Alaska Workers' Compensation Appeals Commission

Guys With Tools, Ltd., d/b/a The Bush Pilot, and Alaska National Insurance Co.,
Appellants,

vs.

Sandra M. Thurston,
Appellee.

Final Decision and Order
Decision No. 062 November 8, 2007

AWCAC Appeal No. 06-039
AWCB Decision No. 06-0323
AWCB Case No. 200217586

Appeal from Alaska Workers' Compensation Board Decision No. 06-0323, issued December 6, 2006, by the northern panel at Fairbanks, Alaska, Fred G. Brown, Chair, Debra G. Noram, Member for Industry, and Damien Thomas, Member for Labor.

Appearances: Nora Barlow, DeLisio, Moran, Gerahhty and Zobel, P.C., for appellants Guys with Tools, Ltd., and Alaska National Insurance Co. Robert M. Beconovich, Robert M. Beconovich, L.L.C., for appellee Sandra M. Thurston.

Commissioners: Jim Robison, Philip Ulmer, and Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

This appeal concerns an employee who suffered a disabling work-related knee injury and subsequently developed an unrelated disabling disease. The board, relying on *Providence Washington v. Fish*,[1] treated the later-developed disease in the same manner as a pre-existing condition when analyzing the employer's liability for the employee's present disability. On review, we conclude the board erred in failing to apply the test dictated by the Alaska Supreme Court in *Estate of Ensley v. Anglo Alaska Constr. Inc.*[2] We also conclude the board erred in failing to decide two questions presented to it for decision: whether Thurston was entitled to compensation for a back injury and whether she made an excessive change of physician. However, we reject

[1] 581 P.2d 680 (Alaska 1978).

[2] 773 P.2d 955 (Alaska 1989).

the argument that an excessive change requires exclusion of the physician's reports from the record. We remand to the board with instructions to rehear the case on the record.

Factual background.

We summarize the facts pertinent to our decision. The appellant, Guys With Tools, Inc., operated the Bush Pilot bar in the Fairbanks International Airport, where Sandra Thurston was employed as a bartender. Thurston slipped on some spilled coffee and injured her left knee on August 17, 2002. She sought treatment on August 23, 2002 from Fairbanks Urgent Care. She was given a referral to Sports Medicine, but instead she saw Dr. Vrablik, who had previously treated her left knee.[3] She began treatment by Dr. Vrablik on September 9, 2002. He prescribed physical therapy and a brace. On December 5, 2002, Dr. Vrablik reported she complained of back pain that he "cannot relate . . . to a work injury." He noted that she had pre-existing spondylosis, but that her gait was altered by the brace. He ordered an MRI (Magnetic Resonance Imaging) scan of the spine that showed a "small left-sided disc protrusion at L4-5 without evidence of canal or nerve root compromise" and "spondylosis at L5-S1."[4]

By February 3, 2003, Dr. Vrablik ordered an MRI scan of the knee to determine if knee surgery may be needed. On March 3, 2003, he reported that the MRI scan shows

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[3] We note that appellee states that Fairbanks Urgent Care referred her to Dr. Vrablik, but the referral sheets show referrals to Sports Medicine or "Ortho." R. 0103, 0403, 0762, and Def. Hrg. Ex. 1, p.1 of 2. The board did not resolve whether there was a referral to Dr. Vrablik or the employee declined an offered referral to Sports Medicine.

[4] R. 0113. Dr. Vrablik had ordered MRI scans of Thurston's lower spine twice in 1998, following complaints of back pain. In January 1998, the MRI scan showed "prominent spondylosis L4-5 and L5-S1 levels with protruding disc material most marked anteriorly at the L5-S1 level." R. 0089. No significant compromise of the canal or neural foramina was identified. In October 1998, the result was described as "changes of spondylosis at L5-S1 predominantly but to a lesser degree at L4-5." R. 0380. Although anterior bulging of the L5-S1 disc was noted, no disc herniation was detected.

"more damage to the anterior horn of the lateral meniscus and a small medial meniscus tear."[5] He recommended arthroscopic surgery. The employer's medical examiner, Dr. Neumann, concurred in this recommendation on April 16, 2003.[6] He also agreed that the back condition, probably a strain related to increased activity using the knee brace, had resolved.[7]

In May 2003, Thurston changed her attending physician to David Witham, M.D., who worked at the Tanana Valley Medical-Surgical Group. He also believed she had a potential meniscus tear. On June 16, 2003, he performed a left lateral meniscectomy, in which he removed a torn portion of the anterior lateral meniscus and shaped the remaining portion to a "smooth curvilinear stump."[8] Although an earlier MRI had shown a medial meniscus tear as well, Dr. Witham found an intact medial meniscus on examination in the surgery.[9] By August 12, 2003, he had recorded that Thurston "approaches fixed and stable point and probably could undergo independent medical examination for permanent partial disability rating."[10]

Thurston was diagnosed with nonwork-related lung cancer shortly afterwards. She was treated by Dr. Carroll for her cancer. She complained to him of back pain, and he referred her for an X-ray on January 8, 2004. It was unchanged from an X-ray taken in October 1997. Thurston did not return to Dr. Witham until April 2004, when Dr. Witham indicated her knee was stable and could be rated.[11] He did not perform impairment ratings; he suggested to the adjuster that Thurston see Dr. Cobden,

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5 R. 0114.

6 R. 0121.

7 R. 0120.

8 R. 0124-25.

9 *Id.*

10 R. 0128.

11 R. 0159.

Dr. Tamai, or Dr. Joosse.[12] The adjuster sent her to Dr. Joosse, who examined her on June 7, 2004. He found she was medically stable, and merited a 1 percent impairment rating for the knee injury.[13]

Thurston developed left leg pain in 2005. She had a Doppler examination to rule out deep vein thrombosis, which revealed popliteal cysts in the knee joint.[14] Dr. Carroll referred her back to Dr. Witham, who saw her on August 30, 2005. He ordered a MRA (Magnetic Resonance Arthography) of the left knee, which was done on October 26, 2005. It confirmed that a previous cyst had grown larger, and that she had generalized cartilage thinning, joint space narrowing, and degenerative spurring.[15] However, there were no new tears of the lateral meniscus shown.

On December 21, 2005, Thurston began treatment by Dr. Cobden at the Advanced Pain Centers of Alaska, initially for back pain and knee pain. He diagnosed an internal derangement of the left knee and referred her for another lumbar spine MRI scan. The MRI scan showed no significant change from previous MRI studies.[16] Dr. Cobden referred Thurston to Dr. Slonimski, who performed a left sacroiliac injection. In August 2006, another MR Arthrogram[17] of the knee was done, which showed no popliteal cyst, degeneration of the medial meniscus, possible strain of the anterior cruciate ligament or mixoid degeneration, tricompartmental bony spurring and chondromalcia of the patella.[18] Dr. Cobden's last medical advice was given July 27,

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[12] R. 0349.

