

# Alaska Workers' Compensation Appeals Commission

Edward Witbeck,

Appellant,

vs.

Superstructures, Inc., and Alaska  
National Insurance Co.,

Appellees.

Final Decision on Reconsideration

Decision No. 020 October 5, 2006

AWCAC Appeal No. 06-001

AWCB No. 200119123

Final Decision on Reconsideration of Alaska Workers' Compensation Appeals Commission Decision No. 014 on appeal of Alaska Workers' Compensation Board Order No. 05-0348, Anchorage Panel, by Rosemary Foster, Chairman, Andrew Piekarski, Board Member for Labor, and Linda Hutchings, Board Member for Management.

Appearances: Edward Witbeck, appellant, *pro se*; Richard Wagg, Russell, Tesche, Wagg, Cooper and Gabbert, for appellees, Superstructures, Inc., and Alaska National Insurance Co.

Commissioners: John Giuchici, Marc Stemp, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

Edward Witbeck seeks reconsideration of the commission's Decision No. 014 affirming the board's denial of his appeal from the reemployment benefits administrator's decision finding he was not cooperating with vocational rehabilitation efforts. Witbeck also asserts for the first time on reconsideration that the board hearing officer was biased and that one of the board members had a conflict of interest requiring recusal. For the reasons stated below, the commission denies Witbeck's motion for reconsideration, but we modify our order of remand to provide additional guidance to the board as a result of our review of Witbeck's motion.

*Introduction.*

Witbeck appealed from the Alaska Workers' Compensation Board's December 28, 2005 Decision No. 05-0348. On appeal, the commission affirmed the board's decision denying Witbeck's claim for a compensation rate adjustment, as a subsequent claim barred by *res judicata* or, as the board considered it, a late request for reconsideration or rehearing for modification of a 2003 decision on his compensation rate. The commission affirmed the board's decision (1) upholding the administrator's decision that Witbeck was not cooperative and (2) terminating reemployment benefits. The commission also vacated the board's decision that the consultation with Dr. Bransford was not reasonable and necessary medical care because the commission concluded the board lacked substantial evidence, in light of the whole record, to support the board's findings. The commission remanded the claim to the board for further proceedings on the issue of the medical care provided by Dr. Bradford.

Witbeck does not challenge the remand to the board. Witbeck requested reconsideration of the two issues decided against him by the board and affirmed by the commission. The commission ordered the motion for reconsideration to be heard by oral argument on September 5, 2006. Appeals Commissioners Giuchici and Stemp traveled to Anchorage to hear the argument; Witbeck appeared by telephone<sup>1</sup> from his home on the Kenai Peninsula and Superstructure's counsel appeared in person.

*Arguments presented on reconsideration.*

Witbeck again argued that he was cooperative with reemployment services providers and that the providers were at fault in any failure to attend meetings or to communicate. Witbeck also now claims that the board's decision to deny him a compensation rate adjustment and affirming the reemployment benefits administrator

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<sup>1</sup> Shortly before the scheduled hearing, Witbeck announced he would not be able to travel to Anchorage for the hearing. On learning that Commissioner Giuchici was traveling from Fairbanks, and Commissioner Stemp from Tazlina, for the hearing, Witbeck withdrew his request to reschedule the hearing until sometime after he returned from Seattle, and agreed to proceed telephonically. The commission notes that the force of Witbeck's argument was not diminished by telephonic participation.

was the product of bias, and that therefore he did not receive a fair hearing. His claim of bias is based on an allegation that the hearing officer, R. Foster, had family connections to a construction firm, Foster Construction, whose employee or employees had filed workers' compensation claims against it. He also claims that board Member for Management, L. Hutchings, is connected to a firm which has workers' compensation claims against it. He argued he had been unable to obtain evidence of the basis for his claim of bias until the time of the motion for reconsideration.

Superstructures argued that for the most part Witbeck was simply rearguing the points he made in his appeal. Superstructures argued that the claim of bias should have been made at the hearing, or in the original appeal, and cannot be raised for the first time in the motion for reconsideration. Superstructures also argued that Witbeck's allegations were not sufficient to be the basis for a claim of bias.

