ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

RICK A. SNELSON, Employee, Claimant, v. ICICLE SEAFOODS, INC., A Self-Insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 199903892 AWCB Decision No. 15-0066 Filed with AWCB Anchorage, Alaska on June 10, 2015

Icicle Seafoods, Inc.'s (Employer) March 21, 2014 petition for a determination Rick A. Snelson (Employee) was not entitled to benefits because he made false statements in a health questionnaire at the time of hiring, and for reimbursement of benefits obtained through false statements was heard May 12, 2015 in Anchorage, Alaska. Also heard on that date were Employee's March 3, 2013, May 14, 2013, and July 4, 2013 claims for benefits. This hearing date was selected on March 4, 2015. Employee appeared, represented himself, and testified. Attorney Thaddeus O'Sullivan appeared and represented Employer. Leurinda Moore, Vincent Phillips, M.D., Daniel Rabin, M.D., Rex Bolin, M.D., and Employee testified by deposition. The record closed at the hearing's conclusion on May 12, 2015.

This is a long and involved case. Employee reported crab asthma as a result of his work for Employer in 1999. There have been eight prior decisions and orders:

1. *Snelson v. Icicle Seafoods, Inc.*, AWCB Decision No. 02-0181 (September 12, 2002) (*Snelson I*): The hearing was set to hear Employee's claim for benefits, but the panel

determined a board-ordered second independent medical evaluation (SIME) was necessary and deferred ruling on Employee's claim.

2. *Snelson v. Icicle Seafoods, Inc.*, AWCB Decision No. 03-0085 (April 17, 2003) (*Snelson II*): *Snelson II* addressed Employee's claim for benefits. In finding the work for Employer was a substantial factor in Employee's disability or need for medical treatment, *Snelson II* gave considerable weight to the opinions of Employee's doctor, Carl Brodkin, M.D., and SIME physician, Daniel Rabin, M.D. Employee's claim for permanent total disability (PTD) was denied, but his claim for temporary total disability (TTD) from February 20, 1999 through July 21, 1999 was granted. His appeal of the denial of reemployment benefits was remanded to the reemployment benefits administrator (RBA). Employer had previously paid Employee $67,500 in permanent partial impairment (PPI) benefits based on Dr. Brodkin's rating of 50 percent impairment. *Snelson II* determined Dr. Raybin's subsequent rating of 15 percent was correct, and as a result, Employer had overpaid Employee $47,250.00. It permitted Employer to recover the overpayment through a 50 percent offset against future benefits.
3. *Snelson v. Icicle Seafoods, Inc.*, AWCB Decision No. 03-0108 (May 20, 2003) (*Snelson III*): *Snelson III* granted Employer's petition for reconsideration of *Snelson II*, and clarified that any future reemployment stipend paid to Employee under AS 23.30.041(k) was not subject to the offset to recover the overpayment.
4. *Snelson v. Icicle Seafoods, Inc.*, AWCB Decision No. 04-0038 (February 12, 2004) (*Snelson IV*): *Snelson IV* granted Employee's claim for interest on the TTD awarded in *Snelson II*. It denied his claim for an AS 23.30.041(k) reemployment stipend from January 23, 2002 through June 23, 2003. .
5. *Snelson v. Icicle Seafoods, Inc.*, AWCB Decision No. 04-0193 (August 16, 2004) (*Snelson V*): *Snelson V* dismissed without prejudice Employee's appeal of the RBA's determination he was ineligible for reemployment benefits.
6. *Snelson v. Icicle Seafoods, Inc.*, AWCB Decision No. 04-0217 (September 14, 2004) (*Snelson VI*): Employer had petitioned for reconsideration of *Snelson V*, contending it should have addressed the merits of Employee's appeal rather than dismissing the claim without prejudice. *Snelson VI* granted Employer's petition and affirmed the RBA's denial of reemployment benefits.

