Alaska Workers' Compensation Appeals Commission

Edward Witbeck,
Appellant,

vs.

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

Final Decision
Decision No. 066 January 23, 2008

AWCAC Appeal No. 07-005
AWCB Decision No: 07-0038
AWCB Case No. 200119123

Appeal from Alaska Workers' Compensation Board Decision No. 07-0038, issued on March 1, 2007, by the southcentral panel at Anchorage, Alaska, Rosemary Foster, Designated Chair, Linda F. Hutchings, Member for Industry.[1]

Appearances: Edward Witbeck, *pro se,* appellant. Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, for appellees Superstructures, Inc., and Alaska National Insurance Company.

This decision has been edited to conform to technical standards for publication.

Commissioners: John Giuchici, Stephen Hagedorn, and Kristin Knudsen.

By: Stephen Hagedorn, Appeals Commissioner.

This appeal concerns the board's finding that Edward Witbeck is not entitled to reimbursement for, or payment of, medical costs related to an evaluation at the University of Washington orthopedics clinic in Seattle by Dr. Bransford on November 14, 2005. Witbeck argues that the board's decision is not supported by substantial evidence. Witbeck also alleged that Hearing Officer Foster and Board Member Hutchings had a "conflict of interest;" we therefore address the makeup of the board panel that made this decision.

[1] Section 23.30.005(f) states: "Two members of a panel constitute a quorum for hearing claims and the action taken by a quorum of a panel is considered the action of the full board."

Based on the board's record and the arguments developed at hearing of this appeal, we AFFIRM the board's decision to deny reimbursement for, or payment of, medical costs related to the evaluation by Dr. Bransford.

Introduction.

On March 1, 2007, the board issued a Decision and Order on Remand[2] dealing with specific issues identified by the commission in Final Decision and Order No. 014 dated July 13, 2006.[3] The record of those proceedings and prior decisions in this matter fully document the history of this claim. The following recitation of facts is limited to those necessary to decide the issues before us. When reciting the factual background of this case, the commission is mindful that it does not engage in fact-finding when reviewing the case on appeal. Instead, the commission reviews the board's findings of fact.

Factual background and proceedings before the board prior to remand.

The board's March 1, 2007, decision on remand reviews the facts of this case in detail over 26 pages of a 35-page decision. Further details of Witbeck's history are related in the board's July 2003 and December 2005 decisions[4] and our decisions of July 13, 2006, and October 5, 2006.[5] Our remand was limited to two issues related to Witbeck's claim for payment of medical benefits (including travel to Seattle) for an

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[2] *Edward Witbeck v. Superstructures, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 07-0038 (March 1, 2007) (*Witbeck VI*).

[3] *Witbeck v. Superstructures, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 014 (July 13, 2006) (*Witbeck IV*).

[4] *Edward Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 03-0173 (July 24, 2003) (*Witbeck I*), *recons. denied*, *Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 03-0202, (August 26, 2003) (*Witbeck II*), and *Edward Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 05-0348 (December 28, 2005) (*Witbeck III*)..

[5] *Witbeck IV, modified on recons.*, *Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 020 (Oct. 20, 2006) (*Witbeck V*).

examination by Dr. Bransford, so this summary is limited to the facts related to those issues.[6]

Witbeck first sought care for his lower back after his injury from Lavern Davidhizar, D.O., in Soldotna. Through Dr. Davidhizar's referrals, he was also seen by Dr. J. Paul Dittrich, M.D., for an orthopedic consultation on April 19, 2002; Davis Peterson, M.D., for another opinion about the possibility of back surgery on June 7, 2002; and, for a "second opinion"[7] by Dr. Edward Voke on September 23, 2002. Neither Dr. Dittrich, Dr. Voke nor Dr. Peterson recommended surgery. Witbeck returned to Dr. Davidhizar for treatment.

On February 13, 2003, Dr. Davis Peterson again stated that Witbeck did not have an "extruded nucleus pulposus." When Witbeck saw Dr. Peterson again on May 29, 2003, Dr. Peterson again stated Witbeck was not a good surgical candidate, but recommended another MRI and EMG studies. On June 11, 2003, the second MRI scan was done. Compared to the 2002 MRI scan, on the 2003 MRI scan the appearance and process of degenerative change and disc protrusion appeared more prominent. After the 2003 MRI scan, Witbeck went to J. Michael James, M.D., for an EMG study, but Witbeck refused to proceed with the EMG study.

