Alaska Workers' Compensation Appeals Commission

ARCO Alaska, Inc. and ACE USA, Appellants, vs. James G. McKenna, Appellee.	Final Decision Decision No. 174 January 3, 2013 AWCAC Appeal No. 12-016 AWCB Decision No. 12-0070 AWCB Case Nos. 199028636M and 198802683

Final decision on appeal from Alaska Workers' Compensation Board Decision and Order No. 12-0070, issued at Anchorage on April 9, 2012, by southcentral panel members Linda M. Cerro, Chair, Rick Traini, Member for Labor, and a concurrence and partial dissent by Amy Steele, Member for Industry.

Appearances: Robin Jager Gabbert, Russell, Wagg, Gabbert & Budzinski, P.C., for appellants, ARCO Alaska, Inc. and ACE USA; Michael J. Jensen, Law Offices of Michael J. Jensen, for appellee, James G. McKenna.

Commission proceedings: Appeal filed May 9, 2012; briefing completed September 11, 2012; oral argument held November 27, 2012.

Commissioners: James N. Rhodes, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

On July 14, 2011, appellants, ARCO Alaska, Inc. and ACE USA (collectively ARCO), filed a petition to dismiss the disability claims of its former employee, appellee,

James G. McKenna (McKenna), based on the provisions of AS 23.30.105(a).[1] McKenna's claims related to back injuries he sustained on February 16, 1988, and on October 28, 1990, while working for ARCO Alaska, Inc. The Alaska Workers' Compensation Board (board) issued two decisions in this matter, the first was interlocutory,[2] and, following a hearing on February 29, 2012, a final-and-interlocutory decision and orders.[3] In the latter, the board declined to dismiss McKenna's disability claims. ARCO appealed that decision to the Workers' Compensation Appeals Commission (commission). We affirm.

2. Factual background and proceedings.

The following factual background is primarily derived from the board's final-and-interlocutory decision, which incorporates by reference the board's findings of fact in its

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[1] AS 23.30.105(a) and (b) read in relevant part as follows, with the July 1988 amendments to .105(a) indicated in italics:

> **AS 23.30.105. Time for filing of claims.**
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> (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, . . . except that, if payment of compensation has been made without an award on account of the injury . . . , a claim may be filed within two years after the date of the last payment *of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215*.
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> (b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard.

[2] *See James G. McKenna v. ARCO Alaska, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 11-0164 (November 21, 2011)(*McKenna I*). The issues addressed in this decision were procedural, pertaining to protective orders.

[3] *See James G. McKenna v. ARCO Alaska, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 12-0070 (April 9, 2012)(*McKenna II*).

prior, interlocutory decision.[4] Because McKenna's claims relate to injuries he suffered over twenty years ago, we will attempt to streamline our recitation of the facts without sacrificing any details that are relevant to this decision.

On February 16, 1988, while tightening a flange on a valve at ARCO Alaska, Inc.'s Swanson River facilities, McKenna slipped, fell backwards onto a valve, and injured his "back."[5] The following day, he was seen in the emergency room at Central Peninsula General Hospital, in Soldotna, where McKenna resided, and was diagnosed with left rhomboid muscle strain and left rib contusion.[6] An x-ray of his thoracic spine taken on February 22, 1988, showed "very minimal scoliosis" with some old disc space calcifications in the upper thoracic region. The left shoulder and cervical spine were reported as normal.[7] Because he worked for ARCO Alaska, Inc. on a week-on/week-off schedule, McKenna lost no time from work for this injury.[8]

McKenna was evaluated in Anchorage by J. Michael James, M.D., on January 26, 1989. Dr. James noted McKenna's medical history included treatment by chiropractors for neck and low back pain as a kind of maintenance procedure, without any clear injuries, and that his preexisting neck pain and low back pain were somewhat exacerbated by the February 16, 1988, work injury. Dr. James' impressions were left T7 radiculopathy demonstrated by electromyography testing, left meralgia paresthetica (lateral femoral cutaneous nerve entrapment) with paresthesias of the left anterolateral thigh, with headaches and neck pain secondary to muscle spasm associated with T7 root compromise.[9] A magnetic resonance imaging (MRI) of McKenna's thoracic spine

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4 *See McKenna II*, Bd. Dec. No. 12-0070 at 5.

