Alaska Workers' Compensation Appeals Commission

Martin Williams, Appellant, vs. Harnish Group, Inc., Appellee.	Final Decision Decision No. 284 March 17, 2021 AWCAC Appeal No. 20-011 AWCB Decision No. 20-0045 AWCB Case No. 201501268

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order on Modification No. 20-0045, issued at Fairbanks, Alaska, on June 12, 2020, by northern panel members Robert Vollmer, Chair, and Jacob Howdeshell, Member for Labor.

Appearances: Kristina M. Miller, CSG, Inc., for appellant, Martin Williams; Krista M. Schwarting, Griffin & Smith, for appellee, Harnish Group, Inc.

Commission proceedings: Appeal filed July 10, 2020; briefing completed November 12, 2020; oral argument held on December 17, 2020.

Commissioners: Michael J. Notar, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Martin Williams timely appealed from the decision in *Williams v. Harnish Group, Inc.* on his petition for modification concerning the appropriate amount of attorney fees awarded and whether a settlement occurred.[1] The Alaska Workers' Compensation Board (Board) originally heard the merits of his claim on April 25, 2019, at which time the Board awarded partial attorney fees based on settlement mentioned in the attorney fees billing statements. Harnish Group, Inc. (Harnish) accepted liability for past medical benefits on

[1] *Williams v. Harnish Group, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 20-0045 (June 12, 2020) (*Williams II*).

the record the day of the hearing.[2] The Board found a settlement was reached by the parties as of April 15, 2019, because that was the last mention of possible settlement in the billing statement. The Board then denied any attorney fees accruing after that date. Mr. Williams petitioned the Board on December 9, 2019, seeking modification of *Williams I*, based on several mistakes of fact. The Board corrected the date of April 15, 2016, to April 15, 2019, and denied the rest of the petition.[3] Mr. Williams then appealed to the Alaska Workers' Compensation Appeals Commission (Commission). The Commission heard oral argument on December 17, 2020, and now remands this matter to the Board for reconsideration.

2. Factual background and proceedings.[4]

Mr. Williams asserts he fell on September 23, 2013, while at work. Mr. Williams had pre-existing right elbow cubital tunnel syndrome and right elbow epicondylitis.[5] On October 9, 2013, the magnetic resonance imaging (MRI) study of his right elbow showed moderate bursitis, severe tendinopathy, and torn common flexor tendon.[6] On November 12, 2013, Jimmy M. Tamai, M.D., performed right medial elbow debridement and common flexor tendon repair surgery.[7]

By December 9, 2013, Mr. Williams had made "excellent clinical progress" following his November 12, 2013, surgery. He had recovered full range of motion in his right elbow without pain and was performing all activities of daily living.[8]

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[2] *Williams v. Harnish Group, Inc.*, Alaska Workers Comp. Bd. Dec. No. 19-0110 (Oct. 30, 2019) (*Williams I*).

[3] *Williams II*.

[4] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[5] *Williams I* at 3, No. 1; R. 248-260, 287-295.

[6] *Id.*, No. 7.

[7] *Id.*, No. 8.

[8] *Id.*, No. 9.

On November 19, 2014, Mr. Williams completed a formal injury report, indicating he had slipped on September 23, 2013, while exiting a pickup truck and landed on his right side, injuring his right arm, shoulder, and tailbone.[9] Harnish completed its section of the report on January 5, 2015, and filed the report with the Workers' Compensation Division (Division) on January 20, 2015.[10]

On January 27, 2016, Harnish controverted all benefits on the basis Mr. Williams had failed to timely report the injury, and because Dr. Tamai's treatment records made no mention of a work injury.[11]

On February 10, 2016, Mr. Williams reported his September 23, 2013, fall at work to Dr. Tamai, and presented him with documents concerning the injury report and Mr. Williams's correspondence with his supervisor after the injury. In response, Dr. Tamai wrote that he had billed Mr. Williams's private health insurance because he was unaware Mr. Williams's treatment involved a workers' compensation injury. Had Dr. Tamai been aware the treatment involved a workers' compensation injury, he "would rectify this area." Dr. Tamai concluded, "there is in fact a causal relationship from [Mr. Williams's] injuries, to the subsequent diagnostic findings at surgery."[12]

