

Alaska Workers' Compensation Appeals Commission

ARCTEC Services, an ASRC Company,
and ASRC Service Center,
Appellants,

vs.

Gayle M. Cummings,
Appellee.

Final Decision

Decision No. 155 August 17, 2011

AWCAC Appeal No. 10-028
AWCB Decision No. 10-0139
AWCB Case No. 200612715

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 10-0139, issued at Fairbanks on August 16, 2010, by northern panel members Amanda K. Eklund, Chair, Jeff Bizzarro, Member for Labor, Sarah Lefebvre, Member for Industry.

Appearances: Robert J. Bredesen, Russell, Wagg, Gabbert & Budzinski, P.C., for appellants, ARCTEC Services, an ASRC Company, and ASRC Service Center. Michael J. Wenstrup, Law Office of Michael J. Wenstrup, LLC, for appellee, Gayle M. Cummings.

Commission proceedings: Appeal filed September 8, 2010; briefing completed December 27, 2010; oral argument held June 21, 2011.

Commissioners: Jim Robison,¹ Philip Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

The employer, ARCTEC Services (ARCTEC), appeals a decision by the Alaska Workers' Compensation Board (board) that concluded ARCTEC's employee, Gayle M. Cummings (Cummings), did not commit fraud under AS 23.30.250(b). The board labeled its decision as an "Interlocutory Decision and Order[.]" Cummings argues that either the commission does not have jurisdiction, or if it does, ARCTEC filed too late to seek our review. After oral argument was heard in this case, the Alaska Supreme Court

¹ Commissioner Robison reviewed the parties' briefing, etc., attended oral argument, deliberated, and decided this appeal with the other panel members. See AS 23.30.007(i).

decided *Monzulla v. Voorhees Concrete Cutting*,² concluding that the commission has implied authority to hear interlocutory appeals. We therefore must evaluate Cummings' arguments as to the type of jurisdiction the commission is exercising in this case to determine whether the matter was timely filed.

The commission concludes that the board's decision was final. It completed its decision-making on the fraud claim and denied ARCTEC a right to reimbursement. The parties do not dispute that the appeal was timely filed so long as the decision was not interlocutory. Consequently, we exercise jurisdiction.

On the merits, according to Cummings, she was volunteering at an herb store. Coincidentally, Cummings certified she was not working on the back of the checks that were issued to her for workers' compensation benefits. The board held that, because Cummings did not believe her work at the herb store constituted employment, she did not knowingly make a false statement. Moreover, the board concluded that ARCTEC did not prove Cummings obtained benefits as a result of any false statement, as no testimony was presented that established when ARCTEC's adjuster first became aware that Cummings had certified she was not working.

ARCTEC argues that Cummings' understanding is not objectively reasonable, and therefore she knowingly misrepresented her work status when she certified that she was not working, gainfully or otherwise. ARCTEC also contends that the adjuster's testimony about why she put the certification language on the back of the checks proves that it relied on Cummings' false certification.

We conclude that Cummings' belief that her volunteer work did not constitute employment was not objectively reasonable and that the extant circumstances might not legally excuse Cummings from a violation of AS 23.30.250(b), which sets forth the penalties for fraudulent acts in the context of obtaining workers' compensation benefits. However, we affirm the board's decision because substantial evidence supports that

² 254 P.3d 341 (Alaska, June 24, 2011).

ARCTEC did not prove the misrepresentations influenced the adjuster to issue subsequent benefit checks.

2. Factual background and proceedings.

Cummings injured her neck, middle back, and right hip when she lifted a grill hood cover while working as a cook for ARCTEC at Clear Air Force Station in mid-August 2006.³ ARCTEC initially accepted the claim and began paying time loss and medical benefits.⁴ On July 21, 2008, ARCTEC controverted Cummings' temporary total disability (TTD) and other benefits on the grounds that Cummings was working full time.⁵ ARCTEC also filed a fraud petition, under AS 23.30.250(a) and (b), seeking reimbursement of benefits under AS 23.30.250(b), and alleging, among other things, that Cummings "has been working while claiming workers' compensation time loss benefits at the same time."⁶

Cummings testified that she volunteered as much as 32-40 hours a week, depending on how much pain she was in,⁷ at the Alaska Herb USA store, beginning with the store's opening in December 2007.⁸ Private investigator Dennis Johnson testified that he observed Cummings at the store on a "very regular work schedule," usually 10:00 a.m. to 6:00 p.m., Monday through Saturday.⁹ During his investigation, Johnson observed her spending 10 full days at the store, with one day off in the middle, in early June 2008.¹⁰

³ R. 0002.

⁴ R. 0011.

⁵ R. 0009.

⁶ R. 0027.

⁷ June 17, 2010, Hr'g Tr. 66:15-17.

⁸ June 17, 2010, Hr'g Tr. 64:16-20.

