Alaska Workers' Compensation Appeals Commission

Sallyanne M. Butts, nee DeCastro, Appellant, vs. State of Alaska, Appellee.	Final Decision Decision No. 254 October 12, 2018 AWCAC Appeal No. 17-023 AWCB Decision Nos. 17-0070, 17-0129 AWCB Case No. 201103811

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 17-0070, issued at Anchorage, Alaska, on June 19, 2017, by southcentral panel members William Soule, Chair, Aaron Plikat, Member for Labor, and Amy Steele, Member for Industry; and, Final Decision and Order on Reconsideration and Modification No. 17-0129, issued at Anchorage, Alaska, on November 20, 2017, by southcentral panel members William Soule, Chair, and Amy Steele, Member for Industry.

Appearances: Andrew D. Wilson, Rehbock & Wilson, for appellant, Sallyanne M. Butts, nee DeCastro; Jahna Lindemuth, Attorney General, and M. David Rhodes, Assistant Attorney General, for appellee, State of Alaska.

Commission proceedings: Appeal filed December 18, 2017; briefing completed June 19, 2018; oral argument held on July 17, 2018.

Commissioners: James N. Rhodes, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Sallyanne M. Butts (Ms. Butts) sustained an injury while working for the State of Alaska (SOA).[1] The Alaska Workers' Compensation Board (Board) denied her claim for additional medical benefits and time loss, and she appealed those decisions to the Alaska

[1] *Butts v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 17-0070 (June 19, 2017) (*Butts I*); *Butts v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 17-0077 (July 12, 2017) (*Butts II*); *Butts v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 17-0129 (Nov. 20, 2017) (*Butts III*).

Workers Compensation Appeals Commission (Commission).[2] The Commission now affirms the Board on all issues.

2. Factual background and proceedings.[3]

Ms. Butts sustained a work injury on March 3, 2011.[4] Prior to this injury, on February 8, 2011, she complained to J. Nels Anderson, M.D., of low back pain after "doing squats." He prescribed pain medication and recommended she remain off work. Ms. Butts felt she needed to continue working and disregarded his advice.[5] She was a recreational weightlifter,[6] and "squats" in weightlifting involves holding a weighted barbell on one's shoulders behind the neck while at the same time "squatting" up and down repeatedly in a numbered set.[7]

On the day of her work injury, Ms. Butts fell forward from a newly acquired ergonomic chair she was trying out at work. Ms. Butts landed on her hands and her left knee.[8] The same day she received massage therapy and reported low back pain and spasms, which "started few weeks ago." She also reported she "fell at work today trying to use new ergonomic chair," and had mid- and low-back, posterior neck, and left knee pain. Ms. Butts continued massage therapy through July 18, 2011.[9]

By April 18, 2011, Ms. Butts could walk two miles twice per week, her low back pain was improving, and her left knee felt better. Throughout her massage therapy, Ms. Butts consistently mentioned her left knee and low back symptoms.[10] However, on

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2 *Butts I, Butts III.*

3 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.

4 *Butts I* at 3, No. 4.

5 *Id.*, No. 2.

6 *Id.*, No. 1.

7 *Id.*, No. 3.

8 *Id.*, No. 4.

9 *Id.*, No. 5.

10 *Id.*, No. 6.

April 27, 2011, Ms. Butts reported low back spasms "last night," said she had "been icing every night," and she was frustrated with her lack of improvement.[11] On May 6, 2011, Ms. Butts was doing better, but her back pain had "moved down" to her lower back.[12] By June 9, 2011, Ms. Butts' knee was doing better, but her low back was still painful even with "simple chores/minimal activity."[13]

On June 13, 2011, Ms. Butts reported difficulty with full weight bearing on her left leg.[14] Ms. Butts reported driving from Soldotna to Anchorage on June 20, 2011, had increased her low back pain,[15] and by June 23, 2011, she reported difficulty sitting at work the day after she did simple household cleaning.[16]

On July 7, 2011, Ms. Butts reported severe pain in her left knee and low back requiring her to leave work the day before. The massage therapist determined Ms. Butts was not improving and was becoming more frustrated with ongoing pain even with minimal activity. The therapist noted left knee swelling and stated the kneecap "does not track well."[17] Henry G. Krull, M.D., on July 12, 2011, reported Ms. Butts still had low back and worsening left knee pain. He recommended knee and lumbar spine physical therapy.[18]

On July 18, 2011, Ms. Butts reported her left knee pain was "severe" and her knee "gives out" on her.[19] On July 25, 2011, Ms. Butts had left knee pain moving to the right

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11 *Butts I* at 3, No. 7.

12 *Id.*, No. 8.

13 *Id.*, No. 9.

14 *Id.*, No. 10.

15 *Id.*, No. 11.

16 *Id.*, No. 12.

17 *Id.* at 4, No.13.

18 *Id.*, No. 14.

19 *Id.*, No. 16.

knee, which she related to her work injury.[20] That was the first reference to her right knee pain.[21]

On August 10, 2011, Ms. Butts told her therapist she was not able to walk for six days following her last PT session, and her left knee felt like "there were loose pieces in the knee and it locked up."[22] Dr. Krull, on August 18, 2011, suggested pain from Ms. Butts' left knee "contusion" was "worsening," and she still had low back pain.[23] Ms. Butts underwent a left knee magnetic resonance imaging (MRI) on August 24, 2011, which disclosed areas of full-thickness cartilage loss involving the medial femorotibial compartment, and moderate to large joint effusion.[24]

Dr. Krull, in his pre-surgery examination, said:

> The diagnoses leading to surgery is symptomatic left knee cartilage injury. The primary complaint is pain. Secondary issues include loss of function and stiffness. Symptoms began after an injury. Prior treatment, including physical therapy, NSAID, analgesics, activity restriction/modification, has not been successful thus far in controlling symptoms. An MRI . . . demonstrated full-thickness MCF lesion with associated bone bruise . . . .[25]

Dr. Krull performed the left knee arthroscopy on August 31, 2011, and found moderate synovial hyperplasia in the retropatellar and medial compartments; an osteochondral lesion on the medial femoral condyle measuring 10 by 20 millimeters; and another osteochondral lesion on the medial tibial plateau.[26]

On September 6, 2011, Dr. Krull released Ms. Butts to return to light or sedentary work only using a brace and crutches, effective September 19, 2011.[27] By October 24, 2011, Ms. Butts reported her left knee pain was "very low, even after traveling and

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20 *Butts I* at 4, No. 17.

