

Alaska Workers' Compensation Appeals Commission

UNOCAL Corporation,
Appellant,

vs.

Paul D. Pietro,
Appellee.

Final Decision

Decision No. 170 September 26, 2012

AWCAC Appeal No. 11-006
AWCB Decision No. 11-0044
AWCB Case No. 199530232

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 11-0044, issued at Anchorage on April 15, 2011, by southcentral panel members William Soule, Chair, Patricia Vollendorf, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, P.C., for appellant, UNOCAL Corporation; Michael J. Jensen, Law Offices of Michael J. Jensen, for appellee, Paul D. Pietro.

Commission proceedings: Appeal filed June 14, 2011; Motion to Dismiss Appeal filed June 17, 2011; Order on Motion to Dismiss (denied) issued June 28, 2011; briefing completed April 11, 2012; oral argument held July 17, 2012.

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

By: Philip E. Ulmer, Commissioner.

1. Introduction.

This appeal concerns whether the Alaska Workers' Compensation Board (board) properly followed the Alaska Supreme Court's (supreme court) order on remand in deciding that Paul Pietro's (Pietro) neuropathy and cancer claims against UNOCAL Corporation (UNOCAL) were compensable.

Pietro contends that he was exposed to toxic levels of arsenic while working at UNOCAL's urea and ammonia plant in Kenai. He filed two workers' compensation claims, asserting on January 8, 2003, that his employment at the plant caused

peripheral neuropathy in his feet, and asserting on October 11, 2006, that his employment caused skin cancer in the form of basal cell carcinoma and melanoma.

Two board panels with different lay members heard Pietro's claims in separate evidentiary hearings held on September 5, 2005, and June 19, 2007. The board ultimately concluded that Pietro had failed to prove his claims by a preponderance of the evidence. These decisions were eventually consolidated into one appeal and reviewed by the supreme court. It held that the board's factual findings were inadequate to permit appellate review in three respects: 1) the board erred in failing to evaluate the lay testimony; 2) the findings did not show consideration of disputed, material issues; and 3) the findings were not detailed enough to show the basis for its decisions. The matter was remanded to the board "to make appropriate findings regarding whether Pietro proved his claims by a preponderance of the evidence."¹

On remand before a new hearing officer, the board panel decided that Pietro's claims would be adjudicated based on the existing record. The remand panel held a hearing on March 16, 2011, and came to opposite conclusions as the earlier panels. The panel decided that both the neuropathy and the cancer claims were compensable. But it did not decide what specific benefits, if any, Pietro was entitled to, instead reserving jurisdiction over any such claims for a hearing at a later date.

UNOCAL appeals, arguing that the board erred in confining the evidence to the existing record on remand. UNOCAL asserts that because credibility was a "major issue" and none of the board members had been present for all of the live testimony, the board should have taken additional testimony in a new hearing. UNOCAL also argues that the board applied a double standard by foreclosing it from presenting more evidence on compensability, but allowing Pietro to present more evidence on his entitlement to benefits.

Pietro argues that the board did not abuse its discretion in deciding the case on remand based on the existing record. He asserts that UNOCAL "was afforded full and

¹ *Pietro v. UNOCAL Corp.*, 233 P.3d 604, 617 (Alaska 2010).

fair hearing rights” at the two evidentiary hearings on the merits of his claims. In addition he contends that much of the evidence was documentary, rather than live testimony, which the board could – and did – review without holding another evidentiary hearing. Moreover, he argues that observing the live witnesses was not essential because the witnesses’ truthfulness was uncontested. Instead, the board had to ascertain which medical opinions were based on the most accurate understanding of Pietro’s work conditions. Pietro also argues that the board’s decision to hold a separate hearing on benefits does not suggest bias against UNOCAL.

The parties’ arguments require the commission to decide whether the board abused its discretion in declining to hold an evidentiary hearing on remand. While we agree that the supreme court’s instructions did not specify that the board must hold a hearing, we conclude that, in the specific circumstances of this case, denying the parties an evidentiary hearing leaves us with a “definite and firm conviction” that a mistake was made.² We are troubled that none of the panel members on remand were present for all of the testimony in the prior evidentiary hearings and the hearing officer was new to Pietro’s case. Moreover, properly evaluating and weighing this testimony, lay and expert, was at the heart of what the supreme court ordered the board to do on remand. Thus, we reverse the board’s decision finding both of Pietro’s claims compensable and remand the matter to the board for a hearing conducted in conformity with this decision.³

2. Factual and procedural background.

Because the board allowed no additional evidence on remand from the supreme court, and to allay any concerns that this commission is wrongly substituting its findings

² *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (April 2000) (defining abuse of discretion).

³ The parties also disputed whether the board’s decision on the merits was based on substantial evidence in the record. These arguments are moot given our conclusion that the board abused its discretion in excluding evidence on remand.

for the board's or the supreme court's, we incorporate the court's recitation of the facts.⁴

Beginning in 1982 Paul Pietro worked for UNOCAL at its urea and ammonia plant in Kenai, first as a physical plant operator and then as a unit coordinator. Sometime around 1985 the physical plant began to burn waste oxazolidone from ammonia and urea production as fuel in one boiler. The waste oxazolidone was considered hazardous because it contained arsenic in concentrations exceeding environmental standards.^{FN1} Oxazolidone was not burned continuously. According to one UNOCAL document, when it was used, oxazolidone constituted about five percent of the "total heat duty of the boiler." UNOCAL stopped burning oxazolidone in 1991 after the Environmental Protection Agency set limits on ambient arsenic levels from burning hazardous waste and UNOCAL determined that the "worst case" emissions from its boiler at the Kenai plant were "several orders of magnitude greater" than these standards.

