

Alaska Workers' Compensation Appeals Commission

Myung H. Walters,
Appellant, Cross-appellee,

vs.

Crazy Horse, Inc., and Alaska National
Insurance Company,
Appellees, Cross-appellants.

Final Decision and Order

Decision No. 060 October 22, 2007

AWCAC Appeal No. 06-031

AWCB Decision No. 06-0271

AWCB No. 200104075

Appeal and cross-appeal from Alaska Workers' Compensation Board Decision No. 06-0271, issued September 29, 2006, by the southcentral panel at Anchorage, Alaska, Rebecca Pauli, Chair, S. T. Hagedorn,¹ Member for Industry, and John A. Abshire, Member for Labor.

Appearances: Myung H. Walters, pro se, appellant, cross-appellee.² Robert J. Bredesen, Russell, Wagg, Cooper & Gabbert, for appellees, cross-appellants Crazy Horse, Inc., and Alaska National Insurance Co.

Commissioners: John Giuchici, Philip Ulmer, and Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

Myung Walters appeals the board's denial of her claim for compensation for injuries suffered in a fight at work. We are bound by the board's finding that the appellant was not a credible witness. The board's findings were supported by

¹ Mr. Hagedorn was appointed to the appeals commission March 1, 2007. He took no part in this appeal.

² The appellant did not appear for scheduled oral argument, despite receiving notice of the hearing. More than an hour after the scheduled argument time, after argument concluded, she telephoned the commission office, saying she had overslept. She was told the commission would consider a written request to hear the argument again, but she did not file a request. The commission took the appeal under deliberation.

substantial evidence in light of the whole record. We affirm the board's decision denying compensation and benefits. Crazy Horse appeals the denial of its petition for reimbursement of attorney fees under AS 23.30.250(b). We agree that the board must find the employee received some benefit under the Alaska Workers' Compensation Act to support a reimbursement order. The right to pursue a claim for workers' compensation is not such a benefit. The board did not engage in the four-step analysis required by *Municipality of Anchorage v. Devon*,³ so we vacate the order denying the petition and remand for rehearing of the petition on the record.

Factual background.

Myung Walters was a dancer at the Crazy Horse Saloon, an Anchorage club. On February 16, 2001, she and another dancer, Kerry Ford, got into a fight over tip money at the club in the early hours of the morning, about an hour before closing time.⁴ Walters was seen at the Providence Hospital emergency room on February 17, 2001 at around 3:00 a.m.⁵

Walters worked the next two days. She was terminated from her employment at the end of her shift February 19, 2001.⁶ She went to work shortly afterwards at another club. On February 21, 2001, Walters called the police to her house to

³ 124 P.3d 414 (Alaska 2005).

⁴ *Myung H. Walters v. Crazy Horse, Inc., (Walters I)*, Alaska Workers' Comp. Bd. Dec. No. 03-0187, 2 (August 7, 2003). The injury date recorded on Walters' report of injury, R. 0001, and first claim, R. 0014, is February 16, 2001.

⁵ R. 0614. The record shows a dictation time of 3:07 a.m. on February 17, 2001. The employee testified she went straight to the emergency room. 2003 Walters Depo. 32:17. Walters said the fight took place when the club was very busy, on the week-end, 2003 Walters Depo. 30:2-4, between Friday evening and Saturday morning. 2003 Walters Depo. 65:2-4. February 17, 2001 was a Saturday.

⁶ Walters testified she was terminated because she called the police to the club after she saw Kerry Ford there. 2003 Walters Depo. 64:13-19.

document her injuries with photographs.⁷ She explained in testimony that she called the police before seeing a doctor because she wanted to “make record of it first.”⁸ On February 22, 2001, she filed a report of occupational injury, listing her injuries as “Arm/Neck/Head/Breast. Left breast implant was punctured during the assault. Arm/neck/head badly hurts.”⁹

On February 23, 2001, Walters was seen again at the Providence Hospital emergency room, reporting that her left breast was smaller and felt heavy.¹⁰ The examining physician reported her saline breast implant had failed and referred her to a plastic surgeon for repair. Walters went to Seattle, where implants in both breasts were replaced on May 16, 2001.¹¹

Before the fight, Walters had been seeing Dr. Como, a chiropractor. She had been treated for “pelvic torque” on February 13, 2001, including treatment directed at the L5 vertebra.¹² She continued to be treated by Dr. Como,¹³ as well as Won Shil Park, M.D.,¹⁴ until sometime in 2004 when records indicate she was referred by William Erickson, ANP,¹⁵ to Lawrence Kropp, M.D., an anesthesiologist, with a diagnosis of “low

⁷ R. 0076. The list included the following photograph descriptions: “left breast which had been damaged and was leaking out thus causing the breast to shrink; right breast which had bruise on it.”

