Alaska Workers' Compensation Appeals Commission

Ashwater-Burns, Inc., Commerce & Industry Insurance Co., Chartis, and Northern Adjusters, Appellants, vs. Joseph D. Huit, Appellee.	Final Decision Decision No. 191 March 18, 2014 AWCAC Appeal No. 13-016 AWCB Decision No. 13-0080 AWCB Case No. 201018436

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 13-0080, issued at Anchorage, Alaska, on July 15, 2013, by southcentral panel members Ronald P. Ringel, Chair, Patricia Vollendorf, Member for Labor, and Dave Kester, Member for Industry.

Appearances: Robert L. Griffin, Griffin & Smith, for appellants, Ashwater-Burns, Inc., Commerce & Industry Insurance Co., Chartis, and Northern Adjusters (collectively Ashwater-Burns); Robert A. Rehbock, Rehbock & Rehbock, for appellee, Joseph D. Huit (Huit).

Commission proceedings: Appeal filed July 26, 2013, with motion for stay; amended notice of appeal filed August 2, 2013; hearing on motion for stay held September 4, 2013; order granting motion for stay issued September 18, 2013; briefing completed December 5, 2013; oral argument held on March 5, 2014.

Commissioners: David W. Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Ashwater-Burns does restoration work on damaged buildings.[1] On November 5, 2010, while working for Ashwater-Burns as a carpenter, Huit scratched his abdomen on

[1] *See Joseph D. Huit v. Ashwater-Burns, Inc. and Commerce and Industry Ins. Co.*, Alaska Workers' Comp. Bd. Dec. No. 13-0080 at 2 (July 15, 2013).

a protruding drywall screw.[2] Huit's condition deteriorated to the point where, on December 3, 2010, he went to the emergency room at Providence Alaska Medical Center.[3] He was diagnosed with a viral infection and sent home.[4] Over the next five days, his condition worsened.[5] Huit returned to the emergency room on December 9, 2010, and was diagnosed with endocarditis.[6]

Huit telephoned Eric Geiser (Geiser), the owner of Ashwater-Burns, on or before December 21, 2010, and told Geiser of the incident when he scratched his abdomen on the drywall screw. Geiser relayed this information to his insurer, which filed a report of injury that same day.[7] On December 24, 2010, Huit was diagnosed with congestive heart failure.[8] Ashwater-Burns controverted all benefits on December 30, 2010, on the grounds that the injury was not timely reported and expert medical evidence was needed to attach the presumption of compensability.[9] Huit filed a workers' compensation claim (claim) on January 7, 2011, seeking temporary total disability and medical benefits, interest, penalties, attorney fees, and costs.[10] He was discharged from the hospital on January 13, 2011.[11]

In due course, a hearing on Huit's claim was held on June 6, 2013, before the Alaska Workers' Compensation Board (board).[12] The only issue was whether the claim

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2 *See Huit*, Bd. Dec. No. 13-0080 at 2.

3 *See id*. at 3.

4 *See id*.

5 *See id*.

6 *See id*. at 3-4. Endocarditis is an "[i]nfection or inflammation of the heart valves or of the lining of the heart." Taber's Cyclopedic Medical Dictionary (2009).

7 *See id*. at 4.

8 *See id*. at 5.

9 *See id*.

10 *See id*.

11 *See id*.

12 *See id*. at 1.

was compensable.[13] The board held that it was.[14] Ashwater-Burns timely appealed that decision to the Workers' Compensation Appeals Commission (commission). We affirm in part, reverse in part, and vacate in part and remand this matter to the board, as more fully explained below.

