Alaska Workers' Compensation Appeals Commission

Larry J. Winkelman, Appellant, vs. Wolverine Supply, Inc. and Alaska Insurance Guaranty Association, Appellees.	Final Decision Decision No. 149 March 21, 2011 AWCAC Appeal No. 10-025 AWCB Decision No. 10-0115 AWCB Case No. 199623284

Final Decision on appeal from Alaska Workers' Compensation Board Decision No. 10-0115, issued at Anchorage on June 23, 2010, by southcentral panel members William J. Soule, Chair, and Robert C. Weel, Member for Industry.

Appearances: Larry J. Winkelman, self-represented appellant; Michael A. Budzinski, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, Wolverine Supply, Inc. and Alaska Insurance Guaranty Association.

Commission proceedings: Appeal filed July 22, 2010; briefing completed January 21, 2011; oral argument was not requested.

Commissioners: Jim Robison, S.T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

In August 1996, the appellant, Larry J. Winkelman (Winkelman), injured his back while working for the appellee, Wolverine Supply, Inc. (Wolverine). Winkelman settled his workers' compensation claim when he entered into a Compromise and Release (C&R) with Wolverine that was approved by the Alaska Workers' Compensation Board (board) in October 2000. Under the terms of that settlement agreement, Winkelman did not waive entitlement, if any, to future medical benefits for his back condition, and Wolverine did not waive its right to contest liability for future medical benefits.

Subsequently, issues arose between Winkelman and Wolverine. At a hearing before the board in April 2008, Winkelman sought to have the C&R set aside and

certain medical benefits in the form of massage and pool therapy awarded. The board declined to set aside the agreement and denied him all further medical care.[1]

Winkelman appealed the board's decision in *Winkelman I* to this commission. During oral argument in that appeal in May 2009, Winkelman asserted that a material medical record he alleged was filed with the board was not actually in the board's file at the time of the April 2008 hearing that resulted in the decision in *Winkelman I*. In the commission's decision,[2] we 1) upheld the board declining to set aside the C&R; 2) modified the board's order denying all future medical treatment as inconsistent with the terms of the C&R; and 3) remanded the matter to the board with instructions pertaining to *the medical record*[3] that was allegedly filed and missing from the board's file.

On remand, following a hearing in May 2010, the board issued another decision.[4] The board's rulings in *Winkelman II* are the subject of this second appeal to the commission by Winkelman.[5] We reverse the board in part with respect to its ruling that Winkelman proved a certain medical record existed and was not in the board's file for

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[1] *See Larry J. Winkelman v. Wolverine Supply, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 08-0169 (Sept. 19, 2008) (*Winkelman I*).

[2] *See Winkelman v. Wolverine Supply, Inc., et al.,* Alaska Workers' Comp. App. Comm'n Dec. No. 115 (Aug. 25, 2009).

[3] We use the singular in accordance with our decision in *Winkelman,* App. Comm'n Dec. No. 115 at 20, which clearly indicated that Winkelman had argued that only one medical record was missing from the board's file.

[4] *See Larry J. Winkelman v. Wolverine Supply, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 10-0115 (June 23, 2010) (*Winkelman II*).

[5] The same day the board issued its decision in *Winkelman II*, Winkelman filed another pleading with the board. The board treated that pleading as a petition for modification of *Winkelman II,* and issued another decision, *Larry J. Winkelman v. Wolverine Supply, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 10-0127 (July 22, 2010) (*Winkelman III*). In that decision, the board denied the petition, essentially ruling that the issues raised by Winkelman were outside of the scope of the remand from the commission. *See Winkelman III*, Bd. Dec. No. 10-0127 at 17-18.

the April 2008 hearing.[6] We affirm the board in part with respect to its ruling that Winkelman did not prove that he timely filed and served that medical record.[7]

2. Factual background and proceedings.

Some of the facts bearing on this matter are set forth in the commission's prior opinion.[8] To provide context to this second appeal, the facts are again summarized here.

Winkelman was working for Wolverine when he injured his back after falling down a set of stairs on August 12, 1996.[9] He moved to Minnesota and initially came under the care of Thomas Balfanz, M.D., and David Freeman, M.D. Wolverine paid Winkelman workers' compensation benefits.[10] Eventually, a second independent medical evaluation (SIME) was performed on June 27, 2000, by Neil Pitzer, M.D.[11] On October 23, 2000, the parties settled Winkelman's claim.[12] In pertinent part, the C&R stated:

> The parties agree that the employee's entitlement, if any, to future medical benefits for his neck and low back condition under the Alaska Workers' Compensation Act is not waived by the terms of this agreement, and that the right of the employer to contest liability for future medical benefits is also not waived by the terms of this agreement.[13]

In 2005, a dispute arose regarding payment for massage and pool therapy. Winkelman submitted a list of massage therapy appointments from January 10, 2005,

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6 *See Winkelman II,* Bd. Dec. No. 10-0115 at 20.