⁸ 2006 Hrg. Tr. 58:1597-98.

⁹ R. 0001.

¹⁰ R. 0616.

¹¹ R. 0815.

¹² R. 0801.

¹³ Dr. Como began treating Walters for head and neck pain he related to the fight on February 19, 2001. R. 0617.

¹⁴ Dr. Park began treating Walters for low back pain following a fall on the ice on January 1, 2003. R. 0719.

¹⁵ ANP Erickson’s reports indicates he practices at the same location as Dr. Park. *Compare* R. 0690 to R. 0686.

back pain with disc degeneration for several years.”¹⁶ Dr. Kropp treated her for “displaced intervertebral disc” and “lumbar radiculopathy.”¹⁷ Dr. Kropp referred her for an MRI scan, which on September 22, 2004, revealed the bilateral pars defect¹⁸ that Walters claimed was caused by the February 16, 2001 fight.

Board proceedings.

Walters filed a claim for benefits on April 4, 2001,¹⁹ which was controverted by the employer on April 20, 2001 on the grounds that the fight did not arise out of and in the course of employment and that any injuries were the result of Walters’s willful intent to injure another employee.²⁰ The board heard Walters’s claim on June 3, 2003.

The board determined that the fight between Walters and Ford was work-related and therefore any injuries incurred in the fight were compensable. However, the board also stated that

Both the emergency room medical report and the police report noted scratches on the employee’s face and on her right leg near her knee. She had a red mark on her right bicep and complained of head pain. The employer does not dispute that these injuries were the result of the altercation. Because we concluded the altercation with Felony was within the course and scope of employment, and we find the employee has attached the presumption of compensability with regard to the injuries noted in the emergency room report.

However, the employee’s allegation that her breast implant was damaged in the in the course and scope of her employment to be based on highly technical medical considerations. The breast implant deflation was not noted until several days after the altercation. The only evidence linking the altercation and the breast implant is the employee’s testimony.

¹⁶ R. 0794.

¹⁷ R. 0787.

¹⁸ R. 0747.

¹⁹ R. 0018. The claim described the injury as “left breast puncture; back and neck pain; arm pain.”

²⁰ R. 0003.

The emergency room report contains no mention of pain or contusion to the breast. We find that it is incumbent upon the employee to come forward with medical evidence to establish the injury arose out of or in the course of the work related altercation. At this time we can not find this injury to be work related.

Similarly, we find the employee's allegation that she was paralyzed and could not walk as a result of the altercation, to be based on highly technical medical considerations and not established by the record before us at this time. The employee finished up the last few minutes of her shift before driving herself to the emergency room. She worked her next two shifts. Neither the emergency room report nor the police report note either of these conditions. Therefore, at this time, we do not find these conditions, if present, to be work related.²¹

After instructing the parties to "attempt to resolve" the claim for benefits, the board reserved jurisdiction to "resolve disputes" regarding Walters's claim for benefits.²²

On August 19, 2005, Walters filed a new claim for compensation, seeking temporary total disability compensation and permanent disability compensation for arm, neck and back injuries as well as the breast implant replacement.²³ The employer answered and controverted the claim, asserting that her work was not a substantial factor in bringing about the claimed injury or disability.²⁴ On January 17, 2006, the employer filed a petition asking that the board make

a finding of fraud regarding the lower leg condition under A.S. 23.30.250(a) & (b). Employer requests repayment of attorneys fees in accordance with A.S. 23.30.250(b). The employee made false and misleading statements for the purpose of obtaining workers' compensation benefits. . . . employee's left lower leg pain is related to a metal sign which fell on her leg while at Nordstroms on May 18, 2002.²⁵

²¹ *Walters I*, Dec. No. 03-0187 at 12-13.

