Alaska Workers' Compensation Appeals Commission

H & H Contractors, Inc. and Alaska Insurance Guaranty Association,
Appellants,

vs.

Larry W. Onigkeit,
Appellee.

Final Decision
Decision No. 135 May 4, 2010

AWCAC Appeal No. 09-019
AWCB Dec. No. 09-0085
AWCB Case No. 199918815

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 09-0085 issued at Fairbanks on May 7, 2009, by northern panel members William Walters, Chair, Damian J. Thomas, Member for Labor, Debra G. Norum, Member for Industry.

Appearances: Robin Jager Gabbert, Russell, Wagg, Gabbert & Budzinski, P.C., for appellants H & H Contractors, Inc. and Alaska Insurance Guaranty Association. Jason A. Weiner, Gazewood & Weiner,[1] for appellee Larry W. Onigkeit.

Commission proceedings: Appeal filed June 8, 2009. Briefing completed November 10, 2009. Oral argument on appeal scheduled for December 23, 2009, and continued by commission order.[2] Oral argument presented February 2, 2010. Notice of appointment of chair pro tempore given March 1, 2010.[3] Notice and Order for Supplemental Briefing issued March 26, 2010. Appellee's Supplemental Brief filed April 6, 2010. Appellants'

[1] The appellee's brief was filed by Jason A. Weiner, Hall and Weiner, Attorneys at Law, P.C.

[2] The appellee's attorney's legal assistant appeared in person to present the appellee's oral argument on Dec. 23, 2009, without notice to the commission. After reaching the appellee's attorney by telephone, appellee's attorney advised the commission that he believed his assistant could represent a party before the appeals commission, that his legal assistant was a law school graduate but not admitted to the Alaska Bar, that appellee's attorney did not have the file, and therefore he was not prepared to present oral argument. The commission ordered oral argument continued so that the attorney could appear. *See Augustyniak v. Carr-Gottstein Foods,* Alaska Workers' Comp. App. Comm'n Dec. No. 064 (Nov. 20, 2007).

[3] Ms. Knudsen's term as chair expired March 1, 2010. She was appointed chair pro tempore in this case.

Supplemental Brief on the Application of Shehata v. Salvation Army, Slip Op. No. 6460 (Alaska 3/12/10) Pursuant to Order Dated 3/26/10, filed April 6, 2010.

Commissioners: David Richards, Philip Ulmer, Kristin Knudsen, Chair *pro tempore.*

By: Philip Ulmer, Appeals Commissioner.

1. Introduction.

This is an appeal of the board's denial of petition for an order directing Larry Onigkeit to reimburse temporary total disability (TTD) and permanent partial impairment (PPI) compensation that he received following a back injury in June 1999. The petitioners claimed that Onigkeit concealed the existence of a serious 1990 back injury suffered when his truck lost a U-joint and he jumped from the truck as it rolled backwards. The back injury that occurred while working for a different employer was sufficiently serious that he received a PPI rating of 17 percent of the whole person and PPI compensation of $22,950 in 1991. Onigkeit did not testify at the board hearing on the petition, but his representative argued to the board that he was not aware he needed to disclose the 1990 injury. The board found that there was insufficient evidence in the record to find that Onigkeit intentionally withheld information from either his physicians or his employer. The board found that such prior back pain as Onigkeit admitted was sufficient to place the employer and his physicians on notice and its origin was not relevant as to whether the adjuster was misled in paying compensation because the origin of a prior injury is not relevant to make a determination or *de facto* finding that a second injury results in compensable disability. The board concluded it could not find Onigkeit knowingly made false or misleading statements or representations during the time he received benefits and denied the petition.

On appeal, the appellants argue the board erred in not considering the 2004 deposition of Larry Onigkeit. The appellants argue that the board erred in not considering the disclosure of a prior back injury in giving a medical history to be a misleading representation, that the origin of prior back injury was relevant to payment

of compensation, and that the board erred in failing to find that Onigkeit's omissions met the criteria for reimbursement under AS 23.30.250(b).