When Dr. Peterson saw Witbeck in August 2003, he told Witbeck that a multilevel fusion, that Witbeck was "very insistent" in demanding, would not improve his level of function or his pain level.[8] Dr. Peterson recommended he seek another opinion and provided him a referral to James Eule, M.D., another Anchorage orthopedic

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[6] We directed the board to make two decisions: first, whether Witbeck had changed his attending physician from Dr. Davidhizer; second, if the board found there was a referral to Dr. Bransford by Dr. Davidhizar or by a new attending physician, whether an examination by Dr. Bransford was "reasonable alternative among indicated medical treatment options." *Witbeck IV,* Dec. No. 014 at 28. If there was no referral by the attending physician, the board was not required to examine whether the examination by Dr. Bransford was a reasonable alternative.

[7] The record contains a referral from Dr. Davidhizar to Dr. Voke for a second opinion. R. 000273.

[8] R. 000629.

surgeon.[9] In October 2003, Dr. Peterson advised Witbeck that neither he, nor members of his clinic, would treat Witbeck in the future.[10]

Witbeck saw Todd Stephen Jarosz, M.D., at the University of Washington in Seattle on April 6, 2004. How he got the appointment was the subject of dispute.[11] Dr. Jarosz recommended additional testing: an EMG, a CT scan with myelogram, a MRI, and possibly an MMPI evaluation with Dr. Michael Boldwood at the University of Washington Medical Center Pain Clinic, before any surgical intervention. There is no record of this testing being done.

Witbeck returned to Dr. Davidhizar December 1, 2004.[12] More than a year after his trip to see Dr. Jarosz, Witbeck returned to Seattle, where he saw Dheera Ananthakrishnan, M.D., at the University of Washington on June 29, 2005.[13] Dr. Ananthakrishnan recommended against surgery and recommended that an MMPI evaluation be done to assess Witbeck's chances of success with future surgery.[14] At Witbeck's request, she gave him a referral to see one of her partners, Dr. Bransford.[15] The cost of his evaluation of Witbeck on November 14, 2005, and travel to Seattle, was the subject of Witbeck's claim, as amended in a pre-hearing conference.[16]

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[9] R. 000359.

[10] R. 000361.

[11] Dr. Jarosz's report was sent to Dr. Paul Peterson, whose practice is located in a different clinic than Dr. Davis Peterson. The record contains no written referral from Dr. Paul Peterson, or a Physician's report from Dr. Paul Peterson. The record contains no written referral from Dr. Davis Peterson or other Alaskan physician.

[12] R. 000385. Dr. Davidhizar commented that he had not seen Witbeck "for a long time."

[13] Dr. Ananthakrishnan's report indicates she was following Witbeck "as he [Dr. Jarosz] has left the University." R. 000397.

[14] R. 000398. There is no evidence Witbeck ever obtained the MMPI.

[15] *Id.*

[16] R. 000099, R. 000453. The 2005 claim filed by Witbeck contains no reference to his trip to Seattle to see Dr. Bransford, and the controversion, R. 000049, and answer, R.000103-05, admit liability for medical benefits. The issue of the trip to Seattle to see Dr. Bransford was listed at the pre-hearing conference on September 7,

The board's first decision on the claim for Dr. Bransford's evaluation.

The board heard Witbeck's 2005 claim on November 16, 2005. In its first decision on Witbeck's claim, the board found that Dr. Bransford's evaluation was not "reasonable and necessary medical care under AS 23.30.095."[17] Therefore, the evaluation and associated transportation expenses were not compensable.[18] The board found that Witbeck remained convinced surgery would help his back condition, and that he sought out the referral to Dr. Bransford.[19] The board found Witbeck believes he finally found a doctor who supports his request for back surgery.[20] Dr. Bransford agreed with the other consultants that Witbeck would not benefit from surgery.[21] The board found the employee had exceeded the number of physician changes allowed, and that because the board "disapproved of 'doctor shopping,'" the board denied payment for both the transportation expenses and the evaluation.[22] Witbeck appealed to the commission.

