treatment under *Hibdon*. *See* n.6, *supra*. *Hibdon*, 989 P.2d at 731, notes that "[w]hen the Board reviews an injured employee's claim for medical treatment made within two years of *an injury that is undisputably work-related*, its review is limited to whether the treatment sought is reasonable and necessary." (Emphasis added, citations omitted).

[47] *Porteleki*, Bd. Dec. No. 09-0179 at 14-15.

[48] *Id*. at 15-17.

[49] *Id.* at 17.

[50] *Id.* The board denied and dismissed the employer's petition to reconsider its decision on attorney fees and costs. *See Franz Porteleki v. Uresco Constr. Materials, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 09-0210 (Dec. 30, 2009).

independent judgment.[51] We must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[52] Because we are uncertain whether the board applied the statutory causation standard and presumption of compensability analysis, we do not consider whether substantial evidence in the record supports its factual findings.

In terms of the attorney fee award, we independently evaluate whether the board properly applied AS 23.30.145.[53] When statutory interpretation is not required, we review fee awards for an abuse of discretion.[54]

4. Discussion.

a. Applicable law.

As we stated in the introduction, the Act, as amended in 2005, applies to Porteleki's claim. 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

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[51] AS 23.30.128(b) (requiring the commission to apply its independent judgment to "questions of law and procedure").

[52] AS 23.30.128(b).

[53] *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150 (Alaska 2007) (independently reviewing whether the board had the authority to award fees under AS 23.30.145(a)); *Gibeau v. Kollsman Instrument Co.*, 896 P.2d 822, 822 (Alaska 1995) (independently reviewing whether attorney fees were payable as a lump sum under AS 23.30.145(a)).

[54] *Circle De Lumber Co. v. Humphrey*, 130 P.3d 941, 946 (Alaska 2006) (noting that the abuse of discretion standard requires upholding the award unless it is "manifestly unreasonable") (citations omitted).

into subsections (a)[55] and (b). As we observed in *Hansen*, prior to this amendment, case law required that the employment be "a substantial factor" in an injured worker's need for medical treatment.[56] Now, to be compensable, AS 23.30.010(a) requires employment to be, "in relation to other causes," "the substantial cause of the . . . need for medical treatment."[57]

In *Runstrom,* we decided that the amended version of the statute, AS 23.30.010(a), modified the last two steps of the presumption analysis.[58] Under the new, statutory causation standard, the employer can rebut the presumption, the second step in the analysis, "by a demonstration of substantial evidence that the death or

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[55] AS 23.30.010(a) states:

> **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 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.

[56] *Pietro v. Unocal Corp.*, 233 P.3d 604, 616 n.31 (Alaska 2010) (noting that the Alaska Legislature changed the causation standard when it amended AS 23.30.010); *Hansen*, App. Comm'n Dec. No. 146 at 10 (citations omitted).

[57] AS 23.30.010(a).

[58] *Runstrom*, App. Comm'n Dec. No. 150 at 6.

disability or the need for medical treatment did not arise out of and in the course of the employment."[59] To do so, "the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment."[60] We held: "[I]f the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the [need for medical treatment], etc., the presumption is rebutted."[61] In terms of the third step in the presumption analysis, we concluded:

> [T]he two elements of the third step in the presumption analysis under former law, that the presumption drops out and the employee must prove the claim by a preponderance of the evidence, should be engrafted on the third step of the analysis under AS 23.30.010(a). . . . If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable.[62]

b. On remand, the board needs to apply AS 23.30.010(a) and the holdings in Hansen and Runstrom to the issue whether Porteleki's medical treatment in the form of knee surgery is compensable.

Here, to attach the presumption, the first step in the presumption of compensability analysis, Porteleki had to first establish "a causal link" between his work-related injury and his need for knee surgery or other medical care.[63] There is no dispute that Porteleki attached the presumption.

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59 AS 23.30.010(a).

60 *Id.*

61 *Runstrom*, App. Comm'n Dec. No. 150 at 7.

62 *Id.* at 8.

63 AS 23.30.010(a) (providing that "[t]o establish a presumption under AS 23.30.120(a)(1) that . . . 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 need for medical treatment."). *Cf. Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999); *Grainger v. Alaska Workers' Comp. Bd.*, 805 P.2d 976, 977 (Alaska 1991). We interpret the phrase "causal link" in the statute no differently than the phrase "preliminary link" as used in *Tolbert* and *Grainger*.