FN1. Arsenic is not a component of oxazolidone, but sodium arsenite, which does contain arsenic, was added during ammonia and urea production to prevent corrosion of processing equipment.

Oxazolidone was sprayed into the boiler chamber with a gun. When he worked as an operator in the utility plant, Pietro was required to put the gun into the boiler and clean the nozzle of the gun if it plugged up. He and other workers reported that oxazolidone sprayed or spilled from the gun. According to the workers, fumes and smoke came out of the boiler when the gun was changed, and exhaust from the boiler stacks reentered the plant because of what one worker described as a "negative vacuum." In addition, the boiler where the oxazolidone was burned had a number of leaks. A UNOCAL document dated September 22, 1989, indicated that water from a leak in the boiler "contained 0.20 ppm of arsenic." Pietro and another worker testified that Pietro experienced skin contact with arsenic when he slipped in a chemical spill that contained arsenic and saturated his clothes. UNOCAL monitored the arsenic exposure of some employees, but Pietro was never selected to wear a monitor for arsenic exposure. Even after the plant stopped burning oxazolidone, arsenic remained in the boiler. A 2001 memorandum to employees set out detailed procedures to avoid arsenic and lead exposure while repairing the boiler.

⁴ The footnotes in the supreme court's opinion are numbered as they are in that opinion.

According to Pietro, he began to experience burning in his feet in the late 1980s, which he initially attributed to working long hours on his feet. In 1991 Pietro filled out a health questionnaire for UNOCAL, in which he indicated he had tingling in his hands, arms, feet, or legs and burning in his arms or legs.^{FN2} His health questionnaires from 1996 through 1999 did not repeat these complaints.

FN2. Numbness, tingling, and burning sensations can all be symptoms of peripheral neuropathy.

Pietro was diagnosed with rheumatoid arthritis in 1997 and began taking medication to control its effects. In spite of the medication, he had flares of the disease that impaired his ability to work. Pietro began treatment with Michael Armstrong, M.D., a rheumatologist, in August 2001. In March 2002, Dr. Armstrong said that Pietro could "never" return to full duty work because of his rheumatoid arthritis. Pietro eventually received both private disability insurance and Social Security disability benefits for his rheumatoid arthritis.

Pietro first brought his foot pain to the attention of his treating physicians in late 2000 and was seen by a podiatrist, Matt Heilala, D.P.M., in July 2001. Dr. Heilala diagnosed rheumatoid arthritis and plantar fasciitis. Pietro began to see providers at Alaska Alternative Medicine Clinic in 2001 after a friend from work had similar complaints. Chart notes from the clinic showed a neuropathy diagnosis.

In 2001 Pietro's physician at Alaska Alternative Medicine Clinic ordered hair testing for toxin exposure. The hair test showed highly elevated levels of arsenic. In January 2002 Pietro had a urine test for toxic metals, which showed arsenic levels within the "reference range." On the advice of an attorney, Pietro consulted with occupational medicine doctors at Harborview Medical Center in Seattle. The Harborview doctors were skeptical of the validity of the hair test and ordered a twenty-four-hour urine test, even though they noted that the urine test would only reveal current exposure. The urine test showed normal arsenic limits, and the Harborview doctors' reports indicated that arsenic exposure was not a likely explanation for Pietro's neuropathy. But after nerve testing by Dr. Heilala showed evidence of peripheral neuropathy,^{FN3} one of the Harborview physicians, Timothy Takaro, M.D., concluded in October 2002 that the nerve studies were consistent with arsenic poisoning and advised Pietro to pursue a case against UNOCAL.

FN3. The test done by Dr. Heilala was called "[q]uantitative neurological testing."

Pietro also consulted with A. Lee Dellon, M.D., a plastic surgeon whose practice was "entirely devoted to peripheral nerves." Dr. Dellon rejected the idea that Pietro's rheumatoid arthritis caused his peripheral neuropathy and recommended testing to rule out other possible causes of

the neuropathy. Dr. Dellon stated that if other possible causes of peripheral neuropathy were ruled out, "then the most likely cause for [Pietro's] peripheral neuropathy would be an occupational exposure to toxins."

Pietro filed a report of occupational injury in October 2002, alleging that exposure to chemicals caused neuropathy in both his feet. UNOCAL controverted all benefits in December 2002, relying on Harborview's initial medical report, which downplayed the role of arsenic in causing the peripheral neuropathy. Shortly after the controversion, Pietro filed a written workers' compensation claim alleging that the neuropathy was the result of work-related chemical exposure.

UNOCAL set up a panel of four doctors for an employer's independent medical evaluation (EIME) in July 2003. The panel consisted of a podiatrist, an orthopedic rheumatologist, a neurologist, and a toxicologist. None of the EIME doctors found a link between Pietro's symptoms and chemical exposure in the workplace. The podiatrist was not able to confirm a diagnosis of peripheral neuropathy on examination but said that arsenic exposure could lead to peripheral neuropathy. Dejan Dordevich, M.D., the EIME rheumatologist, concluded that Pietro's peripheral neuropathy was "a product of rheumatoid arthritis." Lynne Bell, M.D., Ph.D., the neurologist, was unwilling to diagnose peripheral neuropathy because no nerve conduction or EMG studies had been done, and she recommended further testing.^{FN4}

FN4. Dr. Bell did not feel that the testing done by Dr. Heilala confirmed the diagnosis.