2. Factual background and proceedings.

Huit had demolished a built-in vanity in a basement bathroom and was hauling the pieces upstairs and outside when he sustained the scratch to his abdomen on November 5, 2010. He did not report the scratch to Ashwater-Burns because minor scratches are a common occurrence for carpenters, nor did he seek any medical treatment at that time.[15] Steven Huit (Steven), Huit's brother, also worked for Ashwater-Burns. On the day Huit sustained the scratch, he showed it to Steven, who described it as "sizable" with a small amount of clotted blood. Steven corroborated Huit's testimony that minor scratches were a common injury for carpenters.[16]

Over the next couple weeks, both Huit's daughter and wife had occasion to observe the scratch on his abdomen.[17] On December 3, 2010, he went to work, however, Geiser told him he did not look well and should go to the hospital. Steven took Huit to the emergency room where he was diagnosed with a viral infection and sent home with instructions to rest and drink lots of fluids.[18]

Huit got worse. On the morning of December 9, 2010, his brother brought him back to the hospital.[19] On arrival at the emergency room, he complained of fever, muscle pain throughout his body, and nausea. Following tests, including an echocardiogram, Huit was preliminarily diagnosed with endocarditis. There is no

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13 *See Huit*, Bd. Dec. No. 13-0080 at 1-2.

14 *See id*. at 20.

15 *See id*. at 2.

16 *See id*. at 3.

17 *See id*.

18 *See id*.

19 *See id*.

reference to any abdominal scratch in the medical records.[20] Michele McCall, M.D., examined Huit in the emergency room. She made no mention of a scratch on his abdomen. After a long discussion with Huit, Dr. McCall concluded that "[t]his is spontaneous endocarditis."[21]

Robert Bundtzen, M.D., an infectious disease specialist, was consulted. Dr. Bundtzen noted that blood cultures revealed *Staphylococcus aureus*. He diagnosed endocarditis with metastatic lesions to the spleen, kidneys, and brain. He did not mention a scratch on Huit's abdomen. Dr. Bundtzen indicated that the source of the *Staphylococcus* was not clear, stating there was "no focal infection" and "[t]here is no good portal of entry. . . . This happens in a small percentage of the time right out of the blue, and I think that is what happened to him."[22] Nevertheless, according to Huit's wife, Marguerite, Dr. Bundtzen told her that the abdominal scratch was probably the cause of the infection.[23]

On December 23, 2010, Huit was examined while in the hospital by Mark A. Selland, M.D., after an echocardiogram showed worsening heart function. Dr. Selland noted: "Sometime prior to his initial presentation, the patient sustained a scratch or cut to his abdomen which became red, inflamed, and 'infected' per the patient. Otherwise, the patient had no skin lesions, abscesses or other infections."[24] The following day, Huit was diagnosed with congestive heart failure.[25]

On January 4, 2011, Dr. Bundtzen wrote a progress report stating:

> Mr. Huit describes to me a significant scratch or abrasion on his abdomen that he acquired on November 5, 2010. This lesion was described as reddened and tender. It eventually resolved between Nov. 15-20.

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20 *See Huit*, Bd. Dec. No. 13-0080 at 4.

21 *Id*. at 4.

22 *See id*.

23 *See id*.

24 *Id*. at 5 quoting R. 639.

25 *See id*. at 5.

> The portal of entry of the *Staph. aureus* was not apparent when he presented for medical care.
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> The abdominal abrasion is a possible portal of entry for this life threatening staphylococcal infection.[26]

On January 27, 2011, Herbert Semler, M.D., a cardiologist, reviewed Huit's medical records in conjunction with an employer's medical evaluation (EME). Dr. Semler diagnosed endocarditis due to *Staphylococcus aureus*. When asked whether Huit's scratch "is more probable than not the substantial cause" of the endocarditis, Dr. Semler responded:

> [I]t would be my opinion that the alleged scratch, if it [in] fact . . . happened at all, fails to meet the scientific basis for being the substantial cause for the disability or need for medical treatment. There is no convincing proof it arose out of the course of his employment. There was no objective evidence from his co-workers that there was any scratch. . . . My opinion is based on the lack of evidence to support the alleged scratch. . . . The more likely medical explanation for the cause of the bacterial endocarditis is unknown. . . .[27]

Dr. Semler was asked whether he would expect a scratch to Huit's abdomen on November 5, 2010, to still be visible when he was admitted to the hospital on December 9, 2010. Dr. Semler responded:

> This is a difficult question to answer precisely, because it varies from individuals as to how long the abrasion was infected. There was no evidence that it was visible. No one saw the alleged scratch, so I would conclude the employee did not sustain a scratch or abrasion as there was no evidence when he was admitted to the hospital on December 9, 2010. One would think that if he had a *Staph* infection of the skin, that it would still be visible when admitted to the hospital on December 9, 2010.[28]

When asked about the timing between an infected scratch and the development of heart valve vegetation,[29] Dr. Semler answered: "I do not know that there is a 'typical

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[26] *Huit*, Bd. Dec. No. 13-0080 at 5.

[27] *Id*. at 5-6.

[28] *Id*. at 6.

[29] A vegetation is an excrescence on a cardiac valve composed of platelets, fibrin, and often bacteria, seen in bacterial endocarditis and other diseases. *See Huit*, Bd. Dec. No. 13-0080 at 4 (attribution omitted).

timing' between an infected scratch and the development of heart valve vegetation. Usually the typical timing for an infection and the development of heart valve vegetation is four to six weeks. . . ."[30]

On January 31, 2011, James E. Leggett, M.D., an infectious disease specialist, also reviewed Huit's medical records for an EME. Dr. Leggett was asked whether the scratch "is more probable than not the substantial cause" of the endocarditis; he replied:

> I do not believe that Mr. Huit's scratch/abrasion was a more probable than not substantial cause of his *S. aureus* aortic valve endocarditis. *Staphylococcus aureus* infection is associated with colonization and subsequent introduction under the skin, into the lungs, or other entry. The portal of entry may be rather insignificant, such as the alleged abrasion/scratch. This is just as likely to occur outside of work as at work. The source of the *S. aureus* was not the screw or the vanity, but rather the patient's own skin.[31]

When asked if he would expect a November 5, 2010, scratch to be visible on December 9, 2010, Dr. Legett replied: "I would not expect a local self-limited abrasion/scratch, even if infected, to still be visible a month later." In response to a question about other probable sources of the infection, Dr. Leggett stated: "[M]ost staphylococcal infections result from trauma, including lacerations, abrasions, paronychia, folliculitis, and entirely subclinical breaks in the integrity of the epithelium or endothelium." Dr. Leggett's opinion as to the substantial cause of Huit's infection was "an unidentified source as noted by Dr. Bundtzen in his initial consultation note."[32]

Huit had aortic valve replacement surgery on February 16, 2011. He was discharged from the hospital on February 20, 2011.[33]

On May 16, 2011, Huit was seen by William S. Breall, M.D., a cardiologist, for a second independent medical evaluation (SIME). Dr. Breall explained that Huit's

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30 *Huit*, Bd. Dec. No. 13-0080 at 6.

31 *Id*. at 6.

32 *Id*. at 6-7.

33 *See id*. at 7.

congestive heart failure was due to the endocarditis. In addressing causation, Dr. Breall stated:

> [T]here is no evidence in the records to indicate that the scratch on the abdomen caused a bacteremia which resulted in infective endocarditis involving the aortic valve. The scratch on the abdomen did not produce pus. It was not infected. There was no culture obtained from that scratch at the time it was red in appearance. While it is *possible* that this might have been the portal of entry for the *Staph* bacteria, it is not *probable*. I cannot state that there was "a reasonable medical degree of probability" that the scratch on the abdomen caused the endocarditis. To do so would be complete and utter speculation.
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> One must remember that *Staph aureus* is ubiquitous. If it is present all over the body, it will exist in the nose and throat as well as all over the skin. I[t] can get into the bloodstream spontaneously in a susceptible individual from just about any place.

