Case: *H & H Contractors, Inc. and Alaska Insurance Guaranty Association vs. Larry W. Onigkeit*, Alaska Workers' Comp. App. Comm'n Dec. No. 135 (May 4, 2010)

Facts: Larry Onigkeit (Onigkeit) injured his back when his truck bottomed out in a pit while working for H & H Contractors, Inc. (H & H) in 1999. He subsequently injured his right middle finger when he slipped while loading a truck later in 1999. H & H accepted liability for both injuries; paid temporary total disability (TTD) benefits from October 29, 1999, to April 24, 2000; and paid permanent partial impairment (PPI) benefits of $6,750 on May 3, 2000.

Unknown to H & H at the time it paid these benefits was that Onigkeit had injured his back in 1990 while working for another employer, Four Star Terminals (Four Star). Four Star paid benefits, including PPI benefits for those injuries, based on an impairment rating of 17 percent of the whole man. After learning about the 1990 Four Star injury, H & H sought repayment of TTD, PPI, and medical benefits under AS 23.30.250(b).

The board denied the claim for reimbursement, concluding that it was unable to find that the employee knowingly made false or misleading statements or representations before or during the time he was receiving benefits because it had no evidence that the he was asked if he had injured his back at work before. However, Dr. Williamson-Kirkland explained that his standard practice is to review medical history and prior injuries with a patient when he begins treatment and again when he considers permanent impairment. Dr. Williamson-Kirkland testified that Onigkeit "didn't tell us when we asked him if he had any previous medical problems with his back. He just told us he didn't, so he lied at that point . . . ." Dr. Williamson-Kirkland also testified that, "If I had known about the prior rating, then Mr. Onigkeit would have no permanent impairment rating." The board excluded Onigkeit's 2004 deposition as irrelevant because any misrepresentations made in that deposition could not have been relied on to make payments in 1999-2000. H & H appeals.

Applicable law: AS 23.30.250(b) provides in part "If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter . . . by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained."

AS 23.30.190(c) provides in part: "The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury."

In *Municipality of Anchorage v. Devon*, 124 P.3d 424, 429 (Alaska 2005), the Alaska Supreme Court (supreme court) stated the test for an employer to prevail on a fraud claim under subsection .250(b) as:

> [t]he employer must show that: (1) the employee made statements or representations; (2) the statements were false or misleading; (3) the

> statements were made knowingly; and (4) the statements resulted in the employee obtaining benefits.

In *Shehata v. Salvation Army,* 225 P.3d 1106, 1115 (Alaska 2010) the supreme court required the employer to prove "a causal link between a false statement or representation and benefits obtained by the employee." In addition, the Court stated:

> the legislature's failure to include omissions or nondisclosure in the statutory language suggests that ordinarily an omission or nondisclosure could not serve as a basis for a reimbursement order under subsection .250(b). Nonetheless, we recognize that in the common law, silence can be a misrepresentation when a person has a duty to speak. We have also held that silence in the face of a statutory duty to disclose can "amount[] to the concealment of a material fact" for purposes of estoppel. *Id.* at 1116-17.

The court concluded that Shehata did not have a statutory duty to disclose the information that he was working while receiving TTD compensation under the Act.

Issues: Did the board err in excluding the 2004 deposition? Did the board correctly analyze and apply the elements of .250(b)?

Holding/analysis: The board improperly excluded the deposition testimony from consideration on relevance grounds. The 2004 deposition was relevant to Onigkeit's knowledge or consciousness of the significance of concealing the 1990 back injury, as well as his version of the injury. But the commission agreed with the board that false statements in the 2004 deposition could not have caused the employer to pay PPI benefits in 2000. Dec. No. 135 at 13 n.53.

The board erred in finding no evidence that Onigkeit was asked about prior back injuries. "The proper question before the board was not whether Onigkeit misrepresented his back condition, but whether he misrepresented the existence of a workers' compensation injury that resulted in permanent impairment." *Id.* at 14. Dr. Williamson-Kirkland's testimony provided evidence on which "the board might have relied to find that Onigkeit knowingly concealed his 1990 back injury and resulting impairment rating from Dr. Williamson-Kirkland during the rating evaluation." *Id.* The commission also observed that the adjuster had no duty to further investigate Onigkeit's statements that he had only occasional back pain before the 1999 injury because, unlike *Shehata*, there was no evidence that the adjuster disbelieved his statements. The adjuster "should be able to rely on the worker's representation without needing to hire an investigator or expend resources to verify the worker's statement." *Id.* at 16.

If Onigkeit was not asked for information, the board needed to decide whether he had a duty to disclose the prior PPI rating. The commission concluded that AS 23.30.190 did not impose an affirmative duty on an employee to disclose a prior impairment rating without being asked whether he had a prior disabling work injury. "However, if an employee is informed how PPI is calculated, knows he did not reveal the prior PPI

rating to the rating physician, knows or should know that the rating that resulted in payment of PPI compensation is incorrect because no reduction for a prior PPI rating was made, and still remains silent, the employee has concealed the kind of a material fact to which the Supreme Court referred in *Shehata." Id.* at 17.