Case: *Edward Witbeck vs. Superstructures, Inc. and Alaska National Insurance Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 014 (July 13, 2006)

Facts: Witbeck appealed three decisions. 1. Board's denial of his second claim to recalculate his compensation rate. Witbeck had not worked year-round in the three calendar years prior to his injury, earning less than $3,500 each of these years. Witbeck was first paid temporary total disability (TTD) based on his gross weekly wage at the time of injury, but employer later reduced the rate based on his earnings history. The board held a hearing and agreed with the employer's new reduced rate, and then denied Witbeck's request for reconsideration. More than a year later, Witbeck filed a claim asking for a compensation rate adjustment, board decided he was raising same issue that had already been decided and denied this request for rehearing as being too late. The board also noted Witbeck had no new evidence that would support a modification based on mistake of fact.

2. Board affirmed reemployment benefits administrator (RBA's) determination that he was not cooperative and terminating his reemployment benefits. Board agreed substantial evidence in the record supported RBA's findings that he was uncooperative "for demonstrating unreasonable failure to keep appointments, maintain contact with rehabilitation specialist and cooperate with rehabilitation specialist in developing a reemployment plan." Board found Witbeck's testimony was not credible.

3. Witbeck, who was injured in 2001, appealed denial of coverage for consultation with Dr. Bransford and travel costs to see him in Seattle in 2005. Board denied coverage because it was not "reasonable and necessary medical care" under AS 23.30.095(a). It also concluded Witbeck was "doctor-shopping" to find a doctor who would recommend back surgery and had exceeded the number of permitted doctor changes per AS 23.30.095(a). Prior to seeing Dr. Bransford, at least seven doctors, one an employer medical examiner, had recommended against surgery. Another employer medical examiner was the only doctor to state that Witbeck could possibly benefit from surgery as long as an MRI confirmed the diagnosis.

Applicable l aw: 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[.]" "After the board's power to rehear a case under AS 23.30.130(a) expires, *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." Dec. No. 014 at 17.

AS 23.30.041(n) defines uncooperation as "unreasonable failure to (A) keep appointments; . . . (D) maintain contact with the rehabilitation specialist; (E) cooperate with the rehabilitation specialist in developing a reemployment plan and participating in activities relating to reemployability on a full-time basis; . . . (G) participate in any planned reemployment activity as determined by the administrator[.]"

AS 23.30.095(a) provides in part that employers are responsible only for providing medical care and those services "which the nature of the injury or the process of recovery requires," which the Alaska Supreme Court has interpreted to mean the care should be "reasonable and necessary." *Philip Weidner & Assoc. v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999). In addition, if the medical care is beyond 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." *Hibdon* at 731. AS 23.30.095(a) also provides, "When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians." The presumption of compensability, AS 23.30.120(a), applies to questions of whether care is reasonable and necessary. *Municipality of Anchorage v. Carter,* 818 P.2d 661 (Alaska 1991).

Issues: 1. Did board properly deny Witbeck's claim for a rehearing on his compensation rate recalculation? 2. Does substantial evidence support that Witbeck was uncooperative with the reemployment benefits process? 3. Does substantial evidence support that the evaluation with Dr. Bransford was reasonable and necessary medical care? 4. Was the employer excused from payment of a claim for Dr. Bransford's care because Witbeck made an excessive change of physicians?

Holding/analysis: On issue 1, commission concluded board did not abuse its discretion in denying Witbeck's claim. *Res judicata* barred claim unless Witbeck requested a rehearing within a year after his claim was rejected, which he did not do. Also, even if request had been timely, Witbeck presented no new evidence to satisfy criteria for new hearing (mistake of fact).

On issue 2, board found Witbeck's testimony was not credible, a finding that is binding on the commission per AS 23.30.128(b). Record contained substantial evidence documenting uncooperative behavior, including making threatening statements to specialists and staff, refusing to attend basic testing with any of the three specialists assigned to him, failing to attend appointments on time, refusing to meet with the third assigned specialist in a professional setting, and refusing to meet with qualified professionals on the basis of his suspicions of their academic backgrounds. Moreover, no other evidence, other than Witbeck's discredited testimony, provided support that Witbeck's conduct was reasonable or excusable. Commission affirmed board's decision that RBA's determination was not an abuse of discretion.

On issue 3, whether seeing Bransford was reasonable and necessary, the commission could not "discern how the board applied [the presumption] analysis to the specific claim before it, or that the evidence it relied on to overcome the presumption tend[ed] to disprove the elements of Witbeck's claim for medical treatment by Dr. Bransford[,]" Dec. No. 014 at 25, so commission vacated the decision and remanded. Board relied on Dr. Davidhizar's reports, in part, to attach the presumption that Bransford's evaluation and Witbeck's travel costs to the evaluation were compensable, but his reports showed

no referral to Bransford. Moreover, the doctors whom the board relied on to rebut the presumption of compensability had expressed no opinion on whether an evaluation by Bransford was reasonable and necessary.

On whether there was an excessive change of doctors, the commission remanded because the board failed to make findings of fact and conclusions of law on key points. The board found Witbeck's attending doctor was Dr. Davidhizar but failed to make any findings on whether Witbeck changed doctors. "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." Dec. No. 014 at 28. If Witbeck did not change doctors, the board needed to consider whether visits with other doctors were referrals from attending doctor. "If they were valid referrals, the board may consider whether the referrals were a 'reasonable alternative' among 'indicated medical treatment' options." *Id*. at 28.

Note: Witbeck sought reconsideration of this decision in Comm'n Dec. No. 020. That decision added to the instructions to the board on remand: "On remand, the board should include instruction to Witbeck regarding the status of his claim and how to pursue his remaining claim for permanent total disability compensation. This direction does not imply that Witbeck has, or has not, preserved his claim or that he has, or has not, a valid claim for compensation." *Witbeck*, Dec. No. 020 at 10. Witbeck appealed the decision on the Bransford evaluation that the board made on remand; this appeal was decided in Comm'n Dec. No. 066.