Alaska Workers' Compensation Appeals Commission

ARCTEC Alaska, Appellant, vs. Joseph Traugott, Appellee.	Final Decision Decision No. 249 June 6, 2018 AWCAC Appeal No. 17-015 AWCB Decision No. 17-0103 AWCB Case No. 201309316

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 17-0103, issued at Fairbanks, Alaska, on August 29, 2017, by northern panel members Ronald P. Ringel, Chair, and Jacob Howdeshell, Member for Labor.

Appearances: Robert J. Bredesen, Hillside Law Office, LLC, for appellant, ARCTEC Alaska; Eric Croft, The Croft Law Office, for appellee, Joseph Traugott.

Commission proceedings: Appeal filed September 12, 2017, with motion for stay; motion for stay granted November 2, 2017; briefing completed February 7, 2018; oral argument held on February 23, 2018.

Commissioners: James N. Rhodes, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Appellee, Joseph Traugott, was diagnosed with diabetes in 2002 and, subsequently, developed several medical issues. Appellant, ARCTEC Alaska (ARCTEC), hired Mr. Traugott in March 2013. In May 2013, he developed a small blister in the middle arch of his right foot, which he believes was caused by standing on ladders at work. The blister healed, but he then developed a crack on the same foot for which in July 2013 he was hospitalized for cellulitis of the foot. Following a series of interlocutory decisions and orders, the Alaska Workers' Compensation Board (Board) issued a final decision and order on August 29, 2017, finding Mr. Traugott's need for ongoing medical treatment was

substantially caused by his work with ARCTEC.[1] ARCTEC timely appealed contending the Board applied an incorrect legal standard. The Alaska Workers' Compensation Appeals Commission (Commission) heard oral argument on February 23, 2018. The Commission now reverses the Board's decisions, finding the Board erroneously applied an incorrect interpretation in looking at whether Mr. Traugott's work for ARCTEC was "in relation to other causes . . . the substantial cause of the . . . need for medical treatment" as stated in AS 23.30.010(a).

2. Factual background and proceedings.[2]

Mr. Traugott was diagnosed with diabetes in 2002.[3] On August 9, 2004, Mr. Traugott reported a sore on his toe that was healing. A photograph of what appeared to be an open sore on Mr. Traugott's right big toe has a notation stating "old blister from shoes."[4] On February 7, 2005, the medical record noted Mr. Traugott's toe had "completely healed over from 8/04."[5] Mr. Traugott, on April 25, 2005, reported an infection on his left big toe.[6]

By September 22, 2005, Mr. Traugott complained of a right big toe infection, which began five days earlier, and he was placed on oral antibiotics.[7] Mr. Traugott saw Patrick Crawford, D.P.M., on October 3, 2005, who reported that while working in Alaska, Mr. Traugott had a callus that broke down, developing a neurotrophic ulcer on his right

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[1] *Joseph Traugott v. ARCTEC Alaska*, Alaska Workers' Comp. Bd. Dec. No. 17-0103 (Aug. 29, 2017) (*Traugott IV*).

[2] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[3] *Traugott IV* at 2, No. 1.

[4] *Id.*, No. 2.

[5] *Id.*, No. 3.

[6] *Id.*, No. 4.

[7] *Id.*, No. 5.

big toe, but with no evidence of bony involvement.[8] The October 26, 2005, chart note indicated Mr. Traugott's right big toe was better, but needed debridement.[9]

On January 5, 2006, Mr. Traugott's right big toe ulcer was found to be infected with streptococcus.[10] Mr. Traugott was seen in follow up for his right big toe after someone had stepped on it, on January 9, 2006. The toe appeared infected, and Mr. Traugott was placed on oral antibiotics.[11] The right big toe was healed by March 8, 2006.[12]

On September 6, 2006, Dr. Crawford diagnosed possible Charcot foot (Charcot neuroarthopathy) in Mr. Traugott's right foot.[13]

Mr. Traugott was diagnosed with neuropathy on August 11, 2007.[14] Neuropathy, or peripheral neuropathy, is a disruption in the function of peripheral nerves, commonly due to diabetes. It most often involves nerves related to sensation or proprioception.[15] When a person develops neuropathy, their skin stops producing the oils that lubricate the skin and they do not sweat. Because they do not feel damage to the skin, they are at risk of skin ulcers.[16] Mr. Traugott, on October 15, 2008, reported continued pain in both feet, some of which was determined to be nerve-related.[17]

On February 4, 2010, an x-ray revealed evidence of joint destruction in Mr. Traugott's right foot. Dr. Crawford diagnosed Charcot neuroarthopathy in Mr. Traugott's right mid-foot. He noted that the second toe on Mr. Traugott's right foot

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8 *Traugott IV* at 2, No. 6.

9 *Id.*, No. 7.

10 *Id.* at 3, No. 8.

11 *Id.*, No. 9.

12 *Id.*, No. 10.

13 *Id.*, No. 11.

14 *Id.*, No. 12.

15 *Id.*, No. 13.

16 *Id.*, No. 14.

17 *Id.*, No. 15.

was a hammer toe.[18] Charcot neuropathy or Charcot foot is a condition that occurs in a small percentage of individuals with neuropathy. It appears as inflammation in a joint or bone, and the foot gets red, swollen, and looks infected, but there is no organism present. During the inflammation stage, the bones begin to crumble and fall apart. It is unknown why Charcot foot occurs. A flare up of Charcot foot may lead to a deformity causing an abnormal weight-bearing surface. These abnormal weight-bearing surfaces are at additional risk of ulceration because the skin breaks down very easily.[19] Hammer toe can develop as a result of neuropathy. The damage to the nerve causes an imbalance in the muscles of the toe, causing the toe to curl.[20]

Dr. Crawford, on May 2, 2011, noted Mr. Traugott's hammer toe had become infected and recommended surgery to correct the condition.[21] The chart note indicated on the same day that Mr. Traugott had decreased sensation to touch in both legs.[22] Dr. Crawford, on May 5, 2011, stated the infection in Mr. Traugott's toe was a staphylococcus infection.[23] Dr. Crawford stated, on May 16, 2011, he would schedule surgery to correct Mr. Traugott's hammer toes.[24] However, due to unrelated medical complications, the surgery on Mr. Traugott's toes was not performed until May 29, 2012, when Dr. Crawford fused the joints in the second and third toes on Mr. Traugott's right foot using internal fixation.[25] On May 21, 2012, Mr. Traugott reported the lesions on his toe had increased in size, and he was diagnosed with a diabetic ulcer and bone infection (osteomyelitis).[26] On June 21, 2012, the infection in Mr. Traugott's second toe was found

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18 *Traugott IV* at 3, No. 16.

19 *Id.*, No. 17.

20 *Id.* at 4, No. 18.

21 *Id.*, No. 20.

22 *Id.*, No. 19.

23 *Id.*, No. 21.

24 *Id.*, No. 22.

25 *Id.*, No. 23.

