

Alaska Workers' Compensation Appeals Commission

UNOCAL Corporation,
Appellant,

vs.

Paul D. Pietro,
Appellee.

Final Decision on Remand

Decision No. 178 March 19, 2013

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. Commission Dec. No. 170 issued September 26, 2012. Supreme Court order, reversing Dec. No. 170 and remanding to the commission to consider any other issues presented for appeal, issued November 27, 2012. Non-Opposed Motion to Decide Remaining Issues on Appeal filed with the commission on December 14, 2012; Non-Opposition to Motion to Decide filed December 20, 2012.

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

By: Philip E. Ulmer and David W. Richards, Commissioners.

1. Introduction.

This decision addresses the sole remaining issue on remand to the Workers' Compensation Appeals Commission (commission), namely whether substantial evidence supports the Alaska Workers' Compensation Board (board) determination that Paul

Pietro's (Pietro) neuropathy and cancer claims against UNOCAL Corporation (UNOCAL) are compensable. It does.

2. Factual and procedural background.

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. 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 concluded that Pietro failed to prove these claims by a preponderance of the evidence. He appealed, ultimately to the Alaska Supreme Court (supreme court). It summarized the underlying facts as follows.¹

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

¹ The footnotes in the supreme court's opinion are numbered as they are in that opinion.

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.

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 2001.² 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

² Prior to August 2001, Dr. Lee H. Schlosstein treated Pietro's arthritis. Exc. 0026-27, 0038.

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.³

The supreme court concluded that the board's factual findings were inadequate to permit appellate review in three respects: 1) the board's failure 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.⁴ It remanded the matter to the board.

On remand, the board did not take any additional evidence. However, it proceeded to make the findings the supreme court required and, in an about-face, decided instead that both the neuropathy and the cancer claims were compensable based on the existing record.⁵ UNOCAL appealed to the commission.

UNOCAL argued to the commission that substantial evidence did not support the board's decision. Specifically, UNOCAL asserted that the board improperly discredited Dr. Burton's opinion based on two factual errors: 1) he was not board-certified in toxicology; and 2) he concluded that there was no arsenic exposure at the plant when his testimony was that any arsenic exposure was not toxic. UNOCAL also argued that insufficient evidence supported the board's conclusion that 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.

Pietro argued that lay witnesses credibly testified about arsenic exposure at the plant as well as the timing of his feet complaints. In addition, Pietro noted medical testimony supported that chronic arsenic exposure was a substantial factor in Pietro's developing neuropathy and skin cancer. Thus, in Pietro's view, substantial evidence supported the board's decision in his favor.

³ *Pietro v. UNOCAL Corp.*, 233 P.3d 604, 606-10 (Alaska 2010).

⁴ *See Pietro v. UNOCAL Corp.*, 233 P.3d at 617.

⁵ *See Pietro v. UNOCAL Corp.*, Alaska Workers' Comp Bd. Dec. No. 11-0044, 57 (April 15, 2011) (*Pietro VII*).

In the commission's decision, we commented:⁶

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.

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. 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. The board described the testimony of at least six doctors who opined that the toxic exposure at work caused Pietro's neuropathy. 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."^{FN22} 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."

FN 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?

⁶ FN 22 is numbered as it is in the commission's decision.

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. (Sept. 1, 2005, Hr'g Tr. 150:13-23.)

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 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." 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."⁷

On UNOCAL's appeal, a majority of the commission decided that the board abused its discretion by not ordering a new evidentiary hearing on remand.⁸ But the commission rejected UNOCAL's arguments of board bias and concluded the board properly limited the scope of the remand hearing to the issue specified in the pre-hearing conference.⁹

Pietro petitioned the supreme court for review of the commission's decision. The court ordered that:

The petition for review is GRANTED. Independently reviewing the Board's decision to decide the matter on the existing record rather than holding a new evidentiary hearing, the court concludes that the Board did not abuse its discretion. The court reverses the final decision of the Workers' Compensation Appeals Commission dated 9/26/12 and remands to the

⁷ *UNOCAL Corp.*, App. Comm'n Dec. No. 170 at 13-15 (citing *Pietro VII*, Bd. Dec. No. 11-0044, 45-56) (all footnotes omitted, except FN 22).

⁸ *See UNOCAL Corp.*, App. Comm'n Dec. No. 170 at 21.

⁹ *See id.* at 21-22.

Commission for consideration of any other issues that were properly presented for appeal from the Board.¹⁰

The parties agree that the sole remaining issue for the commission to decide on remand is whether the board engaged in reasoned decision-making, supported by substantial evidence, in finding Pietro's claims compensable.

3. Standard of review.

The commission reviews the board's factual findings to determine whether they are supported by "substantial evidence in light of the whole record."¹¹ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹² The board's findings on credibility of witnesses and the weight to be accorded testimony, including medical testimony and reports, are binding on the commission, even if the "evidence is conflicting or susceptible to contrary conclusions."¹³

4. Discussion.

a. Substantial evidence supports that Pietro's neuropathy arose before he developed rheumatoid arthritis.

