Case: *Larry J. Winkelman vs. Wolverine Supply, Inc. and Alaska Insurance Guaranty Association*, Alaska Workers' Comp. App. Comm'n Dec. No. 115 (August 25, 2009)

Facts: Larry Winkelman (Winkelman) settled his workers' compensation claims with his employer in a board-approved agreement four years after he was injured at work falling down some stairs. Winkelman waived almost all types of workers' compensation benefits, including various types of disability compensation, reemployment benefits, and future medical benefits for dental issues, in exchange for $35,000. However, the agreement specified that Winkelman did not waive his entitlement, if any, to future medical benefits for his neck and low back condition and Wolverine Supply, Inc. (Wolverine) did not waive its right to contest liability for future medical benefits for those conditions. Winkelman sought to set aside the settlement agreement and to receive medical benefits for massage and pool therapy. Winkelman's doctor opined that "Mr. Winkelman suffers from chronic pain of his upper back that does require massage and pool therapy for his continued activities of daily living. It is likely that he will never be without this necessity." An employer's doctor opined that the treatment was unnecessary as the lumbar strain he had suffered in the work accident had long since resolved and the board's second independent medical examiner agreed with the employer's doctor. The board rejected setting aside the agreement, denied Winkelman's claims for temporary total disability and other benefits as waived under the agreement, and denied Winkelman pool and massage therapy based on the two doctors' opinions.

Applicable law: AS 23.30.122 provides in relevant part, "[t]]he 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."

8 AAC 45.120(k) provides:

> The board favors the production of medical evidence in the form of written reports, but will, in its discretion, give less weight to written reports that do not include
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> (1) the patient's complaints;
> (2) the history of the injury;
> (3) the source of all facts set out in the history and complaints;
> (4) the findings on examination;
> (5) the medical treatment indicated;
> (6) the relationship of the impairment or injury to the employment;
> (7) the medical provider's opinion concerning the employee's working ability and reasons for that opinion;
> (8) the likelihood of permanent impairment; and
> (9) the medical provider's opinion as to whether the impairment, if permanent, is ready for rating, the extent of impairment, and detailed factors upon which the rating is based.

Issues: Did substantial evidence support the board's decision to deny pool and massage therapy? Does the board's order reflect the issues that the board decided in the decision text? Should the settlement agreement be set aside? Does the board's decision require modification based on Winkelman's claim of a missing medical record?

Holding / analysis: Substantial evidence supported denying therapy. Winkelman challenged the weight and credibility of the evidence, but the board's determinations of the weight to be accorded medical evidence are "conclusive even if there is conflicting evidence in the record or the evidence is susceptible to contrary conclusions. The legislature made the board the 'trier of fact' in workers' compensation claim proceedings. The board's decision as to how much weight should be given one physician over another will not be disturbed by the commission unless review of the entire record leaves the commission with a definite and firm impression that a mistake was made." Dec. No. 115 at 8 (citations omitted). The commission observed that Winkelman's doctor's opinion was not a complete report under 8 AAC 45.120(k) and so the regulation permitted the board to give that report less weight. "The board did not apply improper factors in weighing competing medical opinions. . . . The reports of Drs. Puziss and Swanson provide substantial evidence, evidence a reasonable mind might rely upon, to make a finding that a lifetime allowance of pool therapy and massage is not reasonable medical care necessary for the process of recovery from appellant's 1996 injury." *Id.* at 10.

The commission corrected a clerical error, inserting a comma, in the board's order to make the order conform to the decision text. The decision denied Winkelman pool and massage therapy, but not all future medical care. The board's order was corrected to read: "The employee's claim for continued medical treatment, massage and pool therapy, is denied and dismissed."

The commission remanded to the board to determine if Winkelman's claim of a missing medical record established grounds for modification under AS 23.30.130. Winkelman noticed the medical record was missing when he reviewed the board file for his appeal and he believed the record should be in the board's file because he had timely mailed it to the board and Wolverine. The missing record indicated he had suffered a spinal fracture, not a back strain. "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.

Lastly, the commission affirmed the board's order refusing to set aside the settlement. Winkelman did not allege a material misrepresentation, fraud or duress in entering into the Compromise and Release Agreement. Moreover, the board had observed he was represented by "very competent counsel" in negotiating the settlement. *Id.* at 19. Winkelman argued that he did not know he would become more disabled when he agreed to the settlement, so he made a mistake. *See Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1007-08 (Alaska 2008). But "mistake is not grounds to set aside a settlement." Dec. No. 115 at 19 n.85 (citing *Smith*, 204 P.3d at 1008 (Alaska 2008). In addition, the

commission found no evidence that the employer agreed to pay pool and massage therapy in the agreement.

Concurrence: The concurrence expressed the opinion that the board not only did not, but could not, deny all future medical benefits because the specific terms of the settlement agreement reserved Winkelman's right to make claims for medical benefits for his neck and low back and the employer's right to contest liability. Dec. No. 115 at 22.