26 *Id.*, No. 24.

to be staphylococcus.[27] However, on July 23, 2012, Mr. Traugott was released to work following the hammer toe surgery.[28] By August 3, 2012, Mr. Traugott had a staphylococcus infection in his right third toe.[29]

ARCTEC hired Mr. Traugott in March 2013, and at the time of hiring he was given a physical examination. He was approved for work without restriction, but was notified he should consult his doctor because his pulmonary function test was abnormal. Mr. Traugott worked about three weeks at the Indian Mountain site before being transferred to Tin City. While at Tin City, Mr. Traugott primarily worked replacing heating and cooling systems. The work was six days per week, at least 10 hours per day. Most of the work was overhead, requiring him to spend significant time standing on ladders. Mr. Traugott testified standing on the ladders caused pressure on the middle of his feet.[30]

In the middle of May 2013, Mr. Traugott developed a blister, smaller than the size of a dime, located in the middle of the arch of his right foot toward the outside. He believed the blister was caused by the pressure on his foot while standing on ladders. Mr. Traugott did not seek medical attention and did not report the injury. He treated the blister himself by keeping it clean and did not use any antibiotics. The blister healed and went away within a couple of weeks.[31]

On July 5, 2013, the skin on the sole of Mr. Traugott's right foot cracked open within an inch of where the blister had appeared in May. There was a fetid discharge. Because there are no medical facilities at Tin City, ARCTEC flew Mr. Traugott to Nome the next day.[32] He was hospitalized in Nome with an initial diagnosis of cellulitis of the foot, secondary to diabetes. He reported that, while he had no recent injury to the foot,

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27 *Traugott IV* at 4, No. 25.

28 *Id.*, No. 26.

29 *Id.*, No. 27.

30 *Id.* at 4-5, No. 28.

31 *Id.* at 5, No. 29.

32 *Id.*, No. 30.

he had been experiencing foot problems for about a week.[33] Following its usual practice to report all injuries whether compensable or not, ARCTEC, on July 9, 2013, filed a report of occupational injury or illness.[34]

Mr. Traugott was discharged from Norton Sound Regional Hospital on July 11, 2013, with a diagnosis of moderately severe cellulitis. X-ray and CT scans showed a soft tissue ulcer with no evidence of osteomyelitis, although the possibility of osteomyelitis remained a concern. Wound and blood cultures were negative, suggesting an anaerobic infection. The wound was debrided, and Mr. Traugott was to receive follow-up care when he returned home to Texas.[35]

Mr. Traugott saw Dr. Crawford on July 15, 2013. Dr. Crawford erroneously reported Mr. Traugott had developed a blister on his right foot in May 2013, which had cracked open and become infected.[36] Dr. Crawford diagnosed a diabetic ulcer, cellulitis, and Charcot foot. Another wound culture was done, and Mr. Traugott continued on antibiotics.[37] Mr. Traugott's foot improved initially, but by August 1, 2013, he was hospitalized when osteomyelitis was suspected, and the wound was drained and debrided. Cultures revealed a staphylococcus epidermis infection, and Mr. Traugott was started on a broad-spectrum antibiotic.[38]

On August 12, 2013, ARCTEC controverted all benefits, noting that Mr. Traugott had been diagnosed with diabetic foot cellulitis and there was no evidence the condition was work-related.[39]

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33 *Traugott IV* at 5, No. 31.

34 *Id.*, No. 32.

35 *Id.*, No. 33.

36 According to Mr. Traugott, the blister had healed before this new wound developed (*see* fn. 31).

37 *Traugott IV* at 5, No. 34.

38 *Traugott IV* at 6, No. 35.

39 *Id.*, No. 36.

On December 8, 2013, Mr. Traugott was found to have a staphylococcus aureus infection in his foot.[40] He received a prolonged course of intravenous antibiotic therapy.[41] Mr. Traugott received wound care three times per week, and slowly improved. By June 20, 2014, the wound was nearly closed.[42]

In September 2014, Mr. Traugott's wound was infected with methicillin resistant staphylococcus aureus (MRSA);[43] however, by December 2, 2014, cultures showed no infection in Mr. Traugott's foot.[44] The wound had healed by December 17, 2014, although there was still some swelling and warmth.[45]

Mr. Traugott returned to Dr. Crawford on January 5, 2015, with a swollen right foot and ankle. An x-ray revealed partial dislocation of the right ankle, and Dr. Crawford diagnosed Charcot right foot and ankle, possibly aggravated by gout.[46] Mr. Traugott saw Mark Drew, M.D., at BSA Health System on January 20, 2015. Dr. Drew diagnosed severe right foot and ankle Charcot arthropathy, and noted the ulcer on the sole of Mr. Traugott's foot had not recurred, but he had a thick callus at the site.[47]

On February 9, 2015, Dr. Drew noted the deformity in Mr. Traugott's right ankle was worsening due to Charcot arthropathy, although the sole of his foot remained intact with no ulceration.[48] Dr. Drew, on March 18, 2015, referred Mr. Traugott to an orthopedic surgeon, Dr. Risko, at Amarillo Bone and Joint Clinic.[49] By March 30, 2015, Mr. Traugott

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40 *Traugott IV* at 6, No. 37 (there is a gap for treatment between August 2013 and December 2013).

41 *Id.*

42 *Id.*, No. 38.

43 *Id.*, No. 39.

44 *Id.*, No. 40.

45 *Id.*, No. 41.

46 *Id.*, No. 42.

47 *Id.*, No. 43.

48 *Id.*, No. 44.

49 *Id.*, No. 45.

had developed a small ulceration between the third and fourth toes of his right foot.[50] Mr. Traugott met with Dr. Risko on March 23, 2015, who concluded Mr. Traugott was not a candidate for corrective Charcot foot surgery and recommended a below-the-knee amputation.[51]

Dr. Crawford, on July 16, 2015, filed a Physician's Report stating Mr. Traugott's right foot condition was work-related. He explained "stress to right foot caused blister/open area leading to infection and ulcer."[52]

On November 4, 2015, Mr. Traugott met with orthopedic surgeon Jerry Grimes, M.D., who noted the mid-foot radiographs of Mr. Traugott's ankle were consistent with Charcot neuroarthropathy, but the talus was essentially gone and did not show significant fragmentation. Dr. Grimes concluded the lack of fragmentation could be secondary to infection, Charcot foot, or an avascular necrotic process. Based on blood tests, Dr. Grimes concluded Mr. Traugott did not have active osteomyelitis. Dr. Grimes opined a below-the-knee amputation was reasonable, but given Mr. Traugott's aversion to amputation, an ankle fusion was a reasonable alternative.[53] Dr. Grimes performed the fusion surgery on Mr. Traugott's right ankle using internal hardware on November 12, 2015.[54] Because of the unusual appearance of the talus during surgery, Dr. Grimes sent biopsy samples for pathology and microbiology evaluation.[55]

The pathology tests took several days to complete. On November 24, 2015, the pathologist reported to Dr. Grimes that the bone destruction could be consistent with Charcot foot, but it was more likely that osteomyelitis was an initiating or complicating factor.[56] The microbiology reports subsequently confirmed osteomyelitis in Mr. Traugott's

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50 *Traugott IV* at 7, No. 46.

51 *Id.*, No. 47.

52 *Id.*, No. 48.

53 *Id.*, No. 49.

54 *Id.*, No. 50.