[13] R. 0162.

[14] A popliteal cyst, also known as a Baker's cyst, is a fluid-filled bulge in the popliteal bursa located behind the knee joint.

[15] R. 0619-20.

[16] R. 0632.

[17] This is another name for an MRA.

[18] R. 0821-22.

2006; he thought she may need a brace, but he would not suggest surgery until he had seen more MRI studies.[19]

Board proceedings.

The adjuster paid temporary total disability compensation from October 3, 2002, through April 12, 2004.[20] Thurston filed a workers' compensation claim on July 25, 2003, seeking the "maximum penalty" against the insurer and temporary total disability compensation from September 25, 2002, forward. On August 4, 2003, Guys With Tools controverted her claim, and answered the claim for temporary total disability between September 25, 2002, and October 2, 2002, noting that she was not authorized to leave work until October 3, 2002.[21] Thurston did not file an affidavit of readiness for hearing within two years of the date her July 25, 2003, claim was controverted.

Instead, on February 22, 2006, Thurston filed a new workers' compensation claim against Guys With Tools.[22] In addition to temporary total disability compensation after April 12, 2004, she sought permanent total disability compensation from October 27, 2003, forward, permanent impairment compensation, medical costs, a penalty, and interest.[23] She claimed that her "knee repair surgery has failed" and that she is "permanently totally disabled due to a work related injury and ongoing cancer treatment [and] other medical problems that are not work related."[24]

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[19] R. 0818-19. We note that a later report was included in the Appellant's Excerpt of Record, p. 00233, but as we are unable to locate that report in the board's record, we may not consider it. As the board's discussion of Dr. Cobden's opinion ends with a reference to the July 27, 2006, report, we assume that the board did not have it when the record closed. *Sandra M. Thurston v. Bush Pilot Restaurant and Lounge*, Alaska Workers' Comp. Bd. Dec. No. 06-0323, 4 (December 6, 2006) (F. Brown, Chair).

[20] R. 0002, 0014.

[21] R. 0012, 0025-26.

[22] R. 0027. The adjuster for Guys With Tools's insurer controverted treatment related to the back on February 2, 2006. R. 0018.

[23] R. 0028.

[24] R. 0027.

Guys With Tools answered Thurston's claim on March 24, 2006,[25] and controverted her claim with specificity on June 7, 2006.[26] Thurston filed an affidavit of readiness for hearing on April 17, 2006.[27] In a pre-hearing conference on August 9, 2006, the parties agreed to schedule the hearing on Thurston's February 2006 claim for October 12, 2006.[28] The parties agreed the disputed benefits were: permanent total disability compensation from October 27, 2003, through the present, medical costs, transportation costs, penalty, interest, and attorney fees.[29] The prehearing conference summary noted Guys With Tools addition of an "unauthorized of [sic] change of physician to the defenses" and an objection to inclusion [in the board's record] of Dr. Cobden's medical records.[30] Thurston's counsel also asserted that she "was going to have a knee replacement" and would be incurring additional medical costs.[31]

Arguments presented to the board.

Thurston defined the legal issue before the board as whether the employment was a substantial factor in her current left knee and lumbar spine "conditions."[32] She asserted Dr. Cobden's statement that "because her medial meniscus was injured and them [sic] removed by surgery it [the employment injury] has resulted in the degeneration of the medial joint compartment"[33] was evidence of a "simple cause and

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25 R. 0041-44.

26 R. 0020.

27 R. 0032.

28 R. 0844.

29 R. 0844. The attorney fees were added by verbal amendment. The basis for the penalty claim was not described. The claim for temporary total disability compensation was apparently withdrawn.

30 R. 0844.

31 *Id.*

32 R. 0055.

33 R. 0056-57.

effect relationship."[34] Thurston also asserted that there was an "obvious connection" between her knee injury and her cancer.[35] The two conditions combined to render her permanently and totally disabled. She also argued that the employer failed to overcome the presumption that she was permanently, totally disabled because it failed to demonstrate that there was a labor market for her services, as required by *Leigh v. Seekins Ford*.[36] At hearing, she conceded that her situation "is very much the situation that exists in *Ensley.*[37] However, she argued, notwithstanding the cancer, the employer could not avoid liability for the knee condition because the collapse of the medial compartment required a knee replacement, and the cancer made surgery inappropriate.[38] Penalties were due, she argued, because "there's no medical basis for this conclusion that she's medically stable."[39]

Guys With Tools argued that the concurrent disabilities must be viewed independently under *Ensley.*[40] Dr. Joosse's opinion that her condition was stable, and that she was able to return to work in her former occupation if the knee condition is viewed in isolation, was sufficient to overcome the presumption. His opinion should be given greater weight because Thurston was so poor a historian and only Dr. Joosse had

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[34] R. 0057.

[35] R. 0057. Dr. Joosse's opinion, Thurston argues, is untenable because it is unreasonable to believe that someone who experiences pain after an injury has pain due to the progression of arthritis, but not the injury. Hrg. Tr. 181.

[36] 136 P.3d 214 (Alaska 2006); R. 0058-59.

[37] *Estate of Ensley v. Anglo Alaska Constr. Inc.,* 773 P. 2d 955 (Alaska 1989), Hrg. Tr. 24.

[38] Hrg. Tr. 21. She drew a comparison to an employer being required to pay compensation while a bariatric procedure is done before a knee condition may be treated. Hrg. Tr. 176.

[39] Hrg. Tr. 24.

[40] Hrg. Tr. 28-9.

the opportunity to review her entire history and records, as well as examine her.[41] Responding to the penalty claim, Guys With Tools asserted none was due because Thurston's physician, Dr. Witham, declared she was medically stable and ready for a permanent partial impairment rating.[42] Finally, Guys With Tools argued, citing *Jaouhar v. Marenco Inc*.[43] and *Anderson v. Federal Express,*[44] that the change to Dr. Cobden was an excessive change of physician, and that, in view of his failure to cooperate with a request to depose him, his records should be excluded from evidence.[45]

Responding to the excessive change of physician charge, Thurston argued that the change from Dr. Witham to Dr. Cobden was a change within a clinic – that all the doctors within the clinic are one doctor under 8 AAC 45.082, and that she merely followed the physician she originally wanted when he left the clinic.[46] Therefore, it was not a "change" at all. Thurston characterized Guys With Tools as trying "just to wait and see if [she] is going to beat the odds" instead of paying temporary disability compensation until the knee replacement surgery can be done.[47]

The board's decision.

