Alaska Workers' Compensation Appeals Commission

Edward Witbeck,

Appellant,

vs.

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

Appellees.

Final Decision and Order
Decision No. 014 July 13, 2006
AWCAC Appeal No. 06-001
AWCB No. 200119123

Final Decision 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, Kristin Knudsen.

By Kristin Knudsen, Chair:

Edward Witbeck appeals the board's denial of his second claim for a recalculation of his compensation rate; the board's decision affirming the reemployment benefits administrator's determination that he was not cooperative and terminating his vocational reemployment benefits; and, the board's denial of his claim for medical treatment expenses and related transportation to Seattle. We affirm the board's decision denying his 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. We affirm the board's decision upholding the administrator's decision that Witbeck was not cooperative and terminating reemployment benefits. We vacate the board's decision that the consultation with Dr. Bransford was not reasonable and necessary medical care

for lack of substantial evidence in light of the whole record to support the board's findings and we remand the claim to the board for further proceedings.

Factual background and proceedings before the board.

When reciting the factual background of this case, the commission is mindful that it does not engage in fact-finding when reviewing a case on appeal. Instead, the commission reviews the board's findings of fact. The board's findings of fact "shall be upheld by the commission if supported by substantial evidence in light of the whole record."[1] The board's determination of credibility, including the weight to be accorded medical testimony, is conclusive,[2] and the board's findings regarding the credibility of a witness before the board are binding on the commission.[3]

The board's decision of December 28, 2005, reviews the facts of this case in detail over 26 pages of a 39-page decision.[4] Further details of Witbeck's work history are related in the board's July 2003 decision[5] and the decision of the reemployment benefits administrator.[6] We summarize the facts here for the purpose of placing Witbeck's appeal in context.

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[1] AS 23.30.128(b).

[2] AS 23.30.122.

[3] AS 23.30.128(b).

[4] *Edward Witbeck v. Superstructures, Inc.,* AWCB Decision No. 05-0348 (December 28, 2005), hereafter *Witbeck III.*

[5] *Edward Witbeck v. Superstructures, Inc.*, AWCB Decision No. 03-0173 (July 24, 2003), hereafter *Witbeck I*.

[6] *Ed Witbeck v. Superstructures, Inc.*, Reemployment Benefits Administrator's Memorandum of Decision (October 4, 2005).

Witbeck had worked sporadically[7] in the years before he was hired on September 24, 2001, by Superstructures, Inc., as a "seasonal" iron worker at $16.00/hour.[8] He reported he was injured on September 28, 2001, at 5:00 p.m., when an "iron roof rafter" "slipped off Curties hand, fell on my right foot, left hand."[9] He went to the Central Peninsula Hospital emergency room the following day, where his foot was X-rayed, and no fractures found.[10] The diagnosis was an acute contusion on the dorsum of his right foot, minor contusion of the left hand.[11] On October 1, 2002, Witbeck told Lavern Davidhizer, D.O., that he developed back pain when he bent over to lift the joist off his foot.[12] Dr. Davidhizar diagnosed a "lumbar disc syndrome" and sprained ankle.[13] Witbeck has since received a variety of non-surgical treatment for his low back pain.[14]

Reemployment benefits administrator Doug Salzman determined Witbeck was eligible for reemployment benefits on August 28, 2002,[15] based on a report by specialist

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[7] Employment security records cited by the board in *Witbeck I, supra,* at 4, show Witbeck had not worked year-round in the three calendar years prior to the year of his injury. In 2001, he was paid wages only in the fourth quarter and his total earnings were $1,000; in 2000, he was paid only in the second and third quarters, and earned less than $2,000 in the year; in 1999, he earned less than $600 in two quarters (first and third) of employment; in 1998, he was paid in two quarters (third and fourth) and earned a high of $3,449.50, of which only $24.25 was paid in the fourth quarter.

[8] *Witbeck III, supra,* at 2, 6; October 1, 2001 report of injury (R. 00001).

[9] *Witbeck III, supra,* at 2; October 1, 2001 report of injury (R. 00001).

[10] *Witbeck III, supra,* at 2.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] These included medication, lumbar decompression and lumbar stabilization, *id.,* myofascial release, *id.,* at 4, physical therapy, *id.,* at 7; epidural steroid injection, *id.* at 11, back exercises, *id.,* at 12, and heat and stretching, *id*.

[15] *Witbeck III, supra*, at 9; R. 000532-533.

John Micks.[16] Witbeck was not medically stable, so he continued to receive temporary total disability compensation during the eligibility determination phase of the reemployment process.[17]

Superstructures first paid Witbeck temporary total disability compensation at a rate based on his gross weekly wage at the time of injury. If he had completed a week of work, he would have earned $640.00/week. ($16.00/hour x 40 hours/week).[18] The compensation based on this wage is $405.49/week.[19] From September 29, 2001, when Superstructures began payment, to February 13, 2003, Witbeck was paid $29,137.37.[20]

The compensation rate reduction.

On February 14, 2003, Superstructures recalculated Witbeck's compensation rate after it began paying him permanent partial impairment compensation.[21] The new rate

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[16] *Id.*; R. 000516-528.

[17] When Witbeck was injured, AS 23.30.041(e) allowed an employee to be found eligible for reemployment benefits based on a physician's prediction that the employee "will have permanent physical capacities that are less than the physical demands of . . . (1) the employee's job at the time of injury; or (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury . . . ." Thus, an employee need not be medically stable to begin reemployment benefits. Other subsections of AS 23.30.041 also assume reemployment planning begins before medical stability. AS 23.30.041(h)(7) requires a reemployment plan to contain the "estimated time of medical stability as predicted by the physician;" under AS 23.30.041(k), if "an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease and permanent impairment benefits shall then be paid at the employee's temporary total disability rate."

[18] *Witbeck I, supra,* at 2.

[19] *Id.*

[20] *Witbeck I, supra,* at 2; R. 000014.

[21] Witbeck received a five percent permanent impairment rating, paid bi-weekly because he requested reemployment benefits in April 2002. R.000014, AS 23.30.041(k) ("If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease and permanent impairment benefits shall then be paid at the employee's temporary total disability rate."). Witbeck's benefits were recalculated on March 31, 2003, and the new rate applied retroactively to February 14, 2003. R. 000016.

was the minimum allowable compensation rate of $169/week.[22] On April 15, 2003, Witbeck filed a claim for a compensation rate adjustment, asking that his $405.49/week compensation rate be reinstated.[23] The claim was controverted,[24] and on July 15, 2003, a hearing was held to determine the employee's correct gross weekly wage and compensation rate.[25] Witbeck appeared by telephone.[26] Two witnesses who testified for the employer were found credible by the board.[27]

The board issued its decision July 24, 2003.[28] Witbeck asked for reconsideration.[29] Despite some question whether his request was timely under AS 44.62.540(a), the petition was considered by the board, and the request for reconsideration was denied.[30]

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[22] AS 23.30.175(a). $169.00 was 22 percent of the maximum compensation rate in effect at the time of the employee's injury. AS 23.30.175(a) permits reduction below this rate to the employee's spendable weekly wages "if the employer can verify that the employee's spendable weekly wages are less than 22 percent of the maximum compensation rate." The board did not further reduce Witbeck's compensation rate because Witbeck earned no wages in the year ("12 calendar months") prior to his brief employment at Superstructures, so that application of AS 23.30.220(a)(6) would result in "his receiving no benefits." This compensation rate established by the board results in Witbeck receiving an annual income of $8,788 -- more than twice the annual income the employee earned in the highest of three calendar years prior to the year of injury.

