Alaska Workers' Compensation Appeals Commission

Calvin L. McGahuey,
Appellant,

vs.

Whitestone Logging, Inc., and Alaska Timber Insurance Exchange,
Appellees.

Final Decision
Decision No. 054 August 28, 2007

AWCAC Appeal No. 06-041
AWCB Decision No. 06-0300
AWCB Case No. 200507894

Appeal from Alaska Workers' Compensation Board Decision No. 06-0300 issued November 9, 2006, by the southcentral panel at Anchorage, Rosemary Foster, Chairman, Robert C. Weel, Member for Industry, and Scott Bridges, Member for Labor.

Appearances: Calvin L. McGahuey, pro se, appellant. Patricia L. Zobel, DeLisio, Moran, Geraghty & Zobel, P.C., for appellees Whitestone Logging, Inc., and Alaska Timber Insurance Exchange.

Commissioners: John Giuchici, Stephen T. Hagedorn, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

Calvin McGahuey appeals the board's decision dismissing his claim because he failed to provide written notice of an injury under AS 23.30.100. Because the board's findings of fact and summary application of AS 23.30.100 are insufficient to fairly review the board's decision, we remand for rehearing and further findings.

Factual background and board proceedings.

We summarize here the evidence that was presented to the workers' compensation board. Calvin McGahuey was employed by Whitestone Logging on Afognak Island for several months in the first half of 2004. After he ended his employment, he reported an injury to his ears, which were treated in May 2004.[1] In

[1] Hrg. Tr. 14:5-13. A letter from the workers' compensation division, R. 0274, reflects opening of a workers' compensation case number 200415095 for a date

April 2005, he completed an intake sheet referring to an injury to his lower back and hip "after fight on the job."[2] He completed a Report of Occupational Injury or Illness which he dated April 6, 2005.[3] His employer completed the form May 20, 2005 and it was stamped received by the board on June 8, 2005.[4] The employer's insurer filed a controversion notice June 20, 2005.[5]

Meanwhile, McGahuey went to work for Simpson Timber Co. in California, where he "reinjured the injury."[6] In April 2006 he filed a California workers' compensation claim against Simpson Timber, claiming he had injured his right hip and lower back in that employment.[7]

On February 13, 2006, McGahuey filed a workers' compensation claim with the Alaska Workers' Compensation Board.[8] The claim sought $10,000 in medical care and determination of an "unfair or frivolous controvert." The claim was controverted by the

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of injury May 20, 2004. Because McGahuey's report of his back injury did not include a date, the date he signed the report, April 6, 2005, was assigned as the date of his back injury, and a different file (case no. 200507894) was established for it.

[2] Appellee's Excerpt 00012. This document is not included in the board's file, although McGahuey's medical summary refers to an April 4, 2005 report by "Eric Winter Home." R. 0057. There is no record of treatment in the board file.

[3] R. 0001.

[4] R. 0001.

[5] R. 0002.

[6] Hrg. Tr. 9:13-14.

[7] Hrg. Tr. 16: 16-20. McGahuey did not deny he filed a California workers' compensation claim against Simpson Timber, but he contested the testimony that he was terminated; he testified he walked off the job because he was being harassed. Hrg. Tr. 17:16-17.

[8] R. 0010-11. The board record contains another claim form signed by McGahuey, dated April 27, 2005, stained and heavily creased diagonally, but it has no mark of receipt or service by the board. R. 0009-10.

employer's insurer on March 8, 2006.[9] An amended controversion, filed May 30, 2006, added the allegation that the treatment McGahuey sought was related to the Simpson Timber injury.[10]

In a prehearing conference, McGahuey amended his claim to include temporary total disability compensation.[11] The parties agreed to a hearing on McGahuey's claim on October 11, 2006.[12] In the hearing, McGahuey testified that a coworker named Jason, nicknamed Ace, attacked him while he was in bed,[13] "clothes lined him,"[14] and crushed his back against a table.[15] McGahuey jumped out of a 14-foot window, injuring his hip.[16] He went to the cook, then to Mike Knudsen's house, and spent the night there.[17] At the end of the next day of work, he told the supervisor, John, about the fight and his injuries.[18] He testified that John told him he needed Jason, and asked him if he and Jason couldn't get along.[19] He testified he was limping after the fight.[20] He said he "tried to get to a doctor for two weeks but we were fogged in," but when he did

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9 R. 0004.

10 R. 0006.

11 R. 0299.

12 R. 0330. The issues listed were those in the claim (R. 0010-11) as amended, the employer's answer (R. 0016) and controversion.

13 Hrg. Tr. 8:4-5, 21:16-17.

14 Hrg. Tr. 21:20-21. In sporting vernacular, to "clothes line" means to knock down an opponent by hooking him at the neck with an outstretched arm.