The board characterized the issues before it as "whether the employee's work for the employer is a substantial factor in her current left knee and lumbar conditions" and "whether the employee is entitled to permanent total disability benefits for any disability caused by her work for the employer, under AS 23.30.180."[48] The board summarized

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41 Hrg. Tr. 27-9.

42 Hrg. Tr. 27.

43 Alaska Workers' Comp. Bd. Dec. No. 98-1066 (June 23, 1998).

44 Alaska Workers' Comp. Bd. Dec. No. 98-0104 (April 24, 1998).

45 Employer's Hearing Br., R. 0073.

46 Hrg. Tr. 179.

47 Hrg. Tr. 178.

48 *Sandra M. Thurston v. Bush Pilot Restaurant & Lounge,* Alaska Workers' Comp. Bd. Dec. No. 06-0323, 2 (December 6, 2006).

the medical evidence presented in the records and Dr. Joosse's testimony to the board.[49] It reviewed the three-step presumption analysis,[50] noting that the presumption of compensability applies to a claim of continuing disability.[51] It then began its analysis with this statement:

> In this case, based on the employee's testimony and the medical records, we find the employee has established the presumption that her condition is still work related. Specifically, we rely on the undisputed evidence that the employee injured her back and knee while working for the employer.[52]

The board found that the employer overcame the presumption through production of Dr. Joosse's testimony and opinion that (1) the employee experienced only a knee sprain with a minor lateral meniscal tear, which had resolved, as a result of the work injury, and (2) the employee's chronic low back pain was not related to her work, but was of a recurrent nature and due to pre-existing and unrelated degenerative disc disease.[53]

The board then concluded it agreed that Dr. Joosse had "failed to provide any meaningful opinion as to whether the employee's work injury combined with her pre-existing conditions in a substantial way so as to render her disabled."[54] "It is undisputed," the board said, "that after undergoing surgery, the employee's symptoms

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[49] *Id.* at 2-5.

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

[51] Id. at 5 ("Continuing disability and need for medical benefits must also be presumed, *Olson v. AIC Martin J. V.,* 818 P.2d 669, 672 (Alaska 1991); *Municipality of Anchorage v. Carter,* 818 P.2d 661, 665 (Alaska 1991)."). We note that the holding of *Olson* was that, once temporary disability benefits are awarded, "an employee presumptively remains temporarily totally disabled unless and until the employer introduces 'substantial evidence' to the contrary." 818 P.2d at 672.

[52] *Sandra M. Thurston*, Dec. No. 06-0323 at 6.

[53] *Id.* at 6.

[54] *Id.* at 7.

have continued to persist."[55] The board expressly relied on the medical opinion of Dr. Cobden that "because her medial meniscus was injured and them [sic] removed by surgery it has resulted in the degeneration of her medial joint compartment."[56] "Based on the medical opinion of Dr. Cobden," it found, "the employee's condition remains compensable."[57]

Turning to the claim for permanent total disability compensation, the board found the physicians agreed that "the combination of the employee's knee and cancer conditions have rendered her totally disabled."[58] The board then stated its analysis:

> Based on our review of the record, and in the absence of any evidence from the employer to the contrary, we find the combination of the employee's work injury and her cancer render her entitled to PTD benefits. *See Tolbert v. Alascom, Inc.*, 973 P.2d at 612. (An employee is entitled to benefits whenever a work related aggravation is a substantial factor in the employee's impairment.); *Providence Washington, Inc. v. Fish*, 581 P.2d. 680 (Alaska 1978). Fish's disability was permanent and total despite the fact that other non-work related conditions had combined with the employee's work injury to bring about continuing disability.)[59]

The board followed this analysis with a statement of what an employer must show to overcome a presumption that an employee is not permanently and totally disabled:

> Finally, in order to avoid a finding of eligibility for permanent total disability benefits the employer must present substantial

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[55] *Id.*

[56] *Id.* We note the board's statement of its reasoning is a direct, but unattributed, quote from the employee's hearing brief, R. 0056-57, complete with the typographical error "them" instead of "then."

[57] *Sandra M. Thurston,* Dec. No. 06-0323 at 7. The board noted that it did not exclude Dr. Cobden's opinion because "the employee consistently sought to be treated by Dr. Cobden, and underwent surgery at the clinic where he was employed." *Id.* at 7 n. 3.

[58] *Id.* at 8.

[59] *Id.* We note that the last two sentences are almost exact quotations of Thurston's hearing brief. *Compare* R. 0058.

> evidence that a labor market exists in which the employee can be employable. Given the employee's condition in this case, we find the employer did not provide the requisite proof that the employee is employable. *See Leigh v. Seekins Ford*, 136 P.3d 214 (Alaska 2006) (To overcome the presumption of entitlement to permanent total disability benefits, the "employer must show that there is regular and continuously available work in the area suited to the employee's capabilities, i.e., that [he or she] is not an odd lot worker.") [sic]
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> The record in this case reflects the employer provided no evidence that, in her condition, the employee is employable. On the contrary the employer's physician, Dr. Joosse, suggested the employee seek Social Security Disability benefits.[60]

The board then summarized its conclusions:

> In sum, we find the employee's work for the employer was a substantial factor in her resulting left knee disability. Further, we find the combination of the employee's work-related knee injury and her cancer condition has rendered her permanently totally disabled. Accordingly, we conclude the employer must pay the employee PTD benefits.[61]

This appeal followed.

Our standard of review.

When reviewing appeals from board decisions, the commission may not disturb credibility determinations by the workers' compensation board.[62] If there is substantial evidence in light of the whole record to support the board's findings, the commission must uphold the board's findings. Because the commission makes its decision based on the record before the board, the briefs filed on appeal, and oral argument to the commission,[63] no new evidence may be presented to the commission. Whether the evidence the board relied on is "substantial evidence," and whether the board applied

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[60] *Sandra M. Thurston,* Dec. No. 06-0323 at 8-9. *Compare* R. 0058-59.

[61] *Id.* at 9.

[62] AS 23.30.128(b). The board made no explicit credibility determinations in this case.

[63] AS 23.30.128(a).

the proper legal analysis to the facts, are matters of law to which we are required to apply our independent judgment.[64]

Discussion.