[23] R. 000056-057. Witbeck refers to $135/week as his new compensation rate; that rate probably reflects a 20 percent offset for overpayment of workers' compensation benefits permitted under AS 23.30.155(j), based on the calculation recorded on a compensation report. R. 000045.

[24] R. 000026.

[25] *Witbeck I, supra*, at 1.

[26] *Id*.

[27] *Witbeck I, supra*, at 3, 7.

[28] *Witbeck I, supra*, at 1.

[29] *Witbeck v. Superstructures, Inc.*, AWCB Decision No. 03-0202, 2 (August 26, 2003) (hereafter *Witbeck II*).

[30] *Witbeck II, supra*, at 3.

On June 3, 2005, Witbeck filed a second claim, asking for $800/week permanent partial disability compensation, because "405. week at time of injury not right, I should get 800 a week."[31] Later, he noted on his request for cross examination that "I want my cash 405.00 a week from 03 to 05."[32] The board considered Witbeck's claim as a "request for reconsideration or modification of AWCB Decision No. 03-0173."[33]

The board found that Witbeck's petition was filed more than one year after the last payment of compensation. Therefore, the board denied his petition as being too late to be treated as a petition for modification or reconsideration.[34]

The termination of reemployment benefits.

Following administrator Salzman's determination of eligibility for reemployment benefits, the administrator assigned a reemployment benefits specialist to work with Witbeck.[35] After a series of events detailed by the board,[36] and reemployment benefits administrator,[37] Superstructures petitioned to terminate Witbeck's reemployment benefits on July 25, 2005.[38] A formal reemployment benefits conference was held September 21, 2005.[39]

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[31] R. 000098.

[32] R. 000112.

[33] *Witbeck III, supra,* at 29.

[34] *Id.* at 29, 30.

[35] *Ed Witbeck v. Superstructures, Inc.*, Reemployment Benefits Administrator's Memorandum of Decision, 2 (October 4, 2005) (hereafter RBA Decision); R. 000608. Witbeck initially requested Jon Deisher. His choice was objected to by Superstructures' adjuster. The administrator chose a second provider; that choice was objected to by Witbeck. Ms. White was then chosen by the administrator, and Witbeck's attempts to object to her were rejected by the administrator.

[36] *Witbeck III, supra,* at 18-23.

[37] RBA Decision, *supra,* at 2-3; R. 000608-609.

[38] R. 000106-107.

[39] RBA Decision, *supra,* at 1; R. 000607.

The administrator found the employee was uncooperative in the reemployment process "for demonstrating unreasonable failure to keep appointments, maintain contact with rehabilitation specialist and cooperate with rehabilitation specialist in developing a reemployment plan."[40] On review, the board found substantial evidence supported the administrator's decision and concluded that the administrator had not abused his discretion "in arriving at the determination that the employee was uncooperative."[41] The employee's right to receive reemployment benefits was terminated.[42]

The denial of coverage of Dr. Bransford's consultation and medical transportation benefits to Seattle in November 2005.

Witbeck's attending physician was Lavern Davidhizar, D.O., from the beginning of his back pain treatment.[43] After several months of conservative treatment, the employer sent Witbeck to Clifford Baker, M.D., for an examination.[44] Dr. Baker thought that Witbeck had an "acute protruded left" intervertebral disc at L-5, S-1 that could, if confirmed on MRI, possibly benefit from surgery.[45] Dr. Davidhizar disagreed with Dr. Baker's impression of Witbeck's condition.[46] An April 10, 2002 MRI[47] revealed "very

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[40] RBA Decision, *supra,* at 5; R.000611.

[41] *Witbeck III, supra*, at 32.

[42] *Witbeck III, supra*, at 33.

[43] Although Witbeck was seen at the emergency room of Central Peninsula Hospital on the day after his injury, he did not complain of back pain, and was not treated for it, until he saw Dr. Davidhizar on October 1, 2001. *Witbeck III, supra,* at 2. The board characterized Dr. Davidhizar as "primarily as his treating physician." *Witbeck III, supra*, at 37. We consider this to mean that Dr. Davidhizar was the employee's first "attending physician" within the meaning of AS 23.30.095(a).

[44] *Witbeck III, supra,* at 4.

[45] *Id.*

[46] *Witbeck III, supra*, at 5.

[47] Magnetic Resonance Imaging scan, a test that uses a magnetic field and pulses of radio wave energy to make pictures of organs and structures inside the body.

mild" to "mild to moderate" findings, that Dr. Davidhizar characterized as a "mild (6 mm) disc protrusion at L3-4."[48] A millimeter is one thousandth of a meter, or 0.0394 inch; therefore, 6 mm is slightly less than 1/4th of an inch.

Dr. Davidhizar referred Witbeck to J. Paul Dittrich, M.D., for an orthopedic consultation on April 19, 2002.[49] Dr. Dittrich agreed that Witbeck was not a surgical candidate and recommended physical therapy.[50] Dr. Dittrich refused to see Witbeck further due to Witbeck's "outbursts."[51] Witbeck attended physical therapy in Soldotna, but his attendance was characterized by refusals to perform exercises or to "only do exercises he felt were right."[52] He was, the therapist noted, "very adamant about what he will allow us to do. Does not take directives well."[53]

Dr. Davidhizar referred Witbeck to Davis Peterson, M.D., for another opinion about the possibility of surgery on June 7, 2002.[54] Dr. Peterson also did not consider Witbeck a suitable candidate for surgery.[55] The employer sent Witbeck to a second medical examiner, Dr. Shawn Johnston.[56] The board noted that Dr. Johnston agreed the employee's need for treatment was work-related, but "was doubtful about the need for surgical treatment."[57] Dr. Johnston recommended EMG[58] testing and a possible epidural injection.[59]

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48 *Id.*

49 *Witbeck III, supra*, at 6.

50 *Id.*

51 *Id.; see also, Witbeck III, supra,* at 7.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Witbeck III, supra,* at 10.

56 *Witbeck III, supra*, at 9.

57 *Id*.