55 *Id.*

56 *Id.*, No. 51.

talus.[57] Determining whether the damage to a bone was caused by osteomyelitis or Charcot neuroarthropathy is very difficult using imaging such as x-rays, MRIs, and CT scans, so the best way to distinguish is through a bone biopsy.[58]

While osteomyelitis can develop from a blood-borne infection, the infection is most commonly acquired through a break in the skin, such as a blister, cut, or ulcer. It is one of the most frequent infections of a diabetic foot.[59]

After receiving the pathology and microbiology reports, Dr. Grimes revised his diagnosis, concluding the collapse of Mr. Traugott's talus was due to osteomyelitis rather than Charcot foot. He was convinced the osteomyelitis infection originated with the May 2013 blister on Mr. Traugott's foot. Dr. Grimes stated that while Mr. Traugott was at a higher risk than someone with a healthy foot, Mr. Traugott would probably not have developed the ulceration and osteomyelitis with normal activities. Dr. Grimes relied, in part, on Dr. Crawford's July 16, 2015, report which stated stress to Mr. Traugott's right foot caused a blister or open area leading to the infection and ulcer.[60]

On January 25, 2016, Dr. Marilyn L. Yodlowski performed an employer's medical evaluation (EME). Because Mr. Traugott was unable to travel, Dr. Yodlowski's evaluation was limited to a review of the medical records. While Dr. Yodlowski had Mr. Traugott's medical records dating to 2002, she did not have records from the November 2015 surgery. Dr. Yodlowski noted Mr. Traugott had been diagnosed with both Charcot foot and osteomyelitis well before the work injury. She opined the loss of bone in Mr. Traugott's ankle was most likely due to Charcot foot, but could be due to a combination of Charcot foot and osteomyelitis. She explained the underlying cause of Charcot foot was the peripheral neuropathy due to Mr. Traugott's diabetes, and the Charcot foot develops with normal activities of living, and was not due to trauma. She further

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[57] *Traugott IV* at 7, No. 51.

[58] *Id.*, No. 52.

[59] *Id.* at 8, No. 53.

[60] *Id.*, No. 54 (however, according to Mr. Traugott, the blister healed in May 2013 and it was a couple of months later (July) that the open crack developed (*see Traugott IV* at 5, Nos. 29 and 30).

explained that MRSA was often found on a person's skin, and Mr. Traugott was not at a higher risk of infection because of his work activities. In response to a question asking her to identify the substantial cause of "the diagnosed condition," Dr. Yodlowski responded the cause of the Charcot foot and the infections was Mr. Traugott's diabetes and not his employment.[61]

At the February 18, 2016, hearing, Dr. Yodlowski testified about causation: "countless people climb ladders every day . . . and it doesn't cause a diabetic ulcer;" "what causes a diabetic ulcer is having these underlying abnormalities . . . in your foot structure and then doing activities that people do every day without sustaining injury." She noted that "if you climb ladders and get a blister, you don't get hospitalized unless you have other pathology." She did note, however, that if an individual "didn't follow medical advice on prevention, substantial pressure on middle of foot could likely cause him to develop an ulcer." She did not know how much of the day Mr. Traugott spent on a ladder, but she had not seen nor read about ulcers as a result of standing on ladders.[62]

At the February 18, 2016, hearing, Mr. Traugott testified that prior to the 2013 infection, no doctor had recommended he wear orthotic or diabetic shoes, although he had been prescribed orthotic wedges he could use in work shoes.[63] After the February 18, 2016, hearing, the panel concluded it lacked sufficient understanding of the medical records to properly weigh the medical testimony. As a result, *Traugott I* was issued on March 10, 2016, and ordered a second independent medical evaluation (SIME).

The SIME was ordered with Carol Frey, M.D., an orthopedic surgeon specializing in foot and ankle problems. In addition to the standard SIME questions, *Traugott I* ordered that Dr. Frey be asked the following:

> How likely is it that a blister that healed within a couple of weeks without treatment, including antibiotics, would be the portal of entry for the infection in the diabetic ulcer on Employee's foot that occurred about five weeks later?

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61 *Traugott IV* at 8, No. 55.

62 *Id.* at 8-9, No. 56.

63 *Id.* at 9, No. 57.

> If the blister was not the portal of entry for the infection in Employee's subsequent midfoot ulcer, could such an ulcer develop because Employee's preexisting diabetic neuropathy and Charcot foot were aggravated by significant time spent standing on ladders?
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> What is the likelihood Employee would have developed the midfoot ulcer had he not been engaged in work activities – in other words, how likely is it was the ulcer would have developed if Employee had only engaged in his normal activities of daily living?
>
> Was the collapse of Employee's talus was more likely due to Charcot neuroarthropathy or to osteomyelitis?
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> If the collapse of Employee's talus was due to Charcot neuroarthropathy, did the osteomyelitis aggravate the collapse?
>
> Is it probable that the source of the osteomyelitis in Employee's talus was his midfoot osteomyelitis, or was there another, more likely, source?[64]

The Board's referral letter to Dr. Frey included the following instructions on Alaska workers' compensation law:

> First, under Alaska law, "disability" does not mean a physical impairment; it is an economic concept, and means the inability to earn the wages the employee was earning at the time of the injury.
>
> Second, under Alaska law at the time of Mr. Traugott's injury, the legal test for causation is that the employment be "the substantial cause" of his disability or need for medical treatment. "The substantial cause" means that, in relation to all of the causes which a reasonable person could assign responsibility, employment is more than any other the cause of the employee's disability or need for medical treatment. In determining "the substantial cause," the board is required to evaluate the relative contribution of different causes of an employee's death, disability, or need for medical treatment.
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> Third, the causation analysis becomes somewhat more complicated if the employee had a pre-existing condition. Under Alaska law, an employer takes an employee with whatever pre-existing conditions he or she may have. When a preexisting condition makes an employee more susceptible to injury, the question becomes whether the employment was "the substantial cause" in aggravating, accelerating, or combining with the pre-existing condition to result in disability or the need for medical care. In other words, if an employee has a pre-existing condition, employment may be the substantial cause of his disability or need for medical care, even

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[64] *Traugott v. ARCTEC Alaska*, Alaska Workers' Comp. Bd. Dec. No. 16-0018 at 17 (Mar. 10, 2016) (*Traugott I*).

> though a person without that pre-existing condition may not have suffered a similar injury or consequences.[65]

The referral letter to Dr. Frey also included the questions ordered in *Traugott I*, the Board's standard questions, and questions from both Mr. Traugott and ARCTEC.[66]

Dr. Frey spent eighteen hours reviewing over 3,000 pages of Mr. Traugott's medical record dating back to September 2005.[67] On January 5, 2017, she examined Mr. Traugott and diagnosed a number of conditions. Relevant to Mr. Traugott's right foot or ankle, she diagnosed:

> Diabetes mellitus of more than a decade with evidence of poorly controlled blood sugars.
>
> Peripheral neuropath likely secondary to diabetes. History of multiple wound infections and deformities in the right foot including hammertoes likely secondary to diabetes and peripheral neuropathy.
>
> Right foot Charcot arthropathy documented in the medical records predating May 2013.
>
> Ongoing and multiple ulcerations and diabetic foot wounds.
>
> History of osteomyelitis and possible ongoing chronic osteomyelitis throughout the right foot and possibly now the ankle.