²² *Id.* at 13.

²³ R. 0294-95.

²⁴ R. 0004-6, 0297-99.

²⁵ R. 0306-07.

After a series of prehearing conferences in which Walters was informed of procedures and discovery rights, the board heard Walters's claim for compensation on July 26, 2006.

Walters was the only witness. She testified at length regarding her injuries, when she discovered them, and how they affected her. She asked the board for more time to produce the police photographs taken February 21, 2001; the board gave her an additional 2 weeks to produce the photographs.²⁶

The board's decision reviewed the evidence presented by Dr. Fuller and Dr. Kropp.²⁷ The board determined that its 2003 conclusion that the employee needed to produce some medical evidence to attach the presumption was correct. On reviewing the evidence, and applying proper presumption analysis, it determined that she had raised the presumption through Dr. Kropp's December 21, 2005 report with regard to the low back pars defect.²⁸ The presumption was overcome, however, by Dr. Fuller's deposition testimony and report.²⁹ The board explicitly found that Walters was not credible and that her lack of credibility was significant as Dr. Kropp's opinion was based on her statements.³⁰ The board commented on Walters's demeanor and movements that were inconsistent with her claimed injuries.³¹ The board also found that if the employee had attached the presumption to the breast implant injury,

²⁶ 2006 Hrg. Tr. 94:2597-2608. Walters did not file the photographs.

²⁷ *Myung H. Walters v. Crazy Horse, Inc., (Walters II)*, Alaska Workers' Comp. Bd. Dec. No. 06-0271, 8-9 (September 29, 2006).

²⁸ *Walters II*, Dec. No. 06-0271 at 12.

²⁹ *Id.* at 13.

³⁰ *Id.* at 14.

³¹ *Id.* at 8.

Dr. Fuller's testimony and report would have been sufficient to rebut it.³² The board found that Walters had not proved her claim by a preponderance of the evidence.³³

As to the employer's petition, the board concluded that "another benefit" as used in AS 23.30.250(b) does not include non-pecuniary benefits such as a right to discovery.³⁴ The board adopted and reaffirmed the legal analysis set out in two prior board decisions. It rejected a request "for a finding of fraud" because the employee had not obtained "a benefit associated with her August 16, 2005 workers' compensation claim."³⁵

This appeal and cross-appeal followed.

Our standard of review.

When reviewing appeals from board decisions, the commission is bound by the board's credibility determinations of witnesses who appeared before the board.³⁶ If there is substantial evidence in light of the whole record to support the board's findings, the commission must uphold the board's findings of fact. We do not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of the weight of evidence is the task the legislature assigned to the board, not the commission. Thus, 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.³⁷ The commission upholds the board's

³² *Id.* at 13.

³³ *Id.* at 13-14.

³⁴ *Id.* at 16.

³⁵ *Id.*

³⁶ AS 23.30.128(b).

³⁷ AS 23.30.122.

findings if the evidence on which they are based is adequate to support a conclusion in a reasonable mind.³⁸

Because the commission makes its decision based on the record before the board, briefs, and oral argument, no new evidence may be presented to the commission.³⁹ On questions of law or procedure, not already addressed by the courts or the legislature, the commission is required to exercise its independent judgment.⁴⁰ The question whether the evidence is substantial enough to support a conclusion in a reasonable mind is a question of law.⁴¹

Discussion.

1. The board's finding that Walters was not credible is binding on the commission.

In this case, Walters asks the commission to overturn the board's determination of her credibility because she is telling the truth and her former employer's attorney is telling lies about her. Her brief urges that "Mr. Bredesen is the one who knowingly make false statement to obtain a benefit for him and his client by arrange line of lies."⁴² She insists that she had a good witness that "saw that Ms. Ford [was] stomping and kicking and punching me with sharp 6 inch heel." She explains that she had "forgotten about the [police] photo even exist till right before the hearing" but the photos would prove that her left breast was totally deflated on February 21, 2001. If the board had allowed her more time to get them, they would have corroborated her testimony.