After returning to Dr. Davidhizar, Witbeck sought and received a referral for a "second opinion." [60] Witbeck saw Dr. Edward Voke on September 23, 2002. Dr. Voke agreed with Dr. Peterson that surgery was not indicated.[61] Witbeck returned to Dr. Davidhizar for treatment.[62] On February 13, 2003, Dr. Davis Peterson saw Witbeck.[63] He determined Witbeck was medically stable and ratable, and gave him a five percent whole body permanent impairment rating based on the MRI and ongoing complaints.[64] He noted that Witbeck did not have an "extruded nucleus pulposus."[65] Dr. Peterson confirmed his rating on February 25, 2003.[66]

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.[67] On June 11, 2003, the second MRI was done.[68] This MRI revealed "mild to moderate" neural foraminal narrowing at L3-4 and L4-5, with "moderate" disc bulges; a

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[58] Electromyogram, a test that measures the electrical impulses of muscles at rest and during contraction, used to perform nerve conduction studies, which measure nerve conduction velocity and determine how well individual nerves transmit electrical signals.

[59] *Id.*

[60] *Witbeck III, supra,* at 10. Dr. Davidhizar wrote a referral to Dr. Voke for a second opinion. R. 000273. Since Dr. Davidhizar had already referred Witbeck to Dr. Dittrich and Dr. Davis Peterson, this referral to Dr. Voke was for a third opinion.

[61] *Witbeck III, supra*, at 10.

[62] *Witbeck III, supra*, at 10-11.

[63] *Witbeck III, supra*, at 11.

[64] *Id*.

[65] *Id*.

[66] *Witbeck III, supra*, at 12.

[67] Witbeck III, supra, at 14.

[68] *Witbeck III, supra*, at 15.

moderate disc protrusion complex at L5-S1 and moderate narrowing of the bilateral neural foramina; and minimal disc bulge at the L2-3.[69] Overall, on comparison to the 2002 MRI, the "appearance and process of degenerative change and disc protrusion appear more prominent."[70] After the MRI, Witbeck went to J. Michael James, M.D., for an EMG, but he was confrontational and abusive toward Dr. James' staff and he refused to proceed with the EMG.[71]

When Dr. Peterson saw Witbeck in August 2003, he again advised Witbeck that a multilevel fusion, that Witbeck was "very insistent" in demanding, would not improve his level of function or his pain level.[72] Dr. Peterson recommended he seek another opinion, and provided him a referral to James Eule, M.D., another Anchorage physician.[73] Dr. Peterson also advised Witbeck that neither he, nor members of his clinic, would be "available to treat" Witbeck in the future.[74]

There are no reports from Dr. Eule in the record. However, Witbeck obtained an appointment with Todd Stephen Jarosze, M.D., at the University of Washington in Seattle on April 6, 2004.[75] Dr. Jarosze's report was sent to Dr. Paul Peterson, whose practice is located in a different clinic than Dr. Davis Peterson.[76] Dr. Jarosze

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69 *Id.*

70 *Id.*

71 *Witbeck III, supra*, at 17.

72 *Id.*; R. 000629.

73 *Witbeck III, supra*; R. 000359.

74 *Witbeck III, supra*, at 17.

75 *Witbeck III, supra,* at 21.

76 R. 000365; *Witbeck III*, *supra*, at 21. 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.

recommended additional testing: an EMG, a CT[77] scan with myelogram, a MRI, and possibly an MMPI[78] evaluation with Dr. Michael Boldwood at the University of Washington Medical Center Pain Clinic, before any surgical intervention.[79]

Witbeck returned to Dr. Davidhizar for treatment once[80] before returning to Seattle, more than a year after his trip to see Dr. Jarosze. There he saw Dheera Ananthakrishnan, M.D., at the University of Washington on June 29, 2005.[81] Dr. Ananthakrishnan recommended against surgery and also recommended that an MMPI evaluation be done to assess Witbeck's chances of success with future surgery.[82] At Witbeck's request, she gave him a referral to see one of her partners, Dr.

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[77] Computed (or computerized) Tomography. A CT scan uses X-rays to make detailed pictures of structures inside the body. With a myelogram, a test that uses X-rays and injected dye material, it is often used to make pictures of the bones, and tissues in the space between the bones, of the spine.

[78] Minnesota Multiphasic Personality Inventory, a widely used, standardized psychological test designed to provide information to aid in problem identification, diagnosis, and treatment planning for psychiatric patients. In some medical patients, it is used to assess risks of poor surgical outcome and design treatment strategies, including chronic pain management.

[79] *Witbeck III, supra,* at 21.

[80] December 1, 2004. *Witbeck III*, *supra*, at 22; R. 000385. Dr. Davidhizar commented that he had not seen Witbeck "for a long time."

[81] *Witbeck III, supra,* at 23. Dr. Ananthakrishnan's report indicates she was following Witbeck "as he [Dr. Jarosze] has left the University." R. 000397.

[82] *Witbeck III, supra*, at 23; R. 000398. Witbeck stressed in hearing that this statement means Dr. Ananthakrishnan believes that surgery will be needed in the future. The board was not compelled to draw the same inference. Dr. Ananthakrishnan clearly stated Witbeck did not have "any one area" that would benefit from surgery. In that context, her statement regarding an MMPI could also be read as a caution that any future surgery be preceded by a psychological evaluation.

Bransford.[83] His evaluation of Witbeck on November 14, 2005, and cost of travel to Seattle, is disputed in this case.[84]

The board found that Dr. Bransford's evaluation was not "reasonable and necessary medical care under AS 23.30.095."[85] Therefore the evaluation and associated transportation expenses were not compensable.[86] The board found that Witbeck remained convinced surgery would help his back condition, and that he sought out the referral to Dr. Bransford.[87] The board found Witbeck believes he finally found a doctor who supports his request for back surgery.[88] Dr. Bransford agreed with the other consultants that Witbeck will not benefit from surgery.[89] 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.[90]

The commission's standard of review.

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[83] *Id.*

[84] Witbeck's claim included claims for permanent partial disability compensation, permanent total disability compensation, temporary total disability compensation, and temporary partial disability compensation, R. 000098, but the issues for hearing were limited at the pre-hearing conference on September 7, 2005 to: "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. The pre-hearing summary records the list of issues that will be heard at the hearing, unless the board finds that "unusual and extenuating circumstances" exist. 8 AAC 45.072(g).

[85] *Witbeck III, supra,* at 35.

[86] *Id.*

[87] *Witbeck III, supra,* at 37.

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

[89] *Id.*

[90] *Id.*

AS 23.30.128(b) and AS 23.30.122 together set out the standard of review the commission shall apply when it reviews board decisions. The board's findings regarding credibility of a witness before the board are binding upon the commission. The board's findings of fact will be upheld by the commission if supported by substantial evidence in light of the whole record. If the board's findings are supported by substantial evidence, the commission will not reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive.[91] The commission will not usurp the fact-finding role of the board. On questions of law or procedure, the commission shall exercise its independent judgment.[92]

This case requires the commission to review the board's decision on appeal of the administrator's decision.[93] The statute does not distinguish the standard of review the commission must apply to the board's decision on appeal of the administrator's decision from the board's decision upon hearing a claim.