7. *Snelson v. Icicle Seafoods, Inc.*, AWCB Decision No. 10-0084 (May 12, 2010) (*Snelson VII*): *Snelson VII* denied Employer's petition to dismiss Employee's claims for failing to attend a deposition or to respond to discovery requests. At the time, Employee had two pending claims in which he sought additional TTD and a reduction to the offset amount. Although *Snelson VII* denied Employer's petition to dismiss, it ordered Employee to respond to the discovery requests and to arrange for the scheduling of his deposition. It stated that Employee's failure to comply would result in the dismissal of Employee's claims.
8. *Snelson v. Icicle Seafoods, Inc.*, AWCB Decision No. 10-0118 (June 28, 2010) (*Snelson VIII*): When Employee failed to comply with *Snelson VII*, *Snelson VIII* dismissed his pending claims.

ISSUES

Employer contends Employee is precluded from receiving benefits because he knowingly make false statements about his physical condition on a pre-hire questionnaire. Employee contends he did not make false statements and should not be precluded from receiving benefits.

1. Is Employee precluded from receiving benefits because he made false statements on a pre-hire health questionnaire?

Employer contends it is entitled to reimbursement of the benefits it has paid, because Employee made knowingly false or misleading statements for the purpose of receiving those benefits. Employee denies making false or misleading statements and contends Employer is not entitled to reimbursement.

2. Is Employer entitled to reimbursement because Employee obtained benefits through false or misleading statements?

After *Snelson VIII* was issued, Employee filed nine claims. In February 2015, he requested a hearing on three of those claims. In those claims, he sought additional medical benefits, transportation costs, reimbursement for various expenses, a compensation rate adjustment, a late-payment penalty, interest, a penalty for an unfair or frivolous controversion, and that the overpayment be written off due to financial hardship. At hearing, Employee dropped the claims for transportation costs, reimbursement of cell phone cost, his request the overpayment be written off, and his claim that Employer had not paid all of the PPI as stated in *Snelson II*.

Although Employer contends Employee is precluded from receiving benefits because of the false statements on the health questionnaire, it also contends his claims must be denied because he has produced no supporting evidence.

3. Is Employee entitled to medical costs, a compensation rate adjustment, interest, or penalties?

FINDINGS OF FACT

All findings of fact in *Snelson I* through *VIII* are incorporated herein. The following facts and factual conclusions are reiterated from *Snelson I* through *VIII* or established by a preponderance of the evidence:

1. On December 26, 1990, Employee was admitted to St. Peter Hospital in Olympia, Washington. His chart notes make multiple references to a history of asthma and use of an albuterol inhaler. (St. Peter Hospital, Chart Notes, December 29, 1990). This medical record was first filed as part of a medical summary on March 25, 2014. (Record).
2. On November 4, 1991, Employee completed a report of injury for the Washington Department of Labor and Industries stating he had injured his back lifting a heavy piece of lumber while working for Por Tac, Inc. (Washington Report of Injury, November 4, 1991). This medical record was first filed as part of a medical summary on March 25, 2014. (Record).
3. On December 4, 1991, Employee was seen by Joseph Sueno, M.D., for lumbosacral and cervical strains caused by a 1991 work injury. Employee reported to Dr. Sueno that he had occasional asthmatic attacks in the past. (Dr. Sueno, Evaluation Report, December 4, 1991). This medical record was first filed as part of a medical summary on March 25, 2014. (Record).
4. On January 9, 1992, Employee received physical therapy for his back strains. He again reported a history of asthma. (First Rehabilitation & Physical Therapy, Chart Note, January 9, 1992). This medical record was first filed as part of a medical summary on March 25, 2014. (Record).
5. On April 16, 1992, Employee was by Barbara Jessen, M.D., and Clarence Jones, M.D., for an independent medical evaluation in connection with his 1991 back injury. Employee reported smoking about one and one-half packs of cigarettes a day. He also reported his history of asthma, but stated he had last required medication about six months before. The doctors

diagnosed cervicodorsal and lumbosacral strains caused by the work injury and determined Employee had suffered a permanent impairment. (Independent Medical Evaluation, Report, April 16, 1992). This medical record was first filed as part of a medical summary on March 25, 2014. (Record).