Brent Burton, M.D., a specialist in occupational and environmental toxicology, also examined Pietro. Dr. Burton reviewed the material safety data sheets for the chemicals that Pietro listed on his workers' compensation claim. Dr. Burton did not think that Pietro's peripheral neuropathy had been properly diagnosed and concluded that Pietro did "not have a diagnosable medical condition stemming from any workplace exposure."

Because of the differences in medical opinions, the parties requested a second independent medical evaluation (SIME). The Board arranged for Pietro to see a neurologist, Jonathan Schleimer, M.D., and a rheumatologist, Neal Birnbaum, M.D. Dr. Birnbaum agreed that Pietro had rheumatoid arthritis but found "no evidence that [Pietro's] rheumatoid arthritis [was] in any way related to any industrial exposure" because "there is no medical literature to support the development of rheumatoid arthritis as a consequence of toxin exposure." Dr. Birnbaum concluded that if Pietro had peripheral neuropathy, it should not be attributed to the rheumatoid arthritis. According to Dr. Birnbaum, neurological problems related to rheumatoid arthritis are rare and "usually occur[] only in the

setting of severe active rheumatoid disease." He noted that Pietro's "foot symptoms predate[d] the development of any joint complaints by quite a few years."

Dr. Schleimer did nerve conduction and EMG testing and concluded that Pietro suffered from "a mild polyneuropathy with distal degeneration of sensory axons." Dr. Schleimer thought that Pietro's neuropathy was "likely related to rheumatoid arthritis." He acknowledged that peripheral neuropathy is uncommon in rheumatoid arthritis but considered it "more common than arsenic poisoning or toxicity." Dr. Schleimer also noted "no bone marrow suppression or evidence for a blood count suppression" during Pietro's "period of alleged exposure" and found "no clear documentation of a neuropathy antecedent to" the diagnosis of rheumatoid arthritis. He wrote that if Pietro did not have rheumatoid arthritis, he would consider the possibility of arsenic exposure "more seriously."

To show that his neuropathy was a cause of his inability to work, Pietro submitted to the Board letters from his healthcare providers indicating that he was disabled by his neuropathy. Pietro's attorney sent supplemental interrogatories and documents to the SIME physicians, supplying the doctors with additional medical records and information about chemicals used at the plant. After reviewing the records, Dr. Schleimer stated that he "recognize[d] that there [was] potential for exposure of this patient to heavy metals, arsenic, and other chemicals" but could not state on a more likely than not basis "that the substantial cause of this patient's peripheral neuropathy is related to toxic or heavy metal exposure." The additional information did not change Dr. Birnbaum's opinion.

The Board held a hearing on Pietro's claim on September 1, 2005. Several of Pietro's coworkers testified about conditions inside the utility plant and problems with the boiler that burned oxazolidone. Pietro's wife testified that the pain in his feet began in the late 1980s. Pietro also testified about his medical history and work conditions. Five doctors testified either in person or by deposition.

The doctors gave sharply differing analyses of the cause and development of Pietro's neuropathy. Dr. Dordevich attributed it to Pietro's rheumatoid arthritis, although he acknowledged that fewer than one percent of patients with rheumatoid arthritis develop a sensory neuropathy like Pietro's. Dr. Dordevich agreed that it was possible Pietro was exposed to some arsenic while he was working for UNOCAL, but he did not think the peripheral neuropathy developed as a result of arsenic exposure because Pietro did not show signs of arsenic toxicity in other organs.

Dr. Burton testified that Pietro's neuropathy was not related to arsenic exposure at his work site. His opinion was based in part on the lack of "objective evidence" that Pietro had been exposed to a toxic level of arsenic. Dr. Burton indicated that there was a problem with trying to quantify Pietro's exposure but thought that Pietro's exposure level would not result in development of any arsenic-related symptoms. Dr. Burton's testimony suggested that low-level exposure to arsenic was not harmful and that even doses of arsenic high enough to cause acute symptoms did not always cause permanent damage.

In contrast, Dr. Takaro testified that in his opinion arsenic exposure was the most likely cause of the neuropathy because of the type of neuropathy Pietro had. He thought that other possible explanations for the neuropathy had been ruled out, leaving arsenic exposure as the most likely cause. Dr. Takaro identified the basis of his opinion that Pietro had been exposed to sufficient arsenic to cause medical problems, including reliance on UNOCAL's documents. Dr. Takaro also testified that a "burning sensation in either the hands or feet or both" is "the most common" symptom of "longstanding, low-level exposure to arsenic." He indicated that very low levels of arsenic could cause damage.

Dr. Armstrong testified that in his opinion the rheumatoid arthritis did not cause Pietro's peripheral neuropathy. He stated that neuropathy with a burning sensation is as "rare as hen's teeth" in patients with rheumatoid arthritis. Dr. Armstrong believed "more likely than not" that arsenic exposure was "the responsible factor" in Pietro's neuropathy. Dr. Armstrong also agreed that Pietro's peripheral neuropathy was "the major contributing factor" in some of Pietro's disabilities.

In its decision dated November 4, 2005, the Board denied Pietro's claim, finding that he had not proven it by a preponderance of the evidence. The Board found that Pietro had attached the presumption of compensability. It then found that UNOCAL had rebutted the presumption through the opinions of Dr. Dordevich, Dr. Burton, and Dr. Schleimer. In weighing the evidence, the Board focused on "objective" evidence in finding that Pietro had not met his burden of proof. It found that the hair test for arsenic was considered unreliable and the urine test, which it termed the "gold standard," showed normal levels of arsenic. It also found that the opinions of Pietro's doctors about causation were not "supported by the objective, factual record in this case." It gave more weight to the opinions of Dr. Dordevich, Dr. Burton, and Dr. Schleimer, describing them as "based on objective findings." The Board emphasized that Pietro had not developed other symptoms that would have indicated toxic arsenic exposure, such as "gastrointestinal distress, cardiac issues, or dermatologic issues." Pietro appealed the decision to the superior court.