In his summary, Dr. Breall stated "it is my opinion that there is no hard evidence that Mr. Huit had an industrial accident resulting in his infective endocarditis. . . ."[34]

On October 22, 2011, Francis X. Riedo, M.D., an infectious disease specialist, also examined Huit in connection with a board-ordered SIME. Dr. Riedo stated that none of the medical records prior to or at the time of Huit's admission to the hospital on December 9, 2010, report an abdominal scratch. Dr. Riedo stated he would expect some residual evidence of an infected scratch even four to six weeks later. Regarding causation, Dr. Riedo stated: "While possible, I do not believe on a more probable than not basis that the November 5, 2010 scratch was the substantial cause of Mr. Huit's endocarditis. . . . While it is medically reasonable that a scratch as described by Mr. Huit can cause this illness, it is possible but again not probable given the lack of any skin lesion noted just three to four weeks after the scratch."[35]

On February 26, 2013, Dennis L. Stevens, M.D., an infectious disease specialist, noted:

> Patient does state as did Dr. Bundtzen . . . that he had sustained a scratch on the abdomen while working [for] Ashwater Burns[,] a fire and water restoration company. Apparently, the area got red and persisted for

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[34] *Huit*, Bd. Dec. No. 13-0080 at 7.

[35] *See id*. at 7-8.

about a week, but resolved on its own and this occurred approximately 1 month before his symptoms of endocarditis developed. This is the only potential portal of entry and the patient denied IV drug abuse, etc.[36]

3. Standard of review.

"The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."[37] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[38] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law"[39] and therefore independently reviewed by the commission.[40]

"The board is required to make findings only about questions that are both contested and material."[41] "Whether the board made sufficient findings is a question of law that we review de novo."[42]

The board has the sole power to determine the credibility of a witness and a board finding concerning the weight to be accorded a witness's testimony is conclusive even if conflicting or susceptible to contrary conclusions.[43] The board's findings regarding the credibility of witness testimony are binding on the commission.[44]

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[36] *Huit*, Bd. Dec. No. 13-0080 at 8.

[37] AS 23.30.128(b).

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

[39] *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, 1188-89 (Alaska 1984)).

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

[41] *Pietro*, 233 P.3d at 610-11 (footnote omitted).

[42] *Id.* at 611 (citing *Leigh v. Seekins Ford*, 136 P.3d 214, 216 (Alaska 2006)).

[43] *See* AS 23.30.122.

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

4. Applicable law.

a. Statutes.

AS 23.30.100. Notice of injury or death.

(a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.

. . .

(d) Failure to give notice does not bar a claim under this chapter

(1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;

(2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;

(3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

AS 23.30.120. Presumptions.

(a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter;

(2) sufficient notice of the claim has been given;

(3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;

(4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

(b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

. . .

b. The presumption of compensability.

In *Runstrom v. Alaska Native Medical Center*,[45] the commission had the opportunity to discuss the presumption of compensability, as it was formulated both before and after the 2005 amendments to the Alaska Workers' Compensation Act.

> As the commission has observed, prior to the 2005 amendments to the Act, case law required that employment be "a substantial factor" in causing the employee's disability, need for medical treatment, etc. Now, pursuant to AS 23.30.010(a), the board "must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment." This subsection further provides that "[c]ompensation 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." Under AS 23.30.010(a), as has always been required of the employee under the presumption of compensability analysis, to attach the presumption, the employee must first establish "a causal link" between employment and his or her disability, need for medical treatment, etc. However, as explained below, applying our independent judgment to this legal issue, in the commission's view, the amended version of the statute modifies the last two steps of the presumption analysis.
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> . . .
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> As for the second step of the analysis, to rebut the presumption under former law, the employer's substantial evidence had to either (1) provide an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the injury, etc.; or (2) directly eliminate any reasonable possibility that employment was a factor in causing the injury, etc. In contrast, under the new, statutory causation standard, the employer may rebut the presumption "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." To do so, "the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment."
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> In applying AS 23.30.010(a), what showing is required of the employer to rebut the presumption? We think that, similar to one of the alternative showings under former law, the employer can rebut the presumption with substantial evidence that excludes any work-related factors as the substantial cause of the employee's disability, etc. In other words, if the