6. The Washington Department of Labor and Industries reported that on February 22, 1993, Employee was paid $4,500.00 for permanent partial disability for the 1991 back injury. (Washington Dept. Labor and Industries, Order of Payment, February 12, 1995). This record was first filed as part of a medical summary on March 25, 2014. (Record).
7. On June 14, 1993, Employee applied for unemployment benefits in Washington. He stated he had quit his job with QualCast Foundry, Inc. because it was affecting his ability to breathe properly. (Claimant's Separation Statement, June 14, 1993). This record was first filed as part of a medical summary on March 25, 2014. (Record).
8. On January 6, 1998, Employee completed an employment application for Employer. He stated the reason he left his job with QualCast was to relocate. (Icicle Seafoods, Employment Application, January 6, 1998).
9. On February 10, 1998, Employee completed a health questionnaire for Employer. One question asked about prior occupational injuries, accidents, or illnesses. Employee responded with a dash, and did not disclose his 1991 work related back injury. The questionnaire then asked whether the applicant had ever been treated for 38 listed medical conditions, including asthma and back injury or strain. Employee checked the "No" box for every condition. In bold print, the questionnaire stated "I hereby certify that I have answered the above questions to the best of my knowledge, and that the answers are true and complete. I understand that omission of fact is cause for dismissal and may result in denial of workers' compensation benefits." (Employer, Health Questionnaire, February 10, 1998).
10. On February 12, 1998, Employee signed an employment agreement with Employer to work as a processor for the Opilio crab season ending May 1, 1998. (Employment Agreement, February 12, 1998).
11. On October 3, 1998, Employee signed an acceptance letter, agreeing to work for Employer for the Opilio crab season from November 3 to December 15, 1998. (Acceptance Letter, October 3, 1998).

12. On October 8, 1998, Employee saw Arlene Oliver, ARNP, at Providence Hospital in Centralia, Washington. Employee reported experiencing some lung irritation while working processing crab the previous season and stated he had used Primatene Mist inhalers in the past. He also reported smoking one pack a day for 20 years. ARNP Oliver diagnosed asthma, probably secondary to smoking and prescribed Ventolin and Beclomethasone inhalers. (Providence Hospital Centralia, Chart Note, October 8, 1998).
13. On December 3, 1998, Employee accepted employment with Employer for the Opilio crab season beginning January 15, 1999 and ending May 15, 1999. (Acceptance Letter, December 3, 1998).
14. On January 15, 1999, Employee entered another employment agreement with Employer. (Employment Agreement, January 15, 1999).
15. On March 8, 1999, Employee reported difficulty breathing caused by exposure to crab. He was offered a job on a non-crab processing vessel, but declined. (Report of Occupational Injury or Illness, March 8, 1999).
16. On July 1, 1999, Employee returned to ARNP Oliver. He reported that while working for Employer he had experienced asthma symptoms when exposed to steam from the crab steamers. He stated he had retained a lawyer, who requested a referral to Harborview Medical Center, which had done a "crab asthma" study. (Providence Hospital Centralia, Chart Note, July 1, 1999).
17. On July 21, 1999, Employee was seen by Carl Brodkin, M.D., at Harborview Occupational Medicine Clinic in Seattle, Washington. Employee told Dr. Brodkin that he had been in excellent health prior to working as a crab processor for Employer. Employee reported that he had work in a number of different job settings without respiratory difficulty, including foundry work, welding, maintenance work with gas exposure, oil rig work, fiberglass, autobody and paint work, and lumber mill work. He reported no history of atopy[1], childhood asthma, hay fever, or eczema, but did relate his 15 to 20 year history of smoking one pack per day. Dr. Brodkin noted Employee had been referred by his attorney. (Harborview Medical Center, Chart Note, July 21, 1999).