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[91] The issue of whether there is substantial evidence to overcome the presumption is a question of law which we therefore independently examine as required by AS 23.30.128(b). *See, Norcon, Inc. v. Alaska Workers' Compensation Bd.,* 880 P.2d 1051, 1054 (Alaska 1994). But, when deciding whether the presumption has been overcome, we do not weigh the testimony or the credibility of the witnesses; instead, the evidence tending to rebut the presumption is examined by itself and is not compared to conflicting evidence in the record. *See id.* We will instead test if the evidence relied on by the board is "substantial" evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Grainger v. Alaska Workers' Comp. Bd.,* 805 P.2d 976, 977 n. 1 (Alaska 1991).

[92] On those occasions that we are required to exercise our "independent judgment" to discern a rule not previously addressed by the Alaska Supreme Court or the Alaska State Legislature, we adopt the "rule of law that is most persuasive in light of precedent, reason, and policy." *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[93] There is no right of appeal directly to the commission from the administrator's decision. The commission is granted authority to review "a decision or order of the board," AS 23.30.125(b), but is not granted authority to review the administrator's decisions.

The legislature committed review of the administrator's decisions to the board in AS 23.30.041. The board is directed three times to uphold the administrator's decision unless evidence establishes that the administrator abused his discretion.[94] The broad discretion granted to the administrator reflects the policy that reemployment eligibility, plans, and cooperation be addressed quickly, fairly and efficiently by the administrator, without the board freely substituting its judgment for the administrator's judgment, thus becoming a second reemployment benefits administrator or encouraging appeals of every reemployment benefits decision.

If the board reviews the administrator's decision without taking new evidence,[95] we examine whether the board's decision affirming or reversing the administrator was an abuse of the board's discretion.[96] If the board engages in fact-finding, as it does

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[94] AS 23.30.041(d), (j), and (o) each provide that "the board shall uphold the decision of the administrator unless evidence is submitted supporting an allegation of abuse of discretion on the part of the administrator."

[95] Since AS 23.30.041(d), (j) and (o), provide the parties a right to a "review of the decision [by the administrator] by requesting a hearing under AS 23.30.110" without qualification, the employer and employee alike may present evidence in a hearing under AS 23.30.110(d). Justice Bryner noted in *Irvine v. Glacier General Constr.*, 984 P.2d 1103 (Alaska 1999), that the abuse of discretion standard prescribed by AS 23.30.041

> must yield to the Board's authority to make *de novo* determinations under AS 23.30.110 when, on appeal from an RBA decision granting or denying reemployment benefits, the parties present relevant evidence to the Board that the RBA failed to consider. Because the RBA's decision in such cases would not have been based on all of the relevant evidence properly before the Board, the Board's deference to the RBA under the "abuse of discretion" standard would be inappropriate.

984 P.2d at 1107, n.13.

[96] We do not disregard the board's decision and directly review the administrator's decision. We examine the administrator's decision through the lens of the board's decision, to determine whether the board abused its discretion in upholding or reversing the administrator. In other words, we review the board's review. The legislature directed that "the board *shall uphold* the decision of the administrator *unless*

when it takes additional testimony from witnesses or receives evidence not submitted to the administrator, we will examine whether the board's findings of fact are supported by substantial evidence in light of the whole record.[97] On a question of law applied, or procedure used, by the administrator or the board, the commission is required to exercise its independent judgment.

The board properly refused to reconsider or modify its 2003 decisions reducing Witbeck's compensation rate to $169.00 weekly.

The board regarded Witbeck's claim as seeking modification or reconsideration[98] of its July 2003 decision and order.[99] The board stated it "declines to treat the appeal as a petition for modification."[100] The board went on to reason that

> The employee has not made a timely request for modification as it is more than one year since the last payment of compensation, i.e., July 25, 2003. Also, the employee has not introduced new evidence for the Board's consideration. The Board finds no change in condition or mistake of fact warranting modification of the Board's previous order.[101]

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evidence is submitted supporting an allegation of abuse of discretion on the part of the administrator." Our review examines whether the board complied with that directive.

[97] AS 23.30.128(b). We note that making findings of fact by an agency without substantial evidence to support the findings is an abuse of discretion. *Morgan v. Lucky Strike Bingo,* 938 P.2d 1050, 1055 (Alaska 1997). We apply the test we are directed to use by the legislature in AS 23.30.128(b) to the board's findings of fact when the board engages in fact-finding in an appeal from the administrator's decision. *Berrey v. Arctec Services*, AWCAC Decision No. 009, at 10 n. 20, (Alaska Workers' Comp. App. Comm'n, April 28, 2006).

[98] The board had already granted Witbeck reconsideration of *Witbeck I* in *Witbeck II.* The board had no further authority to grant reconsideration of *Witbeck I* under AS 44.62.540(a).

[99] *Witbeck III, supra,* at 29.

[100] *Id.,* at 30.

[101] *Id.*

Witbeck filed his claim seeking a new hearing on his claim for a compensation rate of $405 weekly on June 3, 2005. It is clear that Witbeck's June 2005 claim was filed more than one year after the board issued its decision in *Witbeck I* or *Witbeck II*, rejecting his March 8, 2003 claim for an increased compensation rate, and more than one year after the compensation payments were reduced to $169 weekly.[102] AS 23.30.130(a) permits the board to review an order because of a mistake in its determination of a fact "before one year after the rejection of a claim." Witbeck was informed that the board rejected his March 3, 2003 claim for reinstatement of his $405.49/week compensation rate in *Witbeck I* and *Witbeck II*. He did not appeal the denial of his claim to the Superior Court.[103] *Witbeck I* became final on the thirtieth day after *Witbeck II*, denying reconsideration, was issued.

The same issue having been heard in *Witbeck I*, decided, and a final order having been issued without subsequent appeal, Witbeck's only opportunity to bring the matter to the board was through a petition for rehearing under AS 23.30.130(a).[104]

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[102] The board found the last payment of compensation was made on July 25, 2003, and that the employee was not entitled to further compensation payments due to his failure to cooperate with reemployment specialists. There is no record evidence that the employee received actual payments of compensation after July 26, 2003. Because he had been overpaid $236.49/week from September 29, 2001 to February 13, 2003, (more than $16,790), Witbeck was paid any remaining lump sum of permanent partial disability compensation due on termination of his reemployment benefits July 25, 2003.

