

**Case:** *Edward Witbeck vs. Superstructures, Inc. and Alaska National Insurance Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 020 (October 5, 2006).

**Facts:** Witbeck sought reconsideration of Comm'n Dec. No. 014. On the commission's decision to uphold the finding of noncooperation and termination of reemployment benefits, Witbeck argued "the providers were rigid, dismissive of him, and over-reacted to his assertion of his rights. In a generous light, Witbeck's argument may be regarded as an argument that the commission (and the board) misconceived material facts: that Witbeck's first provider made him leave her office and called the police; that Witbeck's second provider refused to acknowledge him when he came late to a meeting; and, that Witbeck's third provider refused to meet him under conditions acceptable to him. To Witbeck, these events are evidence of unwillingness of the rehabilitation providers to work with him – not his unwillingness to cooperate with them." Dec. No. 020 at 4. Witbeck also sought reconsideration of compensation rate adjustment, again arguing his wages as an ironworker should have been considered. Finally, Witbeck argued that the hearing officer was biased in favor of the employer because she was herself connected to a construction firm through her family, and that the board member for management was connected to a firm that had workers' compensation claims filed against it. Witbeck did not object to the commission's remand of the board's denial of medical and travel costs associated with a doctor's evaluation in Seattle.

**Applicable law:** AS 23.30.128(f), which provides in pertinent part:

Reconsideration may be granted if, in reaching the decision, the commission (1) overlooked, misapplied, or failed to consider a statute, regulation, court or administrative decision, or legal principle directly controlling; (2) overlooked or misconceived a material fact; (3) misconceived a material question in the case; or (4) applied law in the ruling that has subsequently changed.

Also AS 23.30.128(a) providing in part "new or additional evidence may not be received with respect to the appeal" unless it concerns an application for a stay, for attorney fees and costs of an appeal, for waiver of fees due to indigency or dismissal of appeals for failure to prosecute, or settlement. AS 23.30.128(c).

AS 23.30.128(b) stating in part: "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."

AS 23.30.122 providing in part: "The board has the sole power to determine the credibility of a witness."

**Issue:** Does the commission have authority to reconsider any of its decisions based on the criteria in .128(f)?

**Holding/analysis:** The commission refused to reconsider its decision on reemployment benefits. Although Witbeck's arguments could be viewed as an assertion that the commission "overlooked or misconceived a material fact," the commission must

accept the board's finding of facts and inferences drawn from the evidence, as long as those are supported by substantial evidence and they were. The commission also must accept the board's finding that Witbeck was not credible.

The commission refused to reconsider the denial of compensation rate because it was an attempt by Witbeck to reargue his case rather than to argue a point of reconsideration permitted under .128(f).

On the bias claim, the commission cannot consider new evidence on appeal per AS 23.30.128(a). Witbeck is free to raise the bias claim before the board on remand but the commission cautioned that "a claim of bias or partiality is not made out by showing nothing more than that workers' compensation claims have been filed against the company with which the member for management is connected, anymore than a showing that members of the same union with which the member for labor is connected have filed claims for workers' compensation demonstrates that the member for labor is biased in Witbeck's favor. Witbeck has not alleged that any member of the panel was connected to his employer or another party, had any financial or personal interest in his case, was unable to be fair and impartial toward the parties, or otherwise had any connection or interest that would constitute a violation of AS 39.52 or 2 AAC 64.030." Dec. No. 020 at 6-7.

Lastly, the commission modified its instructions on remand to direct the board to instruct Witbeck regarding the status of his claim and how to pursue his remaining claim of permanent total disability (PTD) compensation. The commission found that Witbeck had raised the PTD issue, along with his other claims, but that it appeared from the record that the claim had not advanced any further than that. The commission noted the board properly did not consider the PTD issue in the prior hearing since it was not listed among the issues for hearing on the prehearing conference summary, 8 AAC 45.065(c). But "[t]here is no notice in the pre-hearing summary that Witbeck withdrew his claim for permanent total disability compensation, that the parties agreed to it being heard at a later time, or that Witbeck was instructed how to bring his claim for other benefits, including permanent total disability, to hearing." Dec. No. 020 at 9.

**Note:** Witbeck went on to raise the bias issue before the board and ultimately appealed the board's decision on the bias issue and on the Bransford evaluation on remand; this appeal was decided in Comm'n Dec. No. 066.