15 Hrg. Tr. 21:22-23.

16 Hrg. Tr. 21:21-22.

17 Hrg. Tr. 12:6-10.

18 Hrg. Tr. 12:13-14, 21:9-10.

19 Hrg. Tr. 12:15-19.

20 Hrg. Tr. 22:11-13.

see a doctor he told him about the altercation.[21] McGahuey testified that "John Rivers never went by procedure and filed a report on my injuries."[22]

Pamela Scott is department manager for Whitestone's insurer.[23] She was the only witness for the employer. She relied on a statement by John Rivers, the "HR person for Whitestone" for her testimony that the employer had no knowledge of an injury.[24] She testified "we couldn't question the other people because they are no longer there."[25] According to Scott's reading of Rivers' statement, he was told of the fight at the time,[26] but she emphasized there was no record of treatment for back pain until after McGahuey's employment by Simpson Timber.[27] She claimed that McGahuey did not file "a Whitestone alleged injury until 4/6 of 06, after he contacted Simpson

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[21] Hrg. Tr. 22:14-15, 10:17-19.

[22] Hrg. Tr. 26:16-17.

[23] Hrg. Tr. 4:15-17.

[24] Hrg. Tr. 23:17 – 24:6.

[25] Hrg. Tr. 24-6-7.

[26] R. 0288. It appears Rivers' statement, headed "Clavin L. McGahuey Page 2," was originally attached to the Report of Occupational Injury (R. 0001) filed June 8, 2005, as it continues the sentence begun in block 38 of the Report: "Alleged injuries would have occurred while he was in the bunkhouse after work hours. A fight started when Mr. McGahuey refused to limit his – cont. page 2." Rivers' statement (R. 0288) continues:

> Telephone calls to ½ hour, per camp rules, so that the other 7 men could use the phone. This information is all second or third hand as everyone who was involved in the bunkhouse has moved on. As Mr. McGahuey did not fill in block #9, I am unsure if this was fight that I was made aware of in March 2004 or not, all participants in the altercation had been drinking, to varing [sic] degrees, against camp rules. There were at least three persons involved, Mr. McGauhuey, Jason Aceveda & Chris Mills.

[27] Hrg. Tr. 16:12-13; 19:2-11.

Timber on 4/3 and they said that he could not file a claim because he had been terminated."[28]

The board, after summarizing the evidence and quoting AS 23.30.100, made the following decision:

> The Board finds that the employee unreasonably delayed filing a report of injury. The fighting incident where the injury occurred took place in March 2004 but the employee did not report for treatment of any back condition until December 2005. He also did not file a report of injury until June 8, 2005, which is not within 30 days as required under AS 23.30.100. None of the exceptions set out under this rule are applicable to the employee. The employer's petition to dismiss the claim pursuant to AS 23.30.100 is granted. Because of the granting of the dismissal, the merits of the employee's claims are not addressed.[29]

This paragraph was followed by an order that the "employer's petition to dismiss under AS 23.30.100 is granted. The employee's workers' compensation claims are denied and dismissed."[30]

Discussion.

1. Standard of review.

If there is substantial evidence in light of the whole record to support the board's findings of fact, the commission must uphold the board's findings.[31] Because the commission makes its decision based on the record before the board, briefs, and oral argument,[32] the commission does not consider evidence that was not part of the board

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[28] Hrg. Tr. 18:16-19.

[29] *Calvin L. McGahuey v. Whitestone Logging, Inc.*, AWCB Dec. No. 06-300, 5 (November 9, 2006).

[30] *Id.* at 6.

[31] AS 23.30.128(b).

[32] AS 23.30.128(a).

record when the board decision was made.[33] The commission may not disturb credibility determinations by the workers' compensation board.[34] However, in reviewing questions of law or procedure, the commission exercises its independent judgment.[35]

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.[36] We examine the evidence objectively so as to determine whether a reasonable mind could rely upon it to support the board's conclusion.[37] We do not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of the weight to be accorded evidence is the task assigned to the board, not the commission. The commission will not reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive.[38] The commission will uphold the board's findings when the evidence is merely adequate to support a conclusion in a reasonable mind.[39]

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[33] The appellant, who represented himself, offered additional factual statements in his oral argument to the commission. We do not consider these facts because they were not present in the board record. The appellee also presented documentary evidence in its excerpt that was not in the board record. We do not consider it for the same reason.

[34] AS 23.30.128(b). The board made no credibility determinations in this case. In the absence of clear credibility findings, the commission does not assume that credibility played a role in the board's decision, because the commission may not decide which witness before the board was more credible than another.