21 *Id.*, No. 18.

22 *Id.*, No. 19.

23 *Id.*, No. 20.

24 *Id.*, No. 21.

25 *Id.*, No. 23.

26 *Id.* at 4-5, No. 24.

27 *Id.* at 5, No. 25.

vacation."[28] However, on October 28, 2011, Ms. Butts was still using a brace and crutches, and said her left knee was not progressing well. Her surgeon noted her gait was "noticeably antalgic" and took her off work.[29]

By December 16, 2011, following extensive PT, Ms. Butts felt "perhaps 20 percent better" in her left knee, but did not feel she could return to work.[30] By January 5, 2012, Ms. Butts had undergone two left knee viscosupplementation injections.[31] On January 30, 2012, following her third viscosupplementation injection, Ms. Butts said she could walk longer periods without pain, and could move her left knee from side to side.[32] On January 31, 2012, Ms. Butts' gait was normal and she was ready to return to modified work. Dr. Krull returned her to work effective February 1, 2012, with five-minute breaks from sitting per hour, no ladders, and limited kneeling and stooping.[33] On February 2, 2012, she still had "mild gait deviations."[34]

By March 27, 2012, Ms. Butts' left knee was much improved and she was back to work.[35] On May 10, 2012, Ms. Butts reported decreased "mild" pain and increased function. Her gait was normal and she was doing home exercises and could return to work without restriction except for occasional five-minute breaks to rest, ice, or elevate her left knee as necessary. She was to return to the clinic on an "as-needed basis." Dr. Krull reported, "She has severe arthritic changes in the medial compartment of her knee that may warrant joint replacement at some point in the future." He further stated she was medically stable with no permanent impairment.[36]

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28 *Butts I* at 5, No. 27.

29 *Id.*, No. 28.

30 *Id.*, No. 29.

31 *Id.*, No. 30.

32 *Id.*, No. 31.

33 *Id.*, No. 32.

34 *Id.*, No. 33.

35 *Id.,* No. 34.

36 *Id.* at 5-6, No. 35.

The next treatment sought by Ms. Butts was on August 16, 2012. Dr. Krull reported:

> Mrs. DeCastro-Butts returns to clinic today for follow-up. Since last visit, she is worse. Her RIGHT knee started hurting a lot about 2 months ago; seems to be increasing. No injury or event. She attributes the symptoms to overuse, due to prior left knee disability and recovery. Left knee also starting to hurt more, along the inner side in particular. No treatment of late (emphasis in original).

He found "normal gait" on the left but "antalgic gait" on the right. He prescribed another left knee injection and a right knee MRI.[37]

The MRI of the right knee on September 6, 2012, disclosed a complex tear in the medial meniscus with involvement of the inferior articular surface; a moderate sprain of the medial collateral ligament; tricompartmental degenerative changes including chondromalacia of the right knee most pronounced within the medial compartment; and large right knee joint effusion.[38] The right knee on the September 2012 MRI appeared to be worse than her left knee on the August 2011 MRI.[39]

On September 13, 2012, Dr. Krull stated the condition in Ms. Butts' right knee was "similar to left knee," noting that she had had no right knee symptomatology prior to her left knee work injury. He opined Ms. Butts' right knee findings "appear to be at least partially related to her current WC claim."[40]

On October 3, 2012, Ms. Butts underwent right knee arthroscopic surgery, but Dr. Krull did not find a microfracture in the right knee.[41] Nonetheless, on October 18, 2012, Dr. Krull removed Ms. Butts from work until further notice.[42]

Ms. Butts began PT for her right knee on January 28, 2013. For the first time since August 16, 2012, Ms. Butts mentioned she was "still having knee problems on the left."

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37 *Butts I* at 6, No. 37.

38 *Id.*, No. 38.

39 *Id.*, No. 39.

40 *Id.*, No. 40.

41 *Id.*, No. 41.

42 *Id.*, No. 42.

Ms. Butts attributed her right knee problems from "favoring" the left leg and having used her right knee for function.[43] On February 21, 2013, Ms. Butts reported a "constant ache in knee" with "swelling present,"[44] and by February 25, 2013, she said her bilateral knee pain was so bad she could not walk after picking up around her home.[45] On February 26, 2013, Dr. Krull determined the result from Ms. Butts' right knee surgery was "poor." He recommended an MRI to check for internal, right knee derangement.[46] By March 7, 2013, Ms. Butts' right knee was worse than pre-surgery and PT was making it worse. Dr. Krull opined Ms. Butts would not get better without additional surgery and her "worsening arthritic changes" may "preclude return to 100%."[47]

On April 3, 2013, Ms. Butts had her second right knee arthroscopic surgery,[48] and on April 25, 2013, Dr. Krull removed Ms. Butts from work until further notice.[49] By June 4, 2013, Ms. Butts reported pain in both knees and Dr. Krull diagnosed right knee medial meniscus tear and bilateral knee osteoarthritis.[50] On August 13, 2013, Dr. Krull diagnosed bilateral knee osteoarthritis.[51] On September 5, 2013, he stated:

> Ms. DeCastro-Butts was referred at the time of her 8-22 visit to Kenai Spine for evaluation of back pain and radiculopathy. The patient attributes the symptoms to her initial injury, in 2011. She has not had formal evaluation of her spine, but I have referred her on several occasions for massage therapy for her spine. Pain is worsening, as well as her neurological symptoms, and Spine evaluation is now indicated.[52]

On October 3, 2013, Stephanie K. Winter, PA-C, charted the following:

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43 *Butts I* at 6-7, No. 43.

44 *Id.* at 7, No. 44.

45 *Id.*, No. 45.

46 *Id.*, No. 46.

47 *Id.*, No. 47.

48 *Id.*, No. 48.

49 *Id.*, No. 49.

50 *Id.*, No. 50.

51 *Id.*, No. 51.

52 *Id.*, No. 52.