5 R. 1342, 0001.

6 R. 1605.

7 R. 1613.

8 R. 1342.

9 R. 1630-32.

taken on February 6, 1989, was negative.[10] Through 1989, McKenna continued to treat with Dr. James for intermittent thoracic pain. By early 1990, Dr. James' records indicated McKenna had no appreciable improvement or relief from symptoms.[11] On August 6, 1990, McKenna saw Dr. James again for routine follow-up for his thoracic injury. He was to follow up in three months.[12]

On October 28, 1990, McKenna injured his back when opening a well choke valve plugged with ice. He felt a pop in the center of his back while turning the valve with a wrench.[13] When he saw Dr. James on November 7, 1990, McKenna complained of a pop in his thoracic spine and described severe thoracic back pain referred into the left chest wall. Dr. James noted an MRI ruled out a disc injury, but showed probable traction injury to the left T6 root with parathesias and referred pain. Dr. James took McKenna off work for two weeks.[14]

An employer's medical evaluation (EME) of McKenna was performed by Theodore G. Obenchain, M.D., on December 20, 1991. During the physical examination, Dr. Obenchain noted tenderness in McKenna's thoracic spine at T7, 8, and 9 on the left, his reported numbness in that area, and suggested his report of a knot or

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[10] R. 1637.

[11] R. 1656.

[12] R. 1666.

[13] R. 0954, 1345.

[14] R. 1669. McKenna treated with Dr. James for many years. R. 1630-33, 1640, 1643, 1647, 1655-56, 1658, 1661-63, 1666, 1669, 1672, 1685, 1707, 1729, 1746, 1755, 1762, 1761, 1765, 1774, 1778, 1787, 1798-1800, 1807-09, 1815-19, 1821-23, 1828-30, 1834-36, 1840-41, 1844-45, 1848-55, 1864-68, 1872-81, 1883-85, 1887-97, 1899-1900, 1914, 1917-18, 1920-23, 1925-26, 1929-33, 1937, 1941, 1945-46, 1958-59, 1962-63, 1973, 1999, 3106, 3117-20, 3130, 3134-37, 3196. According to the notations on them, Dr. James' medical records were contemporaneously provided to ARCO. *See McKenna II*, Bd. Dec. No. 12-0070 at 8. Also, Dr. West completed Alaska Workers' Compensation Board Physician Report forms for work-injury-related treatment. *Id*. at 9.

ball in the area was likely muscle spasm. Dr. Obenchain diagnosed "probable thoracic facet pain with prominent left hemithoracic pain."[15]

On February 16, 1995, Dr. James examined McKenna, noting no change in his condition. Dr. James found that he was medically stable, in no need of retraining, and had a 7% permanent partial impairment (PPI) rating according to the American Medical Association's *Guides to Evaluation of Permanent Impairment*, 3rd Edition.[16] ARCO Alaska, Inc.'s workers' compensation carrier's adjuster memorialized a conversation with McKenna concerning the status of his claims on September 1, 1995. The adjuster noted that McKenna was then working light duty for Unocal, that he was seeing Dr. James every two or three months, and that a settlement of his claims might include some amount for future medications.[17]

On July 15, 2003, Dr. James performed electrodiagnostic studies of McKenna's upper extremities which revealed mild bilateral carpal tunnel syndrome, left greater than right, and increased polyphasic potentials in the cervical paraspinals, which suggested a degenerative disc condition in the cervical spine.[18] For his ongoing thoracic pain, McKenna continued treating with Dr. James or his assistant, Shawna H. Wilson, ANP-C.[19] A thoracic MRI taken on August 24, 2004, revealed a degenerated disc at T5-6 with a small herniation to the right of midline, slightly effacing the thecal sac, with no obvious compression of the cord or nerve root.[20]

On December 9, 2004, another EME was conducted by Edward A. Grossenbacher, M.D. He diagnosed degenerative disc disease T5-6, T7-8 with small disc herniation to the right at T5-6, thoracic radiculopathy, chronic; history of

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15 R. 1723-25.

16 R. 1807.

17 R. 0451.

18 R. 1864-67.

19 R. 1868, 1872-76.

20 R. 1886.

depression; and bilateral carpal tunnel syndrome. Dr. Grossenbacher attributed all but the carpal tunnel syndrome to the October 28, 1990, work injury.[21]

ARCO filed Controversion Notices on April 19, 1999, July 28, 2003, and December 6, 2005,[22] referencing the 1990 work injury number, 199028636. In all of them, benefits were denied on the basis that there was no medical evidence connecting the particular complaints described in the notices with the injury to McKenna's back.[23]

In 2005-2007, McKenna continued to treat with Dr. James,[24] and ANP-C Wilson.[25] On a June 21, 2007, follow up with ANP-C Wilson, McKenna's primary complaint remained "mid-back pain." ANP-C Wilson reviewed MRI results, which showed disc degeneration at T5-6, T6-7, and T7-8, with a small protrusion at T6-7. Dr. James assessed chronic thoracic spine pain, paresthesias of the chest wall, static, myofascial pain of the thoracic area, sleep disturbance secondary to chronic pain, nausea and gastritis secondary to medication, and depression secondary to chronic pain and functional limitation.[26]

An MRI of McKenna's cervical spine was taken on August 16, 2007, due to left upper extremity numbness. The impression was moderate discogenic spondylosis C5-6 without associated cord impingement, severe bilateral neural foraminal narrowing at

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[21] R. 1901-13. The earliest medical record provided to Dr. Grossenbacher was dated November 7, 1990, for treatment McKenna received following the second work injury. *See McKenna II*, Bd. Dec. No. 12-0070 at 11.