2005, in the issues for hearing: "compensation rate adjustment to be based on wage at time of injury, medical costs, including transportation . . . related to treatment in Seattle, Reemployment benefits – whether cooperative with the reemployment process." R. 000453. On October 14, 2005, Witbeck filed a Request for Cross Examination form with this note: 2. Medical Benefits Denied per 8-22-05 11-14-05 Dr. atts. I need [air Fare cab fare, Room Fare, Food Fare. Cash will work] I was referred to Dr. Bransford." R. 000460. With it he filed a copy of his "patient appointment reminder." R. 000461. Witbeck again wrote on a Request for Cross Examination form filed in November 5, 2004 that "I Ed Witbeck was referred on 8-22-05 and 11-14.05 to Dr. Rick Bransford. Medical Benefits Denied? Air Fare Cab Fare Room Fare, Food Fare Denied?" R. 000113.

17 *Witbeck III,* at 35.

18 *Id.*

19 *Witbeck III,* at 37.

20 *Id*. Witbeck testified that Dr. Bransford told him "down the road" "they" would operate on him.

21 *Id.*

22 *Id.*

Our first decision and our remand to the board.

In our first decision, we reviewed the record before the board closely. We concluded that there was substantial evidence to support the board's finding that Dr. Davidhizar was Witbeck's attending physician. However, we stated:

> There is no record that Witbeck gave written notice of a change of attending physician as required by 8 AAC 45.082, but the board failed to make a finding whether or not Witbeck changed attending physicians from Dr. Davidhizar or even attempted a change, or that the employer consented to a change.[23]

We concluded the board had failed to make findings of fact regarding a change of attending physician from Dr. Davidhizar, so it also failed to explain how it reached the conclusion that Witbeck exceeded the allowable changes of attending physician. We also noted the board failed to make an explicit finding of Witbeck's credibility, or lack of credibility, in his testimony to the board regarding obtaining referrals to see Dr. Jarosz, Dr. Ananthakrishnan or Dr. Bransford.

We provided the questions to be decided by the board, after the board decided whether Witbeck changed his treating physician. If the board decided that

> Witbeck did *not* change his attending physician, the question is whether the visits to Drs. Jarosze, Ananthakrishnan, and Bransford were referrals to a specialist by the attending physician, Dr. Davidhizar. If they were valid referrals, the board may consider whether the referrals were a "reasonable alternative" among "indicated medical treatment" options.

If, on the other hand, the board decided that Witbeck *did* change his attending physician, then the board had to decide

> whether the employer is required to pay for treatment by subsequent specialist physicians, in the absence of a referral by the new attending physician or, if there was a referral, whether the referral will be authorized by the board as a reasonable alternative among indicated medical treatment options.

We had pointed out that Drs. Peterson, Dittrich and Voke expressed no opinion on whether an evaluation by Dr. Bransford was reasonable and necessary medical treatment for Witbeck's injury, so the board's reliance on their reports to support a

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[23] *Witbeck IV,* Dec. No. 014 at 28.

finding that an evaluation by Dr. Bransford was not reasonable medical treatment was error. We left it to the board's discretion to decide whether or not it would make additional findings based on the record already developed or take additional evidence on the questions we identified.

The board's second decision on the claim for Dr. Bransford's evaluation.

The board's decision on remand was made without taking additional evidence.[24] The board again reviewed the evidence, and, before making the decisions we asked, commented that it was "uncertain how the Appeals Commission intended us to revisit the issue on remand."[25] Instead of beginning by deciding whether Witbeck changed attending physicians, the board began by deciding whether the treatment by Dr. Bransford was reasonable. It concluded that, because no other physician had recommended surgery (and some discouraged it), and Dr. Bransford also did not recommend surgery, "the employee failed to establish his claim that the Bransford evaluation and related medical transportation expenses constitute reasonable and necessary medical care under AS 23.30.095."[26]

The board then decided whether the employee had changed physicians. It said, in pertinent part,

> The Board finds the employee never sought out another treating physician besides Dr. Davidhizer and any referral to see Dr. Bransford should have come from Dr. Davidhizer who had frequently made referrals for the employee in previous years. The Board finds the employee went to Dr. Jarous at University of Washington without a proper referral from a treating physician. The Board finds that after Dr. Jarous left the University of Washington, Dr. Ananthakrishnan took over his cases. The Board finds the employee saw Dr. Ananthakrishnan who referred the employee to Dr. Bransford. The Board finds the employee's attendance with Dr. Ananthakrishnan was not upon a permissible referral pursuant to AS 23.30.095(a), but rather it

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[24] A prehearing conference was held December 14, 2006 to identify the issues for hearing and advise Witbeck regarding his rights.