The appellee argues that there is no evidence of intentional misrepresentation, only conclusory allegations that are not based on personal knowledge; that the board correctly found that the appellants were on notice of Onigkeit's prior injury, but failed to follow up with affirmative questioning; and that the cause and extent of Onigkeit's back condition is only relevant if he knowingly and intentionally misrepresented the condition. Onigkeit further asserted that, because there is some evidence he admitted he had prior back pain, he did not misrepresent his condition.

Following oral argument before the commission, the Supreme Court published its opinion in *Shehata v. Salvation Army*,[4] reversing the commission's decision in that case. The chair *pro tempore* ordered supplemental briefing from the parties regarding the impact of *Shehata* on this appeal. The appellants argue that *Shehata* is distinguishable because a causal relationship was demonstrated between Onigkeit's silence regarding his prior back injury and the payment of benefits. The appellants argue that Onigkeit's silence was an affirmative concealment of a material fact because he was asked about prior back injuries and the adjuster acted reasonably in its investigation of the 1999 injury. The appellee argues that *Shehata* is controlling because the Court held that silence is not a misrepresentation under AS 23.30.250(b). In addition, even if Onigkeit omitted information in the 2004 deposition, it is not material because the omission could not have been relied on to make payments from 1999 - 2000.

The commission concludes, however, that the board erred by failing to complete the analysis required by *DeNuptiis v. Unocal Corp.*[5] and *Shehata*. The board properly examined whether the employer demonstrated that it would not have paid compensation if material information had not been knowingly withheld. But, the board failed to examine whether the employer would have paid Onigkeit PPI compensation of $8,650 in May 2000, based on a 5 percent whole man rating, if Onigkeit had disclosed

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4 225 P.3d 1106 (Alaska 2010).

5 63 P.3d 272 (Alaska 2003).

to the rating physician or the adjuster the 17 percent impairment rating for which he received $22,950 in PPI compensation in 1991. The existence of a 17 percent PPI rating is a material fact because the April 2000 rating must be reduced due to the existence of the prior rating.

Shehata requires that, when the representation rests on an omission, the board determine if the Alaska Workers' Compensation Act (Act) requires disclosure or if the omission was made in response to a request for the information. Because AS 23.30.190[6] specifically requires that a PPI rating be reduced by a prior impairment rating, if the employee was informed that this is how his PPI compensation would be calculated, then the employee owed a duty to disclose the prior impairment rating.

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[6] AS 23.30.190 provides in part:

> **Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.
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> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.
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> (c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. If the combination of a prior impairment rating and a rating under (a) of this section would result in the employee being considered permanently totally disabled, the prior rating does not negate a finding of permanent total disability.

Therefore, the commission reverses and remands this case to the board to be decided again.

2. Factual background.

Larry Onigkeit injured his back when his truck bottomed out in a pit while working for H & H Contractors on June 9, 1999.[7] He subsequently injured his right middle finger when he slipped on a wet deck while loading a truck on September 18, 1999.[8] H & H Contractors accepted liability for both injuries; paid TTD benefits from Oct. 29, 1999, to April 24, 2000; and paid PPI benefits of $6,750 on May 3, 2000.[9]

Unknown to H & H Contractors at the time it paid these benefits was that Onigkeit had injured his back in 1990 while working for another employer, Four Star Terminals.[10] Onigkeit was injured when he exited a truck he was driving after it lost a U-joint and began sliding off the road.[11] Four Star Terminals paid benefits, including PPI benefits for those injuries, based on an impairment rating of 17 percent of the whole man.[12]

The PPI benefits paid by H & H Contractors as a result of the 1999 injury were based on Dr. Thomas Williamson-Kirkland's PPI rating. Dr. Williamson-Kirkland rated Onigkeit's back injury as resulting in a 5 percent PPI in April 2000.[13] Dr. Williamson-Kirkland treated Onigkeit as part of Onigkeit's participation in a work-conditioning program for his back at the Virginia Mason Clinic.[14] Dr. Williamson-Kirkland asserted that his standard practice is to review medical history and prior injuries with a patient

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7 R. 0001.