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[45] App. Comm'n Dec. No. 150 (Mar. 25, 2011); the Alaska Supreme Court (supreme court) affirmed, 280 P.3d 567 (Alaska 2012).

employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the disability, etc., the presumption is rebutted. However, the alternative showing to rebut the presumption under former law, that the employer directly eliminate any reasonable possibility that employment was *a factor* in causing the disability, etc., is incompatible with the statutory standard for causation under AS 23.30.010(a). In effect, the employer would need to rule out employment as *a factor* in causing the disability, etc. Under the statute, employment must be more than *a factor* in terms of causation.

If the employer successfully rebuts the presumption, under former law, the supreme court consistently held that in the third step of the analysis, 1) the presumption dropped out, and 2) the employee was required to prove all elements of his or her claim by a preponderance of the evidence. Our prior review of the legislative history of the 2005 amendments to AS 23.30.010 did not reveal any intention on the part of the Alaska Legislature to abandon these two elements of the third step in the analysis. On the other hand, as we said earlier, the legislature enacted the amendments to AS 23.30.010 with full knowledge of the supreme court's wording of the presumption analysis under former law, yet it worded the third step in the analysis differently: "[I]f, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment[,]"compensation or benefits are payable.

What form should the third step of the analysis now take? In light of the foregoing considerations, the commission believes the 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). We come to this conclusion because the supreme court has held that "[t]he presumption shifts only the burden of going forward, not the burden of proof." Accordingly, the commission is reluctant to dispense with this burden-allocation feature when applying a third step in the statutory presumption analysis. Therefore, we hold: 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.[46]

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[46] *Runstrom*, AWCAC Dec. No. 150 at 5-8 (footnotes omitted).

5. Discussion.

a. Was the report of injury timely?

AS 23.30.100(a) states that notice of an injury must be provided to the board and the employer within 30 days of the injury. The 30-day deadline begins to run when the first compensable event occurs.[47] Huit maintained he suffered an abdominal scratch on November 5, 2010. However, as the board pointed out,[48] he is not claiming benefits for the scratch, he is seeking compensation for the subsequent infection and endocarditis, which were first diagnosed on December 9, 2010. According to the board, that was the first compensable event.[49] The report of injury was filed on December 21, 2010, within the 30-day deadline. On the basis of the evidence and applicable law, the board concluded that the report of injury was timely.[50] We concur.[51]

b. Was the board's finding that Huit attached the presumption supported by the evidence?

The first step in the presumption of compensability analysis is to determine whether the employee attached the presumption. In the particular circumstances of this case, however, we view that inquiry as two-fold: 1) did Huit sustain a work-related scratch; and 2) was there a causal link between the scratch and his subsequent infection and endocarditis?

First, the board discussed the evidence whether Huit actually suffered a scratch while he was working for Ashwater-Burns on November 5, 2010.[52] If he did, it would partly satisfy the requirement that he demonstrate a preliminary link between injury and employment.[53]

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47 *See Cogger v. Anchor House*, 936 P.2d 157, 160 (Alaska 1997).

48 *Huit*, Bd. Dec. No. 13-0080 at 14.

49 *See id.*, Bd. Dec. No. 13-0080 at 14.

50 *See id.*

51 Because the notice was timely, AS 23.30.100(d) and AS 23.30.120(b), quoted verbatim in Part 4(a) above, do not apply in this case.

52 *See Huit*, Bd. Dec. No. 13-0080 at 15-16.

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

At the outset, the board observed,[54] and we agree, that whether Huit suffered a scratch is not a complex medical question. There was, according to the board, credible evidence from Huit that he was scratched at work. Moreover, his brother and co-worker, Steven, provided credible corroborating testimony that he saw the scratch that same day. On the other hand, as the board pointed out, the medical experts who treated or evaluated Huit could not agree whether he had even sustained the scratch.[55] The opinions of Drs. Bundtzen and Selland, discussed and/or quoted in Part 2, allowed that Huit was scratched. Others, including Drs. Leggett, Breall, Riedo, and Stevens, simply accepted the fact that Huit sustained the scratch as he said he did. Dr. Semler's opinion alone could be understood as expressing doubt, not only on whether Huit suffered the scratch at work, but whether he suffered a scratch at all.