[25] *Witbeck VI* at 27.

[26] *Witbeck VI* at 30.

> was a change of physician. The Board finds that the employee did not provide notice to the employer or the Board, as required pursuant to 8 AAC 45.082(c)(4)(D). The Board finds by a preponderance of the evidence that the employee never sought a referral from his treating physician, Dr. Davidhizer, for the Bransford evaluation. Instead, he obtained a referral from Dr. Anathakrishnan to Dr. Bransford but Dr. Anathakrishnan was not his treating physician. The Board further finds that the employee did not receive a referral from Dr. Davis Peterson because this doctor declined to see the employee as of October 23, 2003. Thereafter, the employee went to doctors at the University of Washington and saw Dr. Ananthakrishnan as Dr. Jarosz had left the University and Dr. Ananthakrishnan took over his cases. In any event, the employee never had a referral to see any physician after Dr. Jarosz left. The employee did not properly change physicians under 8 AAC 45.082 when he sought opinions from Drs. Ananthakrihnan and Bransford. Consequently, under 8 AAC 45.082(a), the Board will not order the employer to pay the medical evaluation and medical transportation expenses incurred by the employee in seeking this opinion.[27]

The board refused to make the requested credibility finding, asserting it was unnecessary because Witbeck's failure to comply with 8 AAC 45.082 meant that his change was "excessive as a matter of law."[28]

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[27] *Witbeck VI* at 31.

[28] *Witbeck VI* at 32. We had noted in *Witbeck IV* at 25, n. 138, that

> Witbeck testified that when he made the appointment [with Dr. Jarosze] he was told he needed a referral from his doctor so he faxed the paperwork to Dr. Peterson and he faxed it "right back." There is some evidence (Dr. Jarosze's report) that a referral came from Dr. Paul Peterson instead of Dr. Davis Peterson, but no documentary evidence clearly corroborating Witbeck's testimony. Witbeck's testimony was interrupted by his chuckles, accusations of a conspiracy between his doctor and the insurance company, a search for a report he asserted was proof of a conspiracy to harm him, and his complaint about not having a third party case to take to court. In the circumstances, the board's determination whether or not Witbeck's testimony is credible is crucial.

Our standard of review.

The board's findings of fact "shall be upheld by the commission if supported by substantial evidence in light of the whole record."[29] Because the commission makes its decision based on the record before the board, the briefs, and oral argument, no new evidence may be presented to the commission.[30] The board's determination of the credibility of a witness appearing before the board is binding on the commission.[31] The commission is required to exercise its independent judgment on questions of law and procedure.[32]

Dr. Bransford's consultation and medical transportation benefits to Seattle in November 2005.

The parties do not dispute that Witbeck's attending physician was Lavern Davidhizar, D.O., from the beginning of his back pain treatment.[33] The record demonstrates Dr. Davidhizar made a number of referrals to orthopedic specialists over the years of treatment. The board found that Witbeck "never sought out another treating physician besides Dr. Davidhizer and any referral to see Dr. Bransford should have come from Dr. Davidhizer who had frequently made referrals for the employee in previous years." The board's finding that Witbeck never sought out another treating[34] physician is supported by the fact that the record contains no written notice of a change of attending physician[35] and the medical report showing Witbeck returned to Dr. Davidhizar after seeing Dr. Jarosz.

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[29] AS23.30.128(b).

[30] AS 23.30.128(a).

[31] AS 23.30.128(b).

[32] AS 23.30.128(b).

[33] Although Witbeck was seen at the emergency room of Central Peninsula Hospital on the day of his injury, he did not complain of back pain, and was not treated for it, until he saw Dr. Davidhizar as "primarily as his treating physician". We consider this to mean that the board found Dr. Davidhizar was the employee's first "attending physician" within the meaning of AS 23.30.095(a).

[34] We assume the board meant "attending" physician.

[35] Witbeck listed Dr. Davidhizar as his attending physician on his 2003 claim (R. 000056), and did not list another physician on his 2005 claim (R. 000098).