⁹ June 17, 2010, Hr'g Tr. 89:1-12.

¹⁰ R. 0237-38.

Cummings was not paid for her time at the store,¹¹ and the business operated at a loss.¹² At the store, she testified that she sent out care packages for troops as well as selling herbs to customers and handling the accounting.¹³ She was also pursuing classes to become a master herbalist during this time.¹⁴ She discussed with her reemployment benefits specialist her desires to open a store and to pursue a holistic health course, and they ultimately developed a plan that would help prepare her to run her own business.¹⁵

In fact, Cummings had applied for a business license for Alaska Herb USA more than a year before the store's opening, in November 2006, and this license expired in December 2006.¹⁶ In December 2007, right before the store's opening, Larry Schander (Schander), Cummings' boyfriend, was registered as the sole owner of Alaska Herb USA.¹⁷ At her deposition in September 2008, Cummings explained the apparent ownership change: "I'm on Workman's Comp and I can't have a business."¹⁸ At the hearing, Cummings stated she meant that she "couldn't afford" a business solely on workers' compensation benefits.¹⁹

From at least April 2008 to June 2008, Cummings endorsed biweekly benefits checks that stated on the back: "I certify, as attested by my signature, that I have not worked in any employment or self-employment, GAINFUL OR OTHERWISE, DURING

¹¹ June 17, 2010, Hr'g Tr. 69:3-5.

¹² June 17, 2010, Hr'g Tr. 155:14-20.

¹³ R. 0142, 0147, and 0158 (Sept. 9, 2008, Cummings Dep. 92:16-19, 97:16-21, 108:3-4); June 17, 2010, Hr'g Tr. 68:1-6.

¹⁴ R. 0071 (Sept. 9, 2008, Cummings Dep. 21:22–22:1).

¹⁵ June 17, 2010, Hr'g Tr. 28:14-18, 29:19–30:20.

¹⁶ R. 0269.

¹⁷ R. 0270.

¹⁸ R. 0155 (Sept. 9, 2008, Cummings Dep. 105:18-24).

¹⁹ June 17, 2010, Hr'g Tr. 61:3-10.

THE PERIOD OF DISABILITY COVERED BY THIS CHECK.”²⁰ The record is unclear as to whether Cummings endorsed checks with the above-quoted language beginning with the store’s opening in December 2007 through March 2008 and in July 2008 before ARCTEC’s controversion. The record does not contain cancelled checks covering these months. Cummings testified that she deposited the biweekly checks “all through that time” and she acknowledged the “language” on back of those checks, stating, “I remember what it says.” It is unclear from the context what specific timeframe “all through that time” encompasses.²¹

In any event, Cummings maintained that because she “wasn’t working [at Alaska Herb USA] for money”²² and it was “a hobby”²³ that got her out of the house,²⁴ signing the checks was not a misrepresentation. She stated, “I was not making gainful money.”²⁵ Prior to the July 2008 controversion, she never told ARCTEC’s adjuster, Lynn Palazzotto (Palazzotto), that she was volunteering at the herb store.

²⁰ R. 0509-14. The cancelled checks in the record are dated April 4, 2008, April 16, 2008, May 2, 2008, May 15, 2008, May 30, 2008, and June 13, 2008.

²¹ June 17, 2010, Hr’g Tr. 61:11-16. The relevant testimony in full:

Q: All through that time, you were depositing the biweekly checks?

A: Yes.

Q: And on the back of those checks, they had language on them – and I’ll hold that up as well.

A: I remember what it says.

The questions preceding this testimony do not clarify what specific period was included in “all through that time.” The questions concerned Cummings’ application for a business license for Alaska Herb in November 2006, more than a year before the store was opened and licensed to Schander. June 17, 2010, Hr’g Tr. 60-63.

²² June 17, 2010, Hr’g Tr. 69:3-5.

²³ June 17, 2010, Hr’g Tr. 68:10.

²⁴ June 17, 2010, Hr’g Tr. 69:4-5.

²⁵ June 17, 2010, Hr’g Tr. 69:3.

Palazzotto testified that the language on the check was intended to “remind[] [injured employees] that they need to let us know if they’re working.”²⁶ She testified that she first learned that Cummings was working in a store from Johnson’s report, but she did not immediately controvert Cummings’ benefits because she wanted to be sure of the facts. Palazzotto testified that “[a]ll the video, all the surveillance, and realizing that she’d been signing those checks during that time” eventually prompted her to issue the fraud controversion.²⁷ Palazzotto did not testify as to when she first learned that Cummings had endorsed the checks.²⁸ The record is therefore unclear as to whether Palazzotto issued subsequent checks after verifying that Cummings had certified she was not working on the preceding checks.