On April 4, 2016, Ralph N. Purcell, M.D., evaluated Mr. Williams on Harnish's behalf. Mr. Williams told him he was feeling "perfect" four to five months before the accident. However, Dr. Purcell opined that this was not consistent with the medical records he reviewed. Dr. Purcell made eleven different diagnosis, eight of which related to Mr. Williams's right elbow, and concluded the work injury had caused an elbow contusion, but the cause of Mr. Williams's right elbow cubital tunnel syndrome was idiopathic in nature, as there had been "no trauma associated with that area." He also opined the cause of Mr. Williams's preexisting right elbow medial epicondylitis was also

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9 *Williams I* at 4, No. 10.

10 *Id.*

11 *Id.*, No. 12.

12 *Id.*, No. 13.

"idiopathic or degenerative in nature[,] as there was no clear alternative etiology ever presented in the records reviewed."[13]

On April 27, 2016, Harnish controverted all benefits on the basis of Dr. Purcell's April 4, 2016, employer's medical examination (EME) report.[14]

On March 12, 2018, Dr. Tamai wrote that he disagreed with Dr. Purcell's April 4, 2016, EME report and opined, "Following the injury, [Mr. Williams] presented with objective clinical symptoms beyond 'contusions to the elbow.' His symptoms persisted and were consistent with medial epicondylitis."[15] Dr. Tamai opined Mr. Williams's work for Harnish was the substantial cause of Mr. Williams's need for medical care of his elbow.[16]

On July 9, 2018, Mr. Williams claimed medical and transportation costs, permanent partial impairment (PPI) benefits, interest, and attorney fees and costs. He also sought a second independent medical evaluation.[17]

On July 30, 2018, Harnish answered Mr. Williams's July 9, 2018, claim and controverted time loss, medical, and PPI benefits.[18]

On September 21, 2018, Mr. Williams testified in deposition concerning the details of his September 23, 2013, work injury. Mr. Williams discussed the return of symptoms in his right upper extremity following his second surgery.[19] He also called the lack of reference to a work injury in Dr. Tamai's chart notes a "front office snafu."[20]

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13 *Williams I* at 4-5, No. 14.

14 *Id.* at 5, No. 15.

15 *Id.*, No. 16.

16 *Id.*

17 *Id.*, No. 17.

18 *Id.*, No. 18.

19 Martin Williams Dep., Sept. 21, 2018, at 30:4 – 31:20.

20 Williams Dep. at 31:21 – 32:23.

On October 31, 2018, Dr. Tamai testified in deposition regarding Mr. Williams's medical treatment. He first saw Mr. Williams in October of 2012 for a chronic right elbow pain.[21] Mr. Williams's condition in this regard likely preexisted the 2013 work injury.[22]

The mechanism of injury, as Mr. Williams described it, was consistent with the tear identified on the MRI.[23] Prior to the work injury, Dr. Tamai had released Mr. Williams from his care following his first surgery.[24] Following the work injury, Mr. Williams was complaining of pain "similar in location to what he had before surgery," but he was no longer complaining of the neurologic symptoms, which seemed to have resolved.[25] Although recurrences can occur, Dr. Tamai was a "bit surprised" Mr. Williams was having symptoms again.[26] Dr. Tamai did not remember whether Mr. Williams told him about the work injury.[27] He reviewed Mr. Williams's October 9, 2013, MRI, which showed moderate olecranon bursitis, a new condition for Mr. Williams.[28] Dr. Tamai found this interesting because it pertained to the outer part of the elbow.[29] The two most common causes of bursitis are infection, which Mr. Williams did not have, and trauma.[30] The common flexor tendon tear and Mr. Williams's symptoms are related to the operative site of Mr. Williams's first surgery.[31] Dr. Tamai performed a second surgery on Mr. Williams in November of

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21 Jimmy Tamai, M.D., Dep., Oct. 31, 2018, at 6:4-23.