The appellants argue that the board lacked substantial evidence to support its finding that the 2002 injury was a substantial factor in a knee condition related to the medial meniscus. They argue that the board should have examined the knee condition in isolation because the cancer was a later development and a concurrent, but unrelated, condition, instead of as a pre-existing condition, as required by *Estate of Ensley v. Anglo Alaska Constr., Inc*. Finally, they argue that the board's decision that Dr. Cobden was not an excessive change of attending physician was not supported by sufficient findings of fact and conclusions of law. The board failed to decide a "material and contested issue" presented to it: whether Thurston's change to Dr. Cobden was an "excessive change" and, if so, that his records should have been excluded from consideration by the board. They ask the commission to reverse the board's decision.

In response, Thurston argues that the appellants are "attempting to usurp the factual determination of the Board by casting factual conclusions in the guise of legal error."[65] The board had sufficient evidence to determine that Thurston's left knee condition continues to be compensable, and required active treatment, in Dr. Cobden's reports. Because her condition could not be treated until the cancer resolved, the employer was obliged to continue to pay benefits, notwithstanding that the delay could last the rest of the employee's life. This position, she argues, is consistent with *Ensley.* There was no excessive change of physician because (1) treatment by Dr. Vrablik was at the employer's referral, so Dr. Witham was her first attending physician; (2) even if Dr. Witham was her second physician, the change to Dr. Cobden was permissible because he was her first choice, and she only treated with Dr. Witham (then in the same clinic) because Dr. Cobden was unavailable; and, (3) she was referred to Dr. Cobden by Dr. Bartling, her family physician. Thurston argues there is sufficient

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[64] AS 23.30.128(b).

[65] Appellee's Br. 4.

evidence to support the board's findings and the result of the board's decision is consistent with *Ensley*; therefore, the board's decision should be affirmed.

We approach this appeal as one primarily involving questions of law to which we apply our independent judgment. The choice of analytical structure that applies to the case presented is one of law; whether evidence relied upon by the board is substantial evidence is a question of law; the measure of "excessive change" is a question of law; and, whether an excessive change, if such occurred, compels exclusion of the treatment reports, is a question of law and procedure.

1. The board failed to properly analyze whether the employment-related left knee injury remained a substantial factor in the employee's disability.

We begin our review with the board's decision on Thurston's claim that her 2002 work-related injury was a substantial factor in her current left knee diagnosis, and resulting disability, and that the treatment by Dr. Cobden was covered under AS 23.30.095(a). The board explicitly relied on Dr. Cobden's statement that the injury resulted in the surgical loss of the medial meniscus, and therefore, the collapse of the joint space (owing to the absent medial meniscus) was the result of the injury. The board found this condition combined with the cancer. As a result of the combined conditions, the board found, Thurston was permanently totally disabled and the employer was liable for compensation.

The board's decision reflects an understanding of the presumption of compensability, of the evidence required to overcome the presumption, and the employee's burden of proof when the presumption is overcome. The board found the employee's testimony was sufficient to establish a preliminary link between her knee injury and a back injury and her employment. The board also found that the employee's testimony and unnamed medical records were sufficient to establish a presumption that "her condition is still work related." The board also found that Dr. Joosse's testimony and reports were sufficient to overcome the presumption of

compensability, "such that the employee must prove her claim for continuing benefits by a preponderance of the evidence."[66]

Having established that the employee must prove her claim for continuing benefits, the board immediately stated the employer failed to produce evidence "as to whether the employee's work injury combined with her preexisting conditions in a substantial way."[67] The board's comment on employer failure to *produce* evidence in this context reflects that the board did not require the employee to "prove her claim for continuing benefits by a preponderance of the evidence." The board did not engage in weighing competing opinions because it found the employer did not produce medical opinion evidence on whether the employee's 2002 injury aggravated, accelerated or combined with the pre-existing condition of her knee so as to bring about her present disability. The statement that the employer failed to produce evidence reflects that the board found the employer's side of the scale was empty.

Our review of the hearing transcript and the record reveals that the board's finding that the employer failed to produce any evidence concerning aggravation of the preexisting knee arthritis is not supported by substantial evidence in light of the whole record. Dr. Joosse stated that the "knee arthritic condition and popliteal cyst, these are unrelated to the work injury of August 17, 2002." In hearing, he plainly stated the 2002 injury was not a substantial factor in the need for a knee replacement,[68] that she has arthritis, but it is not post-traumatic,[69] that there has not been a worsening of the cartilage surfaces affected by the 2002 injury,[70] and that the progression of Thurston's preexisting arthritis was not aggravated by the 2002 injury.[71] He suggested that

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66 *Sandra M. Thurston,* Dec. No. 06-0323 at 6.

67 *Id.* at 7.

68 Hrg. Tr. 152:14-17.

69 Hrg. Tr. 147:22-25.

70 Hrg. Tr. 108:14-20.

71 Hrg. Tr. 110:1-9.

Thurston's weight and her chemotherapy accelerated the arthritis in her knee.[72] Dr. Joosse's testimony was evidence produced by the employer directly bearing on the issue in dispute. By failing to engage in a weighing of the evidence, the board did not require the employee to prove her case by a preponderance of the evidence.

The board's error was compounded by its failure to clearly define Thurston's claim. She did not claim that the repaired lateral meniscus tear alone disabled her. Instead, she claimed that the pre-existing conditions diagnosed by Dr. Cobden disabled her and that these conditions had been aggravated or accelerated by her work injury. Dr. Cobden variously identified "internal derangement" of the left knee, bilateral degenerative joint disease, chondromalcia of the left patella, and loss of the medial meniscus leading to loss of joint space in the medial compartment. It is this last condition that Dr. Cobden stated was "secondary to her losing the medial meniscus as documented on 8/17/2002." Thurston claimed this "collapse" of the medial joint compartment will require a knee replacement in the future, and until she can have the knee replacement, she is permanently totally disabled.[73]

The board found that Dr. Cobden "relates the employee's condition to the trauma of her work injury and indicated it has combined with and accelerated her preexisting condition." It expressly relied on Dr. Cobden's statement that because her medial meniscus was removed by surgery it resulted in degeneration of the medial joint compartment. We find the record is devoid of any evidence that the medial meniscus in the employee's left knee was removed in the only reported knee surgery following the employee's 2002 work injury. Dr. Vrablik's 1998 operative notes, Dr. Witham's 2003 operative notes, and the reports of the physicians who read the MRI scans and MRA

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[72] Hrg. Tr. 108:9-13.

