

Case: *Larry J. Winkelman vs. Wolverine Supply, Inc. and Alaska Insurance Guaranty Association*, Alaska Workers' Comp. App. Comm'n Dec. No. 149 (March 21, 2011)

Facts: Larry Winkelman (Winkelman) sought ongoing pool and massage therapy for a work-related back injury. The board denied the treatment. On appeal Winkelman asserted that a document was missing from the board's file that would establish that his work injury fractured, rather than strained, his spine and would therefore lend support to his claim that the pool and massage therapy was reasonable and necessary. After deciding other issues on appeal in *Winkelman v. Wolverine Supply, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 115, the commission remanded:

to allow the board to take up appellant's petition for modification in light of his late discovery that documentary evidence he believed was in the board record was not there. The board may allow appellant to submit evidence that he filed the document in time, but that it was lost or misfiled, and, if the board so finds, the board may determine whether appellant's evidence requires modification of its decision. Dec. No. 115 at 20.

At oral argument before the commission, Winkelman had stated that "I appeal today based on a couple letters that were sent to the Board, one arrived there late, and one was sent there in plenty of time from a chiropractor, Dr. Langen."

On remand, two records were potentially at issue as missing. Prior to the 2008 board hearing, Winkelman submitted a medical summary that contained handwritten entries by Dr. Freeman and Dr. Langen, each of whom signed it, together with their comments interpreting an x-ray or x-rays. A copy of this medical summary was in the board's file with the handwritten notation: "(Not Admitted) Late, No foundation." At the board hearing, Winkelman testified that "the January 14, 2008 Freeman report and April 11, 2008 Langen report were the hand-written comments on the above-referenced undated medical summary[.]" Wolverine's attorney objected to the summary serving as a medical record. Based on a finding that Winkelman was advised at a February 2008 prehearing conference, that evidence had to be filed and served at least 20 days before the hearing, the medical summary "was not admitted because it was 'late' and lacked 'foundation[.]'"

The second record was a 2007 report from Dr. Langen. Winkelman had not produced this report but he testified that it existed and that he filed and served it. He produced two certified mail receipts from August 2007 and October 2007 that he claimed were the dates that he filed and served it. The board did not have the report in its file and Wolverine's counsel denied having received it as well. Dr. Langen wrote in a letter dated May 11, 2010, that he reviewed x-rays in 2007, gave Winkelman the original report and did not retain a copy.

The board applied the presumption of compensability to analyze whether the missing record (1) existed and (2) was timely filed and served. The board concluded that the 2007 report from Dr. Langen existed but was not timely filed and served. The board denied Winkelman's petition for modification. Winkelman appeals.

Applicable law: AS 23.30.120(a), presumption of compensability and related case law.

AS 23.30.128(b) requires the commission to uphold the board's findings of fact if they are supported by substantial evidence in light of the record as a whole. Questions of law are independently reviewed by the commission. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010). "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." *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (August 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

Issues: Did the board properly apply the presumption of compensability? Does substantial evidence support that the medical record existed? Does substantial evidence support that the medical record was not timely filed and served?

Holding/analysis: The commission concluded that the presumption of compensability does not apply to determining whether a medical record existed and was timely filed and served. The commission observed that the Alaska Supreme Court does not apply the presumption to every issue and that applying the presumption would force the employer to prove a negative and was ill-suited to resolving these factual issues.

The commission concluded that the record addressed in the commission's remand order was the 2007 Langen report and not a potentially missing 2008 x-ray report, given that Winkelman asserted that the 2008 medical summary itself was the record.

The commission concluded that substantial evidence did not support that the 2007 report existed. The only evidence that supported that it existed was Winkelman's testimony and Dr. Langen's 2010 letter. The commission decided:

The letter itself is dubious, in that the year "2007" is handwritten on an otherwise typewritten letter. It also is convenient for Winkelman's purposes, but defies prudent practice on Dr. Langen's part, that he would give Winkelman the original of the report and make no copy for his records, as Dr. Langen states in his letter. In short, we conclude that there is very little credible evidence, and certainly not substantial evidence in the record as a whole, that a 2007 x-ray report from Dr. Langen existed. Dec. No. 149 at 14.

However, assuming the report existed, the commission concluded that substantial evidence supported the board's conclusion that it was not timely filed and served. Winkelman could not produce the report; neither the board nor Wolverine's counsel had a copy of the report despite Winkelman's assertion that he filed and served it. In terms of the 2008 medical summary it was undisputed that it was filed late. Winkelman filed it on April 11, 2008, which was not 20 days before the hearing on April 17, 2008.

Note: Dec. No. 115 upheld the board's decision not to set aside the Compromise and Release Agreement and to deny pool and massage therapy but remanded to the board

to determine if Winkelman's claim of a missing medical record established grounds for modification.