Next, with the change in the law, the showing required of Uresco to rebut the presumption, the second step in the analysis, is that it present substantial evidence that the work-related injury is not the substantial cause of Porteleki's need for medical treatment. Although the board misstated the issue to which the rebuttal showing applied,[64] the parties do not dispute that Uresco rebutted the presumption in Porteleki's case with Dr. Joosse's report and testimony.

In the third step in the analysis, Porteleki had to prove by a preponderance of the evidence that his employment was the substantial cause, in relation to other causes, of his need for medical treatment in the form of knee surgery.[65] In Porteleki's case, the board failed to apply the statutory "the substantial cause" test. It appears to us that the board did not evaluate the relative contribution of the different possible causes of Porteleki's need for surgery. These causes may include Porteleki's pre-existing degenerative changes in his left knee; Porteleki's 2007 work injury; and a possible 2003 ACL tear, the occurrence of which the parties dispute. Dr. Joosse testified that the 2003 MRI documented a complete ACL tear and stated that if Porteleki had torn his ACL on December 27, 2007, his knee would have been more swollen and the fluid withdrawn when the MRI was done on January 4, 2008, would have been bloody, rather than "straw-colored."[66] In contrast, Dr. Diamond noted that the 2003 MRI documented an abnormal ACL but that did not change his original opinion that the 2007 work injury was the substantial cause of Porteleki's need for surgical intervention.[67]

First, the board failed to decide whether an earlier ACL tear even occurred, and did not evaluate which of all the causes was the substantial cause in Porteleki's present need

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[64] The board stated that the employer was required to submit "substantial evidence showing . . . the claimed medical benefits are not reasonable and necessary for the work-related injury." Reasonableness and necessity of the medical treatment were not at issue in Porteleki's case; whether the injury necessitating the medical treatment was work-related was the issue. *See* n.6 and n.46, *supra*.

[65] AS 23.30.010(a) and *Runstrom*, App. Comm'n Dec. No. 150 at 8.

[66] R. 059, 065; Oct. 15, 2009, Hr'g Tr. 62-64; 80:17-24.

[67] R. 088-89.

for medical treatment. "The Board is required to make findings about issues that are both contested and material."[68] Here, whether Porteleki's ACL was torn before the 2007 injury is contested because the parties dispute whether this occurred. In addition, it is material because if the ACL tear did not occur at work on December 27, 2007, but it is the substantial cause of Porteleki's need for surgery, then Porteleki may not be able to prove his claim for medical treatment. Thus, it was error to not decide whether Porteleki's ACL was torn before the 2007 injury and to not evaluate the relative contributions of the different possible causes of Porteleki's need for surgery.

Second, the board conclusorily stated that the opinions of Drs. Raymond, Keller, Diamond, and the radiologist that performed the 2008 MRI support that the employee's work injury was the substantial cause of his need for medical treatment without explaining the basis for this decision. Findings must "at a minimum . . . show that the Board considered each issue of significance, *demonstrate the basis for the board's decision*, and [be] sufficiently detailed."[69] We urge the board to carefully consider whether Porteleki's treating doctors expressed an opinion about whether his work-related injury was "the substantial cause" in the need for knee surgery. Although the record supports that Drs. Raymond, Keller, and the 2008 MRI radiologist understood that Porteleki injured his knee at work on December 27, 2007, our review of the record did not uncover any statements by these three doctors that compare causes and pinpoint Porteleki's work-related knee injury, rather than other causes, as "the substantial cause" of his present need for surgery. In contrast, Dr. Diamond and Dr. Joosse expressed specific opinions about causation. Because those opinions are contrary, we leave it to the board to evaluate these medical opinions and testimony.[70]

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68 *Pietro,* 233 P.3d at 612.

69 *Id.* (emphasis added and citation omitted).

70 *See* AS 23.30.122 (providing that the board's findings "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.").

Porteleki argues that the board found Dr. Joosse not credible. Although the board's credibility findings are binding on the commission,[71] we will not assume that lack of credibility was relevant to the board's decision without a specific finding that the board disbelieved a witness.[72] Here, the board did not discuss Dr. Joosse's testimony or report in its analysis of whether Porteleki had proven his claim for medical benefits. Thus, the basis for the board's decision is uncertain.

Therefore, the commission concludes that we must remand this case to the board to consider the evidence, make sufficient findings, and apply the statutory "the substantial cause" test to the issue whether Porteleki's need for knee surgery was work-related.

c. The board properly applied AS 23.30.145 to Porteleki's request for attorney fees and did not abuse its discretion in making the fee award.