[22] R. 0002-03, 0094.

[23] The April 19, 1999, notice controverted benefits related to McKenna's complaints of, and treatment for, joint pain or arthritis in his wrists, hands, knees, and feet. R. 0002. The July 28, 2003, notice controverted medical treatment for McKenna's carpal tunnel syndrome. R. 0003. The December 6, 2005, notice controverted medical treatment for McKenna's carpal tunnel syndrome and left shoulder. R. 0094.

[24] R. 1917-18, 1920-21, 1937, 1941, 1945-46, 1958-59.

[25] R. 1917-18, 1920-21, 1922-23, 1925-26, 1929-30, 1932-33, 1937, 1941, 1945-46, 1958-59, 1962-63.

[26] R. 1962-63.

C5-6, moderate bilateral neural foraminal narrowing from C3-4 through C6-7, and overall mild multilevel degenerative disc and degenerative facet disease.[27]

On November 26, 2007, when McKenna was examined by Marguerite McIntosh, M.D., for his neck pain, she noted discogenic spondylosis at C5-6 without cord impingement, severe bilateral neuroforaminal narrowing at C5-6, overall moderate bilateral neuroforaminal narrowing between the C3-4 through C6-7 levels, mild multilevel degenerative disc disease, and mild overall degenerative facet disease. Dr. McIntosh diagnosed cervical disc disease.[28]

McKenna was examined by Davis C. Peterson, M.D., on January 31, 2008, for neck pain. After diagnosing chronic neck pain likely from facet arthropathy, non-dermatonal numbness in upper extremities, and possible rotator cuff pathology, Dr. Peterson recommended electromyography testing and nerve conduction studies of the left upper extremity, a consultation for possible left-sided facet blocks at C5-6, and physical therapy.[29] On March 4, 2008, on referral from Dr. Peterson, Gregory R. Polston, M.D., performed cervical facet injections of left C4-5 and C5-6. In filling out paperwork for this appointment, McKenna did not attribute the neck pain to any work injury.[30] Dr. McIntosh saw McKenna on March 12, 2008.[31] Dr. James performed 10 more trigger point injections on March 13, 2008.[32]

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[27] R. 1970-71.

[28] R. 1974-75. As of 1998, McKenna's primary care physician in Soldotna was Dr. McIntosh. R. 1531-44, 3013-15.

[29] R. 1978-79.

[30] R. 1990-92, 1980.

[31] R. 1995-96. She reported: "[P]atient has severe pain, 6/10 or greater in the left side of his neck. It is where he can't work anymore . . . He just recently got injections in the left side of his neck[.]. . . He is no longer able to do the work that he is assigned to do on his job and is thinking of quitting. He does have some disability policies and I will be glad to fill those out for him. He should be off work, trying new pain medications."

[32] R. 1999.

On March 31, 2008, McKenna saw Dr. Polston. The treatment plan was to repeat the facet blocks and have McKenna start physical therapy.[33] By letter dated March 31, 2008, McKenna was granted a leave of absence under the Family Medical Leave Act from his employer at the time, Peak Oilfield Services.[34]

Dr. McIntosh saw McKenna for his cervical and thoracic pain on April 14, 2008.[35] Later that month, Dr. Polston performed diagnostic cervical medial branch blocks at C4, C5, and C6 on the left.[36] On April 23, 2008, Franklin Ellenson, M.D., performed electromyography testing and nerve conduction studies, which were normal.[37] The following day, Dr. McIntosh signed a "Physician Certification for Family or Medical Leave" for McKenna to be off work from April 12, 2008, to June 25, 2008, for a chronic condition which was expected to last more than three months and rendered him totally unable to work.[38] Throughout mid-2008, Dr. McIntosh continued to treat McKenna's thoracic and cervical spine.[39] At one appointment, she noted his neck pain was radiating to his thoracic spine, the site of a previous workers' compensation injury.[40] McKenna did not return to work with Peak Oilfield Services when his medical leave was exhausted on June 25, 2008.[41]

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[33] R. 2000-02.

[34] R. 1293-94. McKenna was informed his leave would be for 12 weeks, from April 2, 2008, until June 25, 2008. He was instructed to have completed and return the required physician certification form by April 25, 2008. McKenna was informed that if he could not return to work with a full medical release on June 25, 2008, he would be terminated.

[35] R. 2573.

[36] R. 2018-19.

[37] R. 2020-22.

[38] R. 2023-26. The board observed that it was unclear from the form to which condition Dr. McIntosh was referring. *See McKenna II*, Bd. Dec. No. 12-0070 at 17.

[39] R. 2039, 2042, 2048, 2055.

[40] R. 2042.

[41] R. 0583.