22 Tamai Dep. at 7:17-19.

23 Tamai Dep. at 8:16-25.

24 Tamai Dep. at 9:24 – 10:10.

25 Tamai Dep. at 15:10-16.

26 Tamai Dep. at 15:19-21.

27 Tamai Dep. at 16:1-9.

28 Tamai Dep. at 17:17 – 18:2.

29 Tamai Dep. at 18:4-6.

30 Tamai Dep. at 19:23 – 20:1

31 Tamai Dep. at 21:20-23.

2013.[32] At the time, he did not know Mr. Williams had sustained any trauma.[33] Dr. Tamai did not recommend any further treatment for Mr. Williams and further treatment recommendations would be "hypothetical."[34] Any recurrence of Mr. Williams's cubital tunnel syndrome would be more likely related to Mr. Williams's first presentation, prior to the work injury.[35] Dr. Tamai disagreed with Dr. Purcell on the relationship between Mr. Williams's need for treatment in November 2013 and the work injury.[36] He explained:

> [B]ecause . . . the trauma occurred at the surgical site . . . there would be some predisposition . . . to that being more easily injured again . . . a near-full thickness tear, as described by the MRI. But to say that there was no causal relationship, I think, is a bit of a stretch.[37]

Dr. Tamai did not opine whether Mr. Williams had incurred a permanent partial impairment.[38]

On November 30, 2018, Mr. Williams requested a hearing on his July 9, 2018, claim.[39]

At a January 11, 2019, prehearing conference, the parties agreed to a hearing on Mr. Williams's July 9, 2018, claim. They also agreed to attend another prehearing conference prior to the hearing.[40]

On February 5, 2019, Dr. Purcell testified in deposition he thought the mechanism of injury was consistent with Mr. Williams's reported elbow pain and neurological complaints following the injury.[41] Although he thought Mr. Williams's complaints were

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32 Tamai Dep. at 22:21-25.

33 Tamai Dep. at 23:15-24.

34 Tamai Dep. at 46:12 – 47:6.

35 Tamai Dep. at 47:7-11.

36 Tamai Dep. at 47:20-25.

37 Tamai Dep. at 50:17-25.

38 Tamai Dep. Word Index, October 31, 2018.

39 *Williams I* at 8, No. 22.

40 *Id.*, No. 23.

41 Ralph Purcell, M.D., Dep., Feb. 5, 2019, at 11:24 – 12:1.

inconsistent with the medical records, he did not see any "warning signs" that Mr. Williams was "manipulating information."[42] Based on Mr. Williams's medical record, Dr. Purcell concluded either Mr. Williams did not recover from his first elbow surgery, or he did recover, but the surgery failed to resolve the underlying pathology.[43]

Dr. Purcell discussed his diagnosis and thought Mr. Williams's elbow contusions were related to the work injury, but he did not think Mr. Williams's cubital tunnel syndrome was related.[44] He also opined Mr. Williams's medial epicondylitis and the surgery to repair Mr. Williams's common flexor tendon were due to the "persistence of preexisting pathology" rather than the September 23, 2013, fall.[45] Dr. Purcell ruled out the fall at work as the substantial cause of all conditions other than the contusions.[46] He also did not think that fall aggravated or accelerated any preexisting conditions.[47]

On April 15, 2019, Mr. Williams set forth his attorney fees and paralegal costs through April 9, 2019.[48]

On April 19, 2019, Mr. Williams filed evidence he notified Harnish of his September 23, 2012, slip-and-fall that same day. He also filed evidence Harnish did not notify the Division of his September 23, 2013, injury until January 5, 2015.[49]

Harnish stated that, prior to the hearing, it agreed to pay for Mr. Williams's November 12, 2013, surgery and post-surgical care upon receipt of Health Care Financing Administration coded bills. These bills were originally paid by Mr. Williams's private health

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42 Purcell Dep. at 15:9-13.

43 Purcell Dep. at 19:9-19.

44 Purcell Dep. at 40:15 – 41:8.

45 Purcell Dep. at 41:14-21.

46 Purcell Dep. at 41:22-24.

47 Purcell Dep. at 42:5-12.

48 *Williams I* at 10, No. 26.