The next concern is whether Witbeck's attending physician referred him to Dr. Jarosz at the University of Washington in Seattle on April 16, 2004. There is nothing in the record to indicate that Dr. Davidhizar referred Witbeck to Dr. Jarosz. Witbeck's testimony suggested he asked "Dr. Peterson" to fax a referral to Dr. Jarosz's office, but the record does not contain the fax, and, as the board noted, Dr. Peterson refused to see Witbeck in October 2003, so he could not have been Witbeck's attending physician in April 2004. We conclude there is substantial evidence, in light of the whole record, that supports the board's finding that Witbeck's appointment with Dr. Jarosz was a "self-referral".[36]

After Witbeck was seen by Dr. Jarosz on April 16, 2004, he returned to the University of Washington on June 29, 2005, and was seen by Dr. Ananthakrishnan.[37] Dr. Ananthakrishnan recommended against surgery, but at Witbeck's urging, the doctor referred him to an associate, Dr. Bransford. The board's denial of Dr. Bransford's evaluation[38] of Witbeck on November 14, 2005, and the expenses associated with travel to the evaluation, are the subject of this appeal.

The board found that "Dr. Ananthakrishnan was not a permissible referral pursuant to AS 23.30.095(a), but rather it was a change of physician." From this statement, we deduce that the board, having found no referral to Dr. Jarosz, found that his successor would have been in the same position; that is, that in the absence of a referral from Dr. Davidhizar, Dr. Ananthakrishnan must be a change of physician. We agree that there was substantial evidence in light of the whole record to support the board's finding.

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[36] A complete list of the medical referrals for Witbeck is summarized in the board's March 1, 2007 decision. *Witbeck VI* at 24-25.

[37] Dr. Jarosz had left the practice and Dr. Ananthakrishnan took over his open patient roster, therefore, if Witbeck had a valid change of attending physician to Dr. Jarosz, the change to Dr. Ananthakrishnan would not be another change of physicians. 8 AAC 45.082(c)(2). ("If an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician."). Whether a large university teaching hospital is a "clinic" is a question not presented to us here.

[38] We use the word evaluation advisedly, because Witbeck became belligerent and refused to be examined by Dr. Bransford. R. 0703.

The board next found that Witbeck did not provide notice to the board, or the employer, of a change of physician as required pursuant to 8 AAC 45.082(c)(4)(D). That regulation provides:

> (c) Physicians may be changed as follows:
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> (1) An employee injured before July 1, 1988 . . . .
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> (2) Except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury. If an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician. An employee does not designate a physician as an attending physician if the employee gets service
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> > (A) at a hospital or an emergency care facility;
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> > * * *
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> (4) Regardless of an employee's date of injury, the following is not a change of an attending physician:
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> > (A) the employee moves a distance of 50 miles or more from the attending physician, . . .:
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> > (B) the attending physician dies, . . .;
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> > (C) the employer suggests, . . .;
> >
> > (D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.

We see no requirement in 8 AAC 45.082(c)(4)(D) that the employee give notice of a change of physician to the board. Instead, that regulation establishes a means of *avoiding* a change "without the written consent of the employer," if notice is given but the employer fails to provide timely consent or objection to a change for which consent is requested. Since the employee is allowed one change without employer consent, this subsection does not apply when there is no previous change.

However, an employee *is* required to give advance notice of *any* change by AS 23.30.095(a), whether it is the first change allowed without employer consent, or a change for which consent is required. AS 23.30.095(a) states in part:

> When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician *shall be given before the change*. (*Emphasis added*.).

8 AAC 45.082(c)(2) states that an employee may designate an attending physician "by getting treatment, advice, an opinion, or any type of service from a physician for the injury." This method of giving notice of a change of physician does not satisfy the statutory requirement that the employer be given notice of the change *before* the change. 8 AAC 45.082(c)(2) clearly allows the *first* designation to be done by getting service, but, whether or not employer consent is required, notice of a change from the first designated attending physician must be given before the change takes effect – that is, when the employee gets "treatment, advice, an opinion, or any type of service . . . for the injury."

The requirement of notice is a procedural requirement for exercise of the right to change the attending physician once without consent of the employer. While we agree that the first change may be effected, as the board found occurred in this case, by getting the treatment or service, notice of the change must also be given to the employer to complete the process. The regulation provides only one method of giving notice – a writing to which the employer must respond within 14 days to record consent or denial. 8 AAC 45.082(c)(4)(D) is clearly intended to protect the employee from an employer who unreasonably withholds action on a requested change. In the case of a first change, no employer response is required because the employee has the right to make the change without consent. Nonetheless, the employee has an obligation to give notice, and that obligation is best satisfied by doing so in writing.

