

Case: *UNOCAL Corporation vs. Paul D. Pietro*, Alaska Workers' Comp. App. Comm'n Dec. No. 178 (March 19, 2013)

Facts: Paul Pietro (Pietro) contended that he was exposed to toxic levels of arsenic while working at UNOCAL Corporation's (UNOCAL) urea and ammonia plant in Kenai. He filed two workers' compensation claims. In January 2003, he asserted that his working conditions caused peripheral neuropathy in his feet. In October 2006, he claimed that his workplace arsenic exposure caused skin cancer in the form of basal cell carcinoma and melanoma. The board initially denied both of his claims. The Alaska Supreme Court (supreme court) decided on appeal that the board (1) failed to adequately evaluate lay testimony about the levels of arsenic exposure at the plant; (2) failed to decide a material, disputed issue, whether Pietro's peripheral neuropathy preceded his rheumatoid arthritis, which would tend to suggest that arsenic exposure, rather than the non-work-related arthritis, caused the neuropathy; and (3) failed to make findings detailed enough to show the basis for its decision. On remand, the board decided that both claims were compensable. UNOCAL appeals.

Applicable law: AS 23.30.120(a) presumption of compensability and related case law.

AS 23.30.010 before the 2005 amendments; *Doyon Universal Servs. v. Allen*, 999 P.2d 764, 770 (Alaska 2000), requiring the work to be "a substantial factor" in the development of a medical condition.

AS 23.30.122 provides that "The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . ."

AS 23.30.128(b) provides in part that "The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."

"When medical experts disagree about the cause of an employee's injury, . . . as a general rule 'it is undeniably the province of the Board . . . to decide who to believe and who to distrust.'" *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1243 (Alaska 2007).

"The board's conclusion need not be the *only* conclusion a reasonable mind could reach, nor [need] the evidence [be] the *best* evidence available[,]" so long as substantial evidence in the record supports the conclusion. *Hansen v. McHoes*, Alaska Workers' Comp. App. Comm'n Dec. No. 056, 10 (September 24, 2007).

Issue: Does substantial evidence support the board's conclusion that Pietro's neuropathy and cancer claims are compensable?

Holding/analysis: UNOCAL asserted that insufficient evidence supported the board's conclusion that the neuropathy preceded the arthritis. The commission disagreed. Pietro and his wife's testimony, which the board found credible, supported the board's conclusion. In addition, Pietro reported the burning pain in his feet on a 1991 health questionnaire (he was not diagnosed with arthritis until 1997), although at other times he

did not tell medical providers about the pain in his feet because he attributed it to working long hours. Moreover, Dr. Birnbaum, opined that peripheral neuropathy does not usually appear early in the course of rheumatoid arthritis, lending credence to the theory that the arthritis did not cause it. The commission concluded this constituted substantial evidence.

Substantial evidence supported that Pietro was exposed to chronic levels of arsenic sufficient to be a substantial factor in his development of neuropathy and skin cancers. The board relied on substantial evidence to determine the arsenic exposure, including the credible testimony of Pietro and three co-workers about Pietro's job duties and problems with a boiler at the plant, and internal UNOCAL documents that detailed arsenic- and boiler-related concerns. The board relied on substantial evidence to connect the arsenic exposure to the neuropathy and skin cancers. At least four doctors opined that Pietro's neuropathy was causally related to the arsenic exposure. In addition, at least two doctors stated that Pietro's rheumatoid arthritis did not cause his neuropathy and from a third's report, the board inferred that if the neuropathy developed before the arthritis, that doctor would consider arsenic exposure "more seriously" as a potential factor. In terms of the skin cancer, at least two doctors connected chronic low-level arsenic exposure to the types of skin cancer that Pietro suffered.

UNOCAL argued that the board improperly discredited Dr. Burton's opinion because the board incorrectly stated that he was not board-certified in toxicology and incorrectly characterized the evidentiary basis for his opinion as that Pietro had no workplace arsenic exposure. The commission concluded that any errors the board made were harmless.

The primary reason the board rejected Dr. Burton's opinion was not his credentials but rather the assumptions he made about Pietro's workplace and job duties. . . . Even though [Dr. Burton's testimony] suggests some, rather than zero, arsenic exposure, Dr. Burton's belief about the amount of workplace arsenic exposure that Pietro suffered was much less than the board's assessment of considerable, chronic exposure. Dec. No. 178 at 16.

Note: Dec. No. 170 (September 26, 2012) was reversed by the supreme court. Dec. No. 082 (June 26, 2008) considered whether the commission had jurisdiction in the appeal of the earlier board decisions denying the compensability of Pietro's claims.