Walters asks us to do what we may not do. The board's explicit determination that she was not a credible witness is as conclusive as a jury's finding that a witness is

³⁸ *Grainger v. Alaska Workers' Comp. Bd.*, 805 P.2d 976, 977 n. 1 (Alaska 1991).

³⁹ AS 23.30.128(a).

⁴⁰ AS 23.30.128(b).

⁴¹ *See Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁴² Appellant's Opening Br. 5, ¶ 18.

not credible, and it is binding upon the commission. Nothing in the record establishes that the board acted out of bias, passion or prejudice. The record of Walters's testimony and representations includes two depositions,⁴³ her statements in depositions of other witnesses,⁴⁴ her written statement,⁴⁵ and the two hearings in which she testified. The board had a full opportunity to review and weigh her testimony. The board was able to observe her demeanor and listen to the tone of her voice. Having reviewed the record, we cannot say that the board's decision that Walters's testimony is not credible is so clearly to the contrary of the record of evidence that reasonable minds must, without differing, reach another conclusion.

2. The board's findings of fact are supported by substantial evidence in light of the whole record.

We have previously discussed the role of the commission when an appellant challenges the board's decision not to accept the appellant's view of the facts. In *Witbeck v. Superstructures, Inc.*,⁴⁶ we said

[To] uphold the board's decision we need not draw the same inferences from the facts as the board did; it is enough to uphold the board if there is evidence in the record that supports the inference that the board drew. Thus, when the evidence is capable of supporting different inferences, we may not choose a different inference or deduction than the board chose and change the result because we find another more compelling.

Walters's case relies heavily on her own testimony. She says she had no problems before the fight. She says she was kicked or stomped in the fight.⁴⁷ She says

⁴³ Walters's deposition was taken on March 31, 2003, and June 19, 2006.

⁴⁴ Walters participated actively in depositions of Mark Yost, June 10, 2003; Barbara Taylor, June 10, 2003; Wayne Moberg, May 30, 2003; Lawrence Kropp, M.D., July 11, 2006; and Stephen Fuller, M.D., July 20, 2006.

⁴⁵ R. 0267-0271.

⁴⁶ Alaska Workers' Comp. App. Comm'n Dec. No. 020, 2006 WL 3325410 (October 5, 2006).

⁴⁷ She characterized this as being stomped, kicked and punched by Ford's six-inch heels. Appellant's Opening Br., 3, ¶ 8.

that she was bruised but did not feel sufficient pain to mention the blow to the emergency room physician, despite pointing out more minor bruises, abrasions and scratches. She says her breast implant ruptured and emptied over the next five days, so that it was completely flat by February 21, 2007. She relies on the police list of the photographs to corroborate her testimony that her left breast was bruised and flattened by February 21, 2007.⁴⁸ Despite the board's determination that medical evidence was necessary to establish a link between the implant rupture and the fight, Walters presented no medical testimony establishing such a link.⁴⁹ Walters relies on her testimony and Dr. Kropp's opinion to support her claim that her back pain and pars defect were caused by the fight.⁵⁰

The board found that Dr. Fuller's testimony and report were substantial evidence that rebutted any presumption of compensability regarding both the pars defect claim and the breast implant rupture claim. We agree that his testimony and report⁵¹ are

⁴⁸ R. 0076.

⁴⁹ The appellant did not claim error in the board's application of the presumption analysis.

⁵⁰ Dr. Kropp's opinion is found at R. 0783. He wrote:

MRI also shows a pars defect, which are 90% of the time caused by trauma. She was involved in an altercation in 2001, and since then she has not been able to completely get rid of this pain. She was O.K. before this, and I think that it is reasonable to conclude that this was the proximate cause of these symptoms.