[35] *Id*.

[36] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[37] *Walsh v. Robert D. Mauer, DDS*, AWCAC Dec. No. 044, 6 (June 5, 2007).

[38] AS 23.30.122.

[39] Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Grainger v. Alaska Workers' Comp. Bd.,* 805 P.2d 976, 977 n. 1 (Alaska 1991).

2. The board failed to make findings of fact to support its conclusion that no exceptions in AS 23.30.100(d) apply to McGahuey's injury.

McGahuey claimed at the time of the board hearing that the employer knew about his injury, but the employer failed to file a report of his injury. He claimed that he was dissuaded from filing a report. AS 23.30.100(d) provides that

> d) Failure to give notice does not bar a claim under this chapter
>
> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;

Thus, as the Supreme Court said in *Dafermo v. Municipality of Anchorage*,

> AS 23.30.100(d)(1) creates an exception to the notice requirement when two conditions are met: (1) "the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death," and (2) "the board determines that the employer or carrier has not been prejudiced by failure to give notice . . . ."[40]

The board concluded that the "exceptions" of AS 23.30.100, including 100(d)(1), did not apply. The problem here is that the board made no determination that the two conditions of AS 23.30.100(d)(1) were not met in order to support its conclusion.

McGahuey does not claim that he gave the board and his employer written notice of his injury to his lower back within thirty days of the injury. He repeatedly testified that he gave verbal notice of his injury to John Rivers, his employer's administrator, the day after the injury,[41] and that his injury was known to the employer because he was limping.[42] He testified that he was persuaded not to file a report of injury.[43] He also

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[40] 941 P.2d 114, 118 (Alaska 1997).

[41] Hrg. Tr. 12:13-14; 18:1; 21:9; 22:11.

[42] Hrg. Tr. 22:11-14.

[43] Hrg. Tr. 21:11.

testified that he told the physician in Kodiak, who he saw for an ear problem, about the fight.[44] The board made no finding that McGahuey was not a credible witness. McGahuey's testimony that he told John Rivers about the fight and that he was injured, and that he was visibly limping, was sufficient evidence to demonstrate that the employer knew about the injury. Thus, while there was evidence before the board that McGahuey did not file written notice of his injury within 30 days of his injury, there is evidence that McGahuey made his employer aware of his injury the next day.

The contrary evidence is nothing more than an unsworn statement that is admittedly "second or third hand" which does not comment on any physical injury – only the event leading to the injury. In the absence of any finding respecting McGahuey's credibility, we cannot say that there is evidence to support a finding by the board that the first condition of AS 23.30.120(d)(1) was not met.

We turn now to the second condition: whether the employer was prejudiced by the failure to give notice. We note that timely notice is

> required because it lets the employer provide immediate medical diagnosis and treatment to minimize the seriousness of the injury, and because it facilitates the earliest possible investigation of the facts surrounding the injury. A failure to provide timely notice that impedes either of these two objectives prejudices the employer.[45]

We find no evidence of record that the delay in written notice impeded, or did not impede, immediate medical diagnosis and treatment of the injury. McGahuey testified he was unable to see a doctor because fog prevented him from leaving, but that he did describe his injury to the physician that treated his ears later in May 2004. The physician's report is not part of the board record.[46] The board relied on the absence of

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[44] Hrg. Tr. 10:13-20. Scott testified the visit to the physician in Kodiak was on May 25, 2004. Hrg. Tr. 14:13.

[45] *Dafermo,* 941 P.2d at 118 (citations omitted).

[46] McGahuey testified he told the Kodiak doctor about the fight, Hrg. Tr. 10:19, but Scott testified the Kodiak doctor did not mention of McGahuey's back or hip. Hrg. Tr. 15:10-13. Because the physician's report of treatment would have been filed in the ear injury case, AWCB Case No. 200415095, R. 0274, it was not part of the board's

evidence of earlier treatment to show that the employee did not seek treatment for back and hip pain until sometime in December 2005. However, the board failed to determine whether the delay was due to failure to give written notice, and thus evidence that the failure impeded the employer's ability to provide treatment sooner, or whether McGahuey simply did not suffer an injury in the fight or did not suffer symptoms sufficient to require treatment.

Similarly, we find no evidence that Whitestone's ability to investigate the facts surrounding the injury was, or was not, impeded by the employee's delay in giving written notice. While Scott testified "we couldn't question the other people because they are no longer there," she did not testify to her attempts to find witnesses or documents or provide other evidence that the delay in giving notice (instead of the passage of time between the injury and the claim) impeded Whitestone's ability to investigate the facts. To the contrary, the controversion filed by the insurer in June 2005 states that "Mr. Rivers had investigated the incident at or near the date that it had occurred."[47] Whether this statement is, or is not, an admission is not important here; it is sufficient to our decision to find that there is no evidence on which the board could have supported a conclusion that Whitestone's ability to investigate the facts was impeded by the delay in giving notice.