On June 27, 2008, McKenna applied for social security benefits. The conditions he listed as limiting his ability to work were nerve damage, arthritis, degenerative disc disease, and ruptured and bulging discs. As work limitations, he indicated he could not sit, could not stand for long periods, had difficulty working at a computer, and had trouble driving. According to McKenna, he stopped working on March 25, 2008.[42] On July 10, 2008, the Social Security Administration (SSA) sent him a Notice of Disapproved Claim, finding McKenna ineligible for Supplemental Security Income (SSI).[43]

Dr. McIntosh saw McKenna again on August 8, 2008, for his "neck and back pain." She described his condition as chronic myofascial pain syndrome that originated with a thoracic injury.[44]

On September 27, 2008, at the direction of the SSA, McKenna was seen by Jay E. Caldwell, M.D., for a Physical Residual Function Capacity Assessment. Dr. Caldwell's primary diagnosis was cervical spondylosis.[45]

Thad C. Stanford, M.D., conducted an EME on October 24, 2008. Dr. Stanford's impression was chronic intradiscal injury to the mid-thoracic spine, T8-9 and/or T9-10. It was Dr. Stanford's opinion that McKenna's shoulder impingement, cervical pain, and right buttock pain were not related to the 1990 work injury.[46]

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[42] R. 0902-06, 0924-31. The board considered his last day of work to be April 2, 2008. *See McKenna II*, Bd. Dec. No. 12-0070 at 18.

[43] SSI is a federal income supplement program designed to help aged, blind, and disabled people, who have little or no income; and it provides cash to meet basic needs for food, clothing, and shelter. *http://www.ssa.gov/ssi/.* R. 0907-12.

[44] R. 2048.

[45] R. 2057-64. Cervical spondylosis is a disorder in which there is abnormal wear on the cartilage and bones of the neck (cervical vertebrae). It is a common cause of chronic neck pain. U.S. National Library of Medicine, National Institutes of Health. *http://www.nlm.nih.gov/medlineplus/ency/article/000436.htm.*

[46] R. 2068-75.

On October 27, 2008, James M. Eule, M.D., examined McKenna. His impression was cervical degenerative changes with questionable cervical radiculopathy, facet arthropathy, and small thoracic disc herniation of unlikely clinical significance.[47]

On October 28, 2008, ARCO filed a Controversion Notice denying medical benefits for McKenna's shoulder, cervical spine, and low back.[48] The controversion was based on Dr. Stanford's October 24, 2008, EME report and stated "there is no medical evidence to support that the left shoulder, cervical spine or low back and buttocks complaints and need for treatment are related to, or the result of the original work injury of October 1990." This is the first Controversion Notice in the board's file bearing a signature certifying the notice was sent to McKenna. It is also the first notice on file reciting, on the reverse side, the board-prescribed and required notice to an injured worker of the statutory deadlines for filing claims and requesting hearings.[49]

On November 22, 2008, the SSA found McKenna eligible for Social Security Disability (SSD) benefits.[50] McKenna qualified for SSD benefits based on discogenic and degenerative disorders of the back; his date of disability was determined to be March 25, 2008.[51]

On May 12, 2009, Dr. McIntosh, in a letter to ARCO Alaska, Inc.'s adjuster, indicated that McKenna's prescription medications, Flomax, Zolpidem, Nexium, Endocet, Fentanel, Celebrex, and Tramadol, were all related to his work injury. She also noted no physician had recommended surgery.[52] After reviewing McKenna's records, Dr. Stanford issued a supplemental EME report on May 15, 2009. His opinion was that

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47 R. 2078-80.

48 R. 0005.

49 R. 0005.

50 R. 0903. These benefits are paid to an individual and certain members of his family if he is disabled, and "insured," meaning he worked long enough and paid social security taxes. *http://www.socialsecurity.gov/disability/*.

51 R. 0902.

52 R. 2095.

McKenna's pain complaints were not associated with the objective medical evidence and that he no longer needed any treatment, with the exception of counseling to wean him from excessive narcotic pain medications.[53]

On October 15, 2009, based on Dr. Stanford's supplemental report, ARCO, through counsel, who entered her appearance that day, filed a Controversion Notice denying all medical treatment except counseling to wean McKenna from narcotic pain medication.[54] On December 8, 2009, having reviewed additional records provided to him by ARCO's counsel, Dr. Stanford issued yet another supplemental EME report. That report indicated that he had "reviewed these records previously and of importance of course are the numerous visits and studies showing the presence of thoracic sprain/strain in 1988 and 1989[.]" Thus, it appears that for the first time Dr. Stanford was provided with the medical records relating to McKenna's thoracic work injury on February 16, 1988. In his report, Dr. Stanford observed that McKenna "had significant symptoms prior to his injury in October of 1990," and "it is very clear that the October 1990 work episode is not a substantial factor in causing his spinal conditions, complaints and need for treatment, including narcotic medicines or surgery should he come to that . . . There is a natural progression of this type of symptomatology . . . I cannot implicate a specific episode on October 28, 1990 considering the history for 2½ years, at least, prior to that date."[55] ARCO controverted all medical benefits on December 22, 2009, based on this supplemental report by Dr. Stanford and McKenna's non-participation in any program to wean him from narcotics.[56]