Cummings also testified about her activities selling items on eBay. She testified that she sold off personal property that she owned, such as knickknacks, artwork, a glass collection, old Avon products left over from when she was an Avon representative, and other personal items.²⁹ Cummings also acknowledged that she sold leftover “salve” that she had made for friends on eBay.³⁰ ARCTEC contended that she was selling herbs online for profit,³¹ but the board found that Cummings’ testimony was credible.³²

²⁶ June 17, 2010, Hr’g Tr. 133:20-21.

²⁷ June 17, 2010, Hr’g Tr. 139:17-18.

²⁸ See June 17, 2010, Hr’g Tr. 130–142.

²⁹ June 17, 2010, Hr’g Tr. 18:5-7, 19-21. See also *Cummings v. ASRC Energy Servs., Inc.*, Alaska Workers’ Comp. Bd. Dec. No. 10-0139, 4 (August 16, 2010) (A. Eklund, chair).

³⁰ June 17, 2010, Hr’g Tr. 60:14-20.

³¹ R. 0261-62. See also R. 0159-60 (Sept. 9, 2008, Cummings Dep. 109:22–110:5).

³² *Cummings*, Bd. Dec. No. 10-0139 at 16.

The board heard ARCTEC's fraud claims on June 17, 2010.³³ It concluded that Cummings did not "knowingly" make a false statement, reasoning:

Employee admitted at hearing she was aware of the certification language on the back of her TTD checks and freely signed and deposited the checks. She further testified that she never considered her work at Alaska Herb USA to be employment as it was purely voluntary, she was never paid, and she was only pursuing a hobby to keep her engaged and positive while she was enduring her disability. Employer alleges Employee is disingenuous, and points to the certification as a fraudulent statement Because Employee did not believe her work at the herb store constituted employment, the Board finds she did not make a false statement when signing her TTD checks.³⁴

The board also decided that Cummings was not required to disclose occasional eBay sales of personal property made to supplement her income.³⁵

Second, the board concluded that even if the certification on the back of the checks constituted a knowing misrepresentation, ARCTEC's fraud claim failed because

Employer has not demonstrated that it relied on Employee's fraudulent statement in issuing further TTD payments. While [the adjuster] testified that she "had no idea" Employee was working at the herb store until it was discovered by the investigator, Employer presented no testimony concerning the receipt of returned checks with Employee's signature, nor any testimony on how Employer relied on the certification statement in determining whether to continue issuing further payments.³⁶

The board relied on *Shehata v. Salvation Army*³⁷ in concluding that a causal link between an employee's false statement and the payment of benefits was required.

One board member dissented in part, concluding that Cummings knowingly misrepresented her work status when she signed the backs of the TTD checks and that

³³ June 17, 2010, Hr'g Tr. ARCTEC also asserted that Cummings made false statements to her doctors and reemployment benefits specialist. The board denied these claims and ARCTEC did not appeal on these grounds.

³⁴ *Cummings*, Bd. Dec. No. 10-0139 at 19.

³⁵ *Id.* at 20.

³⁶ *Id.* at 19.

³⁷ 225 P.3d 1106, 1115 (Alaska 2010).

ARCTEC relied on that misrepresentation when it issued further checks. “It is implied that in standard business practice an employer is aware of whether checks it issues have been processed[.]”³⁸

The board’s decision was labeled “interlocutory,” although no further issues on the fraud claim were pending before the board on the date the decision was filed, August 16, 2010.³⁹ The decision stated that the record closed on July 15, 2010.⁴⁰ The board decision included instructions for filing a motion for extraordinary review before the commission within 10 days after the date of service of the decision.⁴¹ The commission, however, had decided over a month earlier that it lacked jurisdiction to hear such interlocutory appeals.⁴² In any event, ARCTEC filed a Notice of Appeal, rather than a motion for extraordinary review, on September 8, 2010.

3. *Standards of review.*

On appeal of board decisions or orders to the commission, the standards of review we are to apply appear in two statutes, AS 23.30.122⁴³ and AS 23.30.128(b).⁴⁴

³⁸ *Cummings*, Bd. Dec. No. 10-0139 at 22 (S. Lefebvre, dissenting in part).

³⁹ *Id.* at 1.

⁴⁰ *Id.*

⁴¹ *Cummings*, Bd. Dec. No. 10-0139 at 22.

⁴² *Municipality of Anchorage v. McKittrick*, Alaska Workers’ Comp. App. Comm’n Dec. No. 136 (June 30, 2010) (*McKittrick*). The commission labeled *McKittrick* as a memorandum decision because it addressed primarily procedural issues in contrast to final commission decisions that address primarily substantive issues. When published, both types of decisions set precedent so long as they are not reversed by the Alaska Supreme Court. See AS 23.30.008(a).

⁴³ AS 23.30.122 reads:

Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness’s testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury’s finding in a civil action.