49 *Id.*, No. 27.

insurance.[50] Harish put notice of its acceptance of liability for past medical benefits on the record at the hearing in *Williams I.*[51]

The Board found that at hearing Mr. Williams testified consistent with his deposition testimony.[52]

On April 25, 2019, Mr. Williams supplemented his request for attorney fees to include time spent through the date of hearing, claiming a total of $21,570.00 in fees.[53] The Board found he did not include an affidavit from either of the two paralegals who worked on the case.[54] The Board also found Attorney Robert Groseclose's time billings totaled $6,372.50, which included $2,120.00 billed after April 15, 2019.[55] The Board found Attorney Kristina Miller's time billings through April 15, 2016 (sic), totaled $3,770.00.[56] The Board did not identify the total Ms. Miller billed through the date of hearing. The Board further found that neither the paralegals' nor any other timekeepers' billing entries duplicated Ms. Miller's entries.[57] The Board further found that time entries containing the word "settlement" began to appear on February 6, 2019, and continued through April 15, 2019.[58] However, the billing entries do not identify any terms of any settlement that was reached other than a mention that Mr. Williams did not wish to close future medical benefits.

On December 9, 2019, Mr. Williams petitioned for modification of the attorney fee award in *Williams I* based on a mistake of fact, which the petition alleged was *Williams I* mistakenly referenced the date of April 15, 2016, instead of April 15, 2019, set forth in

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50 *Williams I* at 10, No. 28.

51 Hr'g Tr. at 5:1-16, Apr. 25, 2019.

52 *Williams I* at 10, No. 30.

53 R. 326-334.

54 *Williams I* at 10-11, No. 31.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

Mr. Williams's Supplemental Attorney Fee Affidavit.[59] Mr. Williams also contended *Williams I* mistakenly calculated Kristina Miller's time through the date of hearing at $3,770.00 instead of the correct total of $12,800.00.[60] Mr. Williams contended the Board incorrectly found a settlement where there was none.

The Board, while correcting the incorrect year from 2016 to 2019, otherwise denied the petition for modification and affirmed *Williams I*. Mr. Williams timely appealed this decision to the Commission.

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.[61] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[62] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[63] On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment.[64]

However, the Board's conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine the credibility of witnesses.[65] The weight given to the witnesses' testimony, including medical testimony

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[59] *Williams II* at 1.

[60] *Id*.

[61] AS 23.30.128(b).

[62] *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[63] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-1189 (Alaska 1984).

[64] AS 23.30.128(b).

[65] AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013).

and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.[66]

Review of discovery dispute rulings by the Board, including the imposition of sanctions, is made pursuant to an analysis of whether the Board abused its discretion.[67]

4. Discussion.

Mr. Williams avers that the Board made a mistake of fact when it calculated Ms. Miller's attorney fees through "April 15, 2016" in *Williams I.* Mr. Williams further asserts that the Board erred in finding a settlement occurred by April 15, 2019, a finding which is not supported by substantial evidence in the record as a whole. The Board awarded attorney fees based on these two mistakes of fact.

Harnish, on the other hand, contends that Mr. Williams's petition for modification should have been a motion for reconsideration, which was due within fifteen days of the date of service of the original decision.[68] *Williams I* was issued on October 30, 2019; therefore, a motion for reconsideration needed to have been filed by November 15, 2019. Mr. Williams's petition for modification was not filed until December 9, 2019, and it should have been characterized as a motion for reconsideration. As a motion for reconsideration, it was untimely and, therefore, it should have been dismissed.[69]

Mr. Williams contends the Board erred in finding a settlement occurred on or before April 15, 2019. Whether the parties actually reached an agreement is a question of fact which must be supported by substantial evidence in the record as a whole.[70]

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66 AS 23.30.122.

67 *See, e.g., Dougan v. Aurora Electric, Inc.*, 50 P.3d 789, 793 (Alaska (2002); *McKenzie v. Assets, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009).

68 AS 44.62.540.

69 If it is considered a petition for modification, it is timely as a request for modification may be made within one year from the date of the original decision. See, AS 23.30.130.