Given this evidence, the board found that, because of the lack of consensus among these medical experts, the lay testimony was more persuasive and entitled to more weight.[56] Because the board's credibility findings are binding on the commission and its weight findings are conclusive, even if the evidence is conflicting or susceptible to contrary conclusions,[57] the commission must defer to the board in these respects. Ultimately, the commission agrees with the board that the evidence established that Huit was scratched as he claimed.[58]

Second, the board determined that whether there is a causal connection between the scratch and Huit's infection and endocarditis is a complex medical question requiring medical evidence to establish that connection.[59] We agree. Infectious disease specialists Drs. Bundtzen, Riedo, and Stevens, and cardiologist Dr. Breall, all indicated that the scratch was a possible or potential portal of entry for the infection

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54 *See Huit*, Bd. Dec. No. 13-0080 at 15.

55 *See id*. at 15-16.

56 *See id*.

57 *See* AS 23.30.122.

58 *See Huit*, Bd. Dec. No. 13-0080 at 16.

59 *See id*.

that led to Huit's endocarditis. In the commission's view, this evidence, coupled with the evidence that he sustained a scratch at work, satisfied the requirement that Huit demonstrate a preliminary link between injury and employment.

c. Was the board's finding that Ashwater-Burns failed to rebut the presumption supported by substantial evidence?

As for the second step in its presumption analysis, the board concluded that Ashwater-Burns had not presented substantial evidence which demonstrated that a cause other than employment played a greater role in causing the infection.[60] However, it based its conclusion on a narrow reading of the commission's decision in *Runstrom*, a reading that was understandable, given particular wording in that decision. We stated:

> [T]he employer can rebut the presumption with substantial evidence that excludes any work-related factors as the substantial cause of the employee's disability, etc. In other words, if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the disability, etc., the presumption is rebutted.[61]

The board focused its attention on the second sentence and apparently understood it to mean that the *only* way to rebut the presumption was to present evidence that a cause other than employment was the substantial cause of Huit's infection and endocarditis.[62] However, the first sentence provides that the presumption can be rebutted through the presentation of substantial evidence that work was not the substantial cause of a disability.

Furthermore, the board cited a supreme court decision that predates the 2005 amendments to the Alaska Workers' Compensation Act[63] for the proposition that "[a]n employer has always been able to rebut the presumption of compensability with an expert opinion that 'the claimant's work was probably not a substantial cause of the

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60 *See Huit*, Bd. Dec. No. 13-0080 at 17.

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

62 *See Huit*, Bd. Dec. No. 13-0080 at 17.

63 *See Huit*, Bd. Dec. No. 13-0080 at 11 citing *Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

disability.'"[64] Updating this pronouncement in keeping with the 2005 statutory amendment providing that employment must be *the* substantial cause of the disability for it to be compensable, it follows that Ashwater-Burns can rebut the presumption with *an* expert opinion that employment was probably not the substantial cause of Huit's disability. The board also cited another pre-amendment supreme court decision which holds that medical testimony pointing to other causes of an employee's disability, without ruling out work-related causes, cannot constitute substantial evidence rebutting the presumption.[65] The question then is whether the medical evidence in this case ruled out employment as the substantial cause of Huit's infection and endocarditis.

