

McKee, Albert

FRAUD

Time period of fraudulent activity

The fact that the Department proves fraud during specific time periods does not relieve the Department of the responsibility to prove fraud for the entire period in which recoupment of benefits is sought. ...*In re Albert McKee*, BIIA Dec., 94 2077 (1996)
[Editor's Note: The Board's decision was appealed to superior court under Grays Harbor County Cause No. 96-2-00188-7.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: ALBERT L. MCKEE**) **DOCKET NO. 94 2077 & 94 2078**
2)
3 **CLAIM NO. J-225365**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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7 Claimant, Albert L. McKee, by
8 Walthew, Warner, Costello, Thompson & Eagan, per
9 John F. Warner

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11 Employer, Peterson Shake Co., Inc., by
12 Claims Management Services, per
13 Paul H. Proctor

14
15 Department of Labor and Industries, by
16 The Office of the Attorney General, per
17 Peter J. Helmberger, Assistant
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19 These are consolidated appeals filed by the claimant on September 14, 1994. Docket No.
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21 94 2077 is an appeal from a June 24, 1994 order issued by the Department of Labor and Industries
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23 that found that the claimant was employed or capable of being gainfully employed from December
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25 29, 1989 until August 13, 1993, which resulted in an overpayment of pension benefits in the
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27 amount of \$62,860.97, which was fraudulently obtained by misrepresentation by the claimant and
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29 concealment of employment capability from the Department, and ordered the claimant to refund to
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31 the Department the overpayment amount plus a 50 percent penalty for a total demand of
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33 \$94,291.45. **REVERSED AND REMANDED.**

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35 Docket No. 94 2078 is an appeal from an order issued by the Department on June 27, 1994,
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37 that found the claimant returned to work December 29, 1989, and therefore, he was considered
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39 permanently and partially disabled and not permanently and totally disabled, and closed the claim
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41 without any additional permanent partial disability award. **AFFIRMED.**

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DECISION

1/4/96

1 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
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3 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
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5 issued on September 29, 1995, in which the order of the Department regarding Docket No. 94
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7 2077, dated June 24, 1994, was reversed and remanded and the Department order regarding
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9 Docket No. 94 2078, dated June 27, 1994, was affirmed.

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11 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
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13 no prejudicial error was committed and the rulings are affirmed.

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15 There are two basic issues involved in these appeals: whether Mr. McKee committed fraud
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17 in obtaining permanent and total disability benefits from the Department for the period from
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19 December 29, 1989 through August 13, 1993, and whether he returned to gainful employment after
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21 the Department found him to be a permanently and totally disabled worker.

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23 The industrial appeals judge found that he did fraudulently obtain benefits throughout the
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25 entire period and that he returned to gainful employment. The Department order finding fraud was
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27 reversed and remanded for the sole purpose of correcting the amount of benefits Mr. McKee would
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29 be required to repay.

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31 We agree that Mr. McKee returned to gainful employment as of December 29, 1989, and
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33 pursuant to RCW 51.32.160, the Department order terminating his permanent and total disability
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35 benefits was correct. We also agree that Mr. McKee fraudulently obtained these benefits, but not
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37 for the entire period of time set out in the Department order in Docket No. 94 2077. The facts of
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39 this appeal are adequately set out in the Proposed Decision and Order and we will only reiterate
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41 them for purposes of our decision.

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43 Mr. McKee was injured on January 27, 1983, when he was struck in the head with a cedar
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45 block. The Department found him to be a permanently and totally disabled worker on September
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47 29, 1989. Sometime in 1993, the Department received an anonymous tip that Mr. McKee was

1 employed operating a shake mill. The investigation was assigned to Gail Dudley on April 19, 1993.
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3 He made a preliminary search of various records and was unable to establish that a business was
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5 being operated.

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7 Sometime later, Mr. Dudley was informed by a detective in the Grays Harbor Sheriff's
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9 Department that they were investigating Mr. McKee. Mr. Dudley reviewed the sheriff's records and
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11 came to the conclusion that Mr. McKee was, in fact, operating a shake mill. His conclusion was
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13 based on his review of checks paid to ABC Shake Mill, Mr. McKee's business, by two shake
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15 companies. (Exhibit Nos. 5 & 6).