Dr. Frey diagnosed several other conditions that, while not directly relevant to Mr. Traugott's foot and ankle, could influence the appropriate course of treatment.[68]

In her report, Dr. Frey answered several of the Board's questions as follows:

> 2. If, in your opinion, one cause of Joseph Traugott's disability, or need for medical treatment is a preexisting condition, did the 2013 employment injury aggravate, accelerate, or combine with the preexisting condition to cause disability or need for treatment?
>
> > The employment injury combined with pre-existing condition of diabetes and neuropathy to produce a break down in the patient's foot and introduction of infection. He has a history of Charcot arthropathy on the right foot but not the left foot. He has a history of infection in the right foot, that responded to antibiotic treatment,

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65 *Traugott IV* at 9-10, No. 59.

66 *Id.* at 10, No. 60.

67 *Id.*, No. 61.

68 *Id.* at 10-11, No. 62.

but does not have the same history on the left. He is clearly, as a result of diabetes and neuropathy at risk for developing CHARCOT arthropathy, but does not have a history of this on the left. There were xrays taken within a year of the injury of the left ankle, and no CHARCOT was reported, even when looking for it. He did not have a history of infection on the left. He had been cleared for work from a previous left fibula fracture. The wound did not break down in the area of the fibula fracture. The patient reports that he continued to work on ladders and climbing and walking, despite pain the mid arch. This contributed to the break down in the skin and the introduction of the infection. Otherwise, there are no records to indicate that he had another site of infection at that time. There are no records to indicate that he had Charcot arthropathy on the left side, prior to the incident of pain and working through pain at work. However, he has a clear history of neuropathy and diabetes that contributed to his eventual need for long term treatment for Charcot arthropathy.

3. Please evaluate the relative contribution of different causes of Joseph Traugott's disability, or need for medical treatment identified in question one.

   Osteomyelitis, Charcot arthropathy, breakdown of the ankle are the conditions that are contributed to by his work. This condition is mainly a result of the diabetes and neuropathy, his preexisting condition, but clearly accelerated by his work injury.

4. Which of the different causes identified in question one is "the substantial cause" of Joseph Traugott's disability, or need for medical treatment? Please provide the basis of your opinion.

   Overall cause:
   75% diabetes & neuropathy
   25% work conditions

   Acceleration
   100% work related. Therefore, for this particular disability at this particular point in time, the work injury is the SUBSTANTIAL CAUSE.

9. How likely is it that a blister that healed within a couple of weeks without treatment, including antibiotics, would be the portal of entry for the infection in the diabetic ulcer on Employee's foot that occurred about five weeks later?

   Not possible to say.

10. If the blister was not the portal of entry for the infection in Employee's subsequent midfoot ulcer, could such an ulcer develop because Employee's preexisting diabetic neuropathy and Charcot foot were aggravated by significant time spent standing on ladders?

The blister more probably than not was the portal of entry.

11. What is the likelihood Employee would have developed the midfoot ulcer had he not been engaged in work activities - in other words, how likely would the ulcer have developed if Employee had only engaged in his normal activities of daily living?

    More probable than not that he would have developed a skin ulcer on the outside, but not at all likely that it would have appeared this quickly. Clearly accelerated by the work and continuing to work through pain.

12. Was the collapse of Employee's talus more likely due to Charcot neuroarthropathy or to osteomyelitis?

    50/50. Impossible to determine by any reasonable evaluation. Therefore given equal weight.

13. If the collapse of Employee's talus was due to Charcot neuroarthropathy, did the osteomyelitis aggravate the collapse?

    Yes.

14. Is it probable that the source of the osteomyelitis in Employee's talus was his midfoot osteomyelitis or was there another more likely source?

    Yes, most likely from a break in the skin, as no other source is identified.[69]

Dr. Frey responded to Employee's SIME questions as follows:

2. Working for Arctec at Tin City, Employee was wearing new boots, was working 60 hours a week, which involved a substantial amount of walking and carrying, and was working on ladders more than on any other job he had ever had. [] "Being on ladders all the time . . . creates a lot of pressure on the middle of our foot." [] In May 2013, he developed a blister in his arch that did not ulcerate and healed cleanly. In July 2013, he developed a blister near the first that ulcerated [].

   In your professional opinion, is this the type of work activity that would lead to the blisters Employee experienced in May and July 2013?

   Yes, especially with boots and ladder use. Mid arch is a very common location.

2.[sic] In the medical records, there are two potential causes of Employee's osteomyelitis, a 2012 hammertoe procedure with no complications and the 2013 blisters, with substantial osteomyelitis complications.

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69 *Traugott IV* at 11-13, No. 63.

2013 blister, as the 2012 infection had cleared, according to medical records.

6. On January 5, 2016, Dr. Yodlowski stated that Employee's "foot would not be reasonably treated by any kind of reconstructive surgery other than a below-knee amputation." Do you agree that amputation is an appropriate medical recommendation for Employee?

   No, there are the options that I mentioned above. Although BKA is the quickest it is not the only recommendation.[70]

Dr. Frey's responses to ARCTEC's SIME questions were as follows:

2. In the context of diabetic midfoot ulcers, does the medical community regard activities of daily living such as walking, standing or climbing (either up/down stairs or ladders), as a pathological cause of the ulcers, and do physicians attach responsibility to those activities?

   No. Not for ADLs.

4. Which factors do you regard as a cause and attach responsibility to, for the development of Employee's diabetic midfoot ulcer?

   Working through pain and continuance of loading his midfoot, not only by wearing a boot (tends to fit the arch more tightly than a shoe), but also use of ladders & long term standing. The patient also reports working through pain.

7. Which of the identified factors is "the substantial cause" of Employee's talus osteomyelitis?

   The midfoot ulcer. This is taking into consideration acceleration. Had it not been for his diabetes and neuropathy he would not have had Charcot. Had it not been for his skin ulcer he would not have had osteomyelitis. Had it not been for his work injury, he would not have had the skin ulcer at the time he had it. He very well may have had skin break down at some point in time, but it is not possible to know when. This skin break down, caused this infection at this point in time.

9. Was the surgery performed by Dr. Grimes reasonable and necessary?

   Yes.[71]

Mr. Traugott's foot was sore to walk on for about a week before it broke open on July 5, 2013. Mr. Traugott was averse to amputation because he knew someone who

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[70] *Traugott IV* at 13, No. 64.

[71] *Id.* at 13-14, No. 65

had a lower leg amputation which led to a total amputation, after which the person died. Mr. Traugott believed the November 2015 surgery was highly successful. At the time of the July 6, 2017, hearing, he was no longer taking pain medication and was on a reduced dosage of antibiotics. He was able to walk using a cane, and stairs were difficult, but he no longer required a cast-boot. He is receiving Social Security disability, although he would have continued to work had the injury not occurred.[72]

Dr. Grimes explained that at the time of the November 2015 surgery, there were three potential options to treat Mr. Traugott's ankle. The first, joint replacement, is contraindicated in patients with neuropathy, so it was not an option. The second, amputation, is the most reliable, and would return Mr. Traugott to activity the fastest. The biggest disadvantage is the lack of mobility without the prosthesis. The third option, fusion, can be done by two methods, internal stabilization or external stabilization. Internal fixation, using an intramedullary rod which is cemented into the bone, is what was used on Mr. Traugott. External fixation consists of rings around the leg with wires going to the bones to hold them in place. Internal fixation is more stable, more convenient for the patient, and has a lower complication rate. Doing a bone biopsy requires surgery; a cut is made and a needle introduced to the area, which entails the risk of introducing infection and is only accurate about 70 percent of the time. Dr. Grimes determined a biopsy was not needed because Mr. Traugott was essentially free of infection symptoms; he had no open wound, his foot was not red or swollen, his white blood cell count was normal, a C-reactive protein test was barely above normal, and his Procedure Site Sedimentation Rate was normal. It was likely Mr. Traugott's implant was infected; because of the lack of blood supply to the implant itself, it isn't possible to clear an infection, and antibiotics are needed to suppress it. With all he knows today, Dr. Grimes would not have used the same procedure, but would have chosen external fixation instead.[73]

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[72] *Traugott IV* at 14, No. 66.