> The patient comes in today for complaint of lower extremity numbness and shooting pain. There is an extensive history to explain this. The patient had an injury on March 3, 2011 at work. She was sitting in an ergonomic chair when she fell out of it. She caught herself with her hands and her left knee. At the time she was complaining of left knee pain and some lower back pain. She was seen and evaluated by Dr. Krull who had sent her to physical therapy for massage, and also gave her some muscle relaxants. Her back did improve. She continued to have left knee pain and had left knee arthroscopy done in 2011. After rehabilitation with the left knee, she started to have right knee pain. She had right knee arthroscopy in October 2012. Shortly after her knee scope procedure she had sharp shooting pains that went from her right knee down into her calf. These pains have continued on and off without any particular trigger. She still had right knee pain and had another knee scope in April 2013. After the second knee scope on the right she noted some lateral anterior thigh numbness. The numbness there is fairly constant and throbs at night.
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> Overall her back pain is significantly lessened since physical therapy. She continues to complain of knee pain . . . .[53]

PA-C Winter diagnosed right leg numbness and knee pain and noted Ms. Butts was not having "much back pain." She referred Ms. Butts to Kristen B. Jessen, M.D., for bilateral lower extremity electromyography (EMG) tests and for a lumbar MRI.[54]

Keith G. Holley, M.D., on November 2, 2013, performed an employer's medical evaluation (EME) and diagnosed a left knee contusion caused by the work injury, resolved; bilateral knee osteoarthritis not work-related and caused by obesity and age-related degenerative changes; sensory numbness in the right thigh, cause undetermined but not likely work-related; and post bilateral knee arthroscopies to address age-related degenerative changes. In his opinion, Ms. Butts' medical care had been reasonable and necessary, but most of it was not work-related. Initial massage therapy and conservative treatment for the left knee, including PT and medications for about two months post-injury, were reasonable, necessary, and related to the work injury, but no subsequent treatment was work-related. He opined Ms. Butts needed staged, bilateral knee replacements, the substantial cause of which was not her work injury, but rather her

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53 *Butts I* at 7-8, No. 53.

54 *Id.*

worsening osteoarthritis. He found that Ms. Butts was medically stable two months following her March 3, 2011, work injury, without any permanent impairment.[55]

On November 7, 2013, Ms. Butts' lumbar MRI disclosed the following: (1) Moderate to severe right-sided neural foraminal narrowing at L3-4; (2) Grade 1 anteriolisthesis, with associated moderate to severe bilateral neural foraminal narrowing at L4-5; and (3) Moderate to severe bilateral neural foraminal narrowing at L5-S1.[56]

Dr. Jessen, on November 22, 2013, performed an EMG and found an "abnormal study" showing polyneuropathy with axonal features and right L3 through S1 radiculopathy. Ms. Butts recited her injury history and told Dr. Jessen she had no back pain for "several weeks."[57] By November 25, 2013, Ms. Butts said her low back pain was "worsening."[58]

On December 3, 2013, Dr. Krull stated he disagreed with Dr. Holley's EME report. He agreed Ms. Butts is obese and has age-related degenerative changes. However, in his view, Ms. Butts did not have osteoarthritis signs or symptoms prior to her work injury. He opined her work injury was the significant contributor "to her current state."[59]

Ms. Butts saw Steven C. Humphreys, M.D., on referral on January 2, 2014, and he diagnosed leg numbness, knee pain, low back pain, foraminal stenosis in the lumbar region, and spondylolisthesis. He noted Ms. Butts' right-sided leg pain started after her right knee arthroscopy, and he referred her to Cynthia H. Kahn, M.D., for pain management.[60]

On May 14, 2014, Ms. Butts completed a pain diagram for Dr. Khan on which she noted upper back, low back, and right leg pain, but did not indicate any left leg or knee

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55 *Butts I* at 8, No. 54.

56 *Id.*, No. 55.

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

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

59 *Id.*, No. 58.

60 *Id.*, No. 59.

symptoms.[61] SOA, on July 15, 2014, controverted Ms. Butts' right to benefits for her low back and for sensory numbness in her right thigh, based on Dr. Holley's November 2, 2013, EME report.[62]

Ms. Butts returned to Dr. Krull on October 16, 2014, stating her bilateral knee pain was worse. He diagnosed bilateral knee osteoarthritis.[63]

On September 22, 2015, Ms. Butts filed a claim for temporary total disability (TTD), permanent partial impairment (PPI), medical costs, transportation costs, interest, and attorney fees and costs for her bilateral knees and low back.[64]

Dr. Krull, on October 26, 2015, reiterated his opinion that the substantial cause of Ms. Butts' "medical condition" requiring ongoing treatment was her March 2011 work injury. He opined Ms. Butts' left knee injury resulted in a meniscus tear and she subsequently developed right knee pain because she favored the left knee. Ms. Butts now had advanced arthritis in both knees "in large part due to her meniscus tears." He recommended bilateral knee replacements because Ms. Butts had failed all other conservative treatment. Until Ms. Butts had both knees replaced, she would not be medically stable. He stated Ms. Butts was not eligible for any work and had not been for "some time," due to her pain and inability to sit, stand, or walk for long.[65]

On October 26, 2015, SOA denied Ms. Butts' claim for all benefits based on Dr. Holley's November 2, 2013, EME report.[66]

On January 21, 2016, Dr. Humphreys again reviewed Ms. Butts' case and noted, "It is difficult to believe" Ms. Butts' grade 1-2 spondylolisthesis with foraminal stenosis "actually happened at the accident, but certainly it could have aggravated a preexisting

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61 *Butts I* at 9, No. 60.

62 *Id.*, No. 61.

63 *Id.*, No. 62.

64 *Id.*, No. 63.

65 *Id.* at 9-10, No. 64.

66 *Id.* at 10, No. 65.

condition." Dr. Humphreys described Ms. Butts' situation as "a cascade of events."[67] He also reviewed Ms. Butts' films and the American Medical Association *Guides to the Evaluation of Permanent Impairment*, Sixth Edition, to derive a 13 percent whole person impairment for Ms. Butts' low back, which he attributed to her March 3, 2011, work injury.[68] Dr. Humphreys' PPI rating did not mention a reduction for any preexisting lumbar condition.[69]

On January 26, 2016, Ms. Butts saw Dr. Krull for the first time in over a year. She reportedly was worse and wanted to proceed with total knee replacement.[70] On May 18, 2016, Dr. Krull replaced Ms. Butts' left knee,[71] and on September 7, 2016, he replaced her right knee.[72]

On September 17, 2016, Dr. Holley performed a medical record review to update his EME, and he stated his opinions in his prior EME report had not changed. In his opinion, Ms. Butts suffered only a left knee contusion when she fell on March 3, 2011, and any other disability or need for medical treatment for her bilateral knees or her low back arose from non-occupationally-related degenerative disease. Dr. Holley stated it was "medically possible, but not medically probable," that Ms. Butts' gait alterations contributed to aggravating her low back pain.[73]

According to his deposition, Dr. Krull is a board-certified orthopedic surgeon who has practiced for 16 years.[74] He began treating Ms. Butts for her knees on March 24, 2011.[75] In his view, Ms. Butts' knee injury at work was more likely than not the cause of

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67 *Butts I* at 10, No. 66.