⁴⁴ AS 23.30.128(b) states:

(footnote continued)

Between them, only subsection .128(b) addresses the standards of review of: 1) questions of law and procedure, and 2) the board's factual findings.

On legal and procedural issues, the commission is to exercise its independent judgment. Here, we independently review as a question of law whether the board's decision was final or interlocutory.⁴⁵

We are to uphold the board's factual findings when supported by substantial evidence.⁴⁶ However, identifying the standards of review of the board's findings in terms of witness credibility and the weight to be accorded testimony is a more complex process.⁴⁷

Section .122 and subsection .128(b), at least in part, both deal with the same subject matter, namely the applicable standard of review of the board's credibility findings. Statutes that deal with the same subject matter are *in pari materia*.⁴⁸ Statutes *in pari materia* are to be construed together.⁴⁹ AS 23.30.122, a 1982 statute enacted prior to the existence of the commission, states in part that "[t]he board has

The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. 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. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

⁴⁵ See AS 23.30.128(b); *Hope Cmty. Res. v. Rodriguez*, Alaska Workers' Comp. App. Comm'n Dec. No. 041, 5 (May 16, 2007).

⁴⁶ See AS 23.30.128(b).

⁴⁷ The supreme court has noted that credibility and weight findings by the board are related. See *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 793 (Alaska 2007).

⁴⁸ See *Underwater Constr., Inc. v. Shirley*, 884 P.2d 150, 155 (Alaska 1994) citing, *inter alia*, 2A Norman J. Singer, *Sutherland* § 51:01-.02 (5th ed. 1992).

⁴⁹ See 2B *Sutherland* § 51:02.

the *sole* power to determine the credibility of a witness.”⁵⁰ AS 23.30.128(b), enacted in 2005 and expressly applicable to the commission, mandates that the board’s findings regarding witness credibility “are *binding* on the commission.”⁵¹ Construing these clauses together, we conclude that the commission must defer to the board concerning its credibility findings. Case law predating the establishment of the commission supports this conclusion.⁵²

Turning to the standard of review of the board’s weight findings, AS 23.30.128(b) does not address the subject. In contrast, AS 23.30.122 provides in part that “[a] finding by the board concerning the weight to be accorded a witness’s testimony . . . is *conclusive*[.]”⁵³ The wording of this clause in section .122 prompts the question whether the commission has any latitude when reviewing the board’s weight findings.⁵⁴ Again, the answer may be found in case law. “[Appellate] review of the board’s decision is deferential. Alaska Statutes AS 23.30.122 . . . gives the board conclusive power to evaluate ‘what weight to accord a witness’ testimony[.]”⁵⁵ Accordingly, as was the case with the board’s credibility findings, we are to defer to the board when it comes to its weight findings.

Even though the commission’s review of the board’s credibility and weight findings is deferential, as stated earlier, we otherwise review the board’s factual

⁵⁰ Italics added.

⁵¹ Italics added.

⁵² See *Brown v. Patriot Maintenance, Inc.*, 99 P.3d 544, 548 (Alaska 2004); see also *Norcon, Inc. v. Alaska Workers’ Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁵³ Italics added.

⁵⁴ We assume, without deciding, that the provision in AS 23.30.129(b), that “[a] finding by *the commission* concerning the weight to be accorded a witness’s testimony . . . is *conclusive*[.]” refers to our findings under AS 23.30.128(c). (Italics added). Those findings are made in connection with hearings before the commission on applications for stays, for attorney fees and costs on appeal, for waivers of fees, and for dismissals for failure to prosecute or upon settlement. See AS 23.30.128(c).

⁵⁵ *Brown*, 99 P.3d at 548.

findings under the substantial evidence standard.⁵⁶ The holding in *Brown* reinforces this conclusion. After discussing the deference owed the board's credibility and weight findings, the supreme court stated that "we limit [appellate] review to determining whether substantial evidence supports the board's decision."⁵⁷

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵⁸ "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."⁵⁹ Again, we exercise our independent judgment on questions of law.⁶⁰

Also, as discussed later in this opinion, the board found Cummings' testimony that she volunteered at Alaska Herb USA credible.⁶¹ However, Cummings' credibility is not the issue here. Instead, at issue are 1) whether her belief that her volunteer work was not employment was objectively reasonable, and 2) whether the circumstances that she credibly testified to legally constitute a violation of the provision in AS 23.30.250(b) that proscribes knowingly making a false or misleading representation for the purpose of obtaining workers' compensation benefits. These are questions of law in respect of which the commission exercises its independent judgment.⁶²

⁵⁶ See AS 23.30.128(b).

⁵⁷ *Brown*, 99 P.3d at 548.

⁵⁸ *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted)).

⁵⁹ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1189 (Alaska 1984)).

⁶⁰ See AS 23.30.128(b).