We agree the record did not contain proof of notice of a change in attending physician prior to the appointments with Dr. Jarosz[39] or Dr. Ananthakrishnan in Seattle. Because Witbeck obtained services from Dr. Ananthakrishnan, the board may choose to regard obtaining services as a change of physician, since the employee "designated" the new attending physician in the same manner as he "designated" the first attending physician, Dr. Davidhizar. However, the board could also find, based on the lack of prior notice and Witbeck's history of self-referral to Dr. Jarosz and return to Dr. Davidhizar, that Dr. Ananthakrishnan had not been designated an attending physician under AS 23.30.095(a) when Witbeck was seen, and, without Witbeck's ratification of the change or notice to the employer, Dr. Ananthakrishnan was not yet his attending physician when the referral to Dr. Bransford was made.

The board based its refusal to order payment on 8 AAC 45.082(a), which provides:

> The employer's obligation to furnish medical treatment under AS 23.30.095 extends only to medical and dental services furnished by providers, unless otherwise ordered by the board after a hearing or consented to by the employer. The board will not order the employer to pay expenses incurred by an employee without the approval required by this *subsection*. (Emphasis added.).

We are somewhat puzzled by the board's reliance on this subsection. The first sentence states that the employer's obligation to pay medical benefits extends only to providers, unless otherwise ordered by the board. The subsection requires board approval if the benefits are claimed for persons who are not "providers." Providers, for purposes of 8 AAC 45.082, are "any person or facility as defined in AS 47.08.140 and licensed under AS 08 to furnish medical or dental services, and includes an out-of-state person or facility that meets the requirements of [8 AAC 45.082]."[40] There is no assertion by the appellees that Dr. Bransford is not a "provider" in the sense of being a person licensed to furnish medical services. However, it is clear that the board found Dr. Bransford was not a specialist to whom Witbeck was referred by his attending

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39 The board found that Dr. Jarosz was a not a change.

40 8 AAC 45.082(b).

physician. Therefore, the board could deny Witbeck's claim for medical benefits as services not covered under AS 23.30.095.[41]

It is clear that Witbeck's search for a doctor that would support a recommendation to perform surgery was a result of his refusal to accept medical opinions that he was not a surgical candidate. He was seen by numerous orthopedic surgeons (Drs. Dittrich, Peterson, Voke, Jarosz, Ananthakrishnan and Bransford) who found no indication that surgery was warranted. The board relied on these opinions that Witbeck's desire for surgery was not reasonable. The board's findings regarding the opinions of the physicians on the advisability of surgical treatment is supported by medical evidence in the record. However, as we pointed out in our decision, "If the claim were for the fusion surgery that Witbeck desires, we could agree that the reports of Drs. Voke, Peterson, and Dittrich were substantial evidence that would overcome a presumption that such surgery was reasonable and necessary treatment. However, *the claim* identified by the board *is only for the evaluation* by Dr. Bransford." (Emphasis added.)[42]

Witbeck was not claiming medical benefits for surgery [although he clearly wanted to see Dr. Bransford in hopes of obtaining surgery]. Witbeck's claim was for the cost of the appointment and travel to Seattle. We found the board "failed to explain

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[41] Even if the board erred in determining that Dr. Ananthakrishnan was an attending physician, it was never established that the care Witbeck received (an orthopedic evaluation) in Seattle was not available in Alaska. There was no evidence that the medical related travel benefits that Witbeck seeks are covered because he produced no evidence that orthopedic evaluations were unavailable to him in Alaska. AS 23.30.395(20), [numbered as in 2001], provides that medical benefits under AS 23.30.095 includes only "transportation charges to the nearest point where adequate medical facilities are available." Since Witbeck had been seen on Dr. Davidhizar's referrals by three orthopedic surgeons in Anchorage and their examinations to derive an opinion regarding surgery did not vary from Dr. Bransford's planned examination or ultimate opinion, the evidence would support a finding that the examination was available in Anchorage, notwithstanding Dr. Dittrich's refusal to treat Witbeck owing to his irascible personality, R. 000226, or Dr. Peterson's withdrawal from his treatment. R. 000361. Dr. Voke did not refuse to see Witbeck, R.000275, and Dr. Peterson provided a referral to James Eule, M.D., another orthopedic surgeon. R. 000359.

