

**Case:** *Myung H. Walters vs. Crazy Horse, Inc. and Alaska National Insurance Company*, Alaska Workers' Comp. App. Comm'n Dec. No. 060 (October 22, 2007)

**Facts:** The employee, Walters, filed a claim for benefits in April 2001, which was controverted by the employer 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' willful intent to injure another employee. After a hearing in 2003, the board determined that the fight between the employee and the other worker, Ford, was work-related and therefore any injuries incurred in the fight, including scratches on her face and on her right leg, a red mark on her right bicep and head pain, were compensable. But the board could not attribute two injuries to the work-related fight, a puncture to her left breast implant causing flattening, and pain that the employee said caused her to be unable to walk. The board found that the employee would need medical evidence to attach the presumption of compensability to these two conditions.

The employee then filed another claim related to her arm, neck and back injuries as well as for breast implant replacement. The board held another hearing in June 2006. On these claims, Walters testified and the board concluded she was not credible. On the breast implant claim, the board concluded that Walters had not attached the presumption because she had no medical evidence linking the implant deflation to the work-related fight. But the board concluded that even if she had attached the presumption, medical evidence rebutted it and she did not prove her claim by a preponderance of the evidence. On the pars defect, the board concluded that the presumption attached and was rebutted but, again, the employee failed to prove her claim by a preponderance of the evidence. The employee appeals this decision.

The employer filed a petition asking the board to find that Walters should be compelled to reimburse its defense costs under AS 23.30.250(b) because she misrepresented the source of her left leg pain. The board found that Walters had not received a benefit "associated with her August 16, 2005, workers' compensation claim." The board denied reimbursement of defense costs 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). The employer appeals this decision.

**Applicable law:** AS 23.30.128(b), providing in part, that "[t]he board's findings regarding credibility of a witness before the board are binding upon 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."

Presumption of compensability, AS 23.30.120(a), and related case law interpreting it.

AS 23.30.010, coverage, before its amendment in 2005, and related case law requiring the work-related injury to be "a substantial factor" in the need for compensation or medical treatment.

AS 23.30.250(a) imposes civil and criminal penalties for specified instances of fraud. *Municipality of Anchorage v. Devon*, 124 P.3d 424, 429 (Alaska 2005), lays out the test for requiring reimbursement of workers' compensation benefits under AS 23.30.250(b):

"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."

**Issues:** Should the commission overturn the board's credibility finding? Did the board rely on substantial evidence in concluding that the breast implant problem and the pars defect were not work-related? Did the board make all the necessary findings in denying reimbursement under AS 23.30.250(b)? Does the board have jurisdiction to decide civil and criminal penalties fraud under AS 23.30.250(a)?

**Holding/analysis:** The employee asked the commission to overturn the board's credibility finding because she was telling the truth, she had a witness who would testify she was stomped, kicked and punched with a sharp 6-inch heel that deflated her breast, and, if given more time, she could have corroborated her testimony with police photographs of the damage to her left breast. The commission rejected this argument:

The board's explicit determination that she was not a credible witness is as conclusive as a jury's finding that a witness is not credible, and it is binding upon the commission. Nothing in the record establishes that the board acted out of bias, passion or prejudice. . . . 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. Dec. No. 060 at 8-9.

Moreover, substantial evidence supported the board's findings that the breast implant deflation and the pars defect were not work-related. On the breast implant, no evidence other than her testimony linked the deflation to the fight. But timing alone (because the deflation occurred after the fight) is insufficient to prove causation. Moreover, Dr. Fuller opined that a traumatic rupture of the implant would not have occurred in the fight and therefore, her job was not a substantial factor in causing her injury. No medical evidence contradicted this opinion. The employee's surgeon found a "Grade IV contracture" of the left breast, which occurs when the scar tissue or capsule that normally forms around the implant tightens and squeezes the implant.

On the pars defect, Dr. Kropp opined that the fight was the proximate cause based 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." *Id.* at 11. The commission listed the substantial evidence that supported the board's discrediting of this opinion and the board's denial of a link between the pars defect and the fight: "The record contains a history of treatment for back pain prior to the fight, contradictory and poorly explained statements by [the employee] about her symptoms afterwards, Dr. Kropp's testimony that his opinion was based on what Walters told him, his opinion that 'there's no medical proof one way or another' that the pars defect was caused by the injury, 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” and the board’s determination that the employee was not credible. *Id.* at 11-12 (footnotes omitted).

On the cross-appeal, the commission remanded to the board because it failed to apply the four-step *Devon* analysis. The board found that the “employee has not obtained a benefit *associated with her August 16, 2005 claim.*” The commission stated,

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. *Id.* at 14.

The commission remanded so that the board could address whether the emergency room visit was paid as the employer claimed, and whether it was paid as a result of a false or misleading statement.

However, the commission agreed with the board that to require reimbursement under .250(b), the employee must have obtained some benefit such as payment of compensation or medical benefits, and that the right to pursue a claim for workers’ compensation is not such a benefit. “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.” *Id.* at 15.

Lastly, the commission held the board does not have jurisdiction to decide any claim of fraud under AS 23.30.250(a) because that is reserved to the courts and, therefore, the board should not comment on prospective guilt or innocence if proceedings were brought under that provision.

**Note:** This case was appealed to the Alaska Supreme Court but the appeal was dismissed when the parties settled.