On May 20, 2010, Dr. McIntosh wrote that McKenna had documented T7 radiculopathy from the 1988 injury, which, in her opinion, was exacerbated by the 1990 injury. She also noted he had continued pain complaints and needed pain medication. Her diagnoses were chronic thoracic spine pain, myofascial pain of the thoracic area,

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53 R. 0009-11.

54 R. 0007.

55 R. 2101-03.

56 R. 0012.

depression secondary to chronic pain and functional limitation, thoracic radiculopathy, thoracic degenerative disc disease, thoracic arthropathy, and hypertension probably secondary to anti-inflammatories used to treat his pain. Dr. McIntosh thought that McKenna had a PPI. Her opinion was that his need for treatment was reasonable and necessary, and work related to either the 1988 or 1990 work injury.[57]

On August 23, 2010, identifying both the 1988 and 1990 injury dates, McKenna filed a workers' compensation claim dated July 1, 2010, which included a claim for permanent total disability benefits.[58] ARCO controverted all benefits on September 20, 2010.[59] On November 9, 2010, ARCO filed an Answer alleging, as affirmative defenses, among others, that McKenna's claim was barred under various statutes of limitation, AS 23.30.100, AS 23.30.105, and AS 23.30.110(c), and under the doctrine of *laches*, failure to mitigate damages, and application of the last injurious exposure rule.[60] On December 8, 2010, and December 20, 2010, ARCO again filed Answers alleging similar affirmative defenses.[61]

On March 7, 2011, McKenna was examined by Gary Olbrich, M.D., an addiction specialist, for another EME. Dr. Olbrich documented McKenna's pharmaceutical use during the course of recovery to include narcotic and non-narcotic medications. Among Dr. Olbrich's impressions were opioid dependence maintained in active state by use of prescription medications, depressive disorder, and chronic pain syndrome secondary primarily to psychosocial causes and not necessarily accompanied by a recognized organic pain generator. Dr. Olbrich thought McKenna's addictive disease was preexisting and was responsible for both his chronic pain and depression. He concluded that the work injuries were not a substantial factor in McKenna's disability or need for medical treatment. The only treatment he recommended was inpatient drug abuse

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57 R. 2694-96.

58 R. 0076-77.

59 R. 0019.

60 R. 0088-91.

61 R. 0104-06, 0123-26.

rehabilitation, which would also not be work related. Dr. Olbrich also concluded that McKenna's addictive disease was not medically stable.[62] On April 11, 2011, ARCO controverted all benefits based on Dr. Olbrich's EME report.[63]

On March 8, 2011, and March 23, 2011, McKenna was deposed. The following exchange took place between ARCO's counsel and McKenna:

> **Q Okay. So you don't know -- you don't know what caused the problems that led to your disability in March of 2008?**
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> A Sure. Yes I do.
>
> **Q What was it?**
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> A A wrench slipped in 1988 out at work. And again, I was opening a valve in 1990 and something popped in my back.
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> . . . .
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> **Q Okay. So in your mind, what was happening in 2008 was always related to these incidents back in '88 and '90?**
>
> A Yes.[64]

On May 2, 2011, Dr. Olbrich supplemented his EME report after reviewing additional medical records. He indicated McKenna's use of Tramadol/Ultram compounded his addictive disease.[65]

On July 14, 2011, ARCO filed a petition to dismiss all of McKenna's non-medical claims under AS 23.30.105(a), and on July 27, 2011, filed its Affidavit of Readiness for Hearing on the petition. On February 29, 2012, ARCO's petition to dismiss McKenna's claims was heard by the board.[66]

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62 R. 0775-811.

63 R. 0025.

64 McKenna Dep. 130:24–131:14, March 23, 2011.

65 R. 1045-61.

66 R. 4413-14; *McKenna II*, Bd. Dec. No. 12-0070 at 1.

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[67] "The findings of the board are subject to the same standard of review as a jury's finding in a civil action."[68] A jury's finding in a civil action can be overturned only if "the evidence, when viewed in the light most favorable to the non-moving party [on a motion for judgment notwithstanding the verdict], is such that reasonable men could not differ in their judgment."[69] We exercise our independent judgment when reviewing questions of law and procedure.[70]

4. Discussion.

The commission will confine its analysis to whether the board erred in declining to dismiss McKenna's disability claim pursuant to the provisions of AS 23.30.105(a) and (b). Resolving those issues will, in essence, subsume any other issues raised by the parties.

a. Applicable law.