3. The board failed to make findings and set forth analysis necessary for commission review of its decision.

The Supreme Court has previously required the board to "explicitly state whether the employee established a preliminary link between [the] employment and [the] physical impairment, whether the employer rebutted the presumption of compensability, and if so, whether the employee proved [the employee's] case by a

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record in this case. There was no *evidence* of its content before the board. The board's citation to a "May 5, 2004 workers' compensation claim" at AWCB Dec. No. 06-0300, 2 n. 1, is not supported by this record.

[47] R. 0002.

preponderance of the evidence"[48] when the board considers a claim for compensation. The three-part presumption analysis must be explicitly set out in the board's decision.

A presumption applies to the timeliness of notice as well: that "sufficient notice of the claim has been given."[49] In this case, the board failed to acknowledge the presumption of sufficient notice, or engage in a parallel presumption-based analysis. No findings were made regarding the raising and rebuttal of the presumption, the weighing of the evidence, or credibility of the witnesses. In this case, the commission is not able to infer analysis from the board's two findings of fact. The commission will not fill in the gaps by making its own findings, *S&W Radiator Shop v. Flynn,* AWCAC Dec. No. 016, 14 (August 4, 2006). The design of the statute establishing the commission provides that the commission, whose decision stands in lieu of the board's decision,[50] implicitly adopts the findings of the board unless the board's findings are not supported by substantial evidence in light of the whole record.[51] The commission does not make its own findings of fact on the merits of the claim or petition heard by the board, particularly where, as here, there is an unresolved challenge to the credibility of witness testimony, because the board is the finder of fact and determiner of credibility.[52] If, as we see in this case, the board fails to make all the findings of fact necessary to apply the law, we must remand.[53]

Conclusion.

The board failed to make findings of fact or determinations of credibility to support its conclusion that the excuses for failure to give written notice provided by

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[48] *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352, 356 (Alaska 1992).

[49] AS 23.30.120(a)(2).

[50] AS 23.30.008(a).

[51] AS 23.30.128(b).

[52] AS 23.30.110(a), AS 23.30.122.

[53] *Stephens v. ITT/Felec Services*, 915 P.2d 620, 627 (Alaska 1996); *c.f., W. R. Grasle Co. v. Alaska Workmen's Comp. Bd.*, 517 P.2d 999, 1004 (Alaska 1974).

AS 23.30.100(d) did not apply in McGahuey's case. The evidence in the record before the board is either insufficient to make findings that would support such a conclusion, or missing altogether. Our careful review of the record demonstrates that the board did not have substantial evidence to support its findings that are necessary for the board's decision. The board did not engage in the analysis of the notice question required by the presumption of sufficient notice. We do not decide the merits of the challenge to the board's ultimate decision that McGahuey's claim is barred. We determine the board's decision is essentially incomplete. We therefore VACATE the board's decision no. 06-0300, and we REMAND this case to the board for rehearing with instructions to apply a presumption analysis based on AS 23.30.120(a)(2), and to set out in its decision sufficient findings of fact, including credibility findings, and reasoning to permit future review if sought by the parties. We do not retain jurisdiction.

Date: *Aug. 28, 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
John Giuchici, Appeals Commissioner

Signed
Steve Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final commission decision on the merits of this appeal from the board's decision and order. However, it is not a final decision on whether Calvin McGahuey's workers' compensation claim should be dismissed or is compensable. This decision vacates (invalidates) the board's decision and remands (returns) the case to the board for the board to hear and decide again. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted. The date of filing is found in the commission clerk's Certification below.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

Because this is not a final decision on the merits of the workers' compensation claim, the Supreme Court may not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. No decision has been made on the merits of this appeal, but if you believe grounds for review exist under the Appellate Rules, you should file your petition within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f). If you wish to appeal or petition for review or hearing 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

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of this Final Decision in the matter of *Calvin L. McGahuey v. Whitestone Logging, Inc., and Alaska Timber Ins. Exchange*, AWCAC Appeal No. 06-041, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *28* day of *August*, 20*07*.

Signed
R. M. Bauman, Appeals Commission Clerk

Certificate of Distribution
I certify that a copy of this Final Decision in AWCAC Appeal No.06-041 was mailed on *8/28/07* to Zobel and McGahuey(certified), at their addresses of record, and faxed to Director WCD, AWCB Appeals Clerk, and Zobel.

Signed *8/28/07*
L. Beard, Deputy Clerk Date