⁶¹ See *Cummings*, Bd. Dec. No. 10-0139 at 15-16.

⁶² See *Providence Health Sys. v. Hessel*, Alaska Workers' Comp. App. Comm'n Dec. No. 131, 9 (Mar. 24, 2010) (citing *Tonoian v. Pinkerton Security*, Alaska Workers' Comp. App. Comm'n Dec. No. 029, 8 (Jan. 30, 2007)).

4. *Discussion.*

- a. *The commission has jurisdiction over Cummings' appeal because the board's decision was final.*

Cummings submits that ARCTEC should have filed a motion for extraordinary review,⁶³ arguing that the board's decision was both labeled interlocutory and was not final in practical terms and that other issues were pending before the board. She maintains that since the date for filing a motion for extraordinary review had lapsed, the appeal was untimely and should be dismissed.⁶⁴ ARCTEC argues, irrespective of the title of the document, that the board decision is a final, appealable order because it "completely denied ASRC's [ARCTEC's] reimbursement and overpayment counterclaim."⁶⁵ The parties do not dispute that ARCTEC's filing was timely if the board decision was final, rather than interlocutory.⁶⁶

At the time ARCTEC filed its appeal, the commission was not accepting motions for extraordinary review. We had concluded in *McKitrick* that the commission lacked jurisdiction to hear interlocutory appeals.⁶⁷ A few days after oral argument in this case, however, the supreme court issued its opinion in *Monzulla*, a decision that had the effect of overruling *McKitrick*, and concluded that the commission has implied authority

⁶³ See 8 AAC 57.072 and 8 AAC 57.074 (repealed 3/27/2011).

⁶⁴ The commission's regulations on motions for extraordinary review, which were repealed this year, required that such a motion be filed within 10 days of the date of service of the board decision or order. See 8 AAC 57.072(a)(1) (repealed 2011). In contrast, an appeal of a final board decision or order must be filed with the commission within 30 days of the decision or order having been filed with the office of the board. See AS 23.30.127(a).

⁶⁵ Appellant's Br. 15 (relying on *Crawford & Co. v. Baker-Withrow*, 81 P.3d 982, 985 (Alaska 2003) (holding one measure of finality is "whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties.")).

⁶⁶ See AS 23.30.007(a) (stating in part that "[t]he commission has jurisdiction to hear appeals from final decisions and orders of the board"); AS 23.30.127(a) (requiring appeals to be filed within 30 days of the board's decision).

⁶⁷ See *McKitrick*, App. Comm'n Dec. No. 136 at 23-24.

to exercise discretionary review of interlocutory decisions or orders on appeal.⁶⁸ We therefore acknowledge that the commission may exercise jurisdiction in this case, regardless of the nature of the board's decision, but we consider the nature of our jurisdiction to resolve the parties' dispute over whether this matter was timely filed.

The test for determining finality is "essentially a practical one."⁶⁹ "[T]he title of the board's decision is not conclusive of its status as a final decision for purposes of appeal to the commission" ⁷⁰ Instead, we consider whether the decision-making process is complete and whether the parties are directly affected by the order.⁷¹ Moreover, because workers' compensation cases are protracted, with the board often hearing claims that are limited to a single dispute rather than a complete resolution of the entire case, the commission may conclude a board decision is final even if it is not the last possible decision that the board may make in a case.⁷² We have held that the standard for finality is met when a board decision fixes the rights of the parties,⁷³ and "leaves no further dispute on a pending claim or petition for the board to resolve."⁷⁴ As we have stated:

⁶⁸ See *Monzulla*, 254 P.3d at 342 (holding that "jurisdiction to hear interlocutory appeals is necessarily incident to the Commission's express power to hear appeals from final board decisions").

⁶⁹ *Crawford & Co. v. Baker-Withrow*, 81 P.3d 982, 985 (Alaska 2003) (quoting *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 184 (Alaska 1980)).

⁷⁰ *Olson v. Fed. Express Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 104, 4 (March 20, 2009).

⁷¹ See *Baker-Withrow*, 81 P.3d at 985 (citing *State, Dep't of Fish and Game, Sport Fishing Div. v. Meyer*, 906 P.2d 1365, 1370 (Alaska 1995)).

⁷² See *Stepovich v. State of Alaska, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 117, 3 (January 5, 2009).

⁷³ See *Hope Cmty. Res. V. Rodriquez*, App. Comm'n Dec. No. 041 at 7-8.

⁷⁴ *Stepovich*, App. Comm'n Dec. No. 117 at 4.