[103] Alaska Rule of Appellate Procedure 602(a)(2) requires that an appeal from a final agency order be filed within 30 days of the mailing of the order, or, if a timely request for reconsideration is filed, within 30 days after the date the agency's reconsideration decision is mailed. The Supreme Court has held that Appellate Rule 602(a)(2) should be relaxed when an agency decision does not inform a party of the decision's finality or the party's right to appeal, *see, e.g., Carlson v. Renkes*, 113 P.3d 638, 642 (Alaska 2005); *Paxton v. Gavlak*, 100 P.3d 7, 12 (Alaska 2004); *Manning v. Alaska R.R. Corp.*, 853 P.2d 1120, 1124 (Alaska 1993), but this rule does not apply to Witbeck because the board's order in *Witbeck I* clearly stated that it was a final order and Witbeck must file an appeal within 30 days. *Witbeck I, supra,* at 8.

[104] AS 23.30.130(a) provides:

> Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for

AS 23.30.130(a) represents an exception to the common law doctrines that prohibit relitigation of factual issues, such as *res judicata.*[105] After the board's power to rehear a case under AS 23.30.130(a) expires, *res judicata* applies to the board's decisions to bar relitigation of claims,[106] although not as rigidly as in judicial proceedings.[107] *Res judicata* will act to preclude a subsequent workers' compensation claim by the same employee against the same parties, asserting the same claim for relief, when the matter raised by the claim was, or could have been, decided in the first claim.[108] *Res judicata* requires that "(1) the prior judgment was a final judgment on the merits, (2) a court of competent jurisdiction rendered the prior judgment, and (3) the same cause of action and same parties or their privies were involved in both suits."[109]

Witbeck I was a final judgment on the merits of Witbeck's claim for a recalculation of his gross wages for the purposes of determining a compensation rate; the board was the proper body to make such determination; and, Witbeck made the

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> the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

[105] *George Easley Co. v. Estate of Lindekugel*, 117 P.3d 734, 743 (Alaska 2005); *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158, 163 (Alaska 1996).

[106] *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 779 (Alaska 2005).

[107] *Id.,* at 780.

[108] *Id.*

[109] *Id., citing Tope v. Christianson,* 959 P.2d 1240, 1243 (Alaska 1998).

same claim[110] against the same employer. Therefore, Witbeck's second claim for the same compensation rate adjustment is barred by *res judicata,* unless his claim was filed within the one-year period provided in AS 23.30.130(a) for requests for rehearing.

By analyzing Witbeck's claim as a request for rehearing for modification under AS 23.30.130(a), the board extended a generous measure of latitude to a *pro se* litigant. Witbeck was more than a year late in filing a pleading that could be construed as a petition for modification.[111] The board's power to grant a rehearing had expired. While we find the board's statement that it "declines to treat the appeal as a motion for modification" puzzling in the absence of an "appeal" to the board and the board's apparent treatment of Witbeck's claim as a petition for modification of a prior order, we conclude the board's decision not to rehear the claim (or petition for modification) was not an abuse of discretion.[112]

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[110] Witbeck's claim for compensation rate increase was not based on an alteration of his compensation status; instead, he was seeking to preserve the same status and rate. In this, his claim is distinguishable from *McKean v. Municipality of Anchorage*, 738 P.2d 1169 (Alaska 1989).

[111] Pleadings filed by self-represented litigants, without assistance of counsel, are held to "less stringent standards than those of lawyers" *Byers v. Ovitt*, 133 P.3d 676, 680 (Alaska 2006), but even a pro se litigant may be required to meet statutory standards. The board is permitted to waive a procedural requirement if "manifest injustice to a party would result from a strict application of the *regulation*" 8 AAC 45.195 (emphasis added), but the board's regulations do not grant the board authority to waive application of the statutory requirements. The board's broad authority to correct mistakes of fact is limited to the one-year period allowed by AS 23.30.130. In this case, Witbeck was informed of the one-year period in both decisions, *Witbeck I, supra,* at 8; *Witbeck II, supra*, at 4. Because compensation payments usually are made bi-weekly, the one-year period may not begin to run for some considerable time after the board's order directing payment of the compensation is issued.

[112] The board exercises its discretion in deciding whether to grant a rehearing. 8 AAC 45.150(a) states: "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." (emphasis added). The commission has authority to review the board's discretionary actions, as AS 23.30.128(b) states:

> The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining

Even if the board had retained the authority to grant rehearing, Witbeck's statements in the record and board hearing testimony repeat that he should receive $405/week,[113] without new, material evidence that, with due diligence, could not have been discovered and produced at the time of hearing in 2003. He presented no evidence of a subsequent material change of condition. Denial of rehearing for modification due to mistake of fact in such circumstances is not an abuse of discretion.[114] Witbeck failed to articulate an argument that the board erred in interpreting the law regarding seasonal or temporary workers, but, if he had, "mistakes of law that have allegedly led to an incorrect rate of compensation" may not be invoked by a party to request rehearing under AS 23.30.130(a).[115] Thus, even if the board's statutory authority to rehear claims had not expired, the board's denial of rehearing for

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> or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

We review the board's decision to grant rehearing under AS 23.30.130(a) as a discretionary act, but in doing so, we exercise our independent judgment in determining whether the law was appropriately construed and the correct procedure followed. We then examine the board's action granting or denying a rehearing for abuse of discretion.

[113] Witbeck argues his compensation rate should not have been reduced because $405/week is closer to the wages he earned at the time of injury. Witbeck also argues he is entitled to a greater recovery because his employer caused his injury by ordering him and another man to carry something too heavy for two men to carry. The board addressed Witbeck's first argument in its decision in *Witbeck I* by considering Witbeck's work history and his likely future earnings. Even $169/week would exceed Witbeck's predicted annual wages at the time of injury if he worked through December. Witbeck's second argument has no merit. AS 23.30.055 bars actions for damages against employers except for statutory claims or intentional torts, *Kinzel v. Discovery Drilling, Inc.,* 93 P.3d 427 (Alaska 2004).

[114] 8 AAC 45.150(d)(2). *See, Lindhag v. State, Dep't of Natural Resources,* 123 P.3d 948, 956, 958 (Alaska 2005).

[115] *George Easley Co., supra*, at 773.

modification, based on change of condition or mistake of fact, would not have been an abuse of discretion. We conclude the board properly denied Witbeck the opportunity to relitigate his claim for reinstatement of his $405.49/week compensation rate.

The board did not abuse its discretion by affirming the reemployment benefits administrator's decision because there is substantial evidence to support the administrator's decision that Witbeck was uncooperative.

The board's finding that Witbeck "is not credible when he offered various excuses for nonparticipation" is binding upon us as a determination that Witbeck, a witness who appeared before the board, lacked credibility in his testimony to the board.[116]

AS 23.30.041(n) defines "noncooperation" as

> [U]nreasonable failure to
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> (1) keep appointments;
> (2) maintain passing grades;
> (3) attend designated programs;
> (4) maintain contact with the rehabilitation specialist;
> (5) cooperate with the rehabilitation specialist in developing a reemployment plan and participating in activities related to reemployability on a full-time basis;
> (6) comply with the employee's responsibilities outlined in the reemployment plan; or
> (7) participate in any planned reemployment activity as determined by the administrator.