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17 There is no evidence that Mr. McKee ever did any of the actual physical work of cutting the
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19 wood. There is evidence that he hired workers, purchased wood, sold wood, and delivered cedar
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21 shakes to customers.

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23 One of the customers was Ron Hagen, who testified that Mr. McKee would telephone him
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25 and ask what the price for shakes was. If the price was satisfactory, he would deliver the shakes to
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27 another mill, collect a receipt which he would show to Mr. Hagen, who would pay him. 6/23/95 Tr.
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29 at 10. Exhibit No. 5 shows that between April 19, 1991 and July 24, 1992, Mr. Hagen paid
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31 \$305,476.93 to ABC Shake Mill. These checks were endorsed and cashed by Mr. McKee. Mr.
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33 McKee alleges that he took the money and paid the workers and other expenses and only kept
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35 \$.05 per shake bundle.

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37 Exhibit No. 6 shows that Pacific Reign, another shake operation, paid ABC \$276,846.46 for
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39 the period from December 29, 1989 until February 26, 1991.

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41 The Department made a prima facie case that Mr. McKee was gainfully employed from
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43 December 29, 1989 until July 24, 1992, based on the amount of money his business received for
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45 that period. Mr. McKee produced no evidence that he did not receive a profit out of these
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1 proceeds. He kept no records and there is no testimony as to what his expenses were or what he
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3 paid his workers. We believe that Mr. McKee was operating a profitable business.
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5 There is some question as to the Department's case from July 25, 1992 until August 13,
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7 1993. There is no evidence that Mr. McKee was operating the mill during this time. There are no
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9 checks from that period and no testimony concerning its operation. The Department investigator
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11 based his conclusion on checks that run only until July 24, 1992. He never went to the mill to
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13 observe its operation. No one testified that the mill was operating after that date.
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15 As in all cases where the Department demands payment of fraudulently obtained benefits, the
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17 Department has the burden of establishing a prima facie case and must meet all nine elements of
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19 fraud by clear, cogent, and convincing evidence. These nine elements are:
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- 21 1) A representation of an existing fact;
- 22 2) its materiality;
- 23 3) its falsity;
- 24 4) the speaker's knowledge of its falsity or ignorance of its truth;
- 25 5) [an] intent that it should be acted on by the person to whom it is made;
- 26 6) ignorance of its falsity on the part of the person to whom it is made;
- 27 7) the latter's reliance on the truth of the representation;
- 28 8) [the] right to rely upon it;
- 29 9) [the] consequent damage.

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39 Sigman v. Stevens-Norton, Inc., 70 Wn.2d 915, 920 (1967).

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41 In In re Kelly Arthur, Dckt. No. 90 2128 (July 30, 1991), we held that the fact that the
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43 Department proves fraud during specific time periods does not relieve it of the responsibility to
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45 prove fraud for the entire period. As in Arthur, in this appeal, the Department made no effort to
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47 present any evidence as to Mr. McKee's physical condition or actual activities after July 24, 1992.

1 In fact, the only evidence as to the period from July 25, 1992 until August 13, 1993, is the
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3 testimony of Dr. Schuster, who testified that Mr. McKee was unable to work due to his physical
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5 condition, proximately caused by his industrial injury.
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7 Based on this record we can only find that Mr. McKee fraudulently obtained benefits for the
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9 period from December 29, 1989 until July 24, 1992, which is the date of the last check received by
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11 his business and the last date for which any evidence was produced that showed that he was
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13 gainfully employed. We are unable to calculate the entire amount of benefits Mr. McKee received
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15 during this time. We have reviewed Exhibit No. 4, copies of his benefit checks from the
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17 Department, and some of the checks are poorly copied and the August 1992 check is not legible.
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19 Rather than determining the exact amount due the Department, we will order the Department to
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21 recoup funds they paid Mr. McKee from December 29, 1989 until July 24, 1992, and to then add
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23 the 50 percent penalty.
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25 **FINDINGS OF FACT**