Generally, an order that reflects final disposition [of] the issues raised in a petition filed independently of a claim or in the absence of a claim will usually be a final decision. However, petitions for board action closely intertwined in, or arising from, preparation of a pending claim or portion of a claim for hearing are general interlocutory and not final.⁷⁵

Applying the foregoing law to the situation in Cummings, the commission concludes that the fraud decision in Cummings was a final, appealable order. The board completed its decision-making by hearing and deciding ARCTEC's petition for a finding of fraud on the merits.⁷⁶ This decision barred, without qualification, ARCTEC from seeking reimbursement from Cummings due to the alleged fraud.⁷⁷ The board did

⁷⁵ *Smith v. CSK Auto, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 002, 3-4 n.4 (January 27, 2006).

⁷⁶ *See Cummings*, Bd. Dec. No. 10-0139 at 20 (concluding "Employee did not fraudulently obtain benefits under AS 23.30.250(b), and Employer is therefore not entitled to a reimbursement of benefits."). *See Olson*, App. Comm'n Dec. No. 104 at 5 (concluding board's decisions to order an Second Independent Medical Examination (SIME) and denying reconsideration of that decision were interlocutory because board was waiting on the SIME results before deciding merits of the underlying claim); *see Stepovich*, App. Comm'n Dec. No. 117 at 8 (concluding board's decision that it had jurisdiction to hear penalty claim was not a final appealable order because board had not yet decided merits of penalty claim); *see Hope Cmty. Res.*, App. Comm'n Dec. No. 041 at 8-9 (holding order to attend medical examination was final because board decided merits of reemployment benefits claim, did not retain jurisdiction to analyze the results of the examination, and no other claims for additional benefits were pending that such an examination would help resolve).

⁷⁷ *See Cummings*, Bd. Dec. No. 10-0139 at 20.

not retain jurisdiction.⁷⁸ The record for the fraud petition closed on July 15, 2010,⁷⁹ precluding any of the parties from presenting any additional evidence in regard to the petition. Although Cummings argued that other claims may now be pending before the board, these are independent of the fraud issue.⁸⁰

Therefore, the commission concludes that the board decision was a final, appealable order subject to our mandatory jurisdiction.⁸¹ This appeal was filed before the statutory deadline.⁸²

b. The board's denial of ARCTEC's fraud claim is affirmed.

On the merits, we must decide whether the board properly applied the law to ARCTEC's fraud claim and whether substantial evidence supports the board's denial of repayment of workers' compensation benefits under AS 23.30.250(b). Subsection .250(b) states in relevant part, "If the board . . . finds that a person has obtained compensation . . . under this chapter . . . by knowingly making a false or misleading 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." *Municipality of Anchorage v. Devon* adopted a four-part test for workers' compensation fraud claims, which indicates that fraud exists if "(1) the employee made statements or

⁷⁸ *Id.* See *Velderrain v. State of Alaska, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 065, 10-11 (November 29, 2007) (holding board's decision was not a final, appealable order so long as the board retained jurisdiction to consider a payment plan for penalties imposed on an uninsured employer. However, when no payment plan was established during the 30 days specified in the board's order, the board's decision was final and appealable).

⁷⁹ See *Cummings*, Bd. Dec. No. 10-0139 at 1.

⁸⁰ See *Hope Cmty. Res.*, App. Comm'n Dec. No. 041 at 7-8 (concluding board's decision requiring employer to pay for reemployment benefits was final because it "fixed the rights of the parties with respect to reemployment benefits and terminated all proceedings" on that issue).

⁸¹ See AS 23.30.007(a) (providing that "[t]he commission has jurisdiction to hear appeals from final decisions and orders of the board . . .").

⁸² See AS 23.30.127.

representations; (2) the statements were false or misleading; (3) the statements were made knowingly; and (4) the statements resulted in the employee obtaining benefits.”⁸³

The board concluded that Cummings did not knowingly make a false statement when she signed her benefit checks⁸⁴ because she did not believe that “volunteering” at Alaska Herb USA was employment and that ARCTEC did not rely on those statements in issuing further payments.⁸⁵ However, ARCTEC appeals, arguing that Cummings knowingly misrepresented her employment status, and that those statements resulted in her obtaining benefits.

We conclude that the board legally erred when considering whether Cummings knowingly misrepresented her employment status. However, substantial evidence supports the board’s conclusion that her misrepresentations did not influence ARCTEC to issue benefit checks.

i. The board did not properly apply the law to the issue whether Cummings knowingly misrepresented her employment status.

The first question on appeal is whether Cummings made her false statements knowingly. The board determined that Cummings’ testimony was credible, and that finding is binding on the commission.⁸⁶ The board found that Cummings did not “knowingly” make false statements when she certified on her benefit checks that she

⁸³ 124 P.3d 424, 429 (Alaska 2005).