7 *See id.*

8 *See Winkelman,* App. Comm'n Dec. No. 115 at 2-5.

9 *See* R. 0001.

10 *See Winkelman,* App. Comm'n Dec. No. 115 at 2.

11 *See Winkelman II,* Bd. Dec. No. 10-0115 at 4.

12 *See* R. 0105-13.

13 R. 0109-10.

to November 29, 2005, for reimbursement.[14] After Wolverine controverted reimbursement,[15] Winkelman submitted a note from Dr. Freeman that said:

> 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. If you should require any further information, please feel free to contact me.[16]

On January 12, 2006, Winkelman filed a second claim, requesting temporary total disability, permanent total disability, a penalty, and interest, as well as medical and transportation benefits.[17] An employer's medical evaluation was performed on June 5, 2006, by John Swanson, M.D.[18] Dr. Swanson reported that massage and pool therapy for the remainder of Winkelman's life was "neither reasonably effective nor necessary for the process of recovery from the lumbar strain since it was resolved by 04/12/97."[19] On April 30, 2007, Winkelman had another SIME; it was performed by Paul Puziss, M.D.[20] Dr. Puziss was of a similar opinion as Dr. Swanson, reporting that "[t]reatment recommended by Dr. Freeman, including ongoing lifetime massage and pool therapy or other modalities, clearly are unreasonable and are not going to be effective, nor are they necessary, for the process of recovery . . . . The treatment . . . is not an acceptable medical option [in] this case."[21]

The board held a hearing on the claim on April 17, 2008. Darryl Jacquot presided at the hearing, as designated chairman. Following that hearing, the board concluded that the settlement agreement could not be set aside.[22] On Winkelman's

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14 *See* R. 0203.

15 *See id.* at 0048.

16 R. 0202.

17 *See* R. 0120-21.

18 *See id.* at 0609-30.

19 R. 0628.

20 *See* R. 0941-57.

21 R. 0954.

22 *See Winkelman I,* Bd. Dec. No. 08-0169 at 16.

claim for medical benefits,[23] the board applied the presumption of compensability analysis.[24] It found that 1) Winkelman raised the presumption; 2) Wolverine rebutted the presumption; and 3) Winkelman had not proved that his claim for medical benefits was compensable by a preponderance of the evidence.[25] The board found that the preponderance of the evidence "supports our conclusion that the employee's ongoing massage and pool therapy for his low back or cervical complaints are no longer related to his 1996 strain."[26] The board concluded that the "claims related to his ongoing medical benefits (massage and pool therapy), for his 1996 injury must be denied and dismissed."[27] In its order, the board stated "[t]he employee's claim for continued medical treatment, massage and pool therapy is denied and dismissed."[28]

Winkelman appealed the board's decision in *Winkelman I* to the commission, which heard oral argument on May 29, 2009. At oral argument, Winkelman stated: "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."[29]

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[23] *See Winkelman I,* Bd. Dec. No. 08-0169 at 16-19.

[24] The presumption of compensability analysis applicable to injuries occurring prior to November 7, 2005, requires a three-step process. In the first step, generally, AS 23.30.120(a)(1) creates the presumption of a compensable disability once the employee has produced some evidence that the claim arose out of or in the course of employment, that is, presented evidence of a preliminary link between employment and injury. In the second step, to rebut the presumption, the employer must produce substantial evidence that either (1) provides an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the disability; or (2) directly eliminates any reasonable possibility the employment was a factor in the disability. If the employer produces substantial evidence rebutting the presumption, in the third step, the presumption drops out and the employee must prove all elements of the claim by a preponderance of the evidence. *See, e.g., Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991).

[25] *See Winkelman I,* Bd. Dec. No. 08-0169 at 17-18.

[26] *Winkelman I*, Bd. Dec. No. 08-0169 at 19 (emphasis in original).

[27] *Winkelman I*, Bd. Dec. No. 08-0169 at 19.

[28] *Id.*

[29] May 29, 2009, Oral Arg. Tr. 5:22-25.