*The commission's authority to reconsider decisions.*

The commission's power to reconsider its decisions is based on AS 23.30.128(f), which provides in pertinent part:

Reconsideration may be granted if, in reaching the decision, the commission (1) overlooked, misapplied, or failed to consider a statute, regulation, court or administrative decision, or legal principle directly controlling; (2) overlooked or misconceived a material fact; (3) misconceived a material question in the case; or (4) applied law in the ruling that has subsequently changed.

These are the only grounds for the commission to exercise reconsideration of a commission decision. The provisions of AS 44.62.540, granting administrative agencies power of reconsideration, do not apply to the commission.<sup>2</sup> Our first question must be whether the request for reconsideration is within the scope of the authority granted to us by the legislature in AS 23.30.128(f).

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<sup>2</sup> AS 23.30.128(d): "The administrative adjudication procedures of AS 44.62 (Administrative Procedure Act) do not apply to the proceedings of the commission." By contrast, 08 AAC 45.150(a) allows a party to request a rehearing and modification of a board order by the board and "The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130."

*Witbeck's request for reconsideration of the finding of non-cooperation and termination of reemployment benefits is outside the scope of the commission's authority.*

Witbeck forcefully argued his position that the board wrongly decided to affirm the administrator's decision that he was not cooperating with the rehabilitation providers. From his point of view, the providers were rigid, dismissive of him, and over-reacted to his assertion of his rights. In a generous light, Witbeck's argument may be regarded as an argument that the commission (and the board) misconceived material facts: that Witbeck's first provider made him leave her office and called the police; that Witbeck's second provider refused to acknowledge him when he came late to a meeting; and, that Witbeck's third provider refused to meet him under conditions acceptable to him. To Witbeck, these events are evidence of unwillingness of the rehabilitation providers to work with him – not his unwillingness to cooperate with them.

Witbeck asks us to do what the statutes do not permit us to do. When reviewing an appeal from the board's decision, the commission does not have the power to make new findings of fact based on the evidence or to consider evidence which was not presented to the board.<sup>3</sup> The commission determines whether or not the board had sufficient evidence to support its findings.<sup>4</sup> To uphold the board's decision we need not draw the same inferences from the facts as the board did; it is enough to uphold the board if there is evidence in the record that supports the inference that the board drew.

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<sup>3</sup> AS 23.30.128(a) states in part:

The matter on appeal shall be decided on the record made before the board, a transcript or recording of the proceedings before the board, and oral argument and written briefs allowed by the commission. Except as provided in (c) of this section, new or additional evidence may not be received with respect to the appeal.

<sup>4</sup> AS 23.30.128(b) states in part: "The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."

Thus, when the evidence is capable of supporting *different* inferences, we may not choose a different inference or deduction than the board chose and change the result because we find another more compelling. There was evidence in the record that supported the inferences that the board drew. Witbeck's arrival at different conclusions from the same evidence is not sufficient reason to reverse the board where the statute requires that we uphold the board.

When the board makes a specific finding that a witness that testified before it is not credible, the board's credibility finding is conclusive and subject to the same standard of review as a jury's finding.<sup>5</sup> In this case, the board specifically found that Witbeck was not a believable witness.<sup>6</sup> We are not firmly convinced that the board's assessment of Witbeck's credibility was clearly erroneous. The board's finding that Witbeck is not credible is binding upon us as a matter of law.

*Witbeck's request for reconsideration of denial of a compensation rate is an attempt to reargue the case made on appeal.*

On the subject of his compensation rate adjustment, Witbeck asserted he was an ironworker for many years, and that it was unfair that his temporary total disability compensation rate did not reflect the wages he earned as an ironworker. Witbeck's earning history was fully reviewed by the board in *Edward Witbeck v. Superstructures, Inc.*, AWCB Decision No. 03-0173 (July 24, 2003). Witbeck unsuccessfully made the same argument at hearing then, and again on reconsideration in *Witbeck v. Superstructures, Inc.*, AWCB Decision No. 03-0202 (August 26, 2003). He failed to

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<sup>5</sup> AS 23.30.122:

The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's findings in a civil action.