The board concluded that Pietro's neuropathy developed before the rheumatoid arthritis.¹⁴ This timing ruled out arthritis, which was indisputably not work-related, as a factor in Pietro's development of neuropathy. The board found Pietro and his wife credible as to the timing issue.¹⁵ Both testified that he experienced burning pain in his feet years before 1996¹⁶ when he developed shoulder pain that was ultimately

¹⁰ *Pietro v. UNOCAL Corp.*, Supreme Court Order (November 27, 2012) (citation omitted).

¹¹ AS 23.30.128(b).

¹² *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000) (citation omitted).

¹³ AS 23.30.122; AS 23.30.128(b).

¹⁴ *See Pietro VII*, Bd. Dec. 11-0044 at 49.

¹⁵ *See id.* at 46.

¹⁶ Pietro and his wife testified that the burning pain in his feet began in the late 1980s, *see Pietro*, 233 P.3d at 606; Hr'g Tr. 84:10-15, 85:15-17, Sept. 1, 2005.

diagnosed as arthritis in 1997. The board also relied on Pietro's 1991 annual health questionnaire for UNOCAL.¹⁷ Pietro checked yes to questions addressing whether he had "pins and needles" sensations in arms or legs, and burning pain in his hands, arms, feet or legs.¹⁸ His testimony clarified that the sensations he reported were in his feet and that a doctor wrote the notation "no changes" on the form during an exam.¹⁹ Pietro did not report the burning foot pain on any other annual employment exams. Pietro also acknowledged that he did not initially report the burning foot pain to Dr. Schlosstein, who began treating him for his rheumatoid arthritis in 1997, because Pietro attributed the pain to walking many hours on the job.²⁰

UNOCAL asserts that the lay testimony and "one inconsistent report," a reference to the 1991 health questionnaire, do not amount to substantial evidence to establish the timing.²¹ The commission views this argument as an attempt to persuade us to reweigh the evidence, which we will not do. The board found the witnesses credible, a determination that is binding on the commission.²² The board specifically found credible Pietro's testimony that he attributed the burning foot pain to long hours on the job,²³ and, therefore, because Pietro believed he knew the cause of the pain, he did not view it as relevant to mention to medical providers. The board's acceptance of Pietro's credibility was an implicit rejection of UNOCAL's argument that Pietro did not have burning foot pain in the relevant timeframe because he should have mentioned it at his employment physicals and reported it earlier to Dr. Schlosstein.

¹⁷ Exc. 0001-13.

¹⁸ Exc. 0009.

¹⁹ Hr'g Tr. 94:8-15, Sept. 1, 2005.

²⁰ Hr'g Tr. 117:10-14, Sept. 1, 2005.

²¹ Appellant's Br. 26, 33-34; Appellant's Non-Opposition to Motion to Decide 1-2.

²² See AS 23.30.128(b).

²³ See *Pietro VII*, Bd. Dec. No. 11-0044 at 28.

Moreover, medical testimony supports Pietro's position on timing as well. At least one doctor, Dr. Birnbaum, opined that peripheral neuropathy does not usually appear early in the course of rheumatoid arthritis,²⁴ lending credence to the theory that the arthritis did not cause it.

Therefore, the commission concludes that Pietro's and his wife's testimony, the 1991 health questionnaire, and Dr. Birnbaum's opinion, constitute substantial evidence to support a finding that Pietro's neuropathy preceded the arthritis.

b. Substantial evidence supports that Pietro's work at UNOCAL exposed him to chronic low levels of arsenic sufficient to be a substantial factor in his development of peripheral neuropathy and skin cancer.

The commission concludes that substantial evidence in the record supports the board's finding that "[e]mployee had considerable exposure to arsenic."²⁵ The supreme court did not require the board to quantify the precise level of Pietro's arsenic exposure²⁶ nor did the court require direct, rather than circumstantial, evidence of arsenic exposure.²⁷ The board relied on substantial evidence, 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.²⁸ From this evidence, the board concluded Pietro suffered chronic, low-level arsenic exposure.

²⁴ Dr. Birnbaum opined that neurological problems related to arthritis "usually occur[] only in the setting of severe active rheumatoid disease." *Pietro*, 223 P.3d at 608.

²⁵ *Pietro VII*, Bd. Dec. No. 11-0044 at 50.

²⁶ *See Pietro*, 233 P.3d at 613 n.22 ("We disagree with UNOCAL that Pietro's inability to quantify exactly his exposure at work would have been a proper basis for the Board's rejection of his claim.")

²⁷ *See id.* at 614 ("[T]he Board had sufficient evidence to evaluate the expert testimony, make a finding regarding Pietro's exposure to toxins, and explain the finding.")

²⁸ *See Pietro VII*, Bd. Dec. No. 11-0044 at 50-52.

Moreover, the board relied on substantial evidence to connect Pietro's workplace arsenic exposure to his neuropathy and skin cancer. Pietro had to prove by a preponderance of the evidence that his workplace arsenic exposure was "a substantial factor" in his developing peripheral neuropathy and skin cancer.²⁹ At least four doctors opined that Pietro's neuropathy was causally related to the arsenic exposure.³⁰ In addition, at least two doctors stated that Pietro's rheumatoid arthritis did not cause his neuropathy³¹ 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.³² 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.³³ The board specifically discredited Dr. Burton's opinions on the causation of the neuropathy and skin cancers because he disagreed with the amount of arsenic

²⁹ AS 23.30.010 before the 2005 amendments; *Doyon Universal Servs. v. Allen*, 999 P.2d 764, 770 (Alaska 2000).