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- 27 1. On February 10, 1983, the Department of Labor and Industries received
28 an application for benefits alleging an industrial injury to the claimant on
29 January 27, 1983, during the course of his employment with Peterson
30 Shake Co., Inc. The claim was allowed and benefits paid. On
31 November 16, 1990, the Department issued an order closing the claim
32 with time loss compensation as paid to September 28, 1989, and placed
33 the claimant on a pension effective September 29, 1989. On June 24,
34 1994, the Department issued an order which found that the claimant
35 was employed or capable of being gainfully employed from
36 December 29, 1989 through August 13, 1993, resulting in an
37 overpayment of pension benefits in the amount of \$62,860.97, which
38 was fraudulently obtained by misrepresentation by the claimant and
39 concealment of employment capability from the Department, and
40 ordered the claimant to refund the Department the overpayment amount
41 plus a 50 percent penalty for a total demand of \$94,291.45. This order
42 was communicated to the claimant on June 27, 1994. On June 27,
43 1994, the Department issued an order finding that the claimant is
44 considered permanently partially disabled and not totally and
45 permanently disabled and closed the claim without any additional
46 permanent partial disability award. The claimant appealed the June 24
47 and June 27, 1994 orders to the Board on August 24, 1994, where they
were assigned Docket Nos. 94 2077 and 94 2078, respectively.

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2. Between December 29, 1989 and July 24, 1992, the claimant was employed as cedar shake broker and manufacturer and received compensation evidencing his ability to perform substantial gainful employment.
3. The claimant received pension benefits from the Department of Labor and Industries between December 29, 1989 and July 24, 1992.
4. The claimant misrepresented to the Department of Labor and Industries that he was not employed and/or not capable of gainful employment on a reasonably continuous basis between December 29, 1989 and July 24, 1992. He knew that this was a false representation, and intended that the Department act thereon by paying him pension benefits to which he was not entitled. The Department was ignorant of the falsity of the claimant's misrepresentation, relied upon his assertion, and had the right to rely thereon, and sustained damages as a result.
5. As of June 27, 1994, the claimant's industrially related medical conditions were fixed and stable and he was permanently partially disabled and not totally and permanently disabled and merited the permanent partial disability award previously awarded.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of these appeals that were timely filed.
2. The claimant fraudulently obtained pension benefits from the Department from December 29, 1989 through July 24, 1992.
3. The Department is entitled to recoupment of the pension benefits paid to Mr. McKee between December 29, 1989 and July 24, 1992, plus a penalty of 50 percent pursuant to the provisions of RCW 51.32.240.
4. As of June 27, 1994, the claimant was not a totally and permanently disabled injured worker as defined by RCW 51.08.160.
5. The June 24, 1994 Department of Labor and Industries order that found that the claimant was employed or capable of being gainfully employed from December 29, 1989 through August 13, 1993, resulting in an overpayment of pension benefits in the amount of \$62,860.97, which was fraudulently obtained by misrepresentation by the claimant and concealment of employment capability from the Department and ordered the claimant to refund the Department the overpayment amount plus a 50 percent penalty for a total demand of \$94,291.45, is incorrect and is reversed and remanded to the Department with directions to issue an order finding that the claimant was employed or capable of

1 being gainfully employed from December 29, 1989 through July 24,
2 1992, resulting in an overpayment of pension benefits, which was
3 fraudulently obtained by misrepresentation by the claimant and
4 concealment of employment capability from the Department, and
5 ordering the claimant to refund the Department the appropriate
6 overpayment amount plus a 50 percent penalty.
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- 8 6. The June 27, 1994 Department of Labor and Industries order that found
9 that the claimant is considered permanently partially disabled and not
10 totally and permanently disabled and closed the claim without any
11 additional permanent partial disability award, is correct and is affirmed.
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13 It is so **ORDERED**.

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15 Dated this 4th day of January, 1996.
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17 BOARD OF INDUSTRIAL INSURANCE APPEALS
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21 /s/ _____
22 S. FREDERICK FELLER Chairperson
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25
26 /s/ _____
27 FRANK E. FENNERTY, JR. Member
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