<sup>6</sup> *Edward Witbeck v. Superstructures, Inc.*, AWCB Decision No. 05-0348 at 32 (December 28, 2005).

appeal that decision. The board found that reassertion of the same argument in 2005 was too late.<sup>7</sup> We agreed. Witbeck raised no new argument on reconsideration before this commission why he should be allowed to raise his claim again. We deny the request for reconsideration of the compensation rate issue as an attempt by Witbeck to reargue his case rather than to argue a point of reconsideration permitted under AS 23.30.128(f)(1) – (4).

*The commission may not consider new evidence.*

Witbeck argued that the hearing officer was biased in favor of the employer because she was herself connected to a construction firm through her family, and that the board member for management was connected to a firm that had workers' compensation claims filed against it. He asserted that these connections created a conflict of interest.<sup>8</sup> He stated he had not received the evidence of these connections until after the board hearing. As we said above, this commission may not review evidence that has not been considered by the board in deciding an appeal. Therefore, the material submitted by Witbeck is not considered by the commission, but it may be considered by the board if Witbeck raises the same argument before the board on remand.

The commission may not hear on reconsideration grounds for appeal that should have been raised in the appeal. Even if Witbeck had raised this issue on appeal, we would find his allegations insufficient. The commission may hear an appeal based on allegations that a party was denied a fair hearing due to a biased or partial board hearing panel. However, a claim of bias or partiality is not made out by showing nothing more than that workers' compensation claims have been filed against the company with which the member for management is connected, anymore than a showing that members of the same union with which the member for labor is

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<sup>7</sup> *Edward Witbeck v. Superstructures, Inc.*, AWCB Decision No. 05-0348 at 29-30 (December 28, 2005).

<sup>8</sup> We note that Witbeck does not assert that any board member or hearing officer had any connection with Superstructures, Inc., or its insurer.

connected have filed claims for workers' compensation demonstrates that the member for labor is biased in Witbeck's favor. Witbeck has not alleged that any member of the panel was connected to his employer or another party, had any financial or personal interest in his case, was unable to be fair and impartial toward the parties, or otherwise had any connection or interest that would constitute a violation of AS 39.52 or 2 AAC 64.030.

*On reconsideration the commission finds there is insufficient record that Witbeck was fully advised and instructed how to pursue a disputed claim.*

We turn now to the issue this commission noted on reconsideration. In the course of his argument to the board and to the reemployment benefits administrator, Witbeck asserted that he had been told by a vocational rehabilitation provider that he could not be rehabilitated due to his work-related disability and illiteracy. He asserted that, although he thought he could not be retrained, he was willing to cooperate with the providers. On his June 6, 2005 claim form, he checked the box for a claim of permanent total disability compensation.<sup>9</sup> The employer filed a controversion of "all benefits" dated June 28, 2005.<sup>10</sup> In the September 13, 2005 pre-hearing summary prepared by Ms. Cohen, it is stated "Following a lengthy discussion, it was determined that the issues [for hearing] are as set forth above."<sup>11</sup> The issues were identified as:

Employee's workers' compensation claim:

- compensation rate adjustment to be based on wage at time of injury
- Medical costs including transportation costs, hotel and taxi fare related to treatment in Seattle.

Reemployment benefits – whether cooperative with the reemployment process.<sup>12</sup>

There is no discussion in the pre-hearing summary of the remaining claims on Witbeck's June 6, 2005 workers' compensation claim. The pre-hearing summary does

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<sup>9</sup> R. 000099.

<sup>10</sup> R. 000049.

<sup>11</sup> R. 000453.

<sup>12</sup> R. 000453.

not indicate whether the employee was advised by the pre-hearing officer to file a request for hearing on his remaining claims, including his claim for permanent total disability compensation, within two years of the date of the controversion of that claim.<sup>13</sup> Witbeck filed a request for hearing on the “6-5-05” claim on November 3, 2005.<sup>14</sup>

The board acted in compliance with 8 AAC 45.065(c) by limiting the hearing and its decision to the issues identified on the pre-hearing summary.<sup>15</sup> However, Witbeck articulated to the administrator and the board an alternate position that he believed he could not be rehabilitated from his injury given his age, disability, and education. Although he did not phrase it as such, this assertion made out the bare elements of an allegation that Witbeck was permanently and totally disabled as a result of the injury on September 28, 2001.<sup>16</sup> Witbeck claimed entitlement to permanent total disability compensation on his 2005 claim form, and the employer controverted all benefits after the claim was filed. It was a disputed claim. The scope of discretion committed to the

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<sup>13</sup> AS 23.30.110(c).