[73] *Id.* at 14-15, No. 67.

Dr. Grimes agreed with Dr. Frey's SIME report regarding how boots fit and the possibility of blisters when wearing boots and working on ladders.[74]

Dr. Grimes opined the infection in Mr. Traugott's talus was the ultimate cause of the need for surgery. He concluded the source of Mr. Traugott's hind-foot infection was the infection in his mid-foot, but he could not offer an opinion as to whether work caused the mid-foot infection.[75]

Dr. Grimes explained that when a healthy person gets a blister, the skin provides a biologic barrier and should be left in place until it ruptures. Because a diabetic is more prone to infections, a blister is often opened or "unroofed," allowing more aggressive wound care. It is possible for an infection to get in even if a blister has not ruptured.[76]

Dr. Yodlowski testified the disintegration of bones from Charcot foot can cause a deformity in the arch, such that it becomes a pressure point, and just walking or standing can wear away the skin causing a diabetic ulcer. She opined diabetes was a direct cause of Mr. Traugott's mid-foot ulcer; the ulcer would not have occurred but for the diabetes. Mr. Traugott's mid-foot ulcer was not dependent on his work for Employer; there was nothing specific about his work conditions that was any different than his recreational activities. Dr. Yodlowski acknowledged that even an unruptured blister can become infected, but she discounted the blister as the source of Mr. Traugott's infection because there is no documentation Mr. Traugott's May 2013 blister became infected. She believed it was more likely that because of the deformity in Mr. Traugott's foot, a bone got very close to the skin, wore a hole in it, and that was the source of the infection. She could not find anything in the medical literature saying ladders caused an increased risk. She stated "hundreds, thousands of people work at ARCTEC and do similar types of jobs and they don't get those conditions, so, no, there's no basis for the work [at] ARCTEC being the cause of those conditions." Mr. Traugott's diabetes is so important of a cause that it

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74 *Traugott IV* at 15, No. 68.

75 *Id.*, No. 69.

76 *Id.*, No. 70.

should be considered the substantial cause of his disability and need for medical treatment.[77]

Given that Mr. Traugott had osteomyelitis that had lasted for months, Dr. Yodlowski stated more testing, including a biopsy, would have been appropriate before surgery. It was unreasonable to use an implanted rod without knowing if an infection was present. Dr. Yodlowski noted that the literature published by the manufacturer of the intramedullary rod used on Mr. Traugott cautioned against its use when infection was present.[78]

Dr. Yodlowski would have expected symptoms if the blister on Mr. Traugott's foot had been infected. When a foot has collapsed as the result of Charcot foot, blisters or diabetic ulcers can form as the result of pressure in areas that were not built for that, such as the arch. She believed the ulcer that formed in July 2013 was a diabetic ulcer, unrelated to the May 2013 blister that healed without any sign of infection.[79]

Dr. Frey agreed with Dr. Grimes's choice not to perform ankle replacement, especially given the loss of bone in Mr. Traugott's ankle. She also agreed there were advantages and disadvantages to both amputation and fusion, and a patient's desire is an important consideration in making a surgical decision. The lack of physical signs, the blood tests, and an MRI indicated the absence of infection, and a bone biopsy is uncommon before surgery. Dr. Frey stated you cannot just stick a needle into a bone and hope to find something; there needs to be a pool of fluid visible on an x-ray to sample. Additionally, there is the risk of introducing an infection while doing the biopsy.[80]

Dr. Frey concluded the osteomyelitis accelerated Mr. Traugott's underlying pre-existing Charcot foot causing it to become symptomatic at the time it did. The most likely cause of the infection in Mr. Traugott's talus was the blister that progressed to an ulcer and an infection. Blisters are more common when wearing a stiff-soled shoe or boot,

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77 *Traugott IV* at 15-16, No. 71.

78 *Id.* at 16, No. 72.

79 *Id.*, No. 73.

80 *Id.*, No. 74.

and boots tend to fit more snugly in the arch, and being on a ladder places most of the weight on the mid-arch. Blisters are caused by friction and overuse. While diabetics with neuropathy are at a higher risk, but for standing on the ladder all day wearing stiff-soled boots, Mr. Traugott would not have developed the blister that introduced the infection. Although the infection could come from other breaks in the skin, there is no evidence in the record of any break in the skin except the blister.[81]

Dr. Frey stated Mr. Traugott's work for ARCTEC was the substantial cause of his disability and need for medical treatment. She explained Mr. Traugott's pre-existing diabetes and neuropathy were 75 percent of the cause of his disability or need for medical treatment, and work contributed 25 percent. However, the acceleration was solely due to work and she added that but for the work, he would not have had the infection, which caused the acceleration of the Charcot foot deformity. Therefore, in her opinion it was more probable than not that Mr. Traugott's pre-existing conditions would have been just fine for the rest of his life had it not been for the work.[82] The Board further decided that extended time working on ladders causes increased pressure on the middle of the foot.[83]

ARCTEC appealed the Board's rulings contending that the Board failed to apply AS 23.30.010(a), failed to determine adequately how Mr. Traugott's mid-foot became infected, and erred in finding Dr. Crawford's July 2015 Physician's Report attached the presumption of compensability and constituted substantial evidence.

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.[84] Substantial evidence is relevant evidence that a reasonable mind might accept as

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[81] *Traugott IV* at 16-17, No. 75 (again this misstates the fact, since Mr. Traugott himself testified the blister healed and it was two months later that the crack in his foot developed. It is entirely possible this crack was the result of his work standing on ladders, but Dr. Frey did not address this aspect).

[82] *Id*. at 16, No. 76.

[83] *Id.*, No. 77.

[84] AS 23.30.128(b).

adequate to support a conclusion.[85] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[86] The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.[87] The Board's findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.[88]

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."[89] The Commission, when interpreting a statute, adopts "the rule of law that is most persuasive in light of precedent, reason, and policy."[90]

4. Discussion.

a. Background and decisions issued by the Board.

The primary issue before the Commission is whether the Board properly applied AS 23.30.010(a) in its presentation of questions to its SIME physician and in its determination of whether the need for ongoing medical treatment for Mr. Traugott was substantially caused by his work injury. Before reaching that issue, a brief summary of the various decisions and orders from the Board is useful.

Traugott I was issued on March 10, 2016, and held that Mr. Traugott raised the presumption of compensability through the medical report of Dr. Grimes that the May

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85 *See*, *e.g.*, *Norcon, Inc. v. Alaska Workers' Comp. Bd.,* 880 P.2d 1051, 1054 (Alaska 1994).