[42] *Witbeck IV* at 24, n. 135.

what in [the doctors'] reports tends to disprove an element of Witbeck's claim for medical and transportation costs for the visit to Dr. Bransford." The question before the board was, "Is an examination by another orthopedist a reasonable alternative among indicated medical options?" The fact that all the prior physicians opined that surgery was not necessary, and that Dr. Bransford agreed with them, does not tend to disprove that it was a reasonable alternative among indicated medical options available to Dr. Ananthakrishnan to refer Witbeck to another orthopedic surgeon for a second opinion.[43] Dr. Ananthakrishnan was not referring him to have surgery. Dr. Bransford's concurring opinion certainly suggests that another evaluation was unlikely to produce any change in the recommended course of treatment. His opinion, however, does not suggest that it was not a reasonable alternative, from a medical view, for another physician to examine Witbeck again.[44]

However, as we stated in our first decision, the board did not need to make a decision whether Dr. Bransford's evaluation was reasonable and necessary medical care unless it first determined that Witbeck's appointment with Dr. Bransford resulted from a referral by an attending physician. In this case, the board found it did not. The board's finding of no referral was based on substantial evidence in light of the whole record. Therefore, it must be affirmed. The error in the board's analysis of the evidence

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[43] Dr. Ananthakrishnan may not have been aware of Witbeck's complete history of referrals and the reports of other physicians. The board, however, should evaluate the reasonableness of referral for another opinion in light of Witbeck's full history instead of only what Witbeck told Dr. Ananthakrishnan; we find the board did review the full history of consultations. If the board had found that, for example, Witbeck's condition between seeing Dr. Peterson and seeing Dr. Ananthakrishnan was unchanged, and that Dr. Bransford's evaluation offered no relevant new technique or specialty, then the board could have relied on the past medical opinions to find that another opinion in the same specialty was unlikely to result in new insight or recommendations, and therefore referral to Dr. Bransford was an unreasonable duplication of previous treatment.

[44] As we noted earlier, Witbeck refused to be examined by Dr. Bransford, R. 0703. Whether Witbeck's lack of cooperation and refusal to undergo the examination that was the object of the appointment was a sufficient basis to deny payment for the travel and the appointment was not addressed by the board, so we do not consider it on appeal.

respecting whether another examination by another orthopedist was a reasonable alternative among indicated medical options is harmless, as the question was moot.

Lastly and importantly, Witbeck relies on a March 12, 2007, letter from Karen Holmberg of the University of Washington Medical Center, which he claims proves the referrals were done properly and the benefits that he seeks are compensable.[45] The board's decision was issued on March 1, 2007. Therefore, the board never considered the March 12, 2007 letter as it was submitted too late for the board to consider. In fact, the letter was written eleven days after the decision was issued. The commission cannot consider new evidence on appeal. The letter was not a part of the record in front of the board, and therefore, we do not consider it as a part of the record on this appeal.

The alleged conflict of interest by Hearing Officer Foster and Board Member Hutchings.

Witbeck asserted in a letter dated September 20, 2006 that Workers' Compensation Hearing Officer Rosemary Foster and Board Member for Industry Linda Hutchings had "conflicts of interest." He charged that:

> Attached is proof of Miss Foster and Mrs. Hutchins conflict of interest with all open work-comp claims. Family members own companies which are involved in work-comp cases. They should resign or be fired."

The "proof" offered was a listing of workers' compensation claims against Foster Construction, Inc., (owned by Rebecca J. Foster and Steven Foster – no known relation to Rosemary Foster), and Hutchings Chevrolet (Linda F. Hutchings is an officer and director of the corporation). The listing of a business owned by a *Rebecca* J. Foster and Steven Foster is not evidence that *Rosemary* Foster is connected to a company that has employees who have filed workers' compensation claims. Foster is a common name; having the same common last name is not proof of a familial relationship. Even if there were such a relationship, it would not constitute a disqualifying conflict of interest. A workers' compensation hearing officer is not barred from having family members in business; she is barred from hearing cases in which the family member is a party, or the

[45] The letter establishes that Dr. Ananthakrishan took over Dr. Jarosz's patient load. The letter does not establish that Witbeck came to Dr. Jarosz on referral from Dr. Davidhizar; it makes no reference to a referral from an Alaskan physician.

family member's business is a party. Witbeck's evidence fails to demonstrate evidence of a relationship between Witbeck and either panel member, or between Superstructures, Inc., or Alaska National Insurance Co., and either panel member. We cannot say that Witbeck's evidence demonstrates the existence of disqualifying conflict of interest.