8 R. 0001.

9 R. 0010.

10 R. 0045.

11 R. 0045.

12 R. 0057.

13 R. 0241.

14 Hrg. Tr. 62:5-8, 16.

when he begins treatment and again when he considers permanent impairment.[15] 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 . . . ."[16] Two of his reports noted this as well, stating that Onigkeit claims he has not "had much back pain in the past."[17] Dr. Williamson-Kirkland further testified that, "If I had known about the prior rating, then Mr. Onigkeit would have no permanent impairment rating."[18] Dr. Williamson-Kirkland released Onigkeit to return to work in April 2000.[19]

In addition to Dr. Williamson-Kirkland, other doctors treated Onigkeit after the 1999 injury. Dr. John W. Joosse's October 18, 1999, chart note indicated that Onigkeit stated "he gradually developed LBP [low back pain] during last several yrs."[20] Dr. Joosse referred him for pain treatment to Dr. Randall K. McGregor who noted on December 7, 1999, "The patient is known to me for having undergone epidural steroid injections in the distant past, the last being in 1990 for complaints of chronic discogenic low back pain. The patient states that over the years his back pain has been present near constantly, being occasionally worse."[21]

The insurance adjuster's nurse case manager Dennis Mellinger[22] interviewed Onigkeit on November 5, 1999, and related Onigkeit's past medical history in his notes: "Has had sore back b4 off and on but always improved has prior claim for rt hand

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15 R. 0237.

16 Hrg. Tr. 71:19-22.

17 R. 0241; 0376-77.

18 Hrg. Tr. 69:12-13.

19 R. 0241.

20 R. 0272.

21 R. 0303.

22 Linda Rudolph, who worked for the insurer as a claims supervisor and manager during 1999 and 2000, testified that "demelling" on the computerized notes indicated that Dennis Mellinger, the case management nurse, entered the notations. Hrg. Tr. 22:17-24.

approx 10-15 yrs ago fell w shakles on haul road fx rt hand missed a few weeks and had surg only other surg was appy as a child."[23]

Onigkeit sought additional medical benefits for his 1999 injury in February 2004, filing a claim seeking payment for back surgery and transportations costs.[24] H & H Contractors controverted this claim in March 2004, stating, "There is no evidence that the need for additional medical treatment, if any, arises out of the occupational injury of 06/09/1999."[25]

In defending this claim, H & H Contractors deposed Onigkeit on May 27, 2004. Onigkeit acknowledged injuring a finger in a prior work accident but denied any other work-related injuries. He stated that the finger was injured when he was working for "Four Star," and that "Dr. [George] Vrablik, you know fixed that finger" and that he believed it occurred in 1985.[26] When asked if he had any other workers' compensation injuries, he stated, "Nah. I've always been pretty careful around things."[27] In fact, Dr. Vrablik had treated him for the back injury as well as the finger injury, and determined the PPI rating for his finger and back in 1991.

In late 2004, H & H Contractors learned of the 1990 back injury when it received documents from the Workers' Compensation Board. On March 10, 2005, H & H Contractors petitioned for repayment of benefits for knowingly making a false or misleading statement to obtain benefits under AS 23.30.250(b).[28]

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23 R. 0224.

24 R. 0023-24.

25 R. 0012.

26 May 27, 2004, Onigkeit Dep. 136:22 – 137:9.

27 May 27, 2004, Onigkeit Dep. 137:11.

28 R. 0041.

3. Board proceedings.

The board heard the claim on March 26, 2009.[29] H & H Contractors sought repayment of all TTD benefits because it would have investigated more thoroughly whether the 1999 injury was a substantial factor in Onigkeit's condition had it known of the earlier back injury. H & H Contractors also sought repayment of the PPI benefits because had Dr. Williamson-Kirkland known of the earlier PPI rating, he would have concluded the 1999 injury led to no new permanent impairment. Lastly, H & H Contractors sought attorney's fees and costs.

Onigkeit did not testify at the hearing but his representative argued that he had not disclosed the prior back injury to his doctors because he believed any requirement to disclose the 1990 injury was past the statute of limitations and because he wished to maintain his privacy.[30]

The board denied H & H Contractors' petition.[31] The board concluded that Onigkeit's doctors were aware that he had pre-existing back problems:

> We note the secondary sources reporting the employee's history vary in the intensity, persistence, and long-standingness of the reported back problems. . . . We find none of the physicians' reports indicate (or record) the etiology of the employee's pre-existing back problems. We find none of the physicians' reports, nor [the insurance adjuster's nurse case manager] Mr. Mellinger's notes, indicate the employee ever affirmatively denied his pre-existing back problems were related to work. All of these records report information specifically solicited by the writers. The one reference to workers' compensation issues in the November 5, 1999 note by Mr. Mellinger, reported a finger surgery. It is not clear whether that is in response to a question from Mr. Mellinger about workers' compensation or surgery: It is worth noting that the entry's following phrase discusses the employee's only other surgery (a childhood appendectomy). We decline to engage in conjecture concerning possible unrecorded questions that might have been asked by the various practitioners. The most reasonable

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[29] *Larry W. Onigkeit v. H & H Contractors, Inc.*, Bd. Dec. No. 09-0085, 1 (May 7, 2009) (W. Walters, Chair).

[30] Hrg. Tr. 98:9-10; 102:24 – 103:6.

[31] *Larry W. Onigkeit*, Bd. Dec. No. 09-0085 at 11.

> interpretation of the records is that they contain answers to specific questions asked. Based on our review of the record, we cannot find the preponderance of the evidence indicates the employee intentionally withheld information from his physicians or employer during the period he received benefits.[32]

The board noted that it would not consider Onigkeit's 2004 deposition because it "occurred long after he had received the benefits disputed in the employer's Petition" and "the employer could not have relied on the 2004 deposition when it paid the disputed benefits[.]"[33]

The board also concluded that "the physicians and employer were actually on notice of the pre-existing problem,"[34] even though they did not know specifically about the 1990 work-related back injury. The board concluded that the source of the pre-existing back problems was not relevant to deciding whether the 1999 injury was a substantial factor in the employee's resulting disability.[35]

Lastly, the board noted that even if Onigkeit intentionally deceived the employer when he was receiving benefits, AS 23.30.250(b) would not apply unless "the deception itself resulted in benefits to which the employee would not otherwise have been entitled."[36]

H & H Contractors appeals.

4. Standard of review.

The board's findings of fact will be upheld by the commission if supported by substantial evidence in light of the whole record.[37] The commission "do[es] not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of weight to be accorded evidence is the task assigned to the board, . . . The commission will not reweigh the evidence or choose between

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32 *Id.* at 9-10.

33 *Id.* at 10 n.62.

34 *Id.* at 10.

35 *Id.* at 10-11.

36 *Id.* at 11 n.65.

37 AS 23.30.128(b).

competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive."[38] 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.[39]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Act.[40] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[41] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy,"[42] to preserve the benefits, balance, and structural integrity of the Alaska workers' compensation system.[43]

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[38] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing AS 23.30.122).

[39] AS 23.30.128(a).

[40] AS 23.30.128(b). The commission reviews board imposition of sanctions for discovery violations for abuse of discretion. *See Cameron v. TAB Elec.*, Alaska Workers' Comp. App. Comm'n Dec. No. 089 at 17-19, 2008 WL 4427218 (Sept. 23, 2008) (holding board did not abuse its discretion in sanctioning employee who sought admission of late-filed medical records).

[41] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[42] *Cameron,* App. Comm'n Dec. No. 089 at (quoting *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

[43] *Conam Constr. Co. v. Bagula*, Alaska Workers' Comp. App. Comm'n Dec. No. 024 at 5, 2007 WL 80650 (Jan. 9, 2007).

5. Discussion.

a. The board failed to consider whether the failure to disclose a PPI rating caused the insurer to pay PPI to which Onigkeit was not entitled.

In *DeNuptiis v. Unocal Corp.*,[44] the Supreme Court held that the board was to apply a preponderance of the evidence standard to claims for reimbursement under AS 23.30.250(b).[45] Relying on *DeNuptiis*,[46] the board interpreted subsection .250(b) to "authorize forfeiture and reimbursement of only those benefits resulting from intentional false or misleading statements or representations."[47] The board said that subsection .250(b)

> requires a finding of five elements for an order reimbursing benefits:
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> 1. The employee made a false or misleading statement or representation;
> 2. the representation was knowingly misleading;
> 3. the representation was for the purpose of obtaining benefits;
> 4. the employee received the sought benefits; and

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44 63 P.3d 272 (Alaska 2003).