[1] Atopy is defined as: a genetic disposition to develop an allergic reaction (as allergic rhinitis, asthma, or atopic dermatitis) and produce elevated levels of IgE upon exposure to an environmental antigen and especially one inhaled or ingested. http://www.merriam-webster.com/medical/atopy

18. No attorney has ever entered an appearance for Employee in this case. (Observation; Record).
19. On July 21, 1999, Employer accepted Employee's claim and began paying benefits. (Compensation Report, April 1, 2001).
20. On November 15, 1999, Employee was seen by Dorsett Smith, M.D., for an employer's medical evaluation (EME). Employee told Dr. Smith that the first season he worked for Employer he worked in the freezer and had no respiratory difficulties, but his symptoms began when he was exposed to steam from the crab cookers. Employee told Dr. Smith he had no prior history of asthma, allergies, hay fever, or eczema. In reciting his employment history, Employee stated he had worked as a sandblaster for several months with no respiratory protection other than a paper mask. He stated he has started smoking at age 16, and smoked one pack per day. The results of a methacholine challenge test indicated mild bronchial hyperreactivity even with the medications Employee was taking. Dr. Smith diagnosed crab asthma, noting Employee had no prior history of asthma or allergies. (Dr. Smith, EME Report, November 15, 1999).
21. On September 12, 2002, *Snelson I* ordered an SIME. (*Snelson I*).
22. On January 6, 2003, Employee was seen by Daniel Raybin, M.D., for an SIME. Employee told Dr. Raybin that had not had asthma, bronchitis, allergic rhinitis, or pneumonia. He also said he had recently decreased from smoking one pack per day to one-half pack. Dr. Raybin diagnosed Employee with a combination of asthma and chronic obstructive pulmonary disease. He concluded the exposure to crab in 1999 was still a substantial factor in causing Employee's condition. He stated "To the extent that his obstructive lung disease is asthma, it was caused by his crab exposure. The patient was asymptomatic prior to the crab exposure. In other words, he had not previously suffered from asthma. . . but for his exposure to crab, he would not have developed asthma at that time and probably would not have it now." Dr. Raybin concluded Employee's exposure to crab caused a permanent worsening of his obstructive pulmonary disease. He determined Employee had a permanent partial impairment rating of 15 percent. (Dr. Raybin, SIME Report, January 6, 2004).
23. *Snelson II* was issued on April 17, 2003. *Snelson II* addressed Employee's claim for benefits. In finding the employment was a substantial factor in Employee's disability or need for medical treatment, *Snelson II* gave considerable weight to the opinions of Employee's doctor,

Carl Brodkin, M.D., and SIME physician, Daniel Rabin, M.D. Employee's claim for (TTD) from February 20, 1999 through July 21, 1999 was granted. His appeal of the denial of reemployment benefits was remanded to the reemployment benefits administrator (RBA). *Snelson II* determined Dr. Raybin's impairment rating of 15% was correct. Because Employer had previously paid Employee $67,500 in PPI benefits based on Dr. Brodkin's 50 percent rating, Employer had overpaid Employee $47,250.00. Employer was permitted to recover the overpayment through a 50 percent offset against future benefits. (*Snelson II*).

24. In 2004, Employee worked at Nortrac, as a welder in a foundry. When he was arrested and could not contact Nortrac, they "cancelled" his employment. (Employee, Deposition Testimony, May 13, 2013).

25. On November 11, 2004, Employee was seen by Rex Bolin, M.D., for a pulmonary function test. The test showed a mild decrease in diffusion and mild obstruction which cleared with albuterol. Dr. Bolin stated:

> The patient smokes much more that he lets on. The type of nicotine staining which he displays would be unusual if he was only smoking one-half pack per day. There is also a smell of smoking in the room. He absolutely needs to quit smoking, or will have progressive deterioration in his lung function.
> . . . .
>
> [T]he impairment brought on by his asthma condition is significantly overstated. I see no reason why he cannot be in a meaningful occupation. The problem is he views himself as being disabled. . . . The only limitations on his employment would be for him to be in a relatively clean environment. I would not recommend anything dealing with seafood, welding, smoke, and fumes, etc. From where I sit right now, I see no limitations in terms of physical labor.