86 *McGahuey v. Whitestone Logging, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-89 (Alaska 1984).

87 AS 23.30.122.

88 AS 23.30.128(b); AS 23.30.122.

89 AS 23.30.128(b).

90 *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

2013 blister was the most likely portal of entry for the development of osteomyelitis. The Board agreed ARCTEC rebutted the presumption of compensability with the EME report of Dr. Yodlowski, who testified Mr. Traugott's diabetes was the cause of his Charcot foot, which in turn caused his diabetic ulcer. The Board then decided that an SIME would be ordered because it found "a significant gap in the medical evidence or a lack of understanding of the medical evidence, and the opinion of an independent medical examiner will help ascertain the parties' rights."[91]

In *Traugott II*, the Board denied ARCTEC's petition for reconsideration. ARCTEC asked for additional findings of fact stating that important facts had been overlooked in *Traugott I.* Specifically, ARCTEC contended the Board erred in finding Mr. Traugott had raised the presumption of compensability, contending among other things:

1. Mr. Traugott had no significant trauma while working for ARCTEC;
2. No physician in the first two years following the onset of the infection related it to Mr. Traugott's work;
3. The workers' compensation claim stated the blister in May 2013 healed without complications although in July 2013 a crack in his foot developed;
4. Dr. Crawford, Mr. Traugott's treating physician, on the Physician's Report simply checked the "yes" box asking if the injury was work related and handwrote "blister/crack on foot ulcerated . . . Stress to right foot caused blister/open area leading to infection and ulcer" which was an incorrect statement of Mr. Traugott's history;
5. Dr. Grimes, Mr. Traugott's subsequent treating physician, conceded in deposition he could not relate the bone infection and subsequent surgery to Mr. Traugott's work with ARCTEC;
6. None of the treating physicians related the diabetic ulcer, infection, osteomyelitis, or any disability or need for treatment to Mr. Traugott's work with ARCTEC; and

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[91] *Traugott I* at 16.

7. Therefore, the Board should not have ordered an SIME.[92]

The Board denied reconsideration, relying on the medical report of Dr. Grimes along with Mr. Traugott's statements that his blister occurred at work. The Board supported its finding that Mr. Traugott raised the presumption of compensability, and reasserted the "eggshell skull" doctrine as not being contrary to the requirements of AS 23.30.010(a) to weigh all causes to determine the substantial cause for medical treatment.

The third decision, *Traugott III,* involved a dispute over the proper questions to ask the SIME physician.[93] ARCTEC contended the questions as posed misstated the current law in the Alaska Workers' Compensation Act. The Board, in denying ARCTEC's petition, noted that the SIME physician is the Board's expert retained to aid the Board in evaluating the medical issues. ARCTEC also raised questions over the use of several terms. One dispute involved the word "injury," which ARCTEC contended refers to "an accidental injury or death" which might lead the SIME doctor to believe incorrectly there was an actual work injury. The Board felt that doctors frequently use injury to refer to damage or trauma and Dr. Frey would not be misled. ARCTEC also objected to the word "blisters" noting that the medical evidence showed only one blister. Again, the Board felt Dr. Frey had all the medical records at her disposal and could easily determine if only one blister occurred. More importantly, ARCTEC argued the questions asked of Dr. Frey misstated the law. The Board asserted the parties could evaluate Dr. Frey's answers through follow-up interrogatories or deposition questions after the SIME report was issued, and declined to revise its questions.

Traugott IV involved the issues of whether Mr. Traugott's employment with ARCTEC was the substantial cause of his disability and need for medical treatment and whether the implantation of an intramedullary rod was reasonable and necessary medical treatment. The Board relied on the evidence of its SIME physician, Dr. Frey, who looked

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[92] *Traugott v. ARCTEC Alaska*, Alaska Workers' Comp. Bd. Dec. No. 16-0029 (Apr. 8, 2016) (*Traugott II*).

[93] *Traugott v. ARCTEC Alaska*, Alaska Workers' Comp. Bd. Dec. No. 16-0063 (July 29, 2016) (*Traugott III).*

at the acceleration of Mr. Traugott's diabetes in isolation to determine it was the substantial cause of his ongoing need for medical treatment. Part of her opinion was based on the questions the Board asked in the SIME letter and in part because she thought without the work activities his ongoing diabetes would likely have been controlled. The Board, having found work to be the substantial cause for ongoing medical treatment, then found the implantation of the intramedullary rod to be reasonable and necessary.

b. What is the proper question when a pre-existing condition is aggravated, accelerated, or combined with a work injury?

The main issue here is whether the Board properly applied AS 23.30.010(a) in the questions submitted to the SIME physician and in reaching its conclusion. Although an employer takes an employee as the employer finds the employee, where such an employee has a pre-existing condition which may make the employee more susceptible to a work injury, the work injury must still be the substantial cause for any need of medical treatment under AS 23.30.010(a). The task for the Board is to determine when the work injury is just one component in the need for medical treatment and when the work injury is the substantial cause. This is especially true where the question of medical treatment involves ongoing medical care. Did the work injury resolve? Was there an aggravation or acceleration of a pre-existing condition sufficient to override the ongoing medical needs of the pre-existing condition? An aggravation or acceleration may occur, but still not make the work injury the substantial cause of the ongoing medical needs. Moreover, the aggravation or acceleration cannot be viewed in isolation, but must be factored into the query "is the work the substantial cause?"

Dr. Frey, the SIME physician, was asked:

> Which of the different causes identified in question one is "the substantial cause" of Joseph Traugott's disability, or need for medical treatment? Please provide the basis of your opinion.
>
> Overall cause:
> 75% diabetes & neuropathy
> 25% work conditions
>
> Acceleration

> 100% work related. Therefore, for this particular disability at this particular point in time, the work injury is the SUBSTANTIAL CAUSE.

While the acceleration by itself was 100% work-related, this is not the proper question. Dr. Frey had already stated the work conditions were only 25% responsible. Acceleration may not be viewed in isolation, but must be evaluated along with all "other causes" in order to determine "the substantial cause" for the need for medical treatment.[94] Further, at hearing, Dr. Frey testified that when she looked only at the acceleration of Mr. Traugott's pre-existing diabetic condition, that acceleration was 100% work-related because in her opinion "but for" the development of the blister "that led to the infection that caused the ulcer that led to the osteomyelitis and the further progression of the Charcot arthropathy . . . ."[95] She further agreed she did not weigh the pre-existing condition because it "did nothing to accelerate."[96] She reiterated that when she said the acceleration was work-related she did not weigh the relative cause of the pre-existing condition.[97] The problem for Dr. Frey is that the Board gave her conflicting instructions and did not ask her to weigh all causes after looking at the effect of the possible acceleration of Mr. Traugott's condition from the work incident.

Dr. Frey contradicted herself in two important points of testimony. First, she was asked the wrong question by the Board when she was asked to look only at the acceleration of Mr. Traugott's diabetes to ascertain if work was the substantial cause of his ongoing disability. She had previously stated that his pre-existing condition was 75% responsible for his need for medical treatment and his work was 25% responsible. She then stated that in looking solely at the acceleration it was 100% responsible, and so was the substantial cause for the ongoing medical treatment. This was in error. Likewise she seemed to contradict herself when asked about the portal for the infection. She stated:

> 9. How likely is it that a blister that healed within a couple of weeks without treatment, including antibiotics, would be the portal of entry for the

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94 AS 23.30.010(a).