In April 2006 Pietro was diagnosed with skin cancer. He had three lesions: One was on his shoulder and was diagnosed as melanoma, while the other two were on or near his ears and were diagnosed as basal cell carcinoma. After the skin cancers were diagnosed, Pietro obtained an opinion from Richard Parent, Ph.D., a toxicologist. Dr. Parent indicated that Pietro's skin cancers were consistent with arsenic exposure. Dr. Parent concluded, with a reasonable degree of scientific certainty, that Pietro's medical problems "have been caused or contributed to by his exposures to arsenic during his employment . . . at Unocal." In October 2006 Pietro filed a new workers' compensation claim related to the skin cancers and petitioned for modification of the 2005 Board decision based on mistake. At Pietro's request, the superior court stayed the appeal and remanded the case to the Board.

The Board held a hearing in June 2007 on the petition for modification. There was some disagreement about the scope of the hearing: Pietro asked the Board to consider his workers' compensation claim for the skin cancer because it was identified as an issue in the prehearing conference, but the Board decided that it was "not comfortable deciding the compensability of the skin cancer" because of the possibility that Pietro had also been exposed to arsenic while working for Agrium, which bought the ammonia plant from UNOCAL. The Board permitted testimony about the skin cancer because it was a basis of the petition for modification. The Board heard testimony from Dr. Takaro and Dr. Burton as well as some additional testimony from Pietro. Pietro again testified about possible exposure to arsenic at his work, focusing on exposure to his skin. He also discussed his skin cancers and history of sun exposure.

Dr. Takaro testified about regulatory standards for arsenic exposure. According to Dr. Takaro, based on documents he reviewed, arsenic was present in levels well above the "threshold level" described in some regulations. He testified that there is a latency period of ten to fifteen years between exposure to arsenic and development of skin cancer. In Dr. Takaro's opinion, there was "absolutely no question" that Pietro had been exposed to "much more arsenic" than the general population. He also testified that even though sunlight could have contributed to Pietro's skin cancers, animal studies showed that "arsenic and [ultraviolet radiation] together is a much more potent carcinogen than either one apart." Dr. Takaro expressed the opinion that Pietro's exposure to arsenic while working for UNOCAL was a substantial factor in the development of his skin cancer.

Dr. Burton testified that in his opinion Pietro was not exposed to excessive levels of arsenic during his employment with UNOCAL. Dr. Burton noted the absence of testing results and industrial hygiene surveys to show exposure levels. He also based his conclusion on his understanding of workplace conditions and Pietro's lack of symptoms

while he was working. Dr. Burton disagreed with Dr. Takaro's use of data from emissions testing from the plant's smokestack as a means of showing workplace exposure. He also noted that Pietro never showed signs of certain skin lesions that are consistent with arsenic exposure. In Dr. Burton's opinion, Pietro's skin cancers were most likely the result of sun exposure and aging because he did not believe that Pietro had been exposed to significant levels of arsenic. Dr. Burton testified that the exposure level that triggered skin cancer was not known, although it was "a high level."

The Board found in an August 2007 decision that Pietro had provided enough new evidence to permit it to consider his petition for modification of the neuropathy claim, but it again relied on Dr. Burton's opinion to decide that Pietro had failed to prove that his peripheral neuropathy was work related. Pietro then petitioned for reconsideration of the August 2007 decision because the Board had not resolved his 2006 workers' compensation claim for skin cancer. The Board granted his petition in order to make findings related to this claim and issued its final decision on the skin cancer claim on February 22, 2008. It found that Pietro had attached the presumption of compensability and that UNOCAL had rebutted it; the Board decided that Pietro had failed to prove his skin cancer claim by a preponderance of the evidence.

Pietro appealed the August 2007 and February 2008 Board decisions to the Alaska Workers' Compensation Appeals Commission, which decided that it did not have jurisdiction over the appeal. The superior court consolidated the appeals of all of the decisions. The superior court affirmed the Board's decisions, concluding that substantial evidence in the record supported the Board's findings. The court also decided that (1) the Board had properly applied the presumption analysis; (2) substantial evidence supported the Board's finding that UNOCAL had overcome the presumption; (3) the Board had made sufficient findings to permit review; (4) the Board engaged in reasoned decision making; and (5) the Board had adequately considered Pietro's neuropathy as an occupational disease.⁵

Pietro appealed to the supreme court. It decided that substantial evidence supported the board's findings that UNOCAL had rebutted the presumptions that the peripheral neuropathy and skin cancer claims were compensable. But the court concluded that the board needed to make findings about the lay testimony, because Pietro's lay witnesses could support or contradict the experts' assumptions about his

⁵ *Pietro*, 233 P.3d at 606-10.

work conditions and the timing of the development of his neuropathy relative to his rheumatoid arthritis.⁶

The court also decided that the board's factual findings did not show consideration of significant issues. Specifically, the board needed to decide the date of onset of the neuropathy, to make findings on the extent of Pietro's potential exposure to arsenic and the conditions in his workplace, and to address the conflict in the toxicologists' testimony about how much arsenic exposure was sufficient to cause health effects.⁷