68 *Id.*, No. 67.

69 *Id.*

70 *Id.*, No. 68.

71 *Id.*, No. 69.

72 *Id.*, No. 70.

73 *Id.*, No. 71.

74 *Id.* at 10-11, No. 72.

75 *Id.*

her then-current condition, "knee arthritis," which caused her need for continuing treatment.[76] He did not allocate a "percentage of fault" to the knee injury versus other "issues."[77] He stated it can take an acute injury "many months to years" to cause the type of degeneration he saw in Ms. Butts' left knee in 2011.[78] Ms. Butts told Dr. Krull she had no symptoms consistent with knee osteoarthritis until after her work accident and he based his opinion upon this history. Dr. Krull conceded that if a person has memory issues it would make relying upon their memory for purposes of forming a causation opinion potentially problematic.[79] On the other hand, if evidence showed Ms. Butts' history was correct, his opinion about the cause of her need for treatment for her knee would remain the same.[80]

Dr. Krull's hearing testimony was generally consistent with his deposition opinions. He based his causation opinion on (1) Ms. Butts had normal x-rays on her first visit; (2) her left knee MRI showed a focal injury; and (3) her left knee did not have widespread arthritic changes. Though acknowledging he is a "patient advocate," Dr. Krull means this in the general sense that the patient comes first and his goal is to make Ms. Butts better. He would not go "to great lengths" testifying for Ms. Butts, but Dr. Krull firmly believes her work injury was the substantial factor requiring her knee surgeries, including total knee replacements.[81]

According to his deposition, Dr. Humphreys is a board-certified orthopedic physician specializing in spines.[82] Dr. Humphreys reviewed a chiropractor's note from March 3, 2011, which stated Ms. Butts complained of back pain on that date.[83] He

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76 *Butts I* at 10-11, No. 72.

77 *Id*.

78 *Id*.

79 *Id*.

80 *Id*.

81 *Id.* at 11, No. 73.

82 *Id.* at 11-12, No. 74.

83 *Id*.

reviewed another report from May 6, 2011, which also mentioned low back pain.[84] After several visits, Dr. Humphreys diagnosed Ms. Butts with spondylolisthesis, which caused symptoms in both legs with the right being the worse.[85] Weight is not a risk factor for spondylolisthesis.[86] EMG confirmed right-sided radiculopathy, meaning that some of her leg numbness and pain was coming from her back and it was not all coming from her knee.[87] Limping around on a bad knee can aggravate spondylolisthesis, or vice-versa.[88] In "probability," the spondylolisthesis existed but was asymptomatic before her injury.[89] Nevertheless, Dr. Humphreys stated absent a history of low back treatment prior to the work injury, it was most likely her unresolved knee issues caused her back to be symptomatic.[90] After reading Ms. Butts' injury description from the EME report, Dr. opined the "mechanism of injury" was sufficient to cause spondylolisthesis in Ms. Butts' back.[91] However, he favored his opinion that an altered gait from Ms. Butts' knee injury aggravated the preexisting spondylolisthesis.[92] Dr. Humphreys prescribed non-addictive medicines and lumbar injections.[93] In his opinion, if Ms. Butts' altered gait resolved, her "back would settle down."[94] Ms. Butts' spondylolisthesis had progressed, and he opined at some point the disc affected by the spondylolisthesis would require surgery because the disc would degenerate faster than it would have normally.[95]

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84 *Butts I* at 11-12, No. 74.

85 *Id*.

86 *Id*.

87 *Id*.

88 *Id*.

89 *Id*.

90 *Id.*

91 *Id*.

92 *Id*.

93 *Id*.

94 *Id*.

95 *Id*.

Dr. Humphreys hoped total knee replacement surgery to fix Ms. Butts' antalgic gait would reduce symptoms arising from spondylolisthesis.[96] He expected objectively measurable improvement from Ms. Butts' knee surgery and spine treatment.[97] Dr. Humphreys based his opinions about Ms. Butts' pre-injury low back symptoms on her history.[98] As a physician, he tries to be "a patient advocate when it makes sense."[99] On January 21, 2016, Ms. Butts was medically stable for her low back unless she has surgery.[100] He did not believe Ms. Butts' low back symptoms precluded secretarial work.[101] He would not qualify his opinions simply because he had not seen every medical record, because he has seen thousands of patients with this condition.[102] If Ms. Butts' low back spasms started "a few weeks" before her work injury, as stated to her chiropractor on the injury date, this fact would "definitely" change his opinion, especially if she had a history that also included leg pain.[103]

According to his deposition, Dr. Holley is a board-certified orthopedic surgeon.[104] His medical opinions in Ms. Butts' case did not change after reviewing additional medical records, including Dr. Langen's SIME report.[105] Dr. Holley said he accurately recorded Ms. Butts' statement to him that she had periods lasting weeks without lumbar spine pain. He agreed Dr. Jessen's similar report confirms this is what Ms. Butts told him in November 2013.[106] Dr. Holley agreed it was "not unusual" for a patient's history to differ

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96 *Butts I* at 11-12, No. 74.

97 *Id*.

98 *Id*.

99 *Id*.

100 *Id*.

101 *Id*.

102 *Id*.

103 *Id*.

104 *Id.* at 12-13, No. 75.

105 *Id*.

106 *Id.*

from the medical records. He attributed such differences to the patient's "human memory" deficits and preferred to rely on the "history documented in contemporaneous medical reports" taken around the injury date.[107] In Dr. Holley's opinion, a fall straightforward onto one's knee would not damage cartilage, which is typically strong and resists direct compressive loading forces.[108] He agreed there is no credible medical literature suggesting a change in a person's gait to lessen the burden on a knee results in problems for the opposite knee. In Dr. Holley's view, a sudden worsening in Ms. Butts' left knee pain in July or August 2011 was more consistent with a flare-up of symptoms due to preexisting osteoarthritis than to a left knee contusion months earlier.[109] Similarly, he opined if it was work related, Ms. Butts' low back pain would have started after, and not before, her work injury and would not have waxed and waned.[110]

On December 15, 2016, Robert P. Langen, M.D., performed a second independent medical evaluation (SIME) on Ms. Butts. He reviewed 703 pages of medical records. The earliest record Dr. Langen reviewed was the massage therapy report dated March 3, 2011. He also reviewed Dr. Krull's and Dr. Humphreys' depositions. Dr. Langen reviewed the medical records with Ms. Butts, who disagreed she told Drs. Holley and Jessen in November 2013 that she had had no low back pain for several weeks. Ms. Butts also disputed telling PA-C Winter in November 2013 that she was able to walk with a normal gait. Since having her knees replaced, Ms. Butts no longer has knee pain. Pre-injury, Ms. Butts enjoyed gardening, walking three to five miles a day without difficulty, and lifting weights. Dr. Langen diagnosed a left knee contusion; left knee, right knee, and lumbar spine degenerative disease; scoliosis; lumbar spine spondylolisthesis; and obesity. He opined Ms. Butts had significant preexisting left knee degenerative disease and the work injury caused symptomatology for approximately six weeks, but no permanent impairment. He found no objective evidence to indicate the work injury produced a

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107 *Butts I* at 12-13, No. 75.