According to Winkelman, "[the letter from Dr. Langen] states in there the factual fracture of the spine, not a muscle spasm and so on and so forth[.]"[30] Shortly thereafter, Winkelman reiterated that it was Dr. Langen's letter that was not in the board's file when it rendered its decision in *Winkelman I.*[31] Winkelman then explained to the commission that he had filed a petition with the board earlier in May 2009 seeking modification of its decision in *Winkelman I*. The basis for the petition was that the board, in arriving at its decision, apparently failed to consider the evidence provided in Dr. Langen's letter, because the letter was not in the board's file.[32] In its August 25, 2009, decision, the commission remanded the matter to the board with these instructions:

> The commission REMANDS this case to the board 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.[33]

On remand, the board held a hearing on May 4, 2010, with William J. Soule serving as the designated chairman. That hearing resulted in issuance of the board's decision in *Winkelman II*, which set forth in detail the facts having a bearing on its decision.[34] In the interest of clarity, what follows is a review of the board's discussion in *Winkelman II* of the factual record 1) leading up to and following the first hearing on April 17, 2008; and 2) leading up to the second hearing on May 4, 2010. Of particular relevance are those facts pertaining to Winkelman's medical records that, he alleges, existed, were filed with the board prior to the April 17, 2008, hearing, and were missing from the board's file at the time of that hearing. Again, we summarize.

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30 May 29, 2009, Oral Arg. Tr. 6:8-10.

31 *See id.* at 5-7.

32 *See id.* at 7-8 and Appellees' Exc. 002-03.

33 *Winkelman,* App. Comm'n Dec. No. 115 at 20.

34 *See Winkelman II,* Bd. Dec. No. 10-0115 at 3-11.

A prehearing conference was held on February 11, 2008, which Winkelman attended telephonically from Minnesota.[35] The prehearing conference summary reflected that a hearing was set for April 17, 2008, and that the parties were to file and serve their evidence in accordance with 8 AAC 45.120.[36] On April 11, 2008, according to the facsimile cover sheet, Winkelman faxed to the board and to Wolverine's attorney a one-page handwritten hearing brief and a one-page undated Workers' Compensation Medical Summary.[37] In relevant part, the brief stated: "[H]ere are two professional opinions of my med. condition" and "[h]ere are (2) two Dr.'s opinions of the X Rays I had taken in Jan. 2008. (That their [*sic*] was trauma to my spine)[.]"[38] The medical summary contained handwritten entries by Dr. Freeman and Dr. Langen, each of whom signed it, together with their respective comments interpreting an x-ray or x-rays.[39] There is a copy of the medical summary in the board's file with the handwritten notation: "(Not Admitted) Late, No foundation."[40]

Winkelman testified at the April 17, 2008, hearing 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*[.]"[41] According to the board, Winkelman "was told he had to file a medical summary with medical reports included; and that is what he did: he saw his doctors on January 14, 2008 and April 11, 2008

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[35] *See Winkelman II,* Bd. Dec. No. 10-0115 at 5.

[36] *See id.* at 5. There is a discrepancy in the findings of the designated chairman for the April 17, 2008, hearing, Mr. Jacquot, *see id.* at 8, and the findings of the designated chairman for the May 4, 2010, hearing, Mr. Soule, *see id.* at 5, with respect to whether Winkelman was told during the February 11, 2008, prehearing that 8 AAC 45.120 requires the parties to file and serve their evidence at least 20 days prior to hearing.

[37] *See* Appellees' Exc. 035-37.

[38] Appellees' Exc. 036.

[39] *See* Appellees' Exc. 037.

[40] *Winkelman II,* Bd. Dec. No. 10-0115 at 6. By comparing the handwriting, the board, at the second hearing on May 4, 2010, attributed the notation to Mr. Jacquot, the designated chairman for the April 17, 2008, hearing. *See id.*

[41] *Winkelman II,* Bd. Dec. No. 10-0115 at 7 (italics added).

and asked his doctors to complete a medical summary; the undated medical summary with Dr. Freeman's and Dr. Langen's hand-written comments was the result[.]"[42] Other than the medical summary, "the board's file contain[ed] no medical records of any kind, including any x-ray or radiographic reports, from any medical provider in 2008[.]"[43] Wolverine's attorney objected to the medical summary, once it was explained that the summary was intended by Winkelman to serve as a medical record.[44] Based on designated chairman Jacquot's finding that Winkelman was advised at the February 11, 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[.]'"[45]