Lastly, the court decided the board's findings were not detailed enough to understand its reasoning. Specifically, the board needed to provide concrete reasons for rejecting the testimony of Dr. Takaro, Dr. Armstrong, and Dr. Dellon.⁸ Moreover, in rejecting the neuropathy claim, the board erroneously placed too much emphasis on the 24-hour urine test, which the experts agreed would only show ongoing exposure, not exposure that occurred years before the test.⁹ Finally, in rejecting the cancer claim, the board found that sunlight was the most common cause of skin cancer, relying on Dr. Takaro's testimony without explaining why it was implicitly rejecting Dr. Takaro's statement that sun and arsenic exposure combined are a more potent carcinogen than either one alone.¹⁰ The board also misstated aspects of Dr. Burton's and Dr. Takaro's testimony, and erroneously found that "all doctors [had] opined' that Pietro's neuropathy would be accompanied by other symptoms if it were related to arsenic exposure[.]"¹¹ Therefore, the court vacated the board's decisions denying Pietro's

⁶ See *Pietro*, 233 P.3d at 613-14.

⁷ See *id.* at 614-15.

⁸ See *id.* at 615.

⁹ See *id.* at 615.

¹⁰ See *id.* at 616.

¹¹ *Pietro*, 233 P.3d at 616-17.

claims and remanded to the board “to make appropriate findings regarding whether Pietro proved his claims by a preponderance of the evidence.”¹²

On remand, the composition of the three-member board panel changed. William Soule (Soule), the new hearing chair, had not served on any of the prior board panels addressing Pietro’s claims. Patricia Vollendorf (Vollendorf) had the most experience with Pietro’s claims, although she was not on the panel that heard the live testimony regarding the skin cancer. Vollendorf, however, was on the panels that heard the neuropathy testimony and that originally denied the compensability of the neuropathy and cancer claims. The final panel member was Janet Waldron (Waldron), who originally heard the testimony related to the skin cancer but was not present at the first evidentiary hearing concerning the neuropathy claim. Waldron was a participant in making the two decisions that addressed the relationship between the cancer claim and the neuropathy claim, but she was not on the panel that ultimately decided that the cancer claim was not compensable.¹³

¹² *Pietro*, 233 P.3d at 617.

¹³ The board held two evidentiary hearings and issued five written decisions before Pietro’s claims were appealed to the supreme court. *Pietro I*, Alaska Workers’ Comp. Bd. Dec. No. 05-0287 (Nov. 4, 2005) denied the neuropathy claim was compensable after holding the first evidentiary hearing; the hearing officer was Darryl Jacquot and the lay member was Vollendorf. In *Pietro II*, Alaska Workers’ Comp. Bd. Dec. No. 05-0317 (Nov. 30, 2005), Jacquot and Vollendorf denied reconsideration.

In *Pietro III*, Alaska Workers’ Comp. Bd. Dec. No. 07-0260 (Aug. 27, 2007), the board heard Pietro’s petition for modification on the basis that his development of skin cancer after the original two decisions supported that he was exposed to toxic levels of arsenic at work. Two doctors and Pietro testified at the hearing, and the board again denied the neuropathy claim. The panel members were Jacquot, Waldron, and Robert Morigeau. In *Pietro IV*, Alaska Workers’ Comp. Bd. Dec. No. 07-0300 (Sept. 28, 2007), the board panel of Jacquot and Waldron agreed to address the compensability of Pietro’s cancer claim but decided not to take additional evidence. In *Pietro V*, Alaska Workers’ Comp. Bd. Dec. No. 08-0029 (Feb. 22, 2008), the board panel of Jacquot and Vollendorf decided that the skin cancer claim was not compensable.

The remand panel of Soule, Vollendorf, and Waldron denied UNOCAL's petition seeking an evidentiary hearing.¹⁴ The panel observed that all three of the current members had reviewed the entire electronic record. "[O]bserving the witness is not the only way to judge credibility, . . . [The] recordings provide an effective way for a fact-finder to listen to vocal intonations and inflections as well as substantive opinions."¹⁵ The board permitted the parties to present oral arguments and briefs with attachments from the existing record.¹⁶

On the merits, the board decided that both the neuropathy and skin cancer claims were compensable.¹⁷ The board organized its analysis as addressing three questions, timing of the neuropathy relative to the rheumatoid arthritis, causation of the neuropathy, and causation of the skin cancer.

On the first question, the board decided that Pietro's neuropathy developed before the rheumatoid arthritis, relying on Pietro's, his wife's, and a co-worker's credible testimony that the burning pain in Pietro's feet arose years before he experienced the shoulder pain that was ultimately diagnosed as rheumatoid arthritis. The board noted that this testimony was corroborated by Pietro's response to a 1991 employment health questionnaire and by numerous doctors' notes accepting Pietro's self-reported health history. In addition, the board discredited Dr. Burton's opinion and relied on other doctors who opined that rheumatoid arthritis does not always lead to neuropathy, and when it does cause neuropathy, that usually happens after the rheumatoid arthritis has done other damage. From this, the board inferred that it was unlikely that rheumatoid arthritis caused the neuropathy before the arthritis was officially diagnosed.¹⁸

¹⁴ See *Pietro VI*, Alaska Workers' Comp. Bd. Dec. No. 10-0199 (Dec. 10, 2010).

¹⁵ *Pietro VI*, Bd. Dec. No. 10-0199 at 7-8.

¹⁶ See *Pietro VI*, Bd. Dec. No. 10-0199 at 9.