108 *Id.*

109 *Id.*

110 *Id.*

temporary or permanent change in the left knee condition. Accordingly, Dr. Langen opined the work injury did not precipitate the left knee surgeries. Similarly, in his view, the work injury did not necessitate any right knee treatment. The substantial cause of the need to treat the left knee six weeks after the work injury, and the right knee in totality, was preexisting degenerative disease. As for the low back, Dr. Langen stated degenerative disease is the substantial cause of the need for back treatment. He based this opinion on the fact Ms. Butts had pre-injury back symptoms and on the waxing and waning nature of her subsequent low back complaints. Dr. Langen said the work injury was not the cause of any disability. Further, since Ms. Butts remained at full-duty work until August 2011 when she underwent left knee arthroscopic surgery, there was no work-related disability arising from the work injury. Though he opined the treatments to Ms. Butts' knees and low back were not work-related, Dr. Langen agreed they were reasonable and necessary to treat her medical conditions. Dr. Langen provided two 21 percent lower extremity PPI ratings for Ms. Butts' left and right knees, based solely on knee replacement criteria. He provided a 9 percent whole-person lumbar PPI rating, without any reduction.[111] Dr. Langen ultimately opined, "The work-related injury was not the cause for any of the knee treatment."[112]

SOA paid Ms. Butts TTD benefits at a $532.11 weekly rate. Ms. Butts sought TTD from November 5, 2013, through January 24, 2017, or approximately 168 weeks. At her weekly rate, the approximate amount of TTD sought was $89,000.00, plus interest.[113] Ms. Butts also sought PPI based on Dr. Langen's ratings for her left and right knees and her lumbar spine, which came to an 8 percent whole-person PPI per extremity. Combined with the 9 percent whole-person PPI for the lumbar spine, Dr. Langen's total whole-person PPI rating equaled 23 percent, or approximately $40,710.00, plus interest in PPI benefits.[114]

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111 *Butts I* at 13-14, No. 78.

112 *Id.* at 14, No. 79.

113 *Id.* at 15, No. 84.

114 *Id.*, No. 85.

On June 19, 2017, the Board issued *Butts I*, finding Ms. Butts' left knee injury was compensable from the date of injury through May 10, 2012, and finding that her preexisting and ongoing left knee degeneration was the substantial cause of any left knee treatment or disability after May 10, 2012. The Board further found preexisting degeneration was the substantial cause of the ongoing need to treat her right knee, and any related disability. Likewise, Ms. Butts' low back was compensable from the date of injury through May 10, 2012, for the same reasons. The Board denied her claim for TTD after May 10, 2012, and held that she might be entitled to PPI benefits if she obtained a PPI rating for the compensable knee injury. The Board found Ms. Butts might be entitled to medical benefits and related interest if her evidence showed unpaid or reimbursable out-of-pocket medical bills for the compensable left knee injury. The Board also found Ms. Butts had filed a claim, SOA had controverted it, and Ms. Butts had prevailed on her left knee and low back claims beyond the date of the EME, on whose report SOA relied for its denial. The Board awarded Ms. Butts 12.05 hours for attorney fees totaling $3,615.00 and $2,801.74 in litigation costs.[115]

On June 28, 2017, Ms. Butts filed and served a form petition seeking reconsideration or modification of *Butts I*, and requesting additional briefing. Ms. Butts contended *Butts I* failed to consider the constitutionality of its Alaska Workers' Compensation Act (Act) interpretation, failed to address the EME's and SIME's alleged failure to rebut the presumption of compensability, and *Butts I* did not address her arguments that her injury permanently aggravated or accelerated her preexisting conditions.[116]

On June 30, 2017, SOA also filed a petition for reconsideration, modification, and for a finding of an overpayment. SOA contended it overpaid benefits to Ms. Butts, exceeding any possible PPI benefit, making a PPI examination and related costs unnecessary. Further, SOA contended it had paid all medical bills for treatment occurring before May 11, 2012, and consequently, Ms. Butts was not entitled to an attorney fee

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115 *Butts I* at 19-28.

116 *Butts II* at 2-3, No. 2.

and cost award. SOA attached to its petition its attorney's affidavit, which stated there were no medical bills remaining unpaid from before May 11, 2012.[117]

On July 12, 2017, the Board issued *Butts II*, granting Ms. Butts' June 28, 2017, and SOA's June 30, 2017, petitions solely to toll the time to appeal and to allow for additional briefing and argument.[118] Both parties submitted additional briefing and SOA attached affidavits from the adjuster and SOA's paralegal to its briefing. The affidavit dated June 30, 2017, from adjuster Memoree Pollys stated she reviewed her file and did not find any unpaid medical bills for treatment provided to Ms. Butts prior to May 11, 2012, or to any pre-May 11, 2012, unpaid, out-of-pocket expense reimbursement requests from Ms. Butts. To Ms. Pollys' knowledge, Northern Adjusters had paid all pre-May 11, 2012, medical expenses prior to September 18, 2015.[119] SOA's paralegal, Jennifer Cruz, confirmed in an affidavit that she checked with Ms. Butts' medical providers for any unpaid medical bills prior to May 11, 2012. Ms. Cruz further stated that none of Ms. Butts' medical providers had any unpaid medical bills related to her work injury for medical treatment incurred prior to May 11, 2012.[120]

For her part, Ms. Butts, on July 20, 2017, contended *Butts I* properly awarded attorney fees it "deemed reasonable for the benefits awarded to the claimant." She also contended additional attorney fees and costs were awardable pursuant to her petition for reconsideration or modification. Ms. Butts contended SOA could not request a benefit offset should she obtain a PPI rating, because SOA never disputed benefits paid from May 10, 2012, through November 2, 2013. She further contended SOA was not entitled to a 100 percent offset against any future PPI rating for the left knee.[121] She did not object to the affidavits submitted by SOA.