The record before the administrator contained evidence, in the form of the specialists' reports and testimony, that Witbeck made threatening statements to specialists and staff,[117] refused to attend basic testing with any of the three specialists

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[116] *Witbeck III, supra,* at 32. The reemployment benefits administrator failed to include specific findings regarding the credibility of the witnesses who appeared before him, although he states he based his decision on "the testimony of all parties and reports filed by the rehabilitation specialists." RBA Decision, *supra*, at 5.

[117] Witbeck stated to specialist White that he "did not want to have to shoot someone." RBA Decision, supra, at 2; R. 000564 ("He said that he would be coming after whomever caused him to lose his benefits and didn't want to go to jail for shooting someone.") The administrator, in correspondence with Witbeck, related that

assigned to him,[118] failed to attend appointments on time,[119] refused to meet with the third assigned specialist in a professional setting,[120] and refused to meet with qualified professionals on the basis of his suspicions of their academic backgrounds.[121] This is substantial evidence, in light of the whole record, that supports the reemployment benefits administrator's decision that Witbeck was not cooperative.

The board found Witbeck's testimony before the board regarding his noncooperation was not credible.[122] There was no other evidence presented at the board hearing that would support a finding that Witbeck's conduct was either reasonable or excusable. We conclude the board's decision to affirm the administrator's determination of noncooperation[123] and termination of reemployment benefits based on Witbeck's persistent noncooperation,[124] was not an abuse of discretion.[125]

Witbeck stated he would like to see the administrator, Ms. Rudd, and Mr. Wagg, in the dumpster at the end of his driveway. R. 000588.

[118] R. 000595, R. 000601.

[119] R. 000576, R. 000605.

[120] Witbeck refused to meet specialist Dowler in an office setting, proposing that he meet her in an auto parts store parking lot, where he would sit in his truck and she would sit in her car and hand him papers. R. 000605, RBA Decision, *supra*, at 3.

[121] RBA Decision, *supra*, at 3.

[122] Since the board stated it did not reweigh the evidence presented to the RBA, citing *Yahara v. Constr. and Rigging, Inc.,* 851 P.2d 69 (Alaska 1993), we infer that the board was referring to Witbeck's testimony to the board when making its explicit finding of credibility.

[123] The board shall uphold the administrator's decision "unless evidence is submitted supporting an allegation of abuse of discretion on the part of the administrator." AS 23.30.041(o).

[124] AS 23.30.041(n).

[125] An abuse of discretion exists when a decision is arbitrary, capricious, manifestly unreasonable, or stems from improper motive. *Sheehan v. University of Alaska,* 700 P.2d 1295, 1297 (Alaska 1985).

The board failed to adequately explain its decision that the evaluation by Dr. Bransford is not "reasonable and necessary" medical care and to make adequate findings of fact to support its decision that Witbeck had exceeded the number of changes of physician allowed by AS 23.30.095(a).

Witbeck's medical claim presented two issues to the board for decision. Was the visit to Dr. Bransford reasonable and necessary medical care? Was the employer excused from payment of a claim for Dr. Bransford's care because Witbeck made an excessive change of physicians? We find the board failed to adequately explain and support the denial of payment for Dr. Bransford's care.[126] We address the board's consideration of each issue in turn.

A. Reasonable and necessary care.

The Alaska Supreme Court has held that the presumption that "the claim comes within the provisions of this chapter"[127] may be used to support a claim for medical benefits.[128] The presumption is not raised by merely filing a claim, for the claimant must produce some evidence, sufficient to establish a preliminary link, between the

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[126] We do not consider Witbeck's demand for approval of fusion surgery. That issue was not before the board because the issues were limited at the pre-hearing conference. R. 000453. We suspect that Witbeck's claim for Dr. Bransford's evaluation was conflated with his persistent demand for a surgery that Dr. Davidhizar, Dr. Dittrich, Dr. Voke, Dr. Peterson, Dr. Jarosze, Dr. Ananthakrishnan, and Dr. Bransford report they do not recommend for Witbeck. Only Dr. Baker, in January 2002, expressed *conditional* support for surgery *if* his diagnostic impression was confirmed by an MRI. See, R. 000190: "I would concur that lumbar MRI is indicated at this time. If one's philosophy is that lumbar disks undergo surgical treatment in response to pain, then this man probably should have left lumbosacral hemilaminectomy and disk removal, assuming the MRI confirms the diagnosis [of acute protruded left lumbosacral disk]." Witbeck claims that Dr. Ananthakrishnan's recommendation that an MMPI be done before "future surgery" is a statement that he requires surgery in the future, but Dr. Ananthakrishnan also states very clearly that "at this point we do not recommend any surgery for Mr. Witbeck." R. 000408.

[127] AS 23.30.120(a)(1).

[128] *Municipality of Anchorage v. Carter,* 818 P.2d 661 (Alaska 1991).

employment and the claimed injury or disability to raise the presumption.[129] It is well-established that the presumption assists the claimant in establishing a *prima facie* case – the elements of a covered claim – by substituting the presumption for evidence, that the employee would otherwise need to produce, tending to prove the elements of the claim.[130] Thus, it is important to be mindful of the elements of an employee's particular claim when following the well-established steps of the presumption analysis, as the elements of a claim may vary from benefit to benefit.

The board first found that the presumption of compensability attached to Witbeck's claim "for medical benefits in the form of payment of benefits and travel expenses associated with the evaluation performed on November 14, 2005 by Dr. Bransford" on the basis of Witbeck's testimony and the opinions of Dr. Davidhizar.[131] Dr. Davidhizar's report of December 1, 2004, the only report in the interval between Witbeck's visit to Dr. Jarosze and Dr. Bransford, did not recommend referral to another specialist to consider surgery or for other reasons. We are puzzled as to why the board chose to rely on Dr. Davidhizar's reports to attach the presumption to the employee's claim for coverage of the visit to Dr. Bransford, as those reports show no referral to Dr. Bransford. Dr. Davidhizar's reports establish a presumption that Witbeck's injury arose out of and in the course of employment, but this element of the employee's claim was

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[129] *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991).

[130] The presumption assists the claimant in meeting the burden of production of evidence, not of proof. *Veco Inc. v. Wolfer*, 693 P.2d 865, 869 (Alaska 1985). Once raised, the presumption shifts the burden of producing evidence to the employer. *Resler v. Universal Servs., Inc.,* 778 P.2d 1146, 1149 (Alaska 1989). Thus, if the claimant's *prima facie* case is not overcome by substantial evidence to the contrary (i.e., rebutting a necessary element of the claim), the presumption-aided *prima facie* case is sufficient to support an award to the claimant. *Fireman's Fund Am. Ins. Cos. v. Gomes,* 54 P.2d 1013, 1016-17 (Alaska 1976). But, if the employer produces substantial evidence that, if believed, would tend to disprove a necessary element of the claim, the presumption is eliminated, and the claimant must prove all elements of the claim by a preponderance of the evidence. *Resler, supra,* at 1149.