¹⁷ See *Pietro VII*, Alaska Workers' Comp Bd. Dec. No. 11-0044 (April 15, 2011).

¹⁸ See *id.* at 45-49.

On the second question, the board concluded that Pietro had proved his neuropathy claim by a preponderance of the evidence. In support of this conclusion, the board ruled out the rheumatoid arthritis as a cause, since the neuropathy developed first.¹⁹ The board also concluded that Pietro had “considerable exposure to arsenic” at work, describing much of the lay testimony, all of which it found credible.²⁰ The board described the testimony of at least six doctors who opined that the toxic exposure at work caused Pietro’s neuropathy.²¹ The board rejected Dr. Burton’s opinion because the board disagreed with the assumptions that formed the basis of his opinion, namely that Pietro “was exposed to no more arsenic than any other person eating dinner.”²² Similarly, the board gave Dr. Schleimer’s opinion little weight because he admitted he was uncertain whether the neuropathy preceded the rheumatoid arthritis. Lastly, the board gave Dr. Bell’s opinion “very little weight” as it was “conclusory with little analysis.”²³

On the third question, the board decided that Pietro proved his workplace exposure to arsenic was a substantial factor in his development of skin cancer. The board based this conclusion on its finding that Pietro had considerable exposure to

¹⁹ See *Pietro VII*, Bd. Dec. No. 11-0044 at 50.

²⁰ See *id.* at 50-52.

²¹ See *id.* at 53-55.

²² *Pietro VII*, Bd. Dec. No. 11-0044 at 55. Dr. Burton’s testimony was as follows:

Q: And when I say toxic exposure, it appears to me from looking at the documents that [Pietro] likely was exposed periodically to some arsenic. Would that be fair to say?

A: Well, I think the issue, of course, is trying to quantitate [sic] it. If there was some particulate that had some arsenic and it got in the air, then he certainly could have had some very low level, but by no way is it going to be something that's -- I would put it in the same category as the kind of arsenic that we're all exposed to every day by just consuming normal food. But it's nothing that goes beyond that. (Hr’g Tr. 150:13-23, Sept. 1, 2005.)

²³ *Pietro VII*, Bd. Dec. No. 11-0044 at 55.

arsenic at work, two doctors' opinions that such exposure could cause cancer and likely did in Pietro's case, and the lack of any history that Pietro had "any recreational or excessive exposure to ultraviolet light."²⁴ The board discredited Dr. Burton's contrary opinion "primarily because he did not consider the fact that there was any arsenic exposure at the plant."²⁵

The board did not decide Pietro's claims for specific benefits, attorney's fees and costs, and interest. The board stated that, notwithstanding both parties' arguments on these issues in their briefs, the board was permitted to decide only compensability because the prehearing conference summary of February 1, 2011, governed and defined the issues as "the additional findings required by remand from the Supreme Court."²⁶ The board reserved jurisdiction "over any claims for specific indemnity, medical, vocational rehabilitation, PPI [permanent partial impairment], interest or attorney's fees and costs, or other benefits, which will be heard in a subsequent hearing upon due notice."²⁷

UNOCAL appeals.

3. *Standard of review.*

The board's exclusion of evidence on remand is reviewed for an abuse of discretion.²⁸ "An abuse of discretion exists only if the reviewing court is left with the definite and firm conviction, after reviewing the whole record, that the Board erred in its finding."²⁹

²⁴ *Pietro VII*, Bd. Dec. No. 11-0044 at 56.

²⁵ *Id.* at 57. Dr. Burton's testimony concerning Pietro's arsenic exposure is quoted in note 22.

²⁶ *Pietro VII*, Bd. Dec. No. 11-0044 at 45. R. 3889.

²⁷ *Pietro VII*, Bd. Dec. No. 11-0044 at 57.

²⁸ *See DeYonge*, 1 P.3d at 93-94 (addressing the standard of review that would apply to employee's appeal of board's decision to deny her a new evidentiary hearing on remand). *See also Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007).

²⁹ *DeYonge*, 1 P.3d at 94 (citation and brackets removed).

4. Discussion.

a. The board abused its discretion when it restricted the evidence to the existing record on remand.

“When a reviewing court remands a case to an administrative agency, the agency is bound to follow the court’s order[.]”³⁰ The supreme court’s remand order in Pietro’s case neither required nor prohibited the board from holding an evidentiary hearing on remand. The supreme court instructed the board “to make appropriate findings regarding whether Pietro proved his claims by a preponderance of the evidence.”³¹ The commission nevertheless concludes that the board abused its discretion in not ordering a new evidentiary hearing in this particular case because of the changes in the composition of the hearing panel, the complexity of the medical evidence, and the importance of the live testimony to the specific issues that the supreme court instructed the board to address on remand.

Pietro argues that *Smith v. University of Alaska, Fairbanks*,³² provides support for his position that the board could deny a new evidentiary hearing on remand.³³ We believe that *Smith* is distinguishable from Pietro’s circumstances. In *Smith*, the superior court concluded the board erred in assessing the credibility of the employer’s expert, Dr. John Ballard, at the rebuttal stage of the presumption of compensability analysis.³⁴ The superior court decided that the presumption was rebutted as a matter of law and remanded to the board to determine whether the employee had proved his claim by a preponderance of the evidence.³⁵ The superior court explicitly instructed the board that

³⁰ *Smith*, 172 P.3d at 792.

³¹ *Pietro*, 233 P.3d at 617. This is different than the remand order in *DeYonge*, 1 P.3d at 98, which specifically gave the Board discretion: “[I]n determining the amount of TTD due DeYonge, the Board may choose to hear new evidence or simply to rely on the existing record.”