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117 *Butts II* at 3, No. 3.

118 *Id.* at 5.

119 *Butts III* at 11, No. 12.

120 *Id.*, No. 13.

121 *Id.*, No. 15.

On October 20, 2017, Ms. Butts filed and served a medical summary to which was attached an October 20, 2017, "Log Note" from Dr. Krull. The note, which appeared in the form of a medical record similar to Dr. Krull's other medical records, did not evidence a visit from Ms. Butts or a physical examination on that day. The note began, "With regards to the decision and order by the State of Alaska, dated 6-19-2017, I would like to record a few comments/clarifications . . . ." The note went on to critique *Butts I* and to add medical opinions regarding Ms. Butts' case.[122] On October 24, 2017, SOA timely requested cross-examination of Dr. Krull for his October 20, 2017, Log Note.[123]

At hearing on November 15, 2017, as a preliminary matter, SOA expressly maintained its right to cross examine Dr. Krull with regard to his October 20, 2017, log note. Ms. Butts' lawyer said he provided a copy of *Butts I* to Dr. Krull. The Board, after deliberation, orally granted SOA's objection to the admission of Dr. Kroll's log note, finding the log note was not a traditional medical record as it did not contain evidence of a patient visit or examination. The Board further found the log note was the result of Ms. Butts' lawyer sending Dr. Krull a copy of *Butts I* and asking for his response. Further, since SOA objected to the document on foundational grounds, and Ms. Butts failed to provide evidence that Dr. Krull routinely reviewed and critiqued legal decisions, the document was not a "business record" admissible under Alaska Civil Rules as an exception to the hearsay rule.[124]

Ms. Butts did not, either at hearing or before the hearing, object to the Rhodes, Pollys, or Cruz affidavits and their attachments. Ms. Butts did not produce any, or argue that there were any, unpaid or unreimbursed work-related medical expenses prior to May 11, 2012.[125] The Board rendered its decision denying Ms. Butts' petition for reconsideration and modification.[126] The Board granted SOA's petition to the extent that

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122 *Butts III* at 11-12, No. 16.

123 *Id.* at 12, No. 17.

124 *Id.*, No. 19.

125 *Id.*, No. 21.

126 *Id.*

Butts I stated or implied "there were unpaid or unreimbursed, work-related medical bills prior to May 11, 2012," and vacated that award. As a corollary, the Board also vacated the award of attorney fees, since the evidence showed no unpaid or unreimbursed work-related medical bills.[127]

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.[128] 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."[129] The Board's findings of credibility are binding on the Commission because the Board "has the sole power to determine the credibility of a witness."[130] Such a determination by the Board is conclusive "even if the evidence is conflicting or susceptible to contrary conclusions."[131]

4. Discussion.

a. Did the Board properly apply the presumption analysis?

Ms. Butts contends the Board failed to apply the presumption of compensability to each injury she asserts she sustained. Her contention is that she sustained separate injuries during the course of treatment for her initial injury, and the Board did not apply the presumption analysis to those separate injuries.

However, this contention is erroneous. First, there is one work injury – the fall from the ergonomic chair on March 3, 2011. Pursuant to AS 23.30.120 "it is presumed, in the absence of substantial evidence to the contrary that (1) the claim comes within the

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127 *Butts III* at 12, No. 21.

128 AS 23.30.128(b).

129 AS 23.30.128(b).

130 AS 23.30.122.

131 *Id.*

provisions of this chapter . . . ."[132] The presumption analysis is three-fold. The Alaska Supreme Court (Court) has held that in the first step, an employee must demonstrate a preliminary link between work and the injury.[133] If the employee establishes the necessary link, at the next step, an employer, in order to rebut the presumption, must provide substantial evidence to the contrary, *i.e.*, the work injury is not the substantial cause of the disability.[134] The credibility of the evidence is not weighed at this step.[135] If the employer produces substantial evidence that the work injury is not the substantial cause of the disability then the presumption drops out. The employee must then prove her claim by a preponderance of the evidence. Credibility of the evidence is weighed at this stage.[136]

However, the presumption analysis does not apply here to the question of whether there was a work injury, because all parties agree Ms. Butts fell out of her chair at work. The presumption analysis does apply to the question before the Board, which was what ongoing medical treatment was required by Ms. Butts' fall at work. Contrary to the assertions of Ms. Butts, the Board, in *Butts I*, systematically addressed each of Ms. Butts' complaints, using the presumption analysis.

The Board first looked at the question of medical treatment for the left knee. The Board found that the treating physician, Dr. Krull, the EME physician, Dr. Holley, and the SIME physician, Dr. Langen, all agreed Ms. Butts sustained a left knee contusion when she fell. There is disagreement around when and how the left knee injury resolved and whether the work injury was the substantial cause of any need for ongoing medical treatment for the left knee. The Board found that the opinion of Dr. Krull raised the presumption of compensability for the need for ongoing medical treatment. Relying on

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132 AS 23.30.120(a).

133 *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999).

134 *See, e.g., Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 919 (Alaska 2016) (*Huit*).

135 *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

136 *Huit*, 372 P.3d at 919.

the Court's decision in *Hibdon,* the Board also determined Dr. Krull's opinion controlled the direction of medical treatment for the first two years following the injury.[137] However, the Board then determined that after May 10, 2012, the evidence from Drs. Krull, Holley, and Langen was that the left knee injury had resolved. Any one of these doctors' opinions constitutes substantial evidence to rebut the presumption. The Court has said that an expert's opinion that work is not the substantial cause of the need for medical treatment is sufficient to overcome the presumption.[138] The expert opinion must indicate an alternative explanation to work as the substantial cause of the need for medical treatment.

The substantial evidence to rebut the presumption here includes Dr. Krull's release of Ms. Butts to return to work full time with no permanent partial impairment. The Board looked to Dr. Krull's records which showed Ms. Butts returned to work in October 2011 with "very low" knee pain even after traveling and vacation.[139] Dr. Krull released Ms. Butts to return to work in February 2012, and on May 10, 2012, she reported to Dr. Krull she only had mild left-knee pain. He found her gait was normal, he released her to work without restriction, she was medically stable, and she had no permanent impairment. He also noted "severe arthritic changes" and suggested in the future she would need a knee replacement.[140] The Board found that, based on Dr. Krull's assessment in May 2012, along with the reports of Drs. Holley and Langen, Ms. Butts' work injury had resolved.