70 AS 23.30.128(b).

The Alaska Workers' Compensation Act (Act) does not specifically address what constitutes a settlement. The Act does discuss what are agreements with regard to an injury and how the agreement is to be memorialized. AS 23.30.012 states "a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose."[71]

The Alaska Supreme Court (Court) has discussed what constitutes a settlement. The Court has held that a workers' compensation settlement is, in fact, a contract and general contract standards apply to these settlements unless a statute provides otherwise.[72] Whether a settlement exists and what its terms are is evaluated by whether the evidence indicating the settlement and the terms are supported by substantial evidence in the record.[73]

Here, the Board surmised that a settlement occurred by looking at the billing records of Mr. Williams's attorney. The Board took references in the billing record regarding settlement discussion to mean that a settlement had occurred when the record no longer referenced discussions of a settlement. However, the lack of ongoing discussions of a settlement could equally mean that a settlement failed to occur. There is no evidence in the billing records of the terms of a settlement. Discussion of possible settlement began on February 6, 2019, but by March 28, 2019, Harnish had indicated it was not accepting the settlement offer.[74] On April 8, 2019, an email was received from Harnish about possible acceptance of past medical bills.[75] On April 10, 2019, Harnish telephones Mr. Williams's attorney with a settlement offer.[76] On April 15, 2019,

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71 AS 23.30.012(a).

72 *See, e.g., Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093 (Alaska 2008) (citation omitted); *Municipality of Anchorage v. Stenseth*, 361 P.3d 898 (Alaska 2015) (*Stenseth*).

73 *Stenseth*, 361 P.3d at 906.

74 R. 330.

75 R. 331.

76 *Id.*

Mr. Williams advises his attorney he did not wish to close future medical benefits.[77] Otherwise, the billing records are mute as to any terms of a possible settlement. Looking at the attorneys' billing records, it is impossible to ascertain what the terms of a settlement, if a settlement occurred, might have been. There is no evidence in the Board record that an agreement conforming to the requirements of AS 23.30.012 was ever filed with the Board, and no one has indicated one was signed and filed. Thus, there is no substantial evidence in the record to support the finding by the Board that a settlement was reached.

Harnish, at hearing, put on the record that it accepted liability for past medical benefits for Mr. Williams. This acceptance of liability by Harnish is not evidence of a settlement. It is evidence that Harnish was accepting liability of a portion of Mr. Williams claim. Moreover, this acceptance of liability was not put on the record until the day of the hearing, and Harnish never withdrew its controversions of past medical benefits for Mr. Williams. This is not a settlement, but rather an acceptance of liability. Thus, the Board erred in finding a settlement had occurred. This is a mistake of fact because it is not supported by substantial evidence in the record.

The Board then based the award of attorney fees on the premise that a settlement had occurred on April 15, 2019. Therefore, this award of attorney fees is in error because it is based on a mistake of fact. The Board discounted all the work performed by the attorneys after April 15, 2019, but there was no settlement on that date. Thus, the attorneys for Mr. Williams necessarily and prudently prepared for a hearing on all issues including past medical benefits, and it was improper for the Board to discount that work solely on the grounds that a settlement had been reached.

The matter is remanded to the Board for reconsideration of an award of attorney fees which are reasonable and fully compensatory. The Board may evaluate the issues prevailed on and lost at hearing, especially noting that Harnish's acceptance of liability for past medical benefits was a significant victory for Mr. Williams. The difference between the value of Harnish's acceptance of liability for past medical benefits and the

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[77] R. 332.

value of issues of future medical benefits, PPI benefits, and a penalty, should be weighed in calculating what attorney fees should be awarded.

In *Warnke-Green v. Pro-West Contractors, LLC*, the Court stated that it is important in awarding fees that the award of fees be fully compensatory and reasonable.[78] The Court stated, "the purpose of awarding full reasonable attorney's fees in workers' compensation cases is to ensure that competent counsel are available to represent injured workers."[79] The Board needs to consider this admonition when it reconsiders the amount of fees to be awarded.

5. Conclusion and order.

This matter is REMANDED to the Board for reconsideration of the amount of attorney fees to be awarded to Mr. Williams.

Date: *17 March 2021* Alaska Workers' Compensation Appeals Commission

Signed
Michael J. Notar, Appeals Commissioner

Signed
Amy M. Steele, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

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[78] *Warnke-Green v. Pro-West Contractors, LLC*, 440 P.3d 283 (Alaska 2019).

[79] *Id.* at 440 P. 3d at 294.

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 284, issued in the matter of *Martin Williams v. Harnish Group, Inc.*, AWCAC Appeal No. 020-011, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 17, 2021.

Date: *March 19, 2021*

Signed

K. Morrison, Appeals Commission Clerk