Dr. Bolin prescribed a year's worth of asthma medication. (Dr. Bolin, Consultation Note, November 11, 2004).

26. On March 12, 2006, Employee was seen at St. Peter Hospital. His chart states: "Asthma—has not needed tx [treatment] in a long time." (St. Peter Hospital, Triage Record, March 12, 2006).

27. On March 17, 2006, Employee was seen at Sea-Mar Clinic to establish care. Employee disclosed his occupational asthma and stated it was being cared for by Dr. Bolin. (Sea-Mar, Chart Note, March 11, 2006).

28. Employee returned to Sea-Mar Clinic on more than twenty occasions between March 17, 2006 and October 15, 2010. On none of those occasions was his asthma mentioned and he was not prescribed any asthma medication. (Sea-Mar, Chart Notes).
29. On October 15, 2012, Employee again returned to Sea-Mar Clinic where he was seen by Vincent Phillips, M.D. His complaint of asthma was the first mention of asthma since March 17, 2006, and he was prescribed an albuterol inhaler. (Sea-Mar, Chart Note; October 15, 2012; Dr. Phillips, Deposition Testimony, August 7, 2013).
30. Dr. Bolin was deposed on August 17, 2013. He reviewed Employee's file and stated the only medical record in the file pre-dating his November 11, 2004 examination was a report from Harborview. Dr. Bolin explained that once a person is prone to asthma, other irritants were likely to trigger it. In reviewing his November 11, 2004 chart note, Dr. Bolin stated Employee's medical history would have come from Employee, and had he disclosed a prior history of asthma, Dr. Bolin would have noted that in the chart. Dr. Bolin reviewed the December 26, 1990, St. Peter Hospital chart and concluded Employee had been diagnosed with asthma before that time and stated that if someone with preexisting asthma got worse in a crab processing plant he would not consider it crab asthma. Dr. Bolin stated he had not seen Employee since November 11, 2004. (Dr. Bolin, Deposition Testimony, August 17, 2013).
31. Dr. Raybin was deposed twice in this case. On February 26, 2003, he testified about the literature on crab asthma. He stated there was no evidence that crab asthma worsened in the absence of a subsequent exposure, and although some individuals get better when no longer exposed to crab, the asthma persisted in others. (Dr. Raybin, Deposition Testimony, February 26 2003).
32. On April 25, 2014, Dr. Raybin testified that he specifically asked Employee if he had suffered from asthma prior to working for Employer. His 2003 opinion attributing Employee's asthma to the crab exposure was based on Employee's statement he had no prior asthma prior. After reviewing the medical records prior to 1998, Dr. Raybin changed his opinion; he stated Employee's crab exposure was not the initial cause of his asthma. (Raybin Deposition, April 25, 2014).
33. Employee was deposed on May 13, 2013. He was questioned about his employment history on a job application he had completed for Ostrom Mushroom Farm on November 15, 2004.

When asked about apparent discrepancies in the dates of his prior jobs, Employee stated: "[y]ou know, when you put this input in it, it's just to fill the application, it's not totally accurate, but at least if it gets you hired, that's all I try to do." He was aware that when he signed the application he was certifying the information was true and correct. He conceded he had omitted a recent job from his Ostrom application because "you just want things to look as good as possible." "I think I got hired with Icicle Seafoods the same way, just the fact they needed the work force and I was willing to work so, you know, it didn't really matter to them who my last job was belonging to." Employee was also questioned about a Statement of Health, Education, and Employment that he completed for Washington Department of Social and Health Services on January 4, 2006. In his employment history, Employee listed his job with Nortrac and stated he was "laid off" from that job. He conceded he was, in fact, fired, but stated "[i]t looks better on the application to say that." (Employee Deposition, May 13, 2013).