<sup>14</sup> *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 913 (Alaska 1996).

<sup>15</sup> 8 AAC 45.065(c) states in part: “The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.” Thus, although Witbeck raised the allegations that would support a claim for permanent total disability compensation if proved at the hearing, the board could have instructed Witbeck that the claim was not before the board at the time of the hearing.

<sup>16</sup> *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996); *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264, 266 (Alaska 1974) (“The concept of [total] disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability or, more precisely, a decrease in earning capacity due to a work-connected injury or illness. Factors to be considered in making this finding include not only the extent of the injury, but also age, education, employment available in the area for persons with the capabilities in question, and intentions as to employment in the future.”). Witbeck argued that he was not educated and that he could not read well and so computer training would be useless to him.

board's designee under 8 AAC 45.065(a)(1) of "identifying and simplifying the issues" does not extend to disposing of disputed claims without the knowledge of the parties. There is no notice in the pre-hearing summary that Witbeck withdrew his claim for permanent total disability compensation, that the parties agreed to it being heard at a later time, or that Witbeck was instructed how to bring his claim for other benefits, including permanent total disability, to hearing.

The board did not consider or decide a claim for permanent total disability compensation in the hearing on November 14, 2005, and, given the terms of the pre-hearing summary, the board was not required to do so. We also make no comment on whether or not Witbeck has preserved his claim or whether he has a compensable claim for permanent total disability compensation. Our only concern is whether Witbeck had been informed of "how to pursue that right under the law"<sup>17</sup> to bring his disputed claim for permanent total disability compensation to hearing, having placed that issue before the board.<sup>18</sup> After careful review of the record, including the pre-hearing summary and the board recording, we cannot say that Witbeck was so instructed.

The record shows that Witbeck is sometimes argumentative, disagreeable, and distrustful of government authority. There is no doubt that his focus was on recovering his prior high compensation rate and continuing his vocational reemployment benefits. However, the law requires that all persons be fully advised of their rights and instructed on how to pursue their rights under the workers' compensation act and that the board hear and decide material disputed issues in respect to a claim presented to the board. Therefore, on reconsideration we modify our instruction on remand to include this additional direction.

On remand, the board should include instruction to Witbeck regarding the status of his claim and how to pursue his remaining claim for permanent total disability

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<sup>17</sup> *Dwight v. Humana Hosp. Alaska*, 876 P. 2d 1114, 1120 (Alaska 1994), citing *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963).

<sup>18</sup> *Bolieu v. Our Lady of Compassion Care Center*, 983 P.2d 1270, 1275 (Alaska 1999).

compensation. This direction does not imply that Witbeck has, or has not, preserved his claim or that he has, or has not, a valid claim for compensation.

Date: October 9, 2006

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



signed  
John Giuchici, Appeals Commissioner

signed  
Marc Stemp, Appeals Commissioner

signed  
Kristin Knudsen, Chair

#### APPEAL PROCEDURES

This is a final decision on a request for reconsideration of a final decision by the Alaska Workers' Compensation Appeals Commission. It becomes effective when filed in the office of the commission unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal this decision (AWCAC Decision No. 020) and the decision that was the subject of the motion for reconsideration (AWCAC Decision No. 014) must be instituted in the Alaska Supreme Court within 30 days of the filing of this decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

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

#### CERTIFICATION

I certify that the foregoing is a full, true and correct copy of the Final Decision and Order on Reconsideration in the matter of Edward Witbeck v. Superstructures, Inc., and Alaska Nat'l Ins. Co., Appeal No. 06-001; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 5<sup>th</sup> day of October, 2006.

signed  
C.J. Paramore, Appeals Commission Clerk

I certify that a copy of this Final Decision and Order on Reconsideration in AWCAC Appeal No.06-001 was mailed on 10/5/06 to Witbeck & Wagg at their addresses of record and faxed to Wagg, AWCB-Anc & Director WCD.

signed 10/5/06  
L. Beard, Deputy Clerk Date