In contrast to the board's conclusion, we believe that Ashwater-Burns presented substantial evidence in the form of expert medical opinion that rebutted the presumption. Considering that evidence in isolation, as we must at this juncture,[66] there was evidence that ruled out what was identified as the one-and-only potential work-related cause of Huit's disability, namely the scratch. Dr. Riedo, the infectious disease specialist, stated:

> While possible, I do not believe on a more probable than not basis that the November 5, 2010 scratch was the substantial cause of Mr. Huit's endocarditis. . . . While it is medically reasonable that a scratch as described by Mr. Huit can cause this illness, it is possible but again not probable given the lack of any skin lesion noted just three to four weeks after the scratch.[67]

Similarly, Dr. Breall, the cardiologist opined: "While it is *possible* that [the scratch] might have been the portal of entry for the *Staph* bacteria, it is not *probable*. I cannot state that there was 'a reasonable medical degree of probability' that the scratch on the abdomen cause[d] the endocarditis."[68]

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[64] *Huit*, Bd. Dec. No. 13-0080 at 11 quoting *Big K Grocery* at 942.

[65] *See id*. at 11 citing *Childs v. Copper Valley Elec. Ass'n.*, 860 P.2d 1184, 1189 (Alaska 1993).

[66] *See Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

[67] *Huit*, Bd. Dec. No. 13-0080 at 7-8.

[68] *See id*. at 7.

In the context of this case, we think the medical experts have "ruled out" employment, specifically the scratch, as the substantial cause of Huit's infection and endocarditis, as required by the *Childs* decision. Based on our experience in workers' compensation, a medical expert will rarely couch his or her opinions in absolute language. Ordinarily, the standard applicable to their opinions is whether they are held to a reasonable degree of medical probability.[69] Therefore, Dr. Riedo's and Dr. Breall's opinions that the scratch was probably not the cause sufficed to rule out employment as the substantial cause of Huit's disability and rebut the presumption.

d. Was the board's alternative ruling that Huit proved his claim by a preponderance of the evidence supported by substantial evidence?

Alternatively, assuming that Ashwater-Burns rebutted the presumption of compensability, in the last step of its presumption of compensability analysis, the board reviewed the medical evidence bearing on the issue whether Huit had proved, by a preponderance of the evidence, that employment was the substantial cause of his infection and endocarditis.[70] The board decided to give Dr. Bundtzen's opinions the most weight, because he is an infectious disease specialist and was the initial treating physician.[71] Once he was informed of the scratch, he opined that is was a possible point of entry. The board assigned less weight to the opinions of Drs. Breall, Riedo, and Leggett. According to the board, these doctors did not have the benefit of "the credible lay testimony presented at hearing regarding the scratch's existence."[72] Of particular significance to the board were the opinions of Drs. Semler and Leggett, who, without any knowledge of the timing of the scratch and Huit's subsequent hospitalizations, both concluded that it would take between four-to-six weeks for the infection to develop. The board found that the scratch happened on November 5,

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[69] *See Huit*, Bd. Dec. No. 13-0080 at 12 quoting *Beauchamp v. Employers Liability Assur. Corp.*, 477 P.2d 993, 996 (Alaska 1970).

[70] *See Huit*, Bd. Dec. No. 13-0080 at 18-20.

[71] *See id*. at 18.

[72] *See Huit*, Bd. Dec. No. 13-0080 at 19.

2010; Huit's initial hospitalization and diagnosis of an infection took place on December 3, 2010, four weeks later; and his endocarditis was diagnosed six days later, on December 9, 2010.[73] Based primarily on the foregoing findings, the board concluded that Huit "proved by a preponderance of the evidence that the scratch was the substantial cause of his endocarditis."[74]

In reviewing the board's analysis, we again note the following legal principles: 1) the commission must defer to the board in terms of its credibility and weight findings; 2) the question to be resolved involves a complex medical issue; 3) the evidentiary standard applicable to medical opinions is that they must be held to a reasonable degree of medical probability; 4) to uphold the board, its findings must be supported by substantial evidence in light of the whole record; and 5) the question whether the quantum of evidence is substantial enough is a question of law.

We accept the board's credibility and weight findings. Nevertheless, in our review of the whole record, we were unable to identify an opinion from any of the medical experts who treated or evaluated Huit that the scratch was, to a reasonable degree of medical probability, the substantial cause of his infection and endocarditis. Without such evidence relative to this complex medical issue, the commission is at a loss to understand how the board decided that there was substantial evidence supporting its conclusion that Huit proved the compensability of his claim by a preponderance of the evidence. In our opinion there is an insufficient connection between the evidence and the board's conclusion.