45 AS 23.30.250(b) provides:

> If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, 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. Upon entry of an order authorized under this subsection, the board shall also order that person to pay all reasonable costs and attorney fees incurred by the employer and the employer's carrier in obtaining an order under this section and in defending any claim made for benefits under this chapter. If a person fails to comply with an order of the board requiring reimbursement of compensation and payment of costs and attorney fees, the employer may declare the person in default and proceed to collect any sum due as provided under AS 23.30.170(b) and (c).

46 63 P.3d at 278-280.

47 *Larry W. Onigkeit*, Bd. Dec. No. 09-0085 at 9.

> 5. the benefits would not have been received, but for the false or misleading representation.[48]

The board, after reviewing the record, held that it could not find that the employee intentionally withheld information because it had no evidence that the employee was asked if he had injured his back at work before.[49] In other words, the board interpreted the absence of information regarding the 1990 injury in the medical records as the absence of a denial to a specific question.

However, the unrebutted testimony of Dr. Williamson-Kirkland was that Onigkeit *denied* having a prior back injury, when taking his medical history, and again when he was addressing permanent impairment.[50] Dr. Williamson-Kirkland stated that if Onigkeit had disclosed that he had a prior impairment rating of 17 percent, he would have given Onigkeit a 0 percent rating for the 1999 injury.[51] Dr. Williamson-Kirkland asserted that it is his standard practice to review medical history and prior injuries with the patient when beginning treatment and again when addressing permanent impairment.[52] Onigkeit did not claim that he did tell Dr. Williamson-Kirkland about the 1990 back injury. The board's finding that "none of the physicians' reports, nor

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[48] *Id*. But, in *Municipality of Anchorage v. Devon*, 124 P.3d 424, 429 (Alaska 2005), the 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.

The court did not require the employer to prove that the employee made the false statement *with the purpose to obtain the benefit he received* if the statements were false, the employee knew they were false, and the statements resulted in the employee obtaining benefits, presumably because making the false statement to his employer's workers' compensation insurance carrier or adjuster would have little other purpose.

[49] *Larry W. Onigkeit*, Bd. Dec. No. 09-0085 at 9-10.

[50] Hrg. Tr. 71:19-22. *See also* R. 0241; 0376-77.

[51] Hrg. Tr. 69:12-13.

[52] R. 0237.

Mr. Mellinger's notes, indicate the employee ever affirmatively denied his pre-existing back problems were related to work" is not sufficient to support a conclusion that Onigkeit did not conceal his prior back impairment from Dr. Williamson-Kirkland during his impairment rating evaluation because it does not include Dr. Williamson-Kirkland's testimony.

Thus, if Dr. Williamson-Kirkland asked Onigkeit if he had a PPI rating, or a prior back injury at work that disabled him, and Onigkeit denied he did, that would have been an affirmative misrepresentation. The evidence is that the 5 percent PPI rating would not have been given but for the misrepresentation of his history. Without the 5 percent rating, Onigkeit would not have received $6,850 in PPI compensation. And, because Onigkeit had already received a PPI rating and PPI compensation from his 1990 work-related injury, the board may infer that he knew the purpose of the rating was to calculate the amount of PPI compensation he would receive.[53] This is evidence the board might rely on to find that Onigkeit knowingly concealed the 17 percent PPI rating he received for the 1990 Four Star back injury.

The board concluded it was unable to find that the employee knowingly made false or misleading statements or representations before or during the time he was

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[53] We believe 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. Although they listed him as a witness, R. 0247, the petitioners did not call Onigkeit to testify. Hrg. Tr. 82:25 – 83:1. But, Onigkeit was a party, and, as Alaska Rule of Civil Procedure 32(a)(2) provides, "The deposition of a party . . . may be used by an adverse party for any purpose." The board received the transcript of the deposition years before hearing, (Onigkeit Dep. 1, showing board date stamp Dec. 12, 2004), and a letter from the court reporter's staff dated Oct. 18, 2004, informed Onigkeit that the original deposition would be filed at the board (unnumbered and bound with original deposition). There was no reason under 8 AAC 45.120(a) to exclude the deposition testimony from consideration. We agree with the board, *Larry W. Onigkeit,* Bd. Dec. No. 09-0085 at 10 n.62, that Onigkeit's false statements in the 2004 deposition could not have caused the employer to pay PPI benefits in 2000. *Shehata*, 225 P.3d at 1115 (stating "[b]ecause logically a cause must come before a result, Shehata's false statement on October 14, 2005 cannot have been a causal factor in the Salvation Army's payment of benefits before he made the statement.")(footnote omitted).

receiving benefits based on an absence of direct evidence in the medical records. However, with Dr. Williamson-Kirkland's testimony, there was 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.