³² 172 P.3d 782.

³³ Appellee’s Br. 35-37.

³⁴ *See Smith*, 172 P.3d at 792.

³⁵ *See id.*

it could “reject and weigh any testimony of any witnesses in determining whether Smith satisfie[d] his burden of persuasion.”³⁶

On remand, one board panel member changed and the board did not take additional evidence.³⁷ The board decided that Smith’s claim was not compensable, apparently based on both doctors’ conclusions, rather than crediting one doctor’s testimony over the other’s.³⁸ The employee appealed, contending in part that the board’s reversal of its assessment of Dr. Ballard’s testimony was an abuse of discretion.³⁹ The supreme court disagreed, concluding that the board had properly followed the superior court’s remand order that explicitly permitted the board to reweigh the evidence on remand.⁴⁰ The supreme court nevertheless vacated the board’s decision and remanded because the board did not make findings about relevant lay testimony and failed to adequately analyze the medical evidence.⁴¹

The parties in *Smith* did not contest on appeal the board’s decision to decide the case on remand based on the written record. Thus, the supreme court in that case did not address the question whether the board abused its discretion by not ordering a new evidentiary hearing.⁴² Here, the question of whether the board abused its discretion in not ordering a new evidentiary hearing on remand is squarely before the commission.

³⁶ *Smith*, 172 P.3d at 787.

³⁷ *See Smith*, 172 P.3d at 787.

³⁸ *See id.* at 792.

³⁹ *See Smith*, 172 P.3d at 792.

⁴⁰ *See id.*

⁴¹ *See id.* at 789-92.

⁴² Similarly, *DeYonge*, 1 P.3d at 98, also did not decide the issue of whether the board abused its discretion in not ordering an evidentiary hearing on remand. “Our conclusion that DeYonge triggered the compensability presumption and that NANA/Marriott failed as a matter of law to rebut it moots DeYonge’s request for a new evidentiary hearing on those issues.” *Id.* at 98.

Moreover, the evidence in *Smith* was less voluminous than the evidence in Pietro's case. *Smith* involved the compensability of one claim, with evidence consisting of two doctors who testified by deposition and four lay witnesses who testified at a hearing. Pietro's case, in contrast, involves the compensability of two related but distinct claims, with evidence consisting of the reports of at least 11 doctors, including five who testified either in person or by deposition, and several lay witnesses. In addition, only one panel member in *Smith* was new to the claim on remand while in Pietro's case the composition of the panel on remand changed even more. The two lay members had not heard the live testimony related to one of the two claims, and the hearing officer had not previously presided over the hearings on either of the claims.

Thus, the commission believes that, even if the supreme court implicitly approved of the board deciding the case based on the existing record in *Smith*, Pietro's circumstances are distinguishable. The commission concludes that not ordering an evidentiary hearing on remand in Pietro's case was "a definite and firm mistake" because of the volume of complicated evidence and because of the changes in the composition of the panel.

UNOCAL also contends that a new evidentiary hearing was required on remand because live testimony would help the new board panel understand the doctors' medical opinions and provide the panel members with an opportunity to question the witnesses to clarify their opinions.⁴³ "An expert witness may be more effective in person because he or she can illustrate complex ideas by gestures or reference to illustrations. The witness can see what his questioners are referring to and assess, by their facial expressions and gestures, whether they appear puzzled and need further

⁴³ Appellant's Br. 21-25.

explanation.”⁴⁴ UNOCAL asserts this was especially important because the remand order required the board to evaluate the assumptions about Pietro’s work conditions and arsenic exposure that formed the foundation of the doctors’ opinions and because the panel members had differing levels of familiarity with Pietro’s case.

Pietro counters that the witnesses’ truthfulness was not at stake. “There was no suggestion that any of the witnesses weren’t telling the truth, based on the facts they knew and the assumptions upon which they based their opinions.”⁴⁵ Moreover, he observes that much of the medical evidence was documentary and yet UNOCAL never challenged the board’s ability to weigh and assess the credibility of the written evidence.⁴⁶

We find UNOCAL’s arguments more persuasive. Even though no one disputed the doctors’ truthfulness, live testimony permits the board to ask questions relevant to the findings that the supreme court required on remand and allows the panel members, who were new to some of the evidence, to see the demeanor of the witnesses. Moreover, prior to the remand, both parties controlled how to best present their cases. They decided what evidence to present live to assist the board’s credibility determinations and, thus, if they were concerned about the board’s ability to assess the credibility or authoritativeness of a written report, they could choose to present the report’s author as a witness. UNOCAL was denied this opportunity on remand.

⁴⁴ *Voorhees Concrete Cutting v. Monzulla*, Alaska Workers’ Comp. App. Comm’n Dec. No. 114, 13-14 (Aug. 6, 2009) (The Alaska Supreme Court affirmed the commission had jurisdiction to hear this case without addressing the merits of the commission’s decision in *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341 (Alaska 2011)).

⁴⁵ Appellee’s Br. 44.

⁴⁶ Appellee’s Br. 40.

Pietro also argues, and the board cited in its decision, a regulation, 8 AAC 45.070(k), that suggests that changes in panel members do not require a new hearing.⁴⁷ This regulation permits board members to attend hearings by telephone and allows a member who was not at the hearing to deliberate with a two-member panel to break a tie or to replace one member of a two-member panel who becomes unavailable before a decision is filed.⁴⁸ Pietro does not argue that either of these circumstances applied to his case. In the commission's view, this regulation should have no wider application, even by implication, beyond what is explicitly set forth. Thus, we do not believe this regulation supports the board's denial of an evidentiary hearing in Pietro's case.