⁵¹ Dr. Fuller's deposition was remarkable as much for Walters's statements as Dr. Fuller's testimony. However, Dr. Fuller made it clear that his opinion was based on Dr. Como's records, the hospital records, and his understanding of the impact of a "freshly broken bone" in the back. He opined that it was not likely that she had sustained such an injury in the fight. Similarly, he gave the opinion that a traumatic rupture of the implant would not have occurred in the fight. A doctor's testimony that the employee's job was not a substantial factor in causing her injury is substantial evidence even when the doctor admits that the cause of the injury is unknown. *Cowen v. Wal-Mart*, 93 P.3d 420, 426 (Alaska 2004). There is no medical evidence contradicting Dr. Fuller's opinion.

evidence that a reasonable mind might have relied on to base a conclusion that the claimed injuries were not caused by the fight.⁵² We note that Walters's surgeon, Dr. Smith, found a "Grade IV contracture" of the left breast,⁵³ and performed an "extensive capsulectomy."⁵⁴

In short, Walters's theory of the breast implant injury is based on her testimony and "post hoc, ergo propter hoc" reasoning. Only her testimony supports her claim that she had no problems with her left breast before the fight, that the fight was sufficiently traumatic to cause the rupture (and Grade IV contracture three months later), and that she only discovered the breast flattening after the fight. She reasons that if the injury was discovered after the fight, the injury was caused by the fight. Having rejected Walters's testimony as not credible, the board may have found insufficient evidence to support a finding that the breast implant rupture was caused by the fight. We agree the board had sufficient evidence in light of the whole record to reject Walters's claim of injury.

We also find that there is substantial evidence in light of the whole record to support the board's findings regarding the pars defect or low back injury. Walters's theory of the injury is based on Dr. Kropp's opinion, which rests on three assumptions: that 90% of pars defects are caused by trauma; that Walters was "O.K." before the fight; and, that after the fight Walters was not able to rid herself of back pain. The

⁵² The board found that Walters had not raised the presumption of compensability regarding the breast implant claim, but that if she had done so notwithstanding the lack of medical evidence, the board found Dr. Fuller's report and testimony would have been sufficient to rebut it.

⁵³ R. 0815. According to the United States Food and Drug Administration, Center for Devices and Radiological Health, capsular contracture occurs when the scar tissue or capsule that normally forms around the implant tightens and squeezes the implant. Grade IV is the most advanced level of contracture. See US Food & Drug Admin., Center for Devices & Radiologic Health, *Breast Implants - Potential Local Complications and Reoperations*, (September 15, 2004), available at http://www.fda.gov/cdrh/breastimplants/breast_implant_risks_brochure.html, (last visited October 16, 2007).

⁵⁴ R. 0815.

record contains a history of treatment for back pain prior to the fight, contradictory and poorly explained statements by Walters about her symptoms afterwards, Dr. Kropp's testimony that his opinion was based on what Walters told him,⁵⁵ his opinion that "there's no medical proof one way or another" that the pars defect was caused by the injury,⁵⁶ Dr. Fuller's report and testimony contradicting Dr. Kropp's opinion about pars defects, and Dr. Fuller's opinion the fight did not cause the back injury or pars defect. Coupled with the board's determination that Walters's testimony was not credible, this is substantial evidence in light of the whole record on which a reasonable mind might rely to support the conclusion that the pars defect or low back injury were not caused by the fight. We therefore affirm the board's decision.

3. A reimbursement order under AS 23.30.250(b) must be supported by a finding that the employee obtained a benefit under AS 23.30.

We turn now to the cross appeal of the board's decision. Crazy Horse asked the board to find that Walters should be compelled to reimburse its defense costs because she misrepresented the source of her left leg pain. The board, finding that Walters had not received a benefit "associated with her August 16, 2005 workers' compensation claim," refused reimbursement of defense costs of her claim under AS 23.30.250(b); and, finding no evidence of criminal intent, refused to make a finding of fraud under AS 23.30.250(a).⁵⁷ Crazy Horse argues now that the board erred as a matter of fact,

⁵⁵ Kropp Depo. 22:4-17.

⁵⁶ Kropp Depo. 24:10-11.