The board also found that Onigkeit disclosed he had back pain.[54] Therefore, the board held, the fact that Onigkeit had not disclosed a specific work injury was not material, because the origin of the back pain he reported to his physician was not material to the compensability of the injury for which he received compensation.[55] The commission agrees that whether a pre-existing condition is work-related is not material to deciding if the work-related injury aggravated, accelerated, or combined with the pre-existing condition to bring about a temporary disability and need for medical treatment.[56] However, the existence of a prior PPI rating is material to entitlement to, and payment of, PPI compensation because AS 23.30.190(c) requires that a PPI rating be reduced by any prior PPI rating. 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.

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[54] *Larry W. Onigkeit*, Bd. Dec. No. 09-0085 at 10.

[55] *Id*. H & H Contractors failed to present evidence that concealment of the 1990 work injury and resulting disability resulted in Onigkeit receiving medical treatment or temporary disability compensation to which he was not entitled. Evidence that Onigkeit's claim would have been more vigorously contested if the prior injury was known is not proof that concealment resulted in the claimant receiving more temporary compensation or medical benefits than he would have received if the prior injury were known because (1) there is no evidence that controverting the claim would have resulted in paying less temporary compensation or medical benefits and (2) a prior injury did not disqualify Onigkeit from temporary compensation or medical benefits.

[56] *E.g., Thurston v. Guys With Tools, Ltd.*, 217 P.3d 824, 828 (Alaska 2009).

b. If Onigkeit was not asked for information, the board must decide if Onigkeit was notified that a PPI rating is reduced by prior PPI rating, imposing a duty to disclose the prior PPI rating.

In *Shehata v. Salvation Army,* the Supreme Court held an employer need not prove all the elements of common law fraud to obtain reimbursement under subsection .250(b):

> Nothing in the language of the statute or the legislative history indicates that the legislature intended to require an employer to prove all of the elements of common law fraud or misrepresentation in order to secure reimbursement under subsection .250(b).[57]

However, the employer must still prove "a causal link between a false statement or representation and benefits obtained by the employee."[58] Onigkeit argues that the employer failed to prove that he made a false statement, and that failure to disclose the history of a work injury in 1990 was mere silence on a subject he was not questioned about. Therefore, he asserts that no causal link can be drawn between his silence and the benefits he obtained.

In *Shehata,* the Supreme Court held that 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.[59]

The Supreme 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. However, when he was asked by the employer's adjuster if he was working after some weeks, he denied it. Although Shehata argued that the adjuster knew he was lying,

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57 225 P.3d at 1114-15.

58 *Id.* at 1115.

59 *Id.* at 1116-17 (footnotes omitted).

and therefore could not have relied on his statement, the Supreme Court said that, because the adjuster did not yet have the evidence to controvert payment, the fact she was not deceived was not a bar to reimbursement because she acted reasonably to investigate the false statement in order to obtain evidence to controvert the claim.

However, the Supreme Court said,

> [w]e do not suggest that an employer has a duty to investigate all statements made by an injured worker. If an employer seeks claim-related information from the person most likely to have the information — here, the injured worker — the employer 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.[60]

There was no evidence in this case that the adjuster actually disbelieved Onigkeit's statements that he had only occasional back pain before the 1999 injury. Therefore, the adjuster's "duty to investigate" is not triggered.[61] 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."

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[60] *Id*. at 1118 (footnotes omitted).