Uresco makes two arguments regarding the attorney fees award.[73] Uresco argues that the board cannot award "duplicative" fees based on both AS 23.30.145(a) and (b),[74] and that the board should have reduced the award because Porteleki did not prevail on the

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[71] AS 23.30.128(b).

[72] *Hoth v. Valley Constr.*, 671 P.2d 871, 874 n.3 (Alaska 1983) (stating "[a]bsent specific findings by the Board that it chose to disbelieve a witness's testimony, we will not assume that lack of credibility was a relevant factor in the Board's decision.").

[73] Uresco did not concede that the board properly decided that Porteleki prevailed on his claim for medical benefits but argues that even if Porteleki does prevail, the board's fee award is in error.

[74] AS 23.30.145 provides in relevant part:

> (a) Fees for legal services rendered in respect to a claim . . . may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 in compensation. . . .
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> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical or related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. . . .

issue of frivolous or unfair controversion. We address these arguments because they are likely to arise again on remand if the board decides that Porteleki prevailed on his claim for medical benefits.

The board awarded reasonable fees under AS 23.30.145(b), but concluded "the employee is entitled to mandatory statutory minimum attorney fees under AS 23.30.145(a) when, and if, the statutory minimum amount based on the payment of past and future medical, indemnity, and all other benefits exceeds the attorney fee awarded under AS 23.30.145(b)."[75] Although the supreme court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive.[76] Subsection (a) fees may be awarded only when claims are controverted in actuality or fact.[77] Subsection (b) may apply to fee awards in controverted claims,[78] in cases in which the employer does not controvert but otherwise resists,[79] and in other circumstances.[80] It is undisputed that Uresco controverted Porteleki's claim. Thus, we see no reason his attorney could not seek fees under either AS 23.30.145(a) or (b) and find no error in the board's decision to award fees under the higher of (a) or (b).

We review the board's decision to not deduct for the time spent on the unsuccessful unfair or frivolous controversion claim for an abuse of discretion. "The board is in a far better position than the commission to evaluate . . . whether a party successfully

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[75] *Porteleki*, Bd. Dec. No. 09-0179 at 18 (as corrected in the Errata Sheet for Final Decision and Order, issued on December 9, 2009).

[76] *Circle De Lumber Co.,* 130 P.3d at 952 n.76.

[77] *Harnish Group, Inc.*, 160 P.3d at 151-52; *Haile v. Pan Am. World Airways, Inc.*, 505 P.2d 838, 840 (Alaska 1973).

[78] *Circle De Lumber Co.*, 130 P.3d at 952 n.76 (stating "in a controverted case, the claimant is entitled to a percentage fee under subsection (a) but may seek reasonable fees under subsection (b).").

[79] *Harnish Group, Inc.*, 160 P.3d at 152-53.

[80] AS 23.30.145(b) provides in part that it applies "[i]f an employer fails to file timely notice of controversy or fails to pay . . . benefits within 15 days after it becomes due[.]"

prosecuted a claim, and any other consideration bearing on the attorney fee issue."[81] Here, the board acted within its discretion in evaluating the fee award and adequately explained its reasoning for deciding the time spent on the unsuccessful controversion claim was *de minimis*, and substantial evidence supports the *de minimis* finding. Thus, on remand, if the board decides in favor of Porteleki on the medical benefits claim, the board need not reduce the fee award for the time spent litigating the unsuccessful unfair controversion claim.

5. Conclusion.

The commission VACATES the board's decision and REMANDS to the board to determine whether Porteleki's need for knee surgery is work-related under the causation standard and presumption of compensability analysis as provided in AS 23.30.010(a).

Date: *11 May 2011* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David Richards, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal from the board's Decision No. 09-0179. The commission vacated the board's decision and remanded (returned) the case to the board. The commission's decision becomes effective when distributed unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).[82] To see the date it is distributed, look at the box below. It becomes final on

[81] *Bundy v. State of Alaska, Dep't of Health and Soc. Servs.*, Alaska Workers' Comp. App. Comm'n Dec. No. 142, 26 (Dec. 20, 2010).

[82] A party has 30 days after the service or distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was served by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

(continued)

the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[83] 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 no later than 30 days after the day this decision is distributed to the parties. 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[84] 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 this is a full and correct copy of the Final Decision No. 152 issued in the matter of *Uresco Construction Materials, Inc. v. Porteleki,* AWCAC Appeal No. 09-032, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 11, 2011.

Date: *May 17, 2011*

Signed

B. Ward, Commission Clerk

Additional Time After Service or Distribution by Mail. Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

83 *See* n.82, above.

84 *Id*.