AS 23.30.005(a) prescribes the make-up of the board. Each panel must include the commissioner of labor and workforce development or a hearing officer designated to represent the commissioner, a representative of industry, and a representative of labor. (AS 23.30.005(f) allows two members of a panel to constitute a quorum for hearing claims and the action by a quorum of a panel is considered the action of the full board.) The association with labor or industry by board members is mandated by the statute. Representative members are expected to have experience with labor or industry respectively, in order to bring to the board the experience and perspective of their constituency. Therefore, ownership or management of a business that also experiences workers' compensation claims, but which is not a party to the matter being heard, does not disqualify an industry member. Holding office in a labor union whose members file workers' compensation claims, but are not a party to the matter being heard, does not disqualify a labor member.

Neither Hearing Officer Foster, nor Member Hutchings were asked by Witbeck to recuse themselves. There were two pre-hearing conferences in which concerns about the panel make-up could have been addressed, but Witbeck failed to bring forth his concerns about potential "conflicts of interest" for Hearing Officer Foster and Member Hutchings. Witbeck also failed to address his conflict concerns in his hearing brief, which was written by his representative, Barbara Williams. Based on the failure to bring his concerns to the panel, in the brief or pre-hearing conference, we find Witbeck waived the right to object to the panel. We find no evidence on which the board might have found there were conflicts of interest that would prevent any one panel member from hearing the claim, and, if the panel member failed to recuse herself, require us to invalidate the board panel's decision.[46]

[46] The sole basis of Witbeck's allegation of conflict of interest is that members of Hearing Officer Foster's family and Member Hutchings own businesses

Conclusion.

We deduce that the board's findings of fact respecting a change of attending physician are supported by substantial evidence in light of the whole record; we adopt the board's findings. We conclude the board did not err as a matter of law finding Witbeck did not have a valid referral from an attending physician when he initially was seen by Dr. Jarosz, or Dr. Ananthakrishnan, and, notwithstanding his change of physician, when he was ultimately seen by Dr. Bransford. Furthermore, in this regard, we conclude the March 12, 2007, letter alleged by Witbeck to support his position that a valid referral existed, was produced after the decision of the board had already been made, and could not be considered as part of the record. Lastly, we conclude that the members of the board panel did not have a conflict of interest that might prevent them from impartially deciding Witbeck's claim on the evidence before it.

Having concluded that the board's findings on change of physician are supported by substantial evidence in light of the whole record, and that such errors of analysis as the board made are harmless, we AFFIRM the board's decision.

Date: *January 23, 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen Hagedorn, Appeals Commissioner

Signed
John Giuchici, Appeals Commissioner

Signed
Kristin Knudsen, Chair

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against which employees have filed for workers' compensation. Witbeck did not allege any personal partiality, connection to a party, or financial interest in the outcome, or demonstrate a record of partiality or bias. To show hearing officer bias, a party must show that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence; adverse rulings alone are not enough to demonstrate bias. *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007). Other charges raised by Witbeck at oral argument are not considered by the commission as our task is limited to reviewing the board's decision, not making new findings on appeal.

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission dismissed Mr. Witbeck's appeal of the board's decision that dismissed his workers' compensation claim after remand from the appeals commission. The appeals commission's decision ends all administrative proceedings in Mr. Witbeck's workers' compensation claim. It becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the Certification box below.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed 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. To see the date this decision is mailed, look at the clerk's Certificate of Distribution in the box below.

A request for commission reconsideration must be filed within 30 days of the date of mailing of the decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal this decision 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 appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Alaska Workers' Compensation Appeals Commission's Final Decision No. 066 in the matter of the appeal of Edward Witbeck vs. Superstructures, Inc., and Alaska National Insurance Co.; AWCAC Appeal No. 07-005; dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this *23rd* day of *January*, 20*08*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision in AWCAC Appeal No. 07-005 was mailed on *1/23/08* to Edward Witbek (certified) & R. Wagg at their addresses of record and faxed to Wagg, Director WCD, & AWCB Appeals Clerk.

Signed *1/23/08*
L. Beard, Appeals Commission Clerk Date