The relevant subsections of AS 23.30.105, the statute at the center of the parties' dispute whether McKenna's claim was timely filed, were quoted above.[71] The burden of proof is on the employer to establish the affirmative defense of failure to file a timely claim under subsection .105(a).[72] Such a defense is disfavored by the Alaska Supreme Court.[73]

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67 *See* AS 23.30.128(b). Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

68 AS 23.30.122.

69 *Alaska Children's Services, Inc. v. Smart*, 677 P.2d 899, 901 (Alaska 1984) (quoting *Holiday Inns of America v. Peck*, 520 P.2d 87, 92 (Alaska 1974)).

70 *See* AS 23.30.128(b).

71 *See* n.1, *supra*.

72 *See Egemo v. Egemo Const. Co.*, 998 P.2d 434, 438 (Alaska 2000).

73 *See id*.

In *Wolfer v. Veco, Inc.*,[74] a case with roughly similar facts to this one, the supreme court affirmed the board's finding that the employee

> should not be charged with knowledge of the serious or disabling nature of his back problem until [a particular point in time]. Until this time, [the employee] continued trying to work despite the pain. He testified [no one] had clearly explained his problem to him until then. We believe he tried to minimize his disability by working and adapting to this pain with help from other workers and by taking pain medication.[75]

The determination as to when an employee learns of his disability is a question of fact, which is generally reviewed under the substantial evidence standard.[76]

b. When did McKenna know he was disabled and its relation to his employment with ARCO Alaska, Inc.?

Despite the lengthy sequence of events leading to McKenna filing his claim, the pivotal legal issue we must resolve is relatively straightforward. AS 23.30.105(a) provides in relevant part: "The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement."[77] The record reflects that McKenna worked for Peak Oilfield Services until the end of March 2008, when he sought and obtained a leave of absence. As it turned out, he never returned to work. It stands to reason that for the purposes of subsection .105(a), because he had been working, McKenna was not disabled, and therefore could not know of his disability until, at the very earliest, the end of March 2008. Thus, the bar to his claim provided for in subsection .105(a) could not have been applicable until the end of March 2010, at the very earliest. McKenna filed his claim on August 23, 2010. Accordingly, the question the commission must address is: Given the

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[74] 852 P.2d 1171 (Alaska 1993)

[75] *Wolfer*, 852 P.2d at 1172.

[76] *See Egemo*, 998 P.2d at 438.

[77] AS 23.30.395(16) defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]"

two-year time limit provided for in subsection .105(a), at any time between the end of March 2010 and August 23, 2010, did McKenna know of the nature of his disability and its relation to his employment with ARCO Alaska, Inc.?

As a preliminary matter, we must decide whether the knowledge of disability and its relation to employment that subsection .105(a) references should be reviewed using 1) an actual, subjective knowledge on the part of the employee standard, or 2) an objective, reasonable person standard. In doing so, it is appropriate for us to look to the plain language of the statute and the supreme court's analysis in cases such as *Wolfer*, *Collins v. Arctic Builders, Inc.*,[78] and *Burke v. Houston NANA, L.L.C.*,[79] in order to ascertain the relevant standard. As for the plain language of the statute, subsection .105(a) focuses the inquiry on whether the *employee* has knowledge of the nature of the employee's disability and its relation to the employment. In *Wolfer*, the emphasis was on what *the employee* knew, and when he knew it. In *Collins*, the court held that the employee had to have actual knowledge.[80] In *Burke*, a statute[81] with a purpose similar to that of AS 23.30.105(a) was at issue. A majority of the supreme court implicitly rejected the argument that the statute should be interpreted as calling for an inquiry whether the employee knew or should have known that the injury would permanently preclude the employee from returning to work in his occupation at the

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78 31 P.3d 1286 (Alaska 2001).

79 222 P.3d 851 (Alaska 2010).

80 *See Collins*, 31 P.3d at 1290.

81 The statute, former AS 23.30.041(c), provided:

> If an employee suffers a compensable injury that may permanently preclude an employee's return to the employee's occupation at the time of injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines that the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request.

time of injury.[82] Whether an individual knew or should have known something is indicative of an objective, reasonable person standard. That standard was not applied by the majority in *Burke* and we decline to apply it here. On the basis of the foregoing authority, we conclude that actual, subjective knowledge on the part of McKenna is the proper standard.