[73] Thurston's attorney states her theory of her claim in his closing argument at Hrg. Tr. 174:14-175:10. Dr. Cobden made no comment suggesting that a necessary knee replacement was delayed by the cancer treatment; Dr. Joosse only posited that at some point in the future, when her arthritis had sufficiently advanced, knee replacement could be considered by Thurston. He did not say it was needed immediately. The "delayed knee replacement" appears to be a phantom created by Thurston's counsel.

studies, reveal no evidence the medial meniscus was removed by surgery, work-related or otherwise. Both Dr. Vrablik and Dr. Witham noted the medial meniscus was *intact*. There are no operative notes indicating surgical removal of the medial meniscus in the record. Based on the record as a whole, we find reasonable minds could not differ on the fact that the medial meniscus was not removed in Dr. Witham's surgery.[74]

Dr. Cobden's opinion rests on his assumption that the work injury resulted in a surgical loss of the medial meniscus.[75] He then opines that surgical loss resulted in the collapse of the medial joint compartment. Because there is no evidence of a surgical loss of the medial meniscus and the employee does not contradict Dr. Witham's report that it was intact in 2003, we are compelled to conclude that Dr. Cobden's statement is not evidence that a reasonable mind would rely on to reach the conclusion that the employee's 2002 injury was a substantial factor in her medial joint collapse and claimed need for a knee replacement.

The board next found that the "combination of the employee's work injury and her cancer have rendered her totally disabled." However, the board did not have any evidence that the knee injury actually combined with the cancer. There is no evidence that the knee injury aggravated or accelerated the cancer, made it worse, or brought it

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[74] Thurston's attorney argued, "this medial compartment . . . is collapsing. She needs a new knee. The body, in my mind, for purposes of argument, is an integrated system. If your doctors say that this damage over here doesn't cause any of the rest of this or can't be connected to it, I think it's highly suspicious." Hrg. Tr. 174:24-175:5. This argument was not supported by medical testimony that Dr. Witham's surgery caused or aggravated the medial compartment arthritis and loss of the medial meniscus in the left knee. Dr. Cobden ascribed the medial compartment arthritis to surgical loss of the medial meniscus – not partial loss of the lateral meniscus. Thurston's attorney's view of anatomical relationships is not expert medical testimony.

[75] In his earliest reports, Dr. Cobden noted that the lateral meniscus had been partially torn. R.0255. He reported that "most of her symptoms sound suspiciously like they are referred pain from the lower lumbar area." R. 0256. Yet, he then adds, "I think that with the acuity of the *meniscus* tear, the back injury was overshadowed or overlooked." *Id.* He does not explain why he changed his opinion as to which meniscus had been removed, but it is clear that he did.

about. More importantly, there is no evidence that the employee had cancer in 2002, when the knee injury occurred.

The rule applicable to the employee's claim is that the 2002 work-related injury must have caused, or have aggravated, accelerated, or combined with a *pre-existing* condition in such a way that a reasonable mind could regard the work-related injury as a substantial factor in bringing about the claimed current disability.[76] Thus, in the case relied on by the board, the board could rely on evidence of a pre-existing condition that combined with the work injury to produce disability.[77]

The board did not find that the employee's pre-existing arthritis combined with her 2002 work injury to render Thurston permanently totally disabled. It found that the combination of the 2002 work injury and the cancer, a subsequent, unrelated condition, brought about the disability. It combined the impact of the unrelated, post-injury disease with the impact of the 2002 work injury, and on the basis of combined impacts, found the employee was permanently disabled. This was error. The rule that a work-related aggravation of pre-existing condition is compensable if the work-related aggravation is a substantial factor in bringing about disability is based on the principal that the employer "takes the employee as he finds him."[78] That principal does not require the employer to take on unrelated diseases that find the employee after a work-related injury.

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[76] *Olsen Logging Co. v. Lawson,* 856 P.2d 1155, 1161 (Alaska 1993); *Thornton v. Alaska Workmen's Comp. Bd.,* 411 P. 2d 209, 210 (Alaska 1966).

[77] *Providence Washington Inc. v. Fish*, 581 P.2d 680 (Alaska 1978). In a *per curiam* decision, the Supreme Court rejected the argument that a disability owing to pre-existing psychological or emotional disorders is not compensable if, after the work injury, the disorders do not rise to the level of a "traumatic neurosis." The board did not need to find a traumatic neurosis, the Court held, the board could rely on evidence of the pre-existing psychological or emotional "disorders or infirmities," combined with the work-related injury, to find the claimant totally disabled. *Id.* at 681.

[78] *Grainger v. Alaska Workers' Comp. Bd.,* 805 P.2d 976, 978 (Alaska 1991).

In *Estate of Ensley v. Anglo Alaska Constr., Inc.*,[79] the Supreme Court held that an employer is not relieved of liability for an employee's work-related disability by the occurrence of another illness that also disables the employee. Instead, the employee was entitled to receive temporary disability benefits for the period that his work injury would have disabled him, without regard to his cancer treatment.[80] In *Cortay v. Silver Bay Logging*, the Supreme Court affirmed and clarified its statement in *Estate of Ensley*, holding that an employee may not be denied temporary total disability benefits due to work-related disability because he or she is also unavailable for work for other, unrelated reasons.[81] The corollary of this rule is that if the employee's work-related injury is *no longer* disabling, the employee is not entitled to continuing disability compensation, regardless of the unrelated disability.[82] This is a variation of the long-accepted rule that an employee who withdraws from the labor market for reasons unrelated to the work injury is not entitled to compensation for continuing disability when the work injury ceases to be disabling.[83]

The board based its finding of permanent total disability on a combination of the cancer and the knee injury. There is no evidence, and Thurston does not contend, that her cancer was causally related to her knee injury. The board clearly did not consider whether the knee injury was still disabling regardless of her cancer. Since reasonable minds could differ whether the evidence in the record supports a finding of permanent

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[79] 773 P.2d 955 (Alaska 1989).

[80] 773 P.2d at 959-60.

[81] 787 P.2d 103, 108 (Alaska 1990). *See also*, *Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1160 (Alaska 1993).

[82] The negative construction of the rule "it is error not to consider whether the back injury constitutes a disability regardless of the cancer" is somewhat convoluted. *Rhines v. State, Pub. Employees' Ret. Bd.*, 30 P.3d 621, 626 (Alaska 2001). Recast in a positive construction, it is: Consider whether [or not] the back injury constitutes a disability, regardless of the cancer.

[83] *Vetter v. Alaska Workmen's Comp. Bd.,* 524 P.2d 264, 266 (Alaska 1974).

total disability based on the work injury alone, we will vacate the board's decision and remand for rehearing on the record.