34. Leurinda Moore worked as quality assurance manager and recruiter for Employer at the time Employee was hired. She explained the medical questionnaire Employee filled out on February 10, 1998 was the "post-offer/pre-hire" questionnaire Employer used at that time. The offer was conditional on completion of the health questionnaire and proof of eligibility to work in the United States. There were two primary reasons for the health questionnaire: First, the work with Employer was at very remote locations without immediate access to health care. It was important that the information in the health questionnaire be available to medical professionals in the event of an injury. Second, the questionnaire was important to ensure Employer did not assign someone to work that would have been dangerous for them or that exceeded their physical capacities. Employer relied on applicants to answer the questions truthfully. Ms. Moore noted that people with asthma have died processing crab. As a result, it was important to know if an applicant had a history of asthma because steam from the crab cookers can seriously affect someone who has asthma. Applicants with a history of asthma were not assigned to crab processing locations without further information from the applicant's medical provider. Typically, applicants with asthma were offered alternate employment, although that sometimes necessitated delaying the employment until other work was available.

35. At hearing, Employee-testified he had not had asthma before he developed crab asthma in 1999, and had not used inhalers. He was unable to explain the notations in the medical records prior to his hiring with Employer. When asked whether he told Employer what they wanted to hear so he could get the job, Employee stated that "if you tell the truth, it doesn't matter." When asked what evidence supported his claims for transportation costs, reimbursement of cell phone costs, and his request the overpayment be written off, Employee withdrew those claims. When asked what evidence supported his claim that he had not been paid all of the PPI, he stated that was no longer an issue. In support of his claim for a compensation rate adjustment, Employee contended the value of room and board provided by Employer had not been included in the calculation; he offered no evidence to support his claim. He could not explain a penalty or interest were justified as he could not explain what payments were late. He offered no medical opinion stating that his current asthma condition was related to the 1999 crab asthma. (Record).
36. Employee is not credible. His hearing testimony was inconsistent, evasive, and conflicted with clear written evidence. And, as noted above, several documents demonstrate that he is less than forthright and willing to say what he believes will further his cause with little regard for the truth. (Observation).

PRINCIPLES OF LAW

The law in effect at the time of an injury generally determines the parties' rights and remedies, despite later changes to the law. *See, e.g., Weed v. State*, AWCAC Decision No. 204 (November 13, 2014). Unless noted otherwise, all quotations are to the Act as it existed at the time of Employee's 1999 injury.

> **AS 23.30.010. Coverage.**
> Compensation is payable under this chapter in respect of disability or death of an employee.

> **AS 23.30.022. False statements by employee.**
> An employee who knowingly makes a false statement in writing as to the employee's physical condition in response to a medical inquiry, or in a medical examination, after a conditional offer of employment may not receive benefits under this chapter if

> (1) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
>
> (2) there was a causal connection between the false representation and the injury to the employee.

Several board decisions have determined that to prevail under AS 23.30.022, the employer must establish that:

> (1) the employee made a false statement in writing as to his physical condition in response to a medical inquiry, or in a medical examination, after a conditional offer of employment;
>
> (2) the employee made the false statement knowingly;
>
> (3) the employer relied upon the false statement;
>
> (4) reliance on the false statement was a substantial factor in hiring the employee; and
>
> (5) there was a causal connection between the false statement and the employee's injury.

See, e.g., Sossaman v. Alaska Sales and Service, AWCB Decision No. 01-0029 (February 16, 2001).

> **AS 23.30.120 Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
> (1) the claim comes within the provisions of this chapter;
>
> (2) sufficient notice of the claim has been given;
>
> (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
>
> (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Carter*, 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

The application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. See, e.g., *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Medical evidence may be needed to attach the presumption of compensability in a complex medical case. *Burgess Constr. V. Smallwood*, 623 P.2d 603,610 (Alaska 1999). In less complex cases, lay evidence may be sufficiently probative to establish the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). The employee need only adduce "some," "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson*, J.V., 742 P.2d 239, 244 (Alaska 1987). "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

An employer may rebut the presumption of compensability with an expert opinion the claimant's work was probably not a substantial cause of the disability or need for medical treatment. *Gillispie v. B&B Foodland*, 881 P.2d 1106, 1110 (Alaska 1994). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at this point. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985). If the board finds the employer's evidence is sufficient, the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). This means the employee must "induce a belief" in the minds of the board members the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). At this point, the board weighs the evidence, determines what inferences to draw from the evidence, and considers credibility.