Returning to the central issue, because the burden of proof is on ARCO, it is necessary for the commission to review whether substantial evidence[83] supports the board's finding that ARCO failed to prove that McKenna knew he was disabled before August 23, 2008, and that he knew his disability was related to his employment with ARCO Alaska, Inc. We begin by noting that, even though McKenna was treated for his thoracic injuries for many years, the record does not reflect that any physician or other medical provider commented that he was disabled in relation to those injuries prior to August 23, 2010. In particular, his primary providers, Dr. James and, after 1998, Dr. McIntosh, did not communicate to McKenna that he was disabled. When Dr. McIntosh completed the Physician Certification for the medical leave form for McKenna on April 20, 2008, she indicated that he was "presently incapacitated" for a period of more than three months, as distinguished from stating he was permanently disabled. As for work relatedness, Dr. McIntosh noted that the condition that incapacitated McKenna began in 2003.[84] This appears to be a reference to McKenna's cervical condition as the reason he was presently incapacitated, because the first record of McKenna being treated for his neck was the electrodiagnostic studies performed by Dr. James on July 15, 2003.[85] In contrast, it was McKenna's thoracic problems that manifested themselves following the work incidents in 1988 and 1990. Lastly, Dr. McIntosh, when treating McKenna on August 8, 2008, reported that the appointment was a follow-up in connection with a workers' compensation matter, and

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82 *See Burke*, 222 P.3d at 864-66.

83 *See Egemo*, 998 P.2d at 438.

84 Exc. 068.

85 *See* n.18, *supra*.

that he had "[c]hronic myofascial pain syndrome that originated with a thoracic injury."[86] The foregoing is not tantamount to stating that McKenna was disabled from the thoracic injuries he suffered while working for ARCO Alaska, Inc. Like the board,[87] we perceive little in this evidence which would convey to McKenna the information he would need for him to attain the knowledge provided for in AS 23.30.105(a).

Other evidence that bears on these factual issues was generated when McKenna applied for social security benefits on June 27, 2008.[88] On August 9, 2008, SSA received[89] the Disability Report McKenna completed, which indicated that he stopped working on March 25, 2008, when he finally realized he could not continue.[90] McKenna was notified that he was ineligible for SSI for June and July 2008 on July 10, 2008, because he and his wife had resources in excess of the $3,000 limit.[91] A disability determination dated November 14, 2008, notified McKenna that he was eligible for SSD and that his disability began March 25, 2008.[92] We view McKenna's acknowledgement that he could not continue working as *some* evidence that he knew he was disabled. On the other hand, it is not evidence that he related this particular disability to employment with ARCO Alaska, Inc.

Finally, ARCO points to McKenna's deposition testimony, in particular, the exchange quoted above,[93] as evidence that McKenna knew he was disabled in mid-2008 and that his disability related to his employment with ARCO Alaska, Inc.[94] During questioning, once the mid-2008 timeframe was established (it was when McKenna was

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86 R. 2048.

87 *See McKenna II*, Bd. Dec. No. 12-0070 at 47-49.

88 Exc. 073.

89 Exc. 083.

90 Exc. 086.

91 Exc. 077-78.

92 Exc. 093.

93 *See* p. 13, *supra*.

94 Appellants' Br. 12-13, 21.

requesting leave and disability), McKenna was asked what happened in the three-to-five years prior, that could have been the start of his neck and back problems.[95] He did not recall. McKenna was then asked: "So you don't know – you don't know what caused the problems that led to your disability in March of 2008?" His response was: "Yes I do." He then identified the 1988 and 1990 work injuries as the causes of his disability in 2008. McKenna was subsequently asked: "So in your mind, what was happening in 2008 was always related to these incidents back in '88 and '90?" He replied: "Yes."

As the board decided,[96] we are of the opinion that this line of questioning was vague and ambiguous. The timeframes that were being discussed were never made clear. For example, one question asks if McKenna *knows* what caused the problems leading to his disability in 2008. He said he does. Thus, the question can be understood as asking whether McKenna knew, *at the time his deposition was taken in March 2011*, what caused his disability *back in 2008*. His response can be understood in the context of that question. Yes, McKenna knew, at the time his deposition was taken in 2011, what caused his disability back in 2008, namely the 1988 and 1990 work incidents when he suffered injuries. Similarly, almost immediately thereafter, McKenna was asked if, in his mind, what was happening back in 2008, his disability manifesting itself, was always related to the 1988 and 1990 work incidents. This question can also be understood as asking what McKenna knew at the time his deposition was taken in March 2011, not what he knew back in 2008. His answer can be understood as responsive to that inquiry.

McKenna's knowledge of his disability and its relation to his employment with ARCO Alaska, Inc. in 2011 is irrelevant. If ARCO wished to elicit, through McKenna's deposition testimony in 2011, evidence of what he knew back in 2008 regarding his disability and its relation to his employment with ARCO Alaska, Inc., questions that could *only* be understood in that context needed to be asked clearly and

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[95] The record suggests that McKenna's neck complaints began in 2003, five years earlier. His back problems began in 1988.

[96] *See McKenna II*, Bd. Dec. No. 12-0070 at 50.

unambiguously. However, the questions he was asked in that regard lacked the necessary clarity and precision.

The burden of proof was on ARCO to show that prior to August 23, 2008, McKenna knew he was disabled and his disability related to his employment with ARCO Alaska, Inc. The foregoing discussion demonstrates that substantial evidence supports the board's finding that ARCO failed in this respect.