⁸⁴ R. 0509-514. The record contains only the cancelled checks dated April 4, 2008, April 16, 2008, May 2, 2008, May 30 2008, and June 13, 2008. The record does not contain any cancelled checks from the time of the store’s opening in December 2007 through March 2008, or from the end of June 2008 to July 2008 before ARCTEC’s controversion. The commission therefore evaluates only whether Cummings made knowing misrepresentations during the time periods covered by these cancelled checks that are in the record. Although there was testimony suggesting that the certification was included on all of Cummings’ benefit checks, June 17, 2010, Hr’g Tr. 61:11-16 and 133:16-21, without the cancelled checks in the record, we cannot assume that Cummings signed the certification on every check. For instance, she might have crossed off the language or endorsed a check in some other place.

⁸⁵ *Cummings*, Bd. Dec. No. 10-0139 at 16.

⁸⁶ *See* AS 23.30.128(b); *see also* AS 23.30.122.

did not have employment, "GAINFUL OR OTHERWISE," because she believed that the nature of her conduct was "volunteer" work.⁸⁷ However, the relevant legal question here is not whether Cummings believed that she was "volunteering," but whether 1) Cummings was aware the nature of her conduct at the herb store was that of an employee, and 2) the circumstances are such that she is legally excused from any violation of the provisions of AS 23.30.250(b).

First, case law does not define "knowingly" for the purpose of workers' compensation fraud. However, the commission has previously held that a subjectively held belief of a workers' compensation claimant must be objectively reasonable.⁸⁸ We think that an objectively reasonable person in Cummings' circumstances would be aware of the fact that the nature of her conduct was that of employment. In addition, a reasonable person would understand that the language "GAINFUL OR OTHERWISE" includes "volunteer" work.

A reasonable person would be aware that the nature of Cummings' conduct at the herb store was that of an employee, not of a hobbyist. Cummings admitted she had been working there for up to 32-40 hours a week.⁸⁹ She was also aware that the conduct of operating a store, unlike a mere hobby, required a business license.⁹⁰

⁸⁷ See *Cummings*, Bd. Dec. No. 10-0139 at 19. Apparently, there was insufficient evidence presented to the board from which it could conclude that the arrangement between Schander, the sole proprietor of Alaska Herb USA, a for-profit business, and his girlfriend, Cummings, a "volunteer" at that business, would enable *them* to earn income from sales, while Cummings collected workers' compensation benefits.

⁸⁸ See *Hessel*, App. Comm'n Dec. No. 131, 12-14 and 17 (Hessel missed the deadline to file a request for a hearing because he did not understand the procedure that was clearly written on the back of his controversion notice. The commission held that Hessel did not substantially comply with the deadline as a matter of law because his misunderstanding was not reasonable. However, a subjective misunderstanding may be relevant when it shows legal incompetence or an inability to conduct one's own affairs).

⁸⁹ June 17, 2010, Hr'g Tr. 66:11-17.

⁹⁰ June 17, 2010, Hr'g Tr. 16:9-12; R. 0270-71.

Additionally, she sought a *reemployment* plan to sell herbs at a retail store, suggesting that she understood her “hobby” constituted employment.⁹¹ A reasonable person would know that, although she was unpaid, the nature of her conduct was that of an employee.

Moreover, although Cummings believed that the conduct of selling herbs at a retail store as a “volunteer” did not constitute employment, a reasonable person would understand that the language “GAINFUL OR OTHERWISE” on the back of the checks she signed would include conduct that would otherwise be gainful employment. She properly understood in her testimony that the word “gainful” meant to be paid,⁹² and a reasonable person would understand that adding the phrase “or otherwise” would then include all other conduct as an employee, including unpaid employment.

Second, we conclude the board took too narrow a view in terms of the circumstances that would have been sufficient for Cummings to have violated AS 23.30.250(b). The board essentially required Cummings to have engaged in remunerative employment in order to violate the statute, as distinguished from manifesting the potential to work. In the context of this case, her volunteering at the store to the extent she did *might* be indicative of an ability or capacity to work, whether it be light-duty, part-time, whatever her physical condition allowed.⁹³ That, coupled with the “gainful *or otherwise*” certification language on the checks, should have prompted the board to at least consider, in the alternative, whether Cummings was legally excused from any violation of AS 23.30.250(b) under the circumstances.

⁹¹ June 17, 2010, Hr’g Tr. 28:14-18, 29:19–30:20.

⁹² June 17, 2010, Hr’g Tr. 69:3-4. When asked if she had certified she was not working in any employment, gainful or otherwise, Cummings responded, “I was not making gainful money. I wasn’t working there for money.”

⁹³ *See, e.g.*, AS 23.30.200, which provides for temporary partial disability benefits, as distinguished from the TTD benefits Cummings was being paid.

ii. Substantial evidence supports the board's conclusion that Cummings' misrepresentation did not result in her obtaining benefits.

