Case: *Edward Witbeck vs. Superstructures, Inc. and Alaska National Insurance Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 066 (January 23, 2008)

Facts: 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. Witbeck argued that the board's decision that this was not "reasonable and necessary medical care" under AS 23.30.095(a) was not supported by substantial evidence. The employee also argued that the two members of the board panel, Hearing Officer Rosemary Foster and panel member Linda Hutchings had a conflict of interest. Witbeck earlier appealed the board's decision on this and other issues (*see* Dec. No. 014). On remand, the commission directed the board to make two decisions: first, whether Witbeck had changed his attending physician from Dr. Davidhizar; second, if the board found there was a referral to Dr. Bransford by Dr. Davidhizar or by a new attending physician, whether an examination by Dr. Bransford was a "reasonable alternative among indicated medical treatment options." Dec. No. 014 at 28. If there was no referral by the attending physician, the board was not required to examine whether the examination by Dr. Bransford was a reasonable alternative.

The board's decision on remand was made without taking additional evidence. First, the board concluded as it had the first time, that, because no other physician had recommended surgery (and some discouraged it), and Dr. Bransford also did not recommend surgery, "the employee failed to establish his claim that the Bransford evaluation and related medical transportation expenses constitute reasonable and necessary medical care under AS 23.30.095." Second, the board discussed the change in physicians:

> The Board finds the employee never sought out another treating physician besides Dr. Davidhizer and any referral to see Dr. Bransford should have come from Dr. Davidhizer who had frequently made referrals for the employee in previous years. The Board finds the employee went to Dr. Jarous at University of Washington without a proper referral from a treating physician. The Board finds that after Dr. Jarous left the University of Washington, Dr. Ananthakrishnan took over his cases. The Board finds the employee saw Dr. Ananthakrishnan who referred the employee to Dr. Bransford. The Board finds the employee's attendance with Dr. Ananthakrishnan was not upon a permissible referral pursuant to AS 23.30.095(a), but rather it was a change of physician. The Board finds that the employee did not provide notice to the employer or the Board, as required pursuant to 8 AAC 45.082(c)(4)(D). The Board finds by a preponderance of the evidence that the employee never sought a referral from his treating physician, Dr. Davidhizer, for the Bransford evaluation. Instead, he obtained a referral from Dr. Anathakrishnan to Dr. Bransford but Dr. Anathakrishnan was not his treating physician. The Board further finds that the employee did not receive a referral from Dr. Davis Peterson because this doctor declined to see the employee as of October 23, 2003. Thereafter, the employee went to doctors at the University of Washington

> and saw Dr. Ananthakrishnan as Dr. Jarosz had left the University and Dr. Ananthakrishnan took over his cases. In any event, the employee never had a referral to see any physician after Dr. Jarosz left. The employee did not properly change physicians under 8 AAC 45.082 when he sought opinions from Drs. Ananthakrihnan and Bransford. Consequently, under 8 AAC 45.082(a), the Board will not order the employer to pay the medical evaluation and medical transportation expenses incurred by the employee in seeking this opinion.

Applicable law: AS 23.30.095(a) 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.

AS 23.30.095(a) also 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 & Associates, Inc. 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 reviewing the reasonableness and necessity of the particular treatment sought, but has some latitude to choose among reasonable alternatives." *Hibdon* at 731. 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: Was the employer excused from payment of a claim for Dr. Bransford's care because Witbeck did not receive a referral for the evaluation from his attending physician? If Witbeck was properly referred, does substantial evidence support that the evaluation with Dr. Bransford was not reasonable and necessary medical care?

Holding / analysis: The commission affirmed the board's decision to deny payment for the Bransford evaluation because substantial evidence supported that Witbeck did not receive a valid referral from his attending physician. The board's finding that Witbeck's attending physician before he saw Dr. Ananthakrishnan was Dr. Davidhizar was supported by the fact that in the record Witbeck listed Dr. Davidhizar as his attending doctor on his 2003 claim, he did not list another doctor on his 2005 claim, the record contained no written notice of a change of attending physician and a medical report showed Witbeck returned to Dr. Davidhizar after seeing Dr. Jarosz but before seeing Dr. Ananthakrishnan. Seeing Dr. Ananthakrishnan may have constituted a change in doctors because there was no referral to her or it may have been, like Dr. Jarosz, a self-referral on Witbeck's part because Witbeck never provided written notice of his change in doctors. Because Witbeck either had no referral from an attending physician or did not properly change his attending physician to

Dr. Ananthakrishnan so that her referral to Dr. Bransford might be considered proper, the commission affirmed the board's denial of the claim for reimbursement for Dr. Bransford's evaluation.

The commission concluded that under AS 23.30.095(a), Witbeck should have submitted written notice of the change before he saw Dr. Ananthakrishnan. The commission concluded that 8 AAC 45.082(c)(2) permits the claimant to select his very first attending doctor (in this case, Dr. Davidhizar) by simply seeing that doctor but that later changes must be made in writing before the claimant sees the doctor for services. (An employee may change doctors one time without the employer's consent, but all these changes should made in writing.) Witbeck also argued that a March 12, 2007, letter supported his position that a valid referral existed, but the commission would not consider it because it was produced after the board's decision had been made, so it was not part of the record before the board.

The board also denied reimbursement for the evaluation because it was not reasonable and necessary medical care. The board's decision on this point was erroneous because it evaluated whether back surgery (which Witbeck hoped that the evaluation would recommend) was reasonable and necessary, instead of deciding whether Dr. Bransford's evaluation itself was reasonable and necessary. But because the commission affirmed on the grounds of a lack of a valid referral, this error was harmless.

The commission concluded that Witbeck's evidence did not establish that members of the board panel had a conflict of interest that might prevent them from impartially deciding his claim. Witbeck asserted that Foster and Hutchings had family members who owned businesses involved in workers' compensation claims. He referenced Foster Construction (but it was not clear that Rosemary Foster had any connection to that company) and Hutchings Chevrolet (Hutchings was an officer and director of this corporation). In any event, a board member is barred only from "hearing cases in which the family member is a party, or the family member's business is a party." Dec. No. 066 at 16-17. Witbeck did not present evidence of a relationship between Witbeck and either panel member, or between Superstructures, Inc., or Alaska National Insurance Company, and either panel member.

Note: Witbeck filed an earlier appeal of this issue and others, Dec. No. 014, and sought reconsideration of that decision in Dec. No. 020.