2. The board failed to decide the back injury claim advanced by the employee.

In addition to her knee injury, Thurston claimed that she suffered a back injury that caused permanent total disability.[84] Letters from Dr. Cobden and Dr. Slonimski supported the claim of back injury based disability.[85] Thurston claimed that use of a knee brace had brought about back pain; her physicians were more general in their statement of a causal relationship. Dr. Joosse testified that the back symptoms represented the progression of pre-existing arthritic changes in her back that had appeared prior to the injury in 2002. The parties presented the claim for decision to the board, but the board failed to address this claim in its decision. Because the evidence of record is such that reasonable minds could reach different conclusions, we must remand to the board for additional findings of fact on Thurston's claim for permanent total disability compensation and medical benefits related to her lower back.

3. The statutes do not support imposition of an "exclusionary rule" against Dr. Cobden's reports.

We turn to the argument regarding an excessive change of attending physician. Both parties hotly disputed Dr. Cobden's role as Thurston's attending physician because both parties accepted that if Thurston changed to Dr. Cobden without giving notice as required by 8 AAC 45.082(c), Dr. Cobden's reports may not be considered by the board. We find no basis in the statute for such a rule, and much in the statute that militates against its adoption.

We note that the commission granted extraordinary review in order to examine the rule excluding evidence as a sanction for failure to follow appropriate procedures in

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[84] R. 0055.

[85] R. 0326-27.

Sellers v. State, Dep't of Ed. & Early Development.[86] The appeal was dismissed as moot before the commission had an opportunity to decide the question. We stated in our decision, however, that "Whether a sanction should be imposed is a question concerning admissibility, not the weight of the evidence."[87] We noted that the board's decision avoided the question, rather than resolve it. The question is presented again in this case.

AS 23.30.095(a) directs that an employee shall "give proper notification of the selection [of attending physician] to the employer within a reasonable time after first being treated." We discussed in *Witbeck v. Superstructures, Inc.,*[88] the special responsibilities of attending physicians:

> The statute makes a clear distinction between the attending physician and specialist physicians to whom the employee is referred. Only the attending physician is explicitly charged with responsibility for "all medical and related" care; it logically follows that the attending physician is responsible for making referrals to specialists. Requiring the attending physician to make referrals furthers the policy of preventing costly, abusive over-consumption of medical resources through duplication of services when an employee's care is directed by an ever-expanding number of specialists. Imposing responsibility to make referrals on the attending physician ensures the attending physician is fully informed of *all* the medical and related care the employee receives, that he or she is charged to provide by AS 23.30.095(a). The special responsibility of the attending physician to provide all medical and related care complements the emphasis given to the opinion of the attending physician in the two years following the date of injury. *Philip Weidner & Assoc. v. Hibdon,* 989 P.2d at 732. ("[W]here the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the

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86 Alaska Workers' Comp. App. Comm'n Dec. No. 043, 10-11 (May 25, 2007) (A. Hemenway, Chair Pro Tem.). Appeals Commissioners Robison and Ulmer, members of this panel, were members of the *Sellers* panel also.

87 *Id.* at 11.

88 Alaska Workers' Comp. App. Comm'n Dec. No. 014 (July 14, 2006).

> evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable.").[89]

The workers' compensation statutes place certain boundaries on medical benefits. They limit the frequency of certain treatments, regulate the fees payable to physicians, limit the employer's liability for medical care, and require the attending physician to be licensed in the state where the care is provided. However, the statutes also preserve to the employee the right to choose an attending physician free of interference by any person.[90] The statute imposed on the employee an obligation to notify the employer of that choice, so that the employer knows who is responsible for "all medical and related care," and limits the number of times that choice may be exercised without employer consent. On the other hand, there is no numerical limit placed on the number of consultant referrals by the attending physician.

However, if the employee fails to provide such notice, or neglects other notice requirements, the remedy is not the exclusion of evidence from the record. The exclusion of evidence, whether offered by the employee or the employer, does not serve the interest of the board in obtaining the best and most thorough record on which to base its decision. It results in efforts to exclude relevant evidence based on whether the party complied with formalities, instead of examining the relevance of the evidence to the dispute[91] and, if admitted, the merits of the evidence. It does little to deter doctor-shopping, because it is a sanction imposed "after the fact" and, if the employee is unrepresented and is not preparing for a hearing, may have little effect on an employee's conduct prior to a hearing. It is contrary to the informal and narrowly

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[89] *Id.* at 20 n. 142.

[90] AS 23.30.095(i).

[91] 8 AAC 45.120(e). As we said in *Sellers,* Dec. No. 043, at 8 n. 25, the concept of relevance is a logical one. We take this opportunity to correct an error in *Sellers.* The first sentence of section B, on page 10, should read "AS 23.30.095(e) allows an employer to conduct examinations, without authorization from the employee, by two employer's medical examiners in a case."

adversarial nature of most board proceedings. Proceedings before the board are to be "as summary and simple as possible."[92] The board is not bound by "common law or statutory rules of evidence or by technical or formal rules of procedure."[93]

The fundamental rule is that "any relevant evidence is admissible."[94] The result of an exclusionary rule is inherently contrary to the open access to all relevant information regarding the claimant's injury that the workers' compensation statutes are designed to promote. The employee is compelled to release information regarding the reported injury.[95] The free and immediate exchange, as well as filing with the board, of all medical records in the possession or control of both parties is required on the filing of a claim, and the duty to disclose and file medical records continues.[96] The board's procedural regulations state that the board may rely on any document filed more than 20 days before hearing, provided that a request for cross examination has not been properly filed.[97]

We have said that "AS 23.30.095(a) represents a compromise between preventing 'costly over treatment' and protecting free choice of the physician who provides 'all medical and related' care. The employee's right to choose is preserved, but limited in the number of times it can be exercised at the expense of the employer."[98] The employer is not liable for medical care that is not provided under

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92 AS 23.30.005(h).

93 AS 23.30.135(a).

94 8 AAC 45.120(e).

95 AS 23.30.107.

96 AS 23.30.095(h).

97 AS 8 AAC 45.120.

98 *Witbeck*, Dec. No. 014 at 29, citing *Bloom v. Tekton, Inc.*, 5 P.3d 235, 237 (Alaska 2000) ("But in order to curb potential abuse – especially doctor shopping – the Act allows an injured worker to change attending physicians only once without the consent of the employer.").