The next question is whether Cummings' misrepresentation resulted in obtaining benefits. *Shehata v. Salvation Army*⁹⁴ rejected the employee's argument that "justifiable reliance," an element of common law fraud, is an element of fraud in workers' compensation cases. Instead, the supreme court interpreted AS 23.30.250(b) and the *Devon* test to require a causal link between the employee's statement and the benefits obtained.⁹⁵ To determine whether there was a causal link, we must consider whether the false statement influenced ARCTEC to issue benefits.⁹⁶

The board stated that *Shehata* held that "because the employer's adjuster knew Shehata was working when he made the false statement he was not, the employer could not have justifiably relied upon the false statement and was therefore not entitled to a reimbursement order."⁹⁷ This misstates the holding in *Shehata*. In *Shehata*, the supreme court held that "Shehata cannot have obtained benefits by making his false statement before he made the statement[.]"⁹⁸ "[L]ogically a cause must come before a result[.]"⁹⁹ In other words, Shehata's false statement could not influence his employer to pay benefits *before* he lied. *After* he lied, his employer continued to pay benefits until it could secure adequate evidence to support a controversion.¹⁰⁰ The supreme court therefore required Shehata to repay the benefits that he received *after* he made the false statement.¹⁰¹

⁹⁴ 225 P.3d 1106, 1115 (Alaska 2010).

⁹⁵ *See id.*

⁹⁶ *See id.* at 1118; *see H&H Contractors v. Onigkeit*, Alaska Workers' Comp. App. Comm'n Dec. No. 135, 3 (May 4, 2010).

⁹⁷ *Cummings*, Bd. Dec. No. 10-0139 at 18.

⁹⁸ *Shehata*, 225 P.3d at 1118.

⁹⁹ *Id.* at 1115.

¹⁰⁰ *See id.* at 1118.

¹⁰¹ *See id.* at 1120.

In this case, ARCTEC produced no evidence that Cummings' misrepresentations influenced it to provide benefits. There is no evidence that the adjuster, Palazzotto, received Cummings' cancelled checks and looked at the back of them to verify that Cummings had no employment before issuing a subsequent check.¹⁰² In fact, according to Palazzotto's testimony, the purpose of the certification stamp on the back of benefit checks was to serve as a reminder to an employee,¹⁰³ rather than as a representation of employment status for ARCTEC to rely on. Furthermore, Palazzotto's testimony was that "[a]ll the video, all the surveillance, and realizing that she'd been signing those checks during that time" eventually prompted her to issue the fraud controversy.¹⁰⁴ Although Palazzotto eventually became aware of Cummings' false certifications, the employer bears the burden to establish a causal link between the payment of benefits and the employee's misrepresentation. ARCTEC did not prove that it had seen, much less relied, on the certifications at the time it issued subsequent benefit checks.

We agree with the board that ARCTEC has not met its burden of proof that Cummings' misrepresentation influenced it to issue benefit checks. We hold that substantial evidence supports the board's conclusion that ARCTEC failed to show a causal link between Cummings' misrepresentation and the benefits she received. Therefore, although the board legally erred in its analysis whether Cummings knowingly misrepresented her work status, we nevertheless affirm the board's conclusion denying ARCTEC's fraud petition.

¹⁰² One board member in dissent argued that "in standard business practice an employer is aware of whether checks it issues have been processed[.]" *Cummings*, Bd. Dec. No. 10-0139 at 22. However, under *Shehata*, the employer bears the burden of proof in establishing that the false statements resulted in the employee obtaining benefits. See *Shehata*, 225 P.3d at 1115. Even assuming that standard business practice meant that ARCTEC was aware its checks were cashed, this does not prove that ARCTEC looked to see whether Cummings signed the certification or endorsed the check without signing the certification.

¹⁰³ June 17, 2010, Hr'g Tr. 133:20-21.

¹⁰⁴ June 17, 2010, Hr'g Tr. 139:17-18.

5. *Conclusion.*

The commission concludes that the board decision was a final and appealable order and, therefore, the commission must review the decision. Although we conclude that the board erred in deciding whether Cummings knowingly misrepresented her work status, we AFFIRM the board because substantial evidence supports that ARCTEC did not prove that this false statement led to the issuance of subsequent benefits.

Date: 17 August 2011 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Unavailable for Signature

Jim Robison, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirmed the board's decision denying the employer's petition. The commission's decision becomes effective when distributed unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).¹⁰⁵ To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

¹⁰⁵ A party has 30 days after the service or distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was served by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed¹⁰⁶ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal 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

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed¹⁰⁷ to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that with the exception of the correction of typographical errors this is a full and correct copy of the Final Decision No. 155 issued in the matter of *ARCTEC Services v. Cummings*, AWCAC Appeal No. 10-028, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 17, 2011.

Date: August 23, 2011



Signed

B. Ward, Commission Clerk

¹⁰⁶ See n.105, *supra*.

¹⁰⁷ *Id.*