⁵⁷ The board applied AS 23.30.250, as enacted prior to amendment by §§ 61 - 62 ch 10 FSSLA 2005, presumably because the alleged false representations were made before November 7, 2005. The statute then provided:

(a) A person who (1) knowingly makes a false or misleading statement, representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of

because Crazy Horse had paid the emergency room treatment bill, and as a matter of law because it disregarded controlling legal precedent. It argues that, as a matter of public policy, an employer put to the expense of defending a fraudulent claim should be able to recover its costs. Walters now asserts that she never claimed that the pars defect came from the Nordstrom incident and that the cross-appellant's fraud accusation arose from a misunderstanding.⁵⁸

We agree that the board did not apply the proper analysis to the petition, but we do not conclude that the board's error compels the result the employer argues. In *Municipality of Anchorage v. Devon*, the Supreme Court stated the employer must prove by a preponderance of the evidence that the employee knowingly made false or misleading statements for the purpose of securing workers' compensation benefits.⁵⁹

workers' compensation insurance premiums; or (4) employs or contracts with a person or firm to coerce or encourage an individual to file a fraudulent compensation claim is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception as defined in AS 11.46.180, and may be punished as provided by AS 11.46.120 - 11.46.150.

(b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, 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).

⁵⁸ Appellant's Reply Br. 3.

⁵⁹ 124 P.3d 424, 429 (Alaska 2005).

This four-part test was adopted in *Municipality of Anchorage v. Devon*:

Alaska Statute 23.30.250(b) requires repayment of employment benefits when "a person has obtained compensation, medical treatment, or another benefit provided under this chapter by knowingly making a false or misleading statement or for the purpose of obtaining *that* benefit. . . ." (Emphasis added.) The board applies a four-part test for fraud claims. The 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. As it comports with the language of AS 23.30.250(b), we adopt this test. Thus, to succeed in this appeal the municipality must show that the board lacked substantial evidence to conclude that Devon did not secure worker's compensation benefits through such statements or actions.⁶⁰

The board cited *Municipality of Anchorage v. Devon* in a footnote, but failed to make the findings that case requires. Instead, the board found that the "employee has not obtained a benefit *associated with her August 16, 2005 claim.*"⁶¹ The question the board must answer is whether Crazy Horse proved that Walters made the statements described in the petition, that the statements were false or misleading, that Walters made the statements knowingly, and that those statements resulted in Walters obtaining benefits. The issue is not whether Walters made false or misleading statements *and* obtained workers' compensation benefits, or whether the benefits were "associated with" a particular written claim for benefits, but whether the false or misleading statements *resulted in* Walters obtaining benefits, regardless of whether the statements or benefits were associated with a particular written claim.

The board's decision did not address whether, as Crazy Horse claims, the emergency room visit was paid as a result of a false or misleading statement. Crazy Horse asserted to the board that it paid the visit bill.⁶² The board did not decide

⁶⁰ *Id.* at 429 (citations omitted).

⁶¹ *Walters II*, Dec. No. 06-0271 at 16 (emphasis added).

⁶² 2006 Hrg Tr. 80:2222-2224.

whether that bill was paid and, if so, whether it was paid as the result of a false or misleading statement. We will remand for the board to make these findings.

We agree, however, that the board correctly concluded that the phrase “another benefit under this chapter,” does not include the right to file a claim for compensation. There is no provision in AS 23.30 for the imposition of an administrative penalty on those who file false or frivolous claims that do not succeed.⁶³ “Another benefit under this chapter” includes such benefits as vocational reemployment evaluations, plan costs, transportation, and even late payment penalties incurred by the employer. The text of the statute itself makes it clear that only after an order directing “full reimbursement of the cost of all benefits obtained” may the board order payment of defense costs. The benefit obtained must be susceptible to reimbursement; it must have originally been paid to or on behalf of the person ordered to return it. After reimbursement is ordered, the board may 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 employer attorney fees incurred in defending a claim were included in “the cost of all benefits obtained,” the legislature would not have provided that the board may award them in addition to the reimbursement of the “cost of all benefits.”

There are sound policy reasons why employees should not be subject to such penalties. Employers may exert pressure on merely mistaken or confused employees to obtain settlements by suggesting the employee will be liable for defense costs if

⁶³ The commission may find that an appeal is frivolous or filed in bad faith and assess attorney fees against the appellant, even if the appellant is an employee. AS 23.30.008(d). A number of statutes allow administrative revocation of a permit or license on discovery of a false statement, or imposition of an administrative fine. See, e.g., AS 05.15.170(a)(4); AS 06.01.035(e)-(f); AS 08.32.160; AS 16.43.960; AS 18.65.740(a)(3); AS 21.69.210; AS 24.60.260; AS 28.33.100(e)(1); and, AS 47.27.015. For example, AS 23.20.390 imposes on unemployment insurance recipients liability “to the department for a penalty in an amount equal to 50 percent of the benefits that were obtained by knowingly making a false statement or misrepresenting a material fact, or knowingly failing to report a material fact, with the intent to obtain or increase benefits” in addition to the obligation to repay the benefits.