In *Winkelman II*, after discussing Winkelman's first appeal to the commission,[46] the board turned to events relating to the hearing on May 4, 2010. The board found: "[Winkelman] at hearing had difficulty identifying the reports he claimed were missing or misfiled. He ultimately identified: a Henning Chiropractic Clinic report dated January 10, 2008, Dr. Freeman's x-ray report dated January 14, 2008, and Dr. Langen's x-ray report dated April 11, 2008, as among those missing or misfiled[.]"[47] The board noted 1) Winkelman's hearing testimony was that he filed and served the "missing" reports well before the hearing; and 2) that Wolverine's attorney denied having received any records attached to the medical summary.[48] The board also found that at the April 17, 2008, hearing, Winkelman attempted to rely on the medical summary.[49]

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42 *Winkelman II,* Bd. Dec. No. 10-0115 at 7-8.

43 *Id.* at 7.

44 *See id.* at 8.

45 *Winkelman II,* Bd. Dec. No. 10-0115 at 8.

46 *See id.* at 8-9.

47 *Winkelman II,* Bd. Dec. No. 10-0115 at 10.

48 *See id*.

49 *See id.*

Following the May 4, 2010, hearing, the record was left open to afford Winkelman the opportunity to submit documents supporting his testimony that he had filed and served the medical records he asserted were missing.[50] Winkelman filed a letter from Dr. Langen dated May 11, 2010, in which Dr. Langen represented that he reviewed x-rays in 2007 and provided a report, which he gave to Winkelman.[51] Winkelman also filed certified mail receipts bearing postmark dates of August 2007 and October 2007.[52] He maintained that these receipts corresponded to his mailing Dr. Langen's 2007 report to the board and to Wolverine's attorney.[53]

Ultimately, the board ruled against Winkelman. It found that, although Winkelman proved that relevant medical records existed, he was unable to prove that he timely filed and served this medical evidence, which was not in the board's file on April 17, 2008.[54] Winkelman again appealed to the commission.

3. Standard of review.

Pursuant to the provisions of AS 23.30.128(b), the commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the record as a whole. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[55] "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"[56] and therefore independently reviewed by

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50 *See Winkelman II,* Bd. Dec. No. 10-0115 at 10.

51 *See id.* and Appellees' Exc. 042.

52 *See* Appellees' Exc. 043-44.

53 *See Winkelman II,* Bd. Dec. No. 10-0115 at 10.

54 *See id.* at 20.

55 *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors,* 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted)).

56 *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

the commission.[57] The commission exercises its independent judgment in reviewing questions of law or procedure.[58]

4. Discussion.

a. We find that the only medical record that could be the subject of the commission's remand is a 2007 letter or report from Dr. Langen discussing his review of Winkelman's x-rays.

As a first order of business, the commission must determine which medical records are at issue and could be the subject of our earlier remand. At oral argument before the commission on May 29, 2009, Winkelman narrowed in and identified the document he asserted was missing from the board's file. It was a letter from Dr. Langen.[59] The commission's remand to the board was expressly limited to allowing Winkelman to submit evidence in relation to "the document[.]"[60] Hence, we infer that "the document" that could be the subject of the remand is a letter, report, or other medical record from Dr. Langen that Winkelman was referring to in his remarks to the commission.[61]

Based on the record before us, there are only two documents that might satisfy this description. They are: 1) a 2007 report that was referenced in Dr. Langen's May 11, 2010, letter; and 2) an x-ray report from 2008 that was generated by Dr. Langen other than his handwritten comments on the medical summary filed April 11, 2008. For the reasons which follow, if Winkelman can otherwise provide substantial evidence in light of the record as a whole that it existed, we find that the document in question would have to have been Dr. Langen's 2007 report.

As previously mentioned, in *Winkelman II*, the board discussed whether there was any medical record from Dr. Langen that was filed with the board on April 11,

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57 *See* AS 23.30.128(b).

58 *See id*.

59 *See* May 29, 2009, Oral Arg. Tr. 5-7.

60 *See Winkelman,* App. Comm'n Dec. No. 115 at 20.

61 When a reviewing court, or, in this case, the commission, remands a matter to an administrative agency, the agency is bound to follow its order. *See Smith v. University of Alaska, Fairbanks,* 172 P.3d 782, 792 (Alaska 2007)(footnote omitted).