AS 23.30.128(d) states in relevant part: "The commission may remand matters it determines were improperly, incompletely, or otherwise insufficiently developed." Moreover, "[w]hether the board made sufficient findings is a question of law that we review de novo."[75] In the particular circumstances of this case, we conclude that the board made incomplete or insufficient findings with respect to the compensability of

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[73] *See Huit*, Bd. Dec. No. 13-0080 at 19.

[74] *Id*. at 18.

[75] *Pietro*, 233 P.3d at 611.

Huit's claim. Specifically, the board needs to identify with more precision the medical evidence it was relying on in deciding the compensability issue.[76] We believe the evidence supporting the board's compensability holding was incompletely or insufficiently developed and remand for that reason.

6. Conclusion.

The commission AFFIRMS the board with respect to its rulings that the report of injury was timely and Huit attached the presumption. We REVERSE the board's ruling that Ashwater-Burns failed to rebut the presumption of compensability. The commission VACATES the board's holding that Huit proved the compensability of his claim and REMANDS this matter to the board so that it can make sufficient findings, based on the record from the hearing on June 6, 2013, that would enable us to effectively review its decision on the compensability of Huit's claim.

Date: *18 March 2014* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

This is a final decision on the merits of this appeal as to the appeals commission's affirmation of the board's decision in part, reversal of the board's decision in part, and vacating the board's decision in part. This is a non-final decision as to the appeals commission's remand of the matter in part to the board. The final decision portion of this decision becomes effective when distributed (mailed) unless proceedings to

[76] The commission is mindful of the supreme court's admonition in *Sosa de Rosario v. Chenega Logging*, 297 P.3d 139, 149 (Alaska 2013)(footnotes omitted), that entitlement to workers' compensation benefits should not depend on a physician saying the "magic word," that is, using a specific term to prove a claim. On the other hand, for years, the supreme court has consistently required that expert medical opinions be expressed to a reasonable degree of medical probability in order satisfy the evidentiary standard for such opinions. *See Beauchamp*, 477 P.2d 993, 996.

1) reconsider the final decision portion are instituted (started), pursuant to AS 23.30.128(f) and 8 AAC 57.230, or 2) unless proceedings to appeal the final decision portion to the Alaska Supreme Court, pursuant to AS 23.30.129(a) are instituted. See Reconsideration and Appeal sections below.

The non-final portion of this decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted. See Petition for Review section below.

To see the date of distribution look at the box below.

RECONSIDERATION

A party may request the commission to reconsider this decision as to the final decision portion by filing a motion for reconsideration. AS 23.30.128(e) and 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 (mailed) to the parties. If a request for reconsideration of a final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

APPEAL

The commission's final decision portion becomes effective when distributed unless proceedings to appeal to the Alaska Supreme Court are instituted (started). 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[77] 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.

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[77] A party has 30 days after the distribution of a final decision of the commission to file an appeal with the supreme court. If the commission's decision was distributed 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:

> **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.

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
More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

PETITION FOR REVIEW

A party may petition the Alaska Supreme Court for review of that portion of the commission's decision that is non-final. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.[78]

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition the Alaska Supreme Court for review, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612
More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

I certify that this is a full and correct copy of Final Decision No. 191 issued in the matter of *Ashwater-Burns, Inc., Commerce & Industry Insurance Company, Chartis, and Northern Adjusters vs. Joseph D. Huit,* AWCAC Appeal No. 13-016, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 18, 2014.

Date: *March 19, 2014*

Signed
K. Morrison, Appeals Commission Clerk

[78] A party has 10 days after the distribution of a non-final decision of the commission to file a petition for review with the Alaska Supreme Court. If the commission's decision was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c). *See* n.77 for Rule of Appellate Procedure 502(c).