> **AS 23.30.122. 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.

> **AS 23.30.130. Modification of awards.**
> (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175 , a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180 , 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110 . Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
>
> (b) A new order does not affect compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and payment made earlier in excess of the decreased rate shall be deducted from the unpaid compensation, in the manner the board determines.

In *Blanas v. Brower Co.*, 938 P.2d 1056 (Alaska 1997), an injured worker entered into a compromise and release agreement which was approved by board order. After the one-year period in AS 23.30.130(a) had elapsed, the worker filed a petition to set aside the compromise and release agreement for, among other reasons, fraud. The supreme court held that the one-year limitation did not apply to allegations of fraud. The court cited with approval *Estelle v. Board of Educ.*, 14. N.J. 256, 102 A2.d 44 (1954) which held that the Workmen's Compensation Division had "that power inherent in all tribunals to reopen judgments in instances of fraud."

> **AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.**
> . . . .
>
> (b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, 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).

To prevail on a fraud claim under AS 23.30.250(b), an employer must prove four elements: "(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." *Municipality of Anchorage v. Devon*, 124 P.3d 424, 429 (Alaska (2005). In *Arctec Services v. Cummings*, 295 P.3d 916 (Alaska 2013), the supreme court held that as used in AS 23.30.250(b), the term "knowingly" requires the subjective intent to defraud.

ANALYSIS

1. Is Employee precluded from receiving benefits because he made false statements on a pre-hire health questionnaire?

Although *Blanas* was limited to the question of whether a compromise and release could be set aside for fraud after the one year period in AS 23.30.130 had expired, the Supreme Court's rationale in that case applies equally well to an allegation that benefits awarded in a board decision and order were obtained through fraud.

To prevail under AS 23.30.022, Employer must first demonstrate that Employee made a false statement in writing as to his physical condition in response to a medical inquiry, or in a medical examination, after a conditional offer of employment. Employee completed Employer's health questionnaire after a conditional offer of employment. His responses include at least three false statements. He indicated he had never been treated for asthma, when four prior medical records indicate a history of asthma and two of those records indicate his asthma had been treated with medication. He also stated he had no prior occupational injuries or accidents, and no prior back injuries, yet he clearly had a prior work-related back injury, and had been paid permanent partial disability benefits as a result. Employee made false statements in writing as to his physical condition in response to a medical inquiry after a conditional offer of employment.

Second, Employer must demonstrate Employee made the false statements knowingly. The fact that Employee made false statements about both his asthma and back injury strongly suggest the

answer to the question about asthma was not an inadvertent oversight. Further, Employee's statements that he was not concerned about the accuracy of the information in job applications because his goal was to get hired, and that he "just want[ed] things to look as good as possible," coupled with the false or misleading statement in other job applications are convincing evidence Employee knowingly made the false statements.

Third, Employer must show that it relied upon Employee's false statement. The question asking if an applicant had a prior history of asthma is particularly important in this case. Leurinda Moore testified Employer was aware that people with asthma have died from processing crab, and that Employer relied on applicants to truthfully answer the questions on the health questionnaire. Employer relied on Employee's answer to the question about asthma.

Fourth, Employer's reliance on the false statements must have been a substantial factor in hiring Employee. While Ms. Moore testified that Employer tried to place applicants with asthma in other positions, she stated that individuals with a history of asthma were not assigned to crab processing without further consultation with their doctors. Employee's false answer to the question about asthma was a substantial factor in his hiring to process crab.