³⁰ These doctors were Dr. Takaro, who testified that arsenic exposure was the most likely cause because of the type of neuropathy Pietro had, *see Pietro*, 233 P.3d at 609; Dr. Armstrong, who testified that "'more likely than not' that arsenic exposure was 'the responsible factor,'" *Pietro*, 233 P.3d at 609; Dr. Parent, who testified that the arsenic exposure caused or contributed to Pietro's medical problems, *see Pietro*, 233 P.3d at 609; and Dr. Dellon, who concluded that if other possible causes were ruled out, workplace exposure to toxins was the "most likely cause," *see id.* at 607.

³¹ These doctors were Dr. Dellon, *see Pietro*, 233 P.3d at 607; and Dr. Armstrong, *see id.* at 609.

³² *See Pietro VII*, Bd. Dec. No. 11-0044 at 55. Dr. Schleimer wrote that Pietro's neuropathy was "likely related to rheumatoid arthritis" but he found no clear documentation of whether the neuropathy or the arthritis arose first and observed that if Pietro did not have rheumatoid arthritis, he would consider the possibility of arsenic exposure being a factor in his developing neuropathy "more seriously." *See Pietro*, 233 P.3d at 608.

³³ Dr. Takaro opined that Pietro's arsenic exposure at UNOCAL was a substantial factor in the development of his skin cancer, *see Pietro*, 233 P.3d at 610. Similarly, Dr. Parent indicated Pietro's skin cancers were consistent with arsenic exposure, *see id.* at 609.

exposure at the plant. The board also gave little weight to two other opinions on neuropathy causation, namely, Dr. Schleimer's because he could not determine whether the neuropathy preceded the arthritis, and Dr. Bell's because it was "conclusory."³⁴

UNOCAL disputes the board's discrediting one of these opinions. UNOCAL argues that the board's reasons for assigning little weight to Dr. Burton's opinion misstated the record and his testimony. UNOCAL asserts that the board incorrectly stated that Dr. Burton was not board-certified in toxicology and incorrectly characterized the evidentiary basis for his opinion as that Pietro had no workplace arsenic exposure.³⁵ We conclude that any errors the board made in characterizing Dr. Burton's testimony or credentials are harmless.³⁶ 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. Dr. Burton described Pietro's arsenic exposure at the plant as "in the same category as the kind of arsenic that we're all exposed to every day by just consuming normal food."³⁷ Even though this 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. Thus, we conclude that the board rejected Dr. Burton's opinion, not because the board may have misunderstood his testimony or credentials, but because the board disagreed with the evidentiary basis underlying his opinion.

Lastly, we observe that even though UNOCAL presented contrary evidence, the commission is not permitted to reweigh the evidence. "When medical experts disagree about the cause of an employee's injury, . . . as a general rule `it is undeniably the

³⁴ See *Pietro VII*, Bd. Dec. No. 11-0044 at 55.

³⁵ Appellant's Br. 27-29; Appellant's Non-Opposition to Motion to Decide 2-3.

³⁶ An error is harmless when it does not alter the outcome. See *Dwight v. Humana Hosp. Alaska*, 876 P.2d 1114, 1120 (Alaska 1994). UNOCAL also argues that the board failed to mention that Dr. Burton received a material safety data sheet for Oxazolidone, Appellant's Br. 28, but the board did, in fact, mention that Dr. Burton received this data sheet. See *Pietro VII*, Bd. Dec. No. 11-0044 at 20.

³⁷ Hr'g Tr. 150:13-23, Sept. 1, 2005.

province of the Board . . . to decide who to believe and who to distrust.”³⁸ Moreover, “[t]he 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.³⁹ Because we conclude there is substantial evidence in the record to support the board’s decision on the compensability of Pietro’s claims, we affirm the board.

5. Conclusion.

The commission concludes substantial evidence in light of the whole record supports the board’s findings that Pietro’s peripheral neuropathy preceded his rheumatoid arthritis, and that Pietro suffered chronic low-level arsenic exposure working at UNOCAL’s plant. Moreover, we conclude there is substantial evidence to support the board’s decision to find his claims for neuropathy and skin cancer compensable. Therefore, we AFFIRM the board.

Date: 19 March 2013 ALASKA WORKERS’ COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Laurence Keyes, Chair

³⁸ *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1243 (Alaska 2007) (citation omitted).

³⁹ *Hansen v. McHoes*, Alaska Workers’ Comp. App. Comm’n Dec. No. 056, 10 (Sept. 24, 2007).

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).⁴⁰ For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed⁴¹ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

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

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any

⁴⁰ A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

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

⁴¹ *See id.*

proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that this is a full and correct copy of the Final Decision on Remand No. 178 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 March 19, 2013.

Date: March 21, 2013



K. Morrison

K. Morrison, Deputy Commission Clerk