Similarly, we do not find helpful Pietro's and the board's citations to statutes that address board procedures for hearings.⁴⁹ The principles and objectives in these statutes are expressed in such broad language as to be of minimal use in deciding whether the board erred in denying UNOCAL the opportunity to present more evidence. AS 23.30.001(1) speaks of ensuring the "quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to the employers."⁵⁰

⁴⁷ Appellee's Br. 41. *Pietro VI*, Bd. Dec. No. 10-0199 at 8.

⁴⁸ 8 AAC 45.070(k) provides:

The board will, in the board's discretion, permit a member

(1) to attend a hearing by telephone; or

(2) who did not attend a hearing before a two-member panel to review the written record, evidence, and hearing recording and to deliberate with

(A) a deadlocked two-member panel to make a decision; or

(B) the remaining member of a two-member panel if, before a decision is filed on a case heard by a two-member panel, one member dies, resigns from the board, is replaced by the governor, or the member's term of appointment expires.

⁴⁹ Appellee's Br. 33-34. *Pietro VI*, Bd. Dec. No. 10-0199 at 5-6.

⁵⁰ In fact, AS 23.30.001(1) arguably supports both parties' positions. The denial of an evidentiary hearing on remand may ensure a quicker decision at a cheaper cost but it may lack fairness.

AS 23.30.001(4) instructs that hearings “shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.” AS 23.30.135(a) exhorts the board to conduct hearings “in the manner by which it may best ascertain the rights of the parties.” AS 23.30.005(h) requires process and procedure to “be as summary and simple as possible.” All that may be gleaned from these legislative pronouncements is that board hearings are to be conducted with fundamental fairness to the parties. They do not provide any specific criteria for deciding whether it was an abuse of discretion for the board to deprive UNOCAL of the opportunity to present additional evidence on remand.

Therefore, we conclude that the board abused its discretion in denying UNOCAL an evidentiary hearing on remand.⁵¹

b. UNOCAL’s arguments that the board was biased are without merit.

Finally, UNOCAL argues that the board’s reversal on the merits on remand, as well as the board’s limiting the scope of its decision to compensability, demonstrates bias. These allegations are without merit.

On remand, the board “may correct or revisit issues that were not decided by the reviewing court.”⁵² Properly following the court’s remand orders in Pietro’s case requires the board to 1) evaluate lay testimony about Pietro’s arsenic exposure that it may have erroneously considered irrelevant; 2) consider significant and disputed issues that it may have erroneously left unresolved; and 3) re-evaluate factual findings about

⁵¹ UNOCAL also argued the board’s denial of an evidentiary hearing was a violation of due process. This argument is mooted by our decision that the board’s denial of an evidentiary hearing on remand was an abuse of discretion. Moreover, the commission does not have jurisdiction to decide constitutional issues. *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

⁵² *Smith*, 172 P.3d at 792.

the content of doctors' testimony that the record did not appear to support.⁵³ Understandably, applying the correct legal principles and adopting accurate factual findings may result in the board reaching a different decision.

Second, we discern nothing in the board's order that permits only Pietro and not UNOCAL to present additional evidence on the issue of Pietro's entitlement to specific benefits. Thus, we fail to see how setting aside the issue of benefits for a possible later hearing demonstrates bias against UNOCAL. Moreover, we observe that the board properly limited the scope of the hearing to the issue specified at the prehearing conference.⁵⁴ As this case goes forward, the parties should ensure that the prehearing conference summary accurately encompasses the issues that they expect the board to address.⁵⁵

5. Conclusion.

We conclude that the board abused its discretion by denying UNOCAL's request for another evidentiary hearing on remand. We believe that another evidentiary hearing in which both parties may present live testimony is essential in the circumstances of this case, given the complexity of the medical evidence, the specific questions that the supreme court required the board to address on remand, and the changes in the composition of the board panel. Thus, we VACATE the board's decision finding Pietro's neuropathy and cancer claims compensable and REMAND this matter to

⁵³ See *Pietro*, 233 P.3d at 612-17. As the supreme court did, the commission cautions the board to be certain the record supports its characterization of key testimony.

⁵⁴ 8 AAC 45.065(c) provides in part that the prehearing conference "summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing." Pietro's final prehearing conference was held on February 1, 2011. The prehearing summary provided, "The only issue for hearing shall be the additional findings required by remand from the Supreme Court." R. 3889.

⁵⁵ 8 AAC 45.065(d) specifies the steps a party may take to modify or amend a misstatement of fact or prehearing determination in the summary.

the board for an evidentiary hearing that will address the supreme court's remand instructions.

Date: 26 September 2012 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Laurence Keyes, Chair, dissenting.

I respectfully dissent. In my opinion, the board did not abuse its discretion when, on remand, it decided the matter on the existing record. *See DeYonge*, 1 P.3d 90, 94.

Date: 26 September 2012



Signed

Laurence Keyes, Chair

This is a non-final decision as to the appeals commission's remand of the matter to the board. The non-final decision 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. The appeals commission is not a party.

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.

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

I certify that, with the exception of changes made in formatting for publication and correction of grammatical errors, this is a full and correct copy of the Final Decision No. 170 issued in the matter of *UNOCAL Corporation v. Paul D. Pietro*, AWCAC Appeal No. 11-006, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 26, 2012.

Date: October 2, 2012



Signed

B. Ward, Commission Clerk