Further, the Board found that the reports of Drs. Holley and Langen rebutted any presumption that the need for ongoing medical care was work related. Both Drs. Holley and Langen ruled out the work injury as the substantial cause of future medical treatment for the left knee, because Ms. Butts had severe pre-existing arthritis which was age-

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137 *Philip Weidner & Assocs., Inc. v. Hibdon*, 989 P.2d 727 (Alaska 1999) (*Hibdon*).

138 *See, e.g., Safeway, Inc. v Mackey*, 965 P.2d 22 (Alaska 1998); *Stephens v. ITT/Felec Servs.,* 915 P.2d 620 (Alaska 1996); *Huit*, 372 P.3d 904 (Alaska 2016).

139 *Butts I* at 22.

140 *Id.*

related and affected by her obesity. They both opined the ongoing need for medical treatment was the pre-existing osteoarthritis, rather than the work injury which was a contusion which healed.

Ms. Butts then had to prove by a preponderance of the evidence that her work injury to her left knee was the substantial cause of the need for medical treatment after May 2012. While Dr. Krull strongly believes the work injury was the substantial cause of the need for bilateral knee replacements, the Board found the reports of Drs. Holley and Langen and the MRI of the left knee read by Dr. Jesse J. Kincaid in August 2011 to be the more compelling evidence and more credible than the opinion of Dr. Krull.[141] The Board found her pre-existing arthritis was the substantial cause of the knee replacement in 2016, not the work injury. The Board's finding is supported by substantial evidence in the record as a whole. Furthermore, it is the province of the Board to weigh conflicting expert opinions and the Commission should defer to the Board's resolution of any conflict.[142]

The Board next looked at the right knee and found that Ms. Butts raised the presumption that medical treatment for the right knee was substantially caused by the work injury to the left knee based on the opinion of Dr. Krull. Dr. Krull testified that the burden of the left leg injury caused the right leg to become symptomatic. SOA rebutted this presumption with the reports of Drs. Holley and Langen that the pre-existing osteoarthritis was the substantial cause of the need for medical treatment and the right knee replacement.

The Board then found that Ms. Butts was unable to prove her claim for medical benefits related to the right knee by a preponderance of the evidence. The Board relied on a variety of factors including the lack of any right knee symptoms, the mention of it only once in July 2011, and no further mention of right knee problems until August 2012. The Board found this lack of documentation of right knee problems consistent with the medical opinions of Drs. Holley and Langen. Both doctors testified by report and

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141 *Butts I* at 22; Exc. 172-173.

142 *Carlson v. Doyon Universal-Ogden Servs.*, 995 P.2d 224, 229 (Alaska 2000).

deposition that it was her pre-existing arthritis that was the substantial cause of the need for medical treatment.

The Court has held the Board has the power to weigh medical opinions and rely on the evidence in the record when weighing those reports.[143] Moreover, a Board finding is to be upheld if it is supported by substantial evidence in the record as a whole, even if there is conflicting evidence.[144] Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.[145] Moreover, a treating physician's opinion is not entitled to any greater weight than any other physician's testimony in a given case.[146] The Board's finding regarding the weight to be given to a medical report is conclusive.[147]

The Board's weighing of the various medical reports was proper and is supported by substantial evidence in the record as a whole. The Board properly applied the presumption of compensability in finding that the need for medical treatment for the right knee after May 2012 was not substantially caused by the 2011 work injury.

Similarly, the Board reviewed all the medical evidence related to the back complaints by Ms. Butts. Again, the Board properly weighed the various records and doctors' opinions before reaching its conclusion. Specifically, the Board noted the low back complaints from weightlifting in the months prior to the work injury in March 2011. The Board also cited to the revised statement by Dr. Humphreys, that Ms. Butts had pre-existing spondylolisthesis which might have been aggravated by the left knee injury. The Board found more persuasive the opinions of Drs. Holley and Langen that the long intervals between back treatments were more consistent with gradual degenerative progression of the spondylolisthesis than her left knee contusion. The Board, moreover, relied on the report of Dr. Krull that the back had resolved by May 2012 when he released

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143 *See, Cowen v. Wal-Mart*, 93 P.3d 420, 426 (Alaska 2004).

144 *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 952 (Alaska 2005).

145 *Bradbury v. Chugach Elec. Ass'n*, 71 P.3d 901, 905 (Alaska 2003).

146 *Apone v. Fred Meyer, Inc.*, 226 P.3d 1021, 1027-28 (Alaska 2010).

147 *Id.* at 1028.

her to return to work without restrictions. The Board found that any back treatment after May 2012 was the result of her preexisting non-work related and ongoing low back degeneration. Again, it is the Board's province to determine which medical records and opinions are the more persuasive. The Board chose to rely on the record as a whole and found the reports of Drs. Holley and Langen to be the more persuasive. Their finding is supported by the record.

The Board properly applied the presumption analysis to each body part for which Ms. Butts was seeking medical treatment. The Board found correctly that SOA had rebutted the presumption with substantial evidence and that Ms. Butts had to prove her claim by a preponderance of the evidence. The conclusion by the Board that Ms. Butts did not prove by a preponderance of the evidence that her work injury is the substantial cause of any ongoing need for back treatment after May 2012 is supported by the substantial evidence in the record.

b. Did the Board properly analyze the need for medical treatment according to AS 23.30.010 and AS 23.30.095?

Ms. Butts contends the Board erred in failing to order all treatment from the initial injury to be compensable, since the treatment was what the nature of the injury required pursuant to AS 23.30.095. Ms. Butts also avers the Board failed to analyze whether the initial injury combined with, aggravated, or exacerbated her pre-existing conditions, specifically the asymptomatic arthritis in both knees, necessitating her need for medical treatment. Ms. Butts asserts the Board's findings of fact were made without medical opinions in support, and the Board substituted its own opinion for expert evidence.

In 2005, the Legislature amended the Act and in AS 23.30.010 added a specific requirement that when determining the need for medical treatment the Board "must evaluate the relative contribution of different causes of . . . the need for medical treatment." After evaluating the different causes, the employment must be "the substantial cause of the . . . need for medical treatment" before the employer is required to pay for the treatment.[148] The language of AS 23.30.010 now requires the Board to

[148] AS 23.30.010(a).

look at the relative contribution of different causes even in situations, as here, where there might have been an aggravation or acceleration of a preexisting condition.