AS 23.30.095(a); the remedy for an excessive change of attending physician (more exactly, an unnoticed change without consent) is that the employer is not liable to pay for the care because it was not provided pursuant to the workers' compensation statutes.[99]

We examined the board decisions cited to support the exclusion of evidence. Beginning in 1995, the board issued a series of decisions addressing sanctions for failure to comply with the notice and consent requirements of AS 23.30.095(a) and (e). The board's reasoning regarding exclusion of employer medical evaluation reports is explained in *Sherrill v. Tri-Star Cutting.*[100] The board in *Sherrill* found the employer had five physicians examine the employee over a 12 month period, and that the employee "did not consent . . . [and] was not aware of his right to withhold his consent."[101] It acknowledged that AS 23.30.095(e) "does not specify what sanction should be imposed

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[99] AS 23.30.095(a) also represents an effort to prevent a practice that, in our experience, may lead to harm to an employee anxious for a cure. However, we cannot interpret AS 23.30.095(a) as *wholly prohibiting* the employee from entering into an *uncovered* patient – physician relationship; the statute merely establishes, and limits through the notice, referral, and consent requirements, the employer's liability to pay for the services engendered by that relationship. The policies embodied in the limitation on changes of physicians in AS 23.30.095(a), and the regulations provided at 8 AAC 45.182, discourage frequent changes of physician, but they do not deprive an employee of the right to make a decision to accept medical treatment for which the employer is not liable. Injured workers do not lose the right to "exercise autonomy in the control of one's body." *State v. Planned Parenthood of Alaska,* ___P.3d ___, Slip Op. No. 6184 at 24 (Alaska November 2, 2007).

[100] Alaska Workers' Comp. Bd. Dec. No. 95-0118 (May 1, 1995) (L. Lair, Chair). The decision panel included Member Rooney, who had concurred in *Smythe v. NANA Oilfield Serv., Inc.,* Alaska Workers' Comp. Bd. Dec. No. 94-0325 (December 22, 1994), (R. Ostrom, Chair) (excusing the employer from liability for payment of medical care as a "sanction" for non-compliance with AS 23.30.095(a)). Member Koivisto dissented in *Smythe* on a number of grounds, including that the board does not "have the authority to impose a penalty, particularly such a harsh penalty, on an ad hoc basis." Dec. No. 94-0325 at 9.

[101] Dec. No. 95-0118 at 7.

or action taken, if any, for violation of the provision," but found

> if the limit in AS 23.30.095(e) on changing physicians is to have any meaning, there must be some penalty imposed when an employer fails to obtain an employee's consent. To hold otherwise would render the limit meaningless, and would invite insurers and their representatives to "doctor shop" without concern for the clear prohibition of that course of action. We find the appropriate remedy for violation of the statute is to disregard the reports . . . for two purposes. . . . We decline to adopt the holding in Augustine for two reasons: First, employees who are seeking medical treatment and relying on the insurer to pay for the treatment, are in an entirely different position than insurers who are shopping for a medical opinion to support their position. Second, if we are to enforce AS 23.30.095(e), there must be some consequence or sanction imposed for its violation.[102]

The board did not examine whether it had statutory authority to exclude medical evidence as a sanction for non-compliance, as opposed to other forms of sanction. It acted in the belief that some enforcement power was implied by the prohibition.[103]

In *Kosednar v. Northern Grains, Inc.*,[104] the board addressed the employer's claim that suppression of a report for consideration of whether an SIME should be ordered was too extreme a sanction for conduct that was not egregious, weighed against the employer's right to rely on reliable medical evidence. Without addressing the due process issue, the board made it clear that it considered the exclusion of the report a punitive sanction for any level of non-compliance with AS 23.30.095(e):

> As noted in Kosednar I at 5:
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> > On May 23 1988, the Department of Labor submitted its Enrolled Bill Report on CCS SB 322 in which it analyzed the effects of the bill. The report states the changes to AS 23.30.095(a) and (e) would "[l]imit injured worker and employer

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[102] Dec. No. 95-0118 at 7-8.

[103] There was no consideration of the Division of Insurance's role in regulating claims practices by insurers.

[104] Alaska Workers' Comp. Bd. Dec. No. 95-0314 (November 15, 1995) (D. Jacquot, Chair).

> change in treating physician or independent medical evaluator to only one without each other's written consent."
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> In Smythe v. NANA Oilfield Services, Inc., AWCB Decision No. 94-0325 (December 22, 1994), the . . . panel concluded a sanction must be applied under AS 23.30.095(a) or the law would be meaningless. The Smythe panel sanctioned the employee by denying his request for payment of medical charges by his unauthorized physician . . . .
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> We find the legislature clearly intended to limit an employer's ability to change its choice of physician without the employee's consent. To assure compliance, we find an employer must be sanctioned for failing to follow AS 23.30.095(e). Further, we find the sanction adopted in Smythe more harshly impacts an injured worker than excluding a report from an unauthorized change in an employer's physician impacts the employer. Accordingly, we exclude [the] report . . . .
>
> The employer asks us to compel the employee's attendance at an evaluation by its original physician, asserting a change in employer's physician does not preclude subsequent examinations by doctors of its choice without referral. We find no support for the employer's theory. In Black's Law Dictionary, 210 (5th ed. 1979), the verb "change" is defined as: "Alter; cause to pass from one place to another; exchange; make different in some particular; put one thing in place of another; vacate."
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> We find the plain meaning of the word "change" implies a "substitution" not an "addition" for the employer's choice of physician. We find AS 23.30.095(e) does not afford the employer two examining physicians at any given time; rather, only one physician, and subsequently, a change to a new physician at the employer's choice. After one change of examining physicians, subsequent changes must have the employee's written consent. Accordingly, we conclude we must deny and dismiss the employer's request to compel the employee to attend an examination with . . . the employer's original physician.[105]

While the board regarded employer non-liability for payment of medical care not provided under AS 23.30.095 as a sanction, instead of a limit on employer liability, the

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[105] Dec. No. 95-0314 at 3.

board soon extended the exclusion sanction to employee reports as well. In *Anderson v. Federal Express*,[106] the board held that in addition to non-payment of medical care provided by an "excessive" employee physician, the board applied the reasoning in *Sherrill* to employee changes of physician:

> Based on *Burton*, *Smythe* and *Sherrill*, we conclude that if the change of physician provisions are to have any meaning, and are to be enforceable, some sanction must be imposed even if no sanction is prescribed by statute or regulation. In accord with *Burton*, *Smythe* and *Sherrill*, we will not permit Employee to rely on Dr. Nordstrom's opinions to support her claims for temporary disability benefits or additional PPI. AS 23.30.095(a). If we allow Employee to rely on Dr. Nordstrom's opinions, it would set a precedent enabling employees to shop for medical opinions that support their claims.[107]

These cases initiated what has become a custom of the board: "The board *has chosen to refuse to recognize* the reports of EME or attending physicians chosen in violation of AS 23.30.095(a) or (e)."[108] Although they rest on the "equitable power" of the board to fashion an equitable sanction for disregard of the evidence rules, we find that the rigid application of this rule, without regard to the egregiousness of the violation,[109] the notice of right to protest to the opposing party, or possible waiver of the right to withhold consent, elevate form over substance in enforcement of the law.