Fifth, Employer must show there was a causal connection between the false statement and the employee's injury. Dr. Bolin testified that once a person is prone to asthma, other irritants are likely to trigger it. And Ms. Moore testified that had Employee answered "yes" to the question, he would not have been hired to process crab without further medical clearance. Employee's false statement about asthma was the cause of Employee being hired to process crab and his subsequent development of crab asthma.

Because Employer established all elements of AS 23.30.022, Employee is precluded from receiving benefits under the Act. Here, Employer has already paid significant benefits. However, Employee is not entitled to further benefits arising from his employment with Employer.

2. Is Employer entitled to reimbursement because Employee obtained benefits through false or misleading statements?

Employer contends that after his exposure to crab, Employee made false statements to medical providers for the purpose of obtaining benefits, and, as a result, he should be ordered to reimburse the cost of those benefits plus Employer's costs and legal fees. Employer does not argue that the false statements in the health questionnaire were made to obtain benefits under the Act. Under *Devon*, Employer must prove Employee made statements or representations; the statements were false or misleading; the statements were made knowingly; and the statements resulted in Employee obtaining benefits.

On July 1, 1999, Employee told Dr. Brodkin that he had been in excellent health before working as a crab processor and had no history of asthma. On November 15, 1999, Employee told Dr. Smith he had no prior history of asthma, and on January 6, 2003, he told Dr. Raybin he had not had asthma. As noted above, medical records prior to his employment with Employer clearly establish Employee had asthma before his exposure to crab. Employee's statements to Dr. Brodkin, Dr. Smith, and Dr. Raybin were false. Based on Employee's lack of credibility, particularly his practice of stating what he believes is necessary to further his cause regardless of the truth, his statements were knowingly false.

The final *Devon* element, that the statements resulted in Employee obtaining benefits, is problematic. Despite Employee's 1999 falsehood, by 2002, Dr. Smith was clearly aware Employee had asthma prior to his crab exposure. Nevertheless, in 2002, Dr. Smith opined the employment with Employer was a substantial factor in the temporary aggravation of Employee's preexisting asthma. In his April 25, 2014 report, Dr. Raybin changed his opinion that Employee's crab exposure caused his asthma, but Dr. Raybin still stated it was a substantial factor in Employee's need for treatment. In short, when the doctors learned Employee had asthma before his crab exposure, they revised their opinions, but they still maintained the exposure to crab was a substantial factor in Employee's need for treatment. The false statements to the medical providers did not result in Employee obtaining benefits as he would have received them even had he told the truth. Employer did not establish all four *Devon* factors. Employee will not be ordered to reimburse Employee for the benefits he received.

3. Is Employee entitled to medical costs, a compensation rate adjustment, interest or penalties?

Because it has been determined that Employee's false statements on the health questionnaire preclude him from benefits, it is unnecessary to address Employee's claims.

Employer has asked for an order precluding Employee from filing further claims in this case. There is, however, no provision in the Act that authorize the board to make such an order.

CONCLUSIONS OF LAW

1. Employee is precluded from receiving benefits because he made false statements on a pre-hire health questionnaire.

2. Employer is not entitled to reimbursement because Employee obtained benefits through false or misleading statements.

3. Employee is not entitled to medical costs, a compensation rate adjustment, interest or penalties.

ORDER

1. Employer's March 21, 2014 petition for a determination Employee was not entitled to benefits because he made false statements in a health questionnaire at the time of hiring is granted.
2. Employee is not entitled to benefits related to his 1998 and 1999 work processing crab for Employer.
3. Employer's March 21, 2014 petition for reimbursement of benefits obtained through false statements is denied.
4. Employee's March 3, 2013, May 14, 2013, and July 4, 2013 claims for benefits are denied.

Dated in Anchorage, Alaska on June 10, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____

Ronald P. Ringel, Designated Chair

_____

Linda Hutchings, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of RICK A. SNELSON, employee / claimant; v. ICICLE SEAFOODS, INC., a self-insured employer; defendant; Case No. 199903892; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on June 10, 2015.

_____

Sertram Harris, Workers' Compensation Technician