[131] *Witbeck III, supra,* at 34.

not challenged by the employer. Witbeck's testimony offered an explanation of how he came to see Dr. Bransford.[132]

The board recited the test for whether the employer's evidence overcame the presumption of compensability in terms of causation.[133] However, causation, the causal relationship between the injury being treated and the employment, was not challenged by the employer, so we are again confused by the board's consideration of this issue.

The board then went on to find that the opinions of Drs. Peterson, Dittrich, and Voke, "are substantial evidence to rebut the presumption of compensability."[134] However, a close examination of the record reveals that Drs. Peterson, Dittrich and Voke expressed no opinion on whether an evaluation by Dr. Bransford was reasonable and necessary medical treatment for the employee's conceded work-related injury.[135] The absence of opinion on a proposition cannot be construed as opinion opposing it; indeed, there is nothing in the reports authored by Drs. Peterson, Dittrich or Voke that indicate they knew about Witbeck's visits to the University of Washington clinic where Drs. Jarosze, Ananthakrishnan and Bransford practiced, or that further orthopedic evaluation was not necessary. If anything, Dr. Peterson's letter to Dr. Eule suggests that he believed Witbeck could benefit from another consultation.

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[132] Witbeck testified that Dr. "Anti-christianson" told him it was too much for her to operate on him. Witbeck inferred that Dr. Ananthakrishnan was not experienced enough to be able to do the surgery he believed she thought would be needed in the future.

[133] *Witbeck III, supra,* at 35.

[134] *Witbeck III, supra,* at 35.

[135] 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, who did not perform or recommend surgery.

We find the board's reasoning does not adequately explain its ruling.[136] We are not left in doubt that the board articulated the proper legal analysis, but we cannot discern how the board applied that analysis to the specific claim before it, or that the evidence it relied on to overcome the presumption tends to disprove the elements of Witbeck's claim for medical treatment by Dr. Bransford. The board explicitly stated that Witbeck attached the presumption to the claimed medical treatment, and named the evidence on which it relied, but the absence of comment regarding the disputed medical treatment in Dr. Davidhizar's reports leaves more questions than answers about the board's thinking.[137] Similarly, without questioning the general reliability of the reports by Drs. Dittrich, Voke, and Peterson, we find the board failed to explain what in their reports tends to disprove an element of Witbeck's claim for medical and transportation costs for the visit to Dr. Bransford. Finally, the board, having found Witbeck's testimony lacked credibility regarding his excuses for failing to cooperate with the reemployment benefits process, 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. Jarosze, Dr. Ananthakrishnan or Dr. Bransford.[138] We conclude that a remand to the board for further findings is necessary.

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[136] *Lindhag v. State, Dep't of Natural Resources, supra,* at 953.

[137] The employer's explicit admission of liability for "reasonable and necessary medical costs" of treatment for the employee's injury, R. 000103, was sufficient to provide a preliminary link between the employment and the need for treatment of the injury; the dispute centered on whether the treatment was "reasonable and necessary."

[138] Witbeck testified that when he made the appointment 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.

B. Excessive changes of physician.

It is not enough that an employee show that his claim for medical benefits is for treatment of an injury or illness that arose out of and in the course of employment. AS 23.30.095(a) places certain limits on the employer's liability for medical care and the employee's choices of providers. The employer is liable to pay for "reasonable and necessary" care,[139] that, if more than two years from the date of injury, the board authorizes as the "process of recovery may require."[140] The employer's liability is prompted by the employee's choice of an "attending physician" to "provide *all* medical and related benefits."[141] The employee is limited to one change of attending physician without written permission from the employer. Notice of the change must be given before the change. Referral to a specialist *by the employee's attending physician* is not considered a change in physician.[142]

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[139] *Philip Weidner & Assoc. v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999); *Bockness v. Brown Jug, Inc.*, 980 P.2d 462, 466 (Alaska 1999) ("The text of the act itself, along with this judicial interpretation, indicates that Alaska's statutory scheme limits an employer's responsibility to medical care that is reasonable and necessary.").

[140] *Philip Weidner & Assoc. v. Hibdon,* 989 P.2d at 731, holding that beyond the two years following the date of injury, the board "is not limited to reasonableness and necessity of the particular treatment sought, but has some latitude to choose among reasonable alternatives." In this case, the board considered only the reasonableness and necessity of the evaluation by Dr. Bransford; it did not consider obtaining another orthopedic consultation as one form of treatment "among reasonable alternatives."

[141] AS 23.30.095(a). We read the statute as charging the attending physician with the responsibility of providing, in the sense of giving or recommending, "*all* medical and related" care; the employer provides the benefit in the sense of paying for the medical and related care given or recommended by the attending physician.

[142] AS 23.30.095(a). The statute makes a clear distinction between the attending physician and specialist physicians to whom the employee is referred. Only the attending physician is explicitly charged with responsibility for "*all* medical and related" care; it logically follows that the attending physician is responsible for making referrals to specialists. Requiring the attending physician to make referrals furthers the policy of preventing costly, abusive over-consumption of medical resources through duplication of services when an employee's care is directed by an ever-expanding number of specialists. Imposing responsibility to make referrals on the attending

In examining whether Witbeck made an excessive change of physician which would excuse Superstructures from liability for payment of Dr. Bransford's care, the board found that the employee chose Dr. Davidhizar as "primarily" his attending physician. This finding is supported by substantial evidence in the form of both the employee's testimony and the medical records. The board found Dr. Davidhizar referred Witbeck to Dr. Dittrich and Dr. Peterson and again these findings are supported by substantial evidence in the record.[143] The board found that Witbeck saw other physicians "where it was not clear whether it was a referral, including Dr. Voke and Dr. James."[144] The record contains a written referral from Dr. Davidhizar to Dr. Voke (R. 000273), as well as to Dr. Stinson (R. 000305), and a referral from Dr. Peterson for an electromyogram (a diagnostic procedure) "with Rehab [Medicine] Associates in Soldotna," (R. 000347), where Dr. James practices. The board did not explain why this evidence, at least respecting Dr. Voke, was "not clear." Finally, the board found Witbeck "got a referral to Dr. Ananthakristnan at the University of Washington . . . and she referred the employee to Dr. Bransford." We find there is no evidence in the record that Dr. Davidhizar, whom the board found to be the employee's attending physician, referred the employee to Dr. Ananthakrishnan, or to Dr. Jarosze, her predecessor at the University of Washington. The board's finding that Witbeck "got a referral," insofar as it is a finding that Witbeck got a referral to a specialist from his

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physician ensures the attending physician is fully informed of *all* the medical and related care the employee receives, that he or she is charged to provide by AS 23.30.095(a). The special responsibility of the attending physician to provide all medical and related care complements the emphasis given to the opinion of the attending physician in the two years following the date of injury. *Philip Weidner & Assoc. v. Hibdon,* 989 P.2d at 732. ("[W]here the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable.").