In *Traugott*, the Commission stated "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."[149] The Board must consider whether the work injury resolved or whether the aggravation or acceleration was sufficient to override any medical needs generated by the preexisting condition. Under the test for "the substantial cause" an aggravation or acceleration of a preexisting condition by a work injury does not automatically become the substantial cause for the need for medical treatment.

In *City of Seward v. Hansen*, the Commission, in looking at the language in AS 23.30.010, stated that "in relation to other causes" means that only one cause may be the substantial cause.[150] Although the Legislature declined to change the definition of injury to include language that injury did not include aggravation or acceleration, the Legislature did modify the test for benefits to require the work injury to be "the substantial cause" of the need for medical treatment. As noted in *Traugott*, the change from "a substantial factor" to "the substantial cause" is significant and does not drop out of the determination of the compensability of future medical treatment just because there is a preexisting condition. The issue remains for the Board to determine if the work injury or the preexisting condition is the substantial cause for ongoing medical treatment.

Here the Board considered whether Ms. Butts' work injury had resolved. Dr. Krull, her treating doctor, released her to return to work without restriction and with no permanent impairment in May 2012. Both the EME physician and the SIME physician opined the work injury to the left knee was a contusion which healed several weeks after the incident and certainly by May 2012 when Ms. Butts was released to return to work. Both the EME and the SIME physicians were of the opinion that the substantial cause for the bilateral knee replacements was the preexisting osteoarthritis, which in their opinion

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[149] *ARCTEC Alaska v. Traugott*, Alaska Workers' Comp. App. Comm'n Dec. No. 249 at 23 (June 6, 2018) (*Traugott*).

[150] Alaska Workers' Comp. App. Comm'n Dec. No. 146 at 10 (Jan. 21, 2011).

was neither aggravated nor accelerated by the work injury to the left knee. Their expertise, as noted above, is the kind of medical opinion upon which the Board may rely in reaching its conclusion.

The Board's conclusion that Ms. Butts' work injury resolved by May 2012 is supported by the proper consideration of whether her work injury aggravated or accelerated her preexisting osteoarthritis sufficiently to be considered to be the substantial cause of ongoing medical treatment. The Board's conclusion that the work injury resolved in May 2012 without sufficiently aggravating or accelerating the preexisting osteoarthritis is supported by the evidence in the record as a whole, and particularly by the medical opinions of Drs. Holley and Langen. The Board's finding is affirmed.

c. *Is AS 23.30.010 unconstitutional by requiring all conditions to be analyzed in determining if work is the substantial cause of the need for medical treatment?*

Ms. Butts contends the Board also failed to view her work injury in isolation and failed to consider her as an eggshell plaintiff. She asserts the Board erred by including a pre-existing cause in the comparison when it should have looked only at precipitating causes. She contends including pre-existing causes in the comparison of the need for medical treatment is unconstitutional and in violation of the equal protection clauses of the Alaska and United States Constitutions. She specifically contends the Board erred in its interpretation of AS 23.30.095 and AS 23.30.010(a) and its interpretation is unconstitutional.

The Commission, as an administrative agency, has limited jurisdiction which is defined by statute. The Commission "shall be the exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter . . ." unless an appeal is taken to the Alaska Supreme Court.[151] Pursuant to this directive, the

[151] AS 23.30.008(a).

Commission does not have jurisdiction to determine the constitutionality of a statute.[152] Therefore, the Commission does not address this issue.

d. Did the Board improperly fail to award attorney fees?

Ms. Butts finally asserts the Board incorrectly failed to award her attorney fees and costs on all compensation awarded. AS 23.30.145 governs the award of attorney fees for legal services rendered before the Board. Fees may be awarded "on the amount of compensation controverted and awarded" or if the claim has not been controverted but "services have been rendered in respect to the claim . . . ."[153] Fees may be awarded when "an employer fails to file timely notice of controversy or fails to pay compensation . . ." and an attorney has been successful in the prosecution of the claim.[154]

The Board, in *Butts III*, expressly found that Ms. Butts' attorney had not achieved any additional benefits for Ms. Butts from his services. She sought TTD benefits from November 5, 2013, through January 24, 2017, but the Board only awarded her time loss through May 10, 2012, finding that the work injury had resolved by that date.[155] Ms. Butts also sought PPI benefits, but the Board found no valid PPI rating for the left knee as it was on May 10, 2012, had ever been performed. Ms. Butts did not prevail on her claim for PPI benefits.

In *Butts I*, the Board awarded attorney fees on what it presumed were unpaid medical bills. However, based on the additional evidence submitted with SOA's petition for reconsideration, the Board, in *Butts III*, found all medical bills through May 10, 2012, had been paid prior to any attorney involvement and reversed the award. The Entry of Appearance by Ms. Butts' attorney was dated September 18, 2015.[156] SOA controverted all benefits in its October 23, 2015, controversion. The benefits awarded to Ms. Butts,

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152 *Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

153 AS 23.30.145(a).

154 AS 23.30.145(b).

155 *Butts I* at 25.

156 Appellee's Exc. 516-17.

medical and time loss through May 2012, were paid by SOA long before her attorney entered his appearance and long before SOA's 2015 controversion. Her attorney did not achieve any additional benefits for Ms. Butts.

Attorney fees are to be awarded only on benefits controverted and awarded.[157] If no benefits have been awarded, then no fees are owed. Further, an order by the Board regarding awards of attorney fees is reviewed on appeal for abuse of discretion.[158] Abuse of discretion means the award must be "manifestly unreasonable."[159] Here, the Board found no fees were owed to Ms. Butts because she did not prevail on her claim for additional benefits. Her time loss and medical costs that the Board found compensable were paid by SOA prior to any involvement by her attorney. Therefore, the award of no attorney fees was reasonable pursuant to the law and supported by substantial evidence in the record as a whole.

5. Conclusion.

For the foregoing reasons, the Board's decision is AFFIRMED.

Date: __*12 October 2018*__ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, 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

157 AS 23.30.145(a).

158 *Wien Air Alaska v. Arant*, 592 P.2d 352, 366 (Alaska 1979).

159 *Bailey v. Litwin Corp.*, 780 P. 2d 1007, 1011 (Alaska 1989).

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 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. 254, issued in the matter of *Sallyanne M. Butts, nee DeCastro vs. State of Alaska*, AWCAC Appeal No. 17-023, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 12, 2018.

Date: *October 16, 2018*

Signed

K. Morrison, Appeals Commission Clerk