95 Hr'g Tr. at 175:8-11, July 6, 2017.

96 Hr'g Tr. at 174:14-15.

97 Hr'g Tr. at 174:20-24.

infection in the diabetic ulcer on Employee's foot that occurred about five weeks later?

Not possible to say.

10. If the blister was not the portal of entry for the infection in Employee's subsequent midfoot ulcer, could such an ulcer develop because Employee's preexisting diabetic neuropathy and Charcot foot were aggravated by significant time spent standing on ladders?

The blister more probably than not was the portal of entry.[98]

In answer No. 9, she said she could not say the healed blister was the portal, but in answer No. 10 she said it was more probable than not the portal. She did not address in No. 10 the question of whether standing on ladders aggravated Mr. Traugott's pre-existing condition sufficiently to cause a diabetic ulcer to form.

In *City of Seward v. Hansen*, the Commission first discussed the new language in AS 23.30.010(a) and noted that when interpreting a statute the Commission is to "consider its language, its purpose, and its legislative history, in an attempt to give effect to the legislature's intent."[99] The Commission continued that the language in AS 23.30.010(a) requires the Board to "evaluate the relative contribution of different causes of the disability, death, or need for medical treatment, and award benefits if employment is, in relation to other causes, 'the substantial cause' of the . . . need for medical treatment."[100] The Commission further noted that the "in relation to other causes" language means "only one cause can be 'the substantial cause.'"[101] The Commission also discussed that the Legislature declined to revise the definition of "injury" to include the language "'injury' does not include aggravation, acceleration or combination with a pre-existing condition unless the employment is the major contributing cause[.]"[102]

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98 *Traugott IV* at 12.

99 *City of Seward v. Hansen,* Alaska Workers' Comp. App. Comm'n Dec. No. 146 at 10 (Jan. 21, 2011) (*Hansen*), citing *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 217 (Alaska 2005).

100 *Id.* at 10-11.

101 *Id.* at 11.

102 *Id.* at 12.

Nonetheless, the Legislature did change the test for benefits from "a substantial factor" to "the substantial cause." The change from "a" to "the" is significant and the test does not drop out of the review of whether ongoing medical treatment is compensable, just because there is a pre-existing condition. Moreover, this language, as the Commission noted, was added precisely because the Legislature intended to try to control workers' compensation insurance premiums. "Accordingly, we interpret the last two sentences in AS 23.30.010(a) as requiring employment to be, more than any other cause, the substantial cause of the employee's . . . need for medical treatment."[103] In *Hansen*, like the case before us, the issue was whether the work injury combined with the pre-existing condition to be the substantial cause of the employee's need for ongoing medical treatment. To reach that determination, all causes must be weighed against each other to find the one cause that is "the substantial cause."

In looking at this language, the Commission is mindful of the admonition of the Court that a statute is interpreted according to "reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history and its purpose."[104] The Court further noted that the "plainer the statutory language is, the more convincing the evidence of a contrary legislative purpose or intent must be."[105] A stated purpose of the 2005 legislation was to control insurance premiums.[106] Narrowing the medical benefits an employer is required to pay is one way to control premiums.

When reviewing the legislative history, the testimony of Ms. Kris Knudsen is relevant because she pointed out this change in the law would come into play in a scenario much like that with Mr. Traugott. Ms. Knudsen described what might happen to an employee with diabetes who sustains a work injury which is covered, but "later on down the road, you develop a diabetic neuropathy or and ultimately have to have your

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[103] *Hansen* at 14.

[104] *Adamson v. Municipality of Anchorage*, 333 P.3d 5, 11 (Alaska 2014)(citations omitted).

[105] *Id.* (citations omitted).

[106] Senate Judiciary Committee Minutes at 4, April 5, 2005, summary by Paul Lisankie, director, Division of Workers' Compensation.

leg or a toe, you know, amputated. At that point is where you would start to look at what is the substantial factor in the need for that kind of treatment."[107] This is what Dr. Frey did not do.

Similarly, in *Alaska Interstate Construction, LLC v. Morrison,* the Commission looked at the role of the last injurious exposure doctrine in connection with a work injury aggravating a prior work injury, and stated "the employment must now be 'the substantial cause' in relation to all causes for an injury arising after November 2005. It is no longer sufficient for employment to be 'a substantial factor.'"[108] Both the work injury and the pre-existing condition must be evaluated, and the relative relationship of both must be weighed, before determining if the need for ongoing medical treatment is the result of the aggravation by the work injury or the underlying condition. In *Morrison*, the Commission looked at prior case law and distinguished several cases from the requirements in AS 23.30.010(a).[109]

In *DeYonge,* the Alaska Supreme Court (Court) rejected "the distinction between aggravation of symptoms and aggravation of the underlying impairment" and found Ms. DeYonge entitled to benefits for an aggravation of symptoms.[110] *DeYonge* was decided prior to the adoption by the Legislature in 2005 of the new test which now requires that all causes must be examined to determine the relative contribution of each cause to an employee's need for medical treatment. Thus, the question now is whether an aggravation or acceleration is, in comparison to all causes, the substantial cause.

The Court, in *Fairbanks North Star Borough v. Rogers & Babler*,[111] held that the claimant or injured worker needed to prove not only "but for" the second injury the disability would not be as significant, but that the second injury was a substantial factor

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107 Appellee's Brief, Appendix 1 at 3.

108 *Alaska Interstate Constr., LLC v. Morrison,* Alaska Workers' Comp. App. Comm'n Dec. No. 243 at 17 (Jan. 25, 2018).

109 *Id.* at 17-18.

110 *DeYonge v. NANA/Marriott,* 1 P.3d 90, 96 (Alaska 2000).

111 747 P.2d 528, 532 (Alaska 1987).

in the resulting disability. Mr. Traugott contends he need only show that "but for" his work with ARCTEC he would not have developed the diabetic ulcer leading to his diagnosis of osteomyelitis. However, while it may be true that "but for" his work Mr. Traugott may not have needed additional medical treatment, the "but for" test alone is not sufficient to establish compensability. The "but for" test has been superseded by the requirement in AS 23.30.010(a) that all causes be weighed against each other before work can be found to be the substantial cause of the ongoing disability.

In *Shea v. State of Alaska*, the Court, in the context of a claim before the Division of Retirement and Benefits, stated "[t]he underlying injury need not be caused by the employment to receive occupational disability benefits. We have explained that '[i]t is basic that an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury.' This is because 'increased pain or other symptoms can be as disabling as deterioration of the underlying disease itself.'"[112] "The fact that multiple causes contribute to an injury does not automatically preclude recovery. The substantial factor test requires a claimant to demonstrate that '(1) the disability would not have happened "but for" an injury sustained in the course and scope of employment; and (2) reasonable persons would regard the injury as a cause of the disability and attach responsibility to it.'"[113] However, the Court here was looking at the test of whether work was "a substantial factor" and not at the test of whether work was "the substantial cause."