[61] The board stated that the "physicians and employer were actually on notice of the pre-existing problem." *Larry W. Onigkeit,* Bd. Dec. No. 09-0085 at 10. First, the law does not impose a duty on Onigkeit's physicians to investigate for the employer's adjusters. Second, a report of occasional back pain, a common condition in a middle-aged worker, is not "notice" of a prior permanent impairment rating and PPI compensation payment. Third, there is no evidence that Onigkeit's employer knew Onigkeit had been paid PPI compensation by a prior employer. In 2000, when the 5 percent impairment rating was given and PPI compensation paid, only the board and Onigkeit knew Onigkeit had received a PPI rating and compensation in 1991. Onigkeit knew because he had been paid by Four Star's adjuster. The board knew because Four Star reported the payment to the board. *Larry W. Onigkeit,* Bd. Dec. No. 09-0085 at 4 n.35. There is no evidence that the board informed the parties that there was a PPI compensation overpayment when it received the notice of the May 2000 PPI compensation payment. Therefore, unless the report cited by the board alerted the adjuster to enough information to prevent the overpayment of PPI compensation, the report was not sufficient to put the employer on notice of the real pre-existing problem – a 17 percent permanent impairment rating for low back injury.

The more important question is whether Onigkeit's silence (if it was silence and not an affirmative denial) regarding his 17 percent PPI rating was silence in the face of a duty to disclose it. AS 23.30.190 expressly states that PPI ratings must be reduced by a prior PPI rating. Its terms do not expressly require claimants to disclose prior PPI ratings. However, Onigkeit knew what a PPI rating was, and what it meant in terms of benefits, because he had received a substantial sum of money for a PPI rating in 1991. Therefore, if Onigkeit was informed about how the PPI would be calculated after the rating was received, if he knew, or should have known, that Dr. Williamson-Kirkland did not know about his 17 percent rating, or if he had other information that would convey to a reasonable mind that the statute had not been followed, then the board should determine if Onigkeit's continued silence is "a misrepresentation when a person has a duty to speak."

The commission does not conclude here that AS 23.30.190 imposes an affirmative duty on an employee to disclose a prior impairment rating without being asked if he has a prior work injury that disabled him. 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.*

We remand this case to the board to consider whether Onigkeit was on notice about PPI computation such that he knowingly concealed a material fact by not disclosing the prior PPI rating.

6. Conclusion.

For the reasons stated above, the commission VACATES the board's decision denying the petition of H & H Contractors, Inc. for reimbursement under AS 23.30.250(b) of compensation paid to Larry W. Onigkeit, to the extent the denial extends to reimbursement of the permanent partial impairment (PPI) compensation payment and REMANDS the case to the board for rehearing of the petition in light of this decision. The commission AFFIRMS the denial of the petition for reimbursement of

medical care and temporary total disability compensation. The commission does not retain jurisdiction.

Date: *4 May 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
David W. Richards, Appeals Commissioner

Signed
Kristin Knudsen, Chair *pro tempore*

APPEAL PROCEDURES

This is a final decision and order on this appeal of the board's decision denying a petition by H & H Contractors, Inc. and Alaska Insurance Guaranty Association for reimbursement of compensation paid to Mr. Onigkeit. The effect of this decision is that the commission vacated (annulled) part of the board's decision finding the petitioners produced no evidence that failure to disclose a prior injury and impairment rating would result in overpayment of PPI compensation. The commission affirmed (approved) the denial of the petition as to temporary total disability compensation and medical benefits paid to Mr. Onigkeit. The commission sent the case back to the board to rehear the petition for reimbursement of PPI compensation and gave instructions to the board. The commission did not retain jurisdiction. This decision becomes final on the 30th day after the commission mails or otherwise distributes this decision, unless proceedings to reconsider it or seek Supreme Court review are instituted. See the clerk's box on the last page for the date of distribution.

Because the commission remanded a significant part of the case for rehearing and required the board to re-decide part of the petition, the Supreme Court might not accept an appeal. However, the commission has not retained jurisdiction, so the matter is closed in the commission, and the Court may consider this a final, appealable decision.

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 all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. The commission and the board are not parties to the appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review under Appellate Rules. If you believe grounds for review

exist, you should file your petition for review within 10 days after the date this decision was distributed.

You may wish to consider consulting with legal counsel before filing a petition for review or an appeal. If you wish to appeal or petition for review 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

If a request for reconsideration of this 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.

RECONSIDERATION

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the Final Decision No. 135 issued in the matter of *H & H Contractors, Inc. v. Onigkeit,* AWCAC Appeal No. 09-019, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 4, 2010.

Date: *May 11, 2010*

Signed
B. Ward, Appeals Commission Clerk