143 R.000224, R. 000231.

144 *Witbeck III, supra* at 37.

attending physician, lacks substantial evidence to support it. On the other hand, the board did not make a finding that Witbeck changed his attending physician. The board concludes that the employee has therefore "exceeded the number of changes" permitted by AS 23.30.095(a), but this conclusion, resting on findings that are not supported by substantial evidence in light of the whole record, cannot be affirmed.

We agree the employee may have exceeded the number of physicians allowed, but we will not fill the gap in the board's findings by making our own determination based on the record before us. The board found Witbeck's attending physician was Dr. Davidhizar. 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 physician from Dr. Davidhizar or even attempted a change, or that the employer consented to a change.

If 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.[145] If Witbeck did change his attending physician, the question is 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.[146] We find the board failed to make findings of fact and conclusions of law on these key points. Therefore, we are unable to complete our review of the board's decision and a remand to the board is necessary.[147]

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[145] *Hibdon, supra*, at 731. Witbeck's claim for medical treatment by Dr. Bransford was filed more than two years after the date of injury.

[146] We note that Drs. Jarosze, Ananthakrishnan, and Bransford all appear to be practitioners of the same specialty as Drs. Dittrich, Voke, and Peterson. We note that they were not referrals for diagnostic procedures, as to a radiologist for an MRI.

[147] *Lindhag, supra,* at 953, n.15.

We agree with the board that "doctor shopping"[148] is a practice to be discouraged,[149] but the desire to prevent "doctor shopping" must be balanced against the competing value of preserving the employee's free choice of attending physician. AS 23.30.095(a) represents a compromise between preventing "costly over treatment" and protecting free choice of the physician who provides "all medical and related" care.[150] The employee's right to choose is preserved, but limited in the number of times it can be exercised at the expense of the employer.

AS 23.30.095(a), implemented at 8 AAC 45.082, provides a neutral mechanism to limit the practice of doctor shopping by imposing on the attending physician the responsibility to make, and thereby monitor, referrals to specialists and by limiting the employee to one change of attending physician. Before the board determines that the employee is "doctor shopping" by seeking unreasonable (e.g., ineffective or unrelated to injury) or unnecessary (e.g., excessive number or excessively repetitive within the same specialty) referrals, the board should determine whether the employee and his attending physician have complied with the statute and regulation. [151]

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[148] The board describes "doctor shopping" as "the practice of consulting *numerous* physicians until a physician is found to support the particular *party's position.*" *Witbeck III, supra,* at 37 (emphasis added). Thus, doctor shopping involves both a claim-related motive and abusive over-consumption of medical resources.

[149] The board has suggested that AS 23.30.095(a) and (e) represent a "clear prohibition" against that practice. *Sean A. Colette v. Arctic Lights Electric, Inc.,* AWCB Decision No. 05-0135 at 6 (May 19, 2005). We read AS 23.30.095(a) as creating a mechanism intended to prevent the "abuse of frequent physician changes, with its resultant costly over treatment, by those seeking opinions to support their claims." House Judiciary Comm. Sectional Analysis, HCS CSS SB 322 (April 6, 1988), cited in *Timothy P. Kosednar v. Northern Grains, Inc.,* AWCB Decision No. 96-0041 at 3 (January 25, 1996).

[150] *Bloom v. Tekton, Inc.,* 5 P.3d 235, 237 (Alaska 2000) ("But in order to curb potential abuse – especially doctor shopping – the Act allows an injured worker to change attending physicians only once without the consent of the employer.").

[151] AS 23.30.095(a) provides, in its limitation on changes of attending physician, and in its requirement that referrals to specialists be made by the attending physician, one measure of what constitutes a reasonable change in physicians and

There is no need to examine the motive for the employee's change if the statute and regulation have been followed for a change of attending physician;[152] if the statute and regulation have not been followed, the change is excessive as a matter of law. Similarly, the board need not examine the employee's motive for a referral to a specialist if the referral is not by the attending physician.

Because there is no numerical restriction on the number of referrals to specialists by the attending physician in AS 23.30.095(a), the board may only consider whether a challenged specialist referral is "reasonable and necessary" in the first two years following injury. More than two years after an injury, the board may exercise its discretion in deciding whether to authorize another specialist referral as a reasonable alternative among indicated treatment options. The board may address motive when an allegation is made that an employee seeking unnecessary specialist referrals is "doctor shopping."

Conclusion

We affirm the board's decision denying Witbeck's claim for a compensation rate adjustment as barred by *res judicata*. We affirm the board's decision affirming the administrator's determination of noncooperation and terminating reemployment benefits. We vacate the board's order denying payment of medical and related transportation benefits associated with an evaluation by Dr. Bransford, and we remand the employee's claim for medical benefits associated with his evaluation by Dr. Bransford to the board for further proceedings in accord with this decision. The board

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necessary referral to specialists. Evidence the referral does not comply with AS 23.30.095(a) is evidence that the referral is not "reasonable."

[152] *Bloom, supra,* at 239. (Holding that when an attending physician becomes unwilling or unable to provide treatment "concerns over the possibility of doctor shopping assume secondary importance and cannot override the statute's primary purpose of allowing injured workers to choose their attending physician" and permitting substitution of an attending physician as now provided by regulation.) However, the statute requires referral to a specialist be made by the attending physician; if a specialist becomes unable or unwilling to provide care, the attending physician must make a new referral.

may chose if it will make additional findings based on the record already developed or take additional evidence on the questions we have identified.

Date: __*July 13, 2006*__ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

____*Signed*_____
Marc Stemp, Appeals Commissioner

_____*Signed*_____
John Giuchici, Appeals commissioner

_____*Signed*_____
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision. It becomes effective when filed in the office of the Appeals Commission unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal 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 Appeals Commission and all other parties to the proceedings before the Appeals Commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the Appeals Commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the Appeals 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 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 delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Edward Witbeck v. Superstructures, Inc., and Alaska National Ins. Co.; Appeal No. 06-001; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *13th* day of *July* , 200*6* .

Signed
C. J. Paramore, Appeals Commission Clerk

I certify that a copy of the foregoing Final Decision in AWCAC Appeal No. 06-001 was mailed on *7/13/06* to Edward Witbeck, Richard Wagg, attorney for appellees, the Alaska Workers' Compensation Board (Anchorage office), and the Director of the Workers' Compensation Division, at their addresses of record.

Signed: C J Paramore *7/13/2006*
Signature Date