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[106] Alaska Workers' Comp. Bd. Dec. No. 98-0104 (April 24, 1998) (R. Reinhold, Chair; H. Lawlor, Member, dissenting).

[107] *Id*. at 9, *citing Burton v. Annett Island Packing Co.,* Dec. No. 96-0161 (April 24, 1996)(L. Lair, Chair) (holding employer not required to accept third physician as employee's attending physician or to pay for third physician's treatment); *Smythe,* Dec. No. 94-0325; and, *Sherrill,* Dec. No. 95-0118. Appeals Commissioner Ulmer was a member of the board panel that decided *Anderson v. Federal Express.*

[108] *Richardson v. American Linen Supply,* Alaska Workers' Comp. Bd. Dec. No. 02-0271, 5, 2002 WL 31870230 *5 (December 19, 2002) (S. Sumner, Chair).

[109] We note that this practice originated in a case wherein the employee was sent to five physicians in a 12-month period. Not all cases present such clear violations. For example, an employer may find it hard to discern when an employee's attending physician is "unwilling" to treat the employee, 8 AAC 45.082, or disagrees with the employee about the proposed treatment the employee desires. In such cases, the

The board's regulation informs the parties that "any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, *regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.*"[110] We find the ad hoc exclusion of relevant evidence as a sanction leads to uneven results and inconsistency in application from one injured worker to another, as absurd shifts are made to avoid finding an improper change of physician. No sanctions occur unless a claim is filed and the case is brought to hearing.[111] Employees and their attending physicians may err through inadequate information on their rights and obligations.[112] Employers may be chilled from a legitimate change or tempted to buy or coerce consent to a change. If the board wishes to adopt a rule excluding evidence improperly obtained, the board should consult with the department to develop and adopt such a rule by regulation. Until then, we cannot support the blanket exclusion of medical reports solely because the reports were written by physicians chosen in excess of an allowable change.[113]

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board must decide whether the physician was unwilling to accept the employee as a patient or if the employee was unwilling to accept the chosen physician's sound professional judgment.

[110] 8 AAC 45.120(e).

[111] If a sanction is to be an enforcement tool, it should apply to the same conduct in cases that are not heard as well as those heard by the board.

[112] *DeYonge v. NANA Marriott*, 77 P.3d 1277, 1233 (Alaska 2003) is illustrates the confusion due to inadequate information on attending physician responsibilities. In order to assure that employees are properly notified of their rights to refuse consent to excessive changes, the department may wish to adopt a standard form for a Notice of Employer Medical Evaluation, and to insure all parties know the attending physician responsibilities, a standard Designation of Attending Physician.

[113] We note that the remedy for an employee subjected to an excessive number of employer medical evaluators under AS 23.30.095(e) is to refuse consent and obtain a protective order under AS 23.30.108(c). In 1995, AS 23.30.108(c) had not been adopted; we see no reason to perpetuate a practice adopted to deter abuse *because no alternative was available,* when a means to avoid abuse now exists.

The employer raised a defense based on an excessive change of attending physician. The board held that the change to Dr. Cobden was not excessive because Thurston "consistently sought to be treated" by him. Based on this rationale, an employer may "consistently seek" an unavailable expert, but be able to send an employee to any number of other, interim experts. An employee is entitled to freely choose an attending physician from those available to treat him or her; but not to defer making a "counted" choice until the favored physician is available. An employee may not, under the principle of "free choice," force a busy physician to treat an injury, nor force an employer to pay for an unlimited number of interim physicians until the favored one is available. Therefore, while we agree Dr. Cobden's records should not be excluded from the record, we disagree with the board's reasoning in reaching that conclusion. Therefore, we direct the board to examine the evidence and to determine if the change to Dr. Cobden was an improper change of attending physician.

Conclusion.

The board made findings based on evidence which would not be relied upon by a reasonable mind to reach a conclusion, and applied the wrong legal analysis to the case presented for permanent total disability due to her left knee injury. The board failed to decide a claim for disability due to back injury presented to it. The board failed to make findings of fact and to decide whether Thurston's change to Dr. Cobden was an excessive change of attending physician.

Therefore, we VACATE the board's Decision and Order No. 06-0323 in AWCB Case No. 200217586, and we REMAND this matter to the board with instructions to rehear the employee's claim on the present record in accord with our decision. We request the commission clerk to return the record to the board within 20 days of this

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AS 23.30.005(h) permits the department to adopt regulations to allow hearings on such matters to be done by a single hearing officer. There is a range of discovery sanctions available under AS 23.30.108(c), but barring the board from reviewing the evidence should not be the first choice.

decision for action by the board. The board's decision is vacated by this order; therefore, we dissolve the stay on appeal, as there is no longer a board order to stay.

Date: *8 November 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final commission decision on the merits of this appeal from the board's Decision No. 06-0323. However, it is NOT a final decision on whether Sandra Thurston's workers' compensation claim is compensable. This decision vacates (invalidates) the board's decision and remands (returns) the case to the board for the board to hear and decide again. The outcome may or may not change. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted. The date of filing is found in the commission clerk's Certification below.

Effective November 7, 2005 proceedings to appeal must be instituted (started) in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. Because this is not a final decision on the merits of the workers' compensation claim, the Supreme Court may not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. If you believe grounds for review exist under the Appellate Rules, you should file your petition within ten days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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). If you wish to appeal or petition for review or hearing 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 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I certify that the foregoing is a full, true, and correct copy of this Alaska Workers' Compensation Appeals Commission Decision No. 062 in the matter of *Guys With Tools, Inc., dba The Bush Pilot, and Alaska National Insurance Co., vs. Sandra M. Thurston*, AWCAC Appeal No. 06-039, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *8th* day of *November*, 20*07*.

Signed
L. Beard, Deputy Appeals Commission Clerk

Certificate of Distribution
I certify that a copy of this Final Decision and Order in AWCAC Appeal No.06-039 was mailed on *11/8/07* to Barlow & Beconovich at their addresses of record, and faxed to Barlow, Beconovich, Director WCD, AWCB Appeals Clerk & AWCB-Fairbanks.

Signed *11/8/07*
L. Beard, Deputy Clerk Date