unsuccessful. Novel, unusual, or meritorious claims by uncertain employees may be chilled. Board deliberations may be influenced by anxiety that a credibility determination may expose a witness to consequential liability. Our experience tells us that false and frivolous claims add to the cost of the workers' compensation system as a whole. They poison employer attitudes toward other, more meritorious, employee claims, they consume public resources, and they increase the costs that an employer must insure against and thus the cost of insurance. However, the rights to file a claim or petition and to exercise due process rights under AS 23.30, are not "benefits" in the sense of advantages or privileges, as Crazy Horse argues; they are rights recognized by the state and exercised in the manner provided by AS 23.30, available to the employer as much as to the employee. Employees with novel or uncertain claims should not be intimidated by the risk of incurring liability for attorney fees at the board level. The board should be free to make necessary credibility determinations to decide such claims, without adverse determinations resulting in claims for defense cost reimbursement. The burden of defending false or frivolous claims at the board level is the price of a system of laws to which employers, as well as employees, may turn to defend themselves.⁶⁴

The commission questions the board's comment on evidence of the motives and knowledge of the employee under AS 23.30.250(a).⁶⁵ The determination of all questions, including motive and knowledge, under AS 23.30.250(a) are reserved to the court system. It is not appropriate for the board, or this commission, to comment on the court's prospective finding of guilt or innocence of a person if proceedings were to be brought under AS 23.30.250(a). The board's comment suggests the board has jurisdiction to decide whether Walters had a criminal motive and is inappropriate.

⁶⁴ We refer only to the cost of defense of claims based on misrepresentations that do not result in payment of benefits. We do not suggest that the cost of defense should not be awarded as well as the cost of bringing the petition for reimbursement when the board orders reimbursement under AS 23.30.250(b).

⁶⁵ *Walters II*, Dec. No. 06-0271 at 16.

Conclusion.

The board's determination of credibility is binding on the commission, and there is substantial evidence in light of the whole record to support the board's factual findings. We therefore AFFIRM the board's denial of Walters's claim for compensation, medical, and reemployment benefits. The board did not engage in the four-part analysis required under AS 23.30.250(b) respecting Crazy Horse's petition for reimbursement of benefits resulting from false or misleading statements and an order for payment of defense costs. We do not assume the board's power to make findings of fact on claims and petitions before the board. We REMAND this case to the board with instructions to rehear Crazy Horse's petition on the present record in accord with this decision.

Date: 22 Oct. 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

John Giuchici, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission affirmed (approved) the board's decision that dismissed the workers' compensation claim. The appeals commission's decision ends all administrative proceedings in the workers' compensation claim. In the cross-appeal, the appeals commission remanded (returned the case) to the board to rehear the petition for reimbursement on the record (without new evidence being submitted). The board will issue a new order on the petition, but no more hearings will be held or decisions made on the claim for compensation. This decision becomes effective when filed in the office of the appeals commission unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is filed and be brought by a party-in-

interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. To see the date this decision is filed, look at the clerk's Certification below.

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

If you wish to appeal this decision to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION BY THE APPEALS COMMISSION

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 Alaska Workers' Compensation Appeals Commission Decision No. 060, the final decision and order in the matter of *Myung H. Walters v. Crazy Horse, Inc., and Alaska National Insurance Company*, Appeal No. 06-031, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 22nd day of October, 2007.

Signed

R. M. Bauman, Appeals Commission Clerk

Certificate of Service

I certify that a copy of this Decision No. 060, the Final Decision and Order in AWCAC Appeal No. 06-031, was mailed on 10/22/07 to Walters (certified) & Bredesen at their addresses of record and faxed to Bredesen, Director WCD, & AWCAC Appeals Clerk.

Signed

10/22/07

L. Beard, Deputy Appeals Commission Clerk Date