2008, other than the medical summary. The board noted that, at the April 17, 2008, hearing, Winkelman testified that Dr. Langen's April 11, 2008, report consisted of his handwritten comments on the medical summary.[62] This fact was confirmed in Winkelman's contemporaneously-filed hearing brief, which indicated that it was the medical summary that provided Dr. Langen's opinion with respect to Winkelman's January 2008 x-rays.[63] That medical summary was in the board's file, with written notations on it authored by designated chairman Jacquot.[64] Thus, it is reasonable to find, based on this evidence, that other than the aforementioned medical summary, no medical record generated by Dr. Langen was filed by Winkelman on April 11, 2008, so that it would be present in the board's file for the April 17, 2008, hearing.

On the other hand, there was no 2007 report from Dr. Langen in the board's file, despite Winkelman's assertions that he filed and served it. In Dr. Langen's May 11, 2010, letter,[65] he stated that he reviewed Winkelman's x-rays in 2007,[66] provided the original of a report to Winkelman, and failed to make a copy for his records.[67] The letter also indicates that Winkelman told Dr. Langen that he, Winkelman, had filed that report with the board and served it on Wolverine's attorney.[68] Finally, Winkelman maintained that the certified mail receipts bearing 2007 postmarks that he submitted to the board were evidence of his filing Dr. Langen's 2007 letter with the board and serving it on Wolverine's attorney.[69] The foregoing reflects that the letter or report that Winkelman asserts was "missing" from the board's file at the April 17, 2008, hearing

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62 *See Winkelman II,* Bd. Dec. No. 10-0115 at 7.

63 *See* Appellees' Exc. 036.

64 See n.40, *supra.*

65 *See* Appellees' Exc. 042.

66 The reference to the year "2007" in the letter was handwritten, whereas the remainder of the letter was typewritten. *See id.*

67 *See* Appellees' Exc. 042.

68 *See id.*

69 *See Winkelman II,* Bd. Dec. No. 10-0115 at 10 and Appellees' Exc. 043-44.

and the subject of our remand would have to have been Dr. Langen's 2007 report, if it existed.

b. The record as a whole does not provide substantial evidence that the 2007 report from Dr. Langen existed so that it could be filed and served before the April 17, 2008, hearing.

Applying the presumption of compensability analysis, the board found that 1) Winkelman had raised the presumption that x-ray reports actually existed; 2) Wolverine had failed to rebut the presumption with substantial evidence; and 3) had Wolverine rebutted the presumption, Winkelman proved by a preponderance of the evidence that x-ray reports existed.[70] For the following reasons, we conclude the board's analysis is flawed.

First, the commission views the issue whether the presumption analysis should be applied as one of law or procedure to which the commission applies its independent judgment.[71] Second, the Alaska Supreme Court has held that the "presumption analysis does not apply to every possible issue in a workers' compensation case."[72] Third, here, the presumption analysis is ill-suited to decide the specific issue whether a particular medical record existed. In keeping with the holding in *Burke*, the commission declines to apply it. Instead, we should determine whether the board's finding that x-ray reports existed is supported by substantial evidence in light of the record as a whole.[73]

As a preliminary matter, the board did not specify which x-ray reports it was referring to when it found that reports existed. However, as we have explained in the preceding section, x-ray reports by Drs. Freeman and Langen relating to x-rays taken in January 2008 are not at issue. The commission's remand was confined to whether a single letter or report from Dr. Langen existed which, according to Winkelman, states that he has a fracture of the spine.[74] Therefore, if there is substantial evidence in the

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70 *See Winkelman II,* Bd. Dec. No. 10-0115 at 16-17.

71 *See* AS 23.30.128(b).

72 *Burke v. Houston Nana, L.L.C.,* 222 P.3d 851, 861 (Alaska 2010).

73 *See* AS 23.30.128(b).

74 *See* May 29, 2009, Oral Arg. Tr. 5-7.

record as a whole that it otherwise existed, only an x-ray report from Dr. Langen in 2007, as referenced in his May 11, 2010, letter, could correlate with the commission's remand and the board's finding that x-ray reports existed.

As for the suitability of the presumption analysis to the issue whether a 2007 x-ray report from Dr. Langen existed, we note the board found that Winkelman raised the presumption through his testimony that x-rays were taken, which his physicians reviewed and commented upon in reports of their findings. We agree that this evidence suffices for that purpose.[75] Next, the board found that Wolverine had not provided substantial evidence to rebut the presumption.[76] We agree, however, as a practical matter, Wolverine could not provide any rebuttal evidence that the 2007 report from Dr. Langen did *not* exist. To do so, it would have to prove a negative proposition, which is logically problematic. Unlike the issue whether Wolverine was served with the report, denial of receipt of the report is not necessarily probative of the issue whether the report *existed*