In *Rivera v. Wal-Mart*, the Court considered a work injury described as a sprain or strain to have been a temporary and transient aggravation of a pre-existing and underlying degenerative condition.[114] Rivera, unlike the claimant in *DeYonge*, was able to return to work without any significant time loss. In *Rivera*, the disputed medical question was whether the underlying condition was the cause of Rivera's chronic pain

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[112] *Shea v. State, Dep't of Admin., Div. of Ret. and Benefits*, 267 P.3d 624, 631 (Alaska 2011).

[113] *Id.* at 633.

[114] *Rivera v. Wal-Mart Stores, Inc.,* 247 P.3d 957, 962 (*Rivera*) (Alaska 2011).

and the Board found it was the pre-existing condition not the work strain. The Court held that the Board's "findings about the weight given to medical testimony are conclusive."[115] However, these conclusions must be reached using the correct analysis.

In *Huit v. Ashwater Burns, Inc.,*[116] the Court specifically did not decide how to apply the presumption analysis when there is another cause involved such as a prior injury. It would appear that the analysis is a two-step operation. First, one must look at the second injury to determine what benefits apply to it. Then, any ongoing benefits must be analyzed again to ascertain what is the substantial cause for these future benefits.

Here Dr. Frey, upon whom the Board relied in finding work to be the substantial cause of Mr. Traugott's ongoing medical problems, stated unequivocally that "the overall cause: 75% diabetes & neuropathy 25% work conditions."[117] This is substantial evidence that Mr. Traugott's pre-existing condition was the substantial cause of his need for medical treatment. It was only when the Board asked Dr. Frey to look at the acceleration in isolation that she found work to the substantial cause. However, under AS 23.30.010(a), work is the substantial cause only "**if, in relation to other causes**, the employment is the substantial cause of the . . . need for medical treatment."[118] Dr. Frey was asked to use the wrong test when she came to the conclusion that work was the substantial cause of Mr. Traugott's need for medical treatment. Her opinion, thus, is not substantial evidence in the record as a whole because it is based on a misstatement of the law.

The Board erred in relying on Dr. Frey's second opinion that in looking only at the acceleration of Mr. Traugott's pre-existing diabetes then work was the substantial cause of his need for additional medical treatment. When Dr. Frey properly weighed all causes, AS 23.30.010(a), she unequivocally stated that 75% of the need for medical treatment

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115 *Rivera* at 964.

116 *Huit v. Ashwater Burns, Inc.,* 372 P.3d 904, 919 (*Huit*) (Alaska 2016).

117 *Traugott IV* at 11-13, No. 63.

118 AS 23.30.010(a) (emphasis added).

was his diabetes and neuropathy and 25% was work conditions. Thus, work could not be the substantial cause of his need for medical treatment. The Board erred in finding work was the substantial cause.

c. Was the presumption of compensability properly raised and rebutted?

ARCTEC has contended that the presumption of compensability was not raised here because in *Traugott I* the Board relied on the report of Dr. Grimes that the blister was the likely portal of entry for the bacteria, plus the testimony of Mr. Traugott that standing on ladders put pressure on his feet leading to the blister and then the cracking on his foot. Then, in *Traugott IV*, the Board relied on Dr. Crawford's checked box on the Physician's Report along with his statement that the blister led to the infection and ulcer, plus Dr. Grimes's report the mid-foot crack was the source of the infection. ARCTEC contends that such a shift in position demonstrates Mr. Traugott did not raise the presumption because the May 2013 blister had healed yet the doctors referred to it as the portal for the infection.

Nonetheless, the amount of evidence to establish the presumption of compensability, is slight. A modicum of evidence is all that is necessary to establish the link between the work injury and any ongoing disability.[119] While it is generally necessary to have some medical evidence to establish the preliminary link, the Court has held the amount of evidence needed is minimal and if the medical issue is not complicated, lay testimony may be enough to establish the link.[120]

Here, Mr. Traugott relied on the Physician's Report where Dr. Crawford had checked "yes" in the box addressing the question of whether the infection was work-related. He also relied on the testimony of Dr. Grimes that the blister was the portal for the infection, along with his own testimony that working on ladders for substantial periods of time put undue stress on his feet leading first to the blister, which healed, and then to

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[119] See, e.g., *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991).

[120] See, e.g., *Beauchamp v. Emp'rs Liab. Assurance Corp.*, 477 P.2d 993 (Alaska 1970); *Emp'rs Commercial Union Co. v. Libor*, 536 P.2d 129 (Alaska 1975).

the crack, which did not heal. This amount of evidence is sufficient to raise the presumption of compensability even though it is somewhat contradictory and based on information which proved to be incorrect (the blister healed, while the crack or diabetic ulcer did not).

Once the necessary link between work and disability is established, the employer must rebut the presumption with substantial evidence that work is not the substantial cause of any need for medical treatment.[121] An employer is able to rebut the presumption with an expert's opinion that work is not the substantial cause of the disability.[122]

ARCTEC rebutted the presumption with the report of Dr. Yodlowski. Her report is sufficient evidence to rebut the presumption because it is evidence by an expert that the work was not the substantial cause for Mr. Traugott's ongoing medical treatment.

Once the presumption of compensability is rebutted, the employee has the burden to prove the claim by a preponderance of the evidence. The Board did not err in finding that Mr. Traugott raised the presumption of compensability and that ARCTEC rebutted the presumption. The issue, as addressed above, is whether, due to the erroneous standard addressed to the SIME physician, Mr. Traugott was able to prove his claim by a preponderance of the evidence. The answer is he could not because the Board and its SIME physician relied on an incorrect interpretation of AS 23.30.010(a).

The Board incorrectly asked Dr. Frey to ignore the requirement in AS 23.30.010(a) that all causes must be evaluated to determine "the relative contribution of different causes of . . . the need for medical treatment" and after looking at all causes only then is the medical treatment compensable in relation to all causes if work is the substantial cause. This is not to say that a work injury will never be the substantial cause when the employee has a pre-existing condition affected by the work injury. There are many possible scenarios when the weighing of the different causes will result in a finding that work is the substantial cause. However, the Board cannot abrogate its duty to "evaluate the relative contribution of different causes" and it may not mislead its SIME physician

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121 AS 23.30.120; AS 23.30.010(a); *Huit*, 372 P.3d 904, 919.

122 *Bradbury v. Chugach Elec. Ass'n*, 71 P.3d 901, 906 (Alaska 2003).

with misstatements of the law causing the SIME physician's opinion to be less than helpful in the Board's obligation to "evaluate the relative contribution of different causes."[123]

5. Conclusion.

The Board gave its SIME physician misleading questions about the significance of weighing or evaluating all the different causes of an injured worker's need for medical treatment. Therefore, the Board's decision that work with ARCTEC was the substantial cause of his need for medical treatment is REVERSED. His claim is not compensable.

Date: ___*6 June 2018*_____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

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

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for

[123] AS 23.30.010(a).

reconsideration of this final decision is filed on time with the Commission, any 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, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 249 issued in the matter of *ARCTEC Alaska vs. Joseph Traugott*, AWCAC Appeal No. 17-015, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 6, 2018.

Date: *June 7, 2018*

Signed

K. Morrison, Appeals Commission Clerk