In terms of appellate review of the adequacy of the board's finding, in essence, ARCO is asking the commission to overturn it. As that is the case, McKenna has requested that the commission also analyze the evidence under the standard in AS 23.30.122. It states in part: "The findings of the board are subject to the same standard of review as a jury's finding in a civil action." We have already noted the law applicable to this analysis.[97] Adapting that standard to our review of the board's finding here, the commission concludes that we can overturn it only if the evidence, when viewed in the light most favorable to McKenna, reveals that the board's finding is unreasonable. Consistent with case law, the foregoing standard is an objective, deferential one. If there is room for diversity of opinion, then the finding is one for the board to make.[98]

Applying this standard here, there is evidence that, once he was disabled, McKenna knew of his disability and its relation to his employment with ARCO Alaska, Inc. On obtaining a leave of absence in late March 2008, he never returned to work and the SSA subsequently determined he was disabled as of March 25, 2008. Thus, there is no dispute whether McKenna was disabled in mid-2008. As for evidence that, at the time, he knew he was disabled, McKenna filled out a Disability Report in conjunction with his application for social security benefits, submitted June 27, 2008, in which he indicated that he realized he could not continue working as of March 25, 2008. McKenna knew that his thoracic problems originated with the work incidents in

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[97] *See* Part 3, Standard of review, *supra*.

[98] *See Holiday Inns of America*, 520 P.2d at 92 n.12.

1988 and 1990, and knew that some of his medical treatment over the ensuing 20 years related to his thoracic problems. These considerations are some indication that, in mid-2008, McKenna knew he was disabled and his disability related to his employment with ARCO Alaska, Inc. However, under the aforementioned standard, even though there is evidence which supports a finding that is contrary to the board's, those are not sufficient grounds for the commission to overturn it. Rather, even though in our view the evidence might support the opposite finding, the board's finding is entitled to deference, as it is reasonable.

c. Do AS 23.30.105(a) and (b), when construed together, render subsection .105(b) inapplicable here?

ARCO also argued that McKenna's claim is barred,[99] pursuant to the provisions of AS 23.30.105(b).[100] The board held it was not,[101] citing a supreme court case as authority for its holding.[102] In the commission's view, *Justice* is not particularly helpful to our analysis because the underlying facts are distinguishable. Instead, we think the issue can be resolved through statutory construction.

Construction of statutes presents a question of law to which we apply our independent judgment.[103] Statutes that were enacted at the same time or deal with the same subject matter are *in pari materia* and are to be construed together.[104] Here, although we are dealing with two subsections of a statute, AS 23.30.105(a) and (b), rather than two statutes, the same principle applies. Since AS 23.30.105(a) and (b)

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99 Appellants' Br. 25-26.

100 *See* n.1, *supra*.

101 *See McKenna II*, Bd. Dec. No. 12-0070 at 51-52.

102 *Justice v. RMH Aero Logging, Inc.*, 42 P.3d 549, 556-57 (Alaska 2002).

103 *See* AS 23.30.128(b) and *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912 n.1 (Alaska 1996) (citing *State, Dep't of Nat. Resources v. City of Haines*, 627 P.2d 1047, 1049 (Alaska 1981)).

104 *See, e.g., Underwater Const., Inc. v. Shirley*, 884 P.2d 150, 155 (Alaska 1994).

were enacted together and cover the same subject matter, the timeliness of disability claims, they should be construed harmoniously.

We conclude that the two subsections operate to provide two different means of avoiding dismissal of a disability claim as untimely. First, pursuant to subsection .105(a), a claim is timely if "it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment[.]" Second, pursuant to subsection .105(b), even though a claim was not timely filed under subsection .105(a), if the employer fails to object to the timeliness of a claim at the first hearing, it cannot be dismissed. In other words, subsection .105(b) has no application when a claim is timely filed within two years of the employee having knowledge of the disability and its relation to employment.

Here, the board denied ARCO's petition to dismiss because ARCO failed to show, to the board's satisfaction, that McKenna knew of his disability and its relation to his employment with ARCO Alaska, Inc. more than two years before he filed his claim on August 23, 2010. Stated another way, the board found that McKenna's disability claim was timely filed under AS 23.30.105(a), therefore, it is not subject to being barred pursuant to AS 23.30.105(b).

5. Conclusion.

We AFFIRM the board's decision.

Date: *3 January 2013* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

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).[105] 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 distributed[106] 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

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[105] 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.

[106] *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, with the exception of minor typographical errors or grammatical that were corrected, this is a full and correct copy of the Final Decision No. 174 issued in the matter of *ARCO Alaska, Inc. and ACE USA v. James G. McKenna,* AWCAC Appeal No. 12-016, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 3, 2013.

Date: *January 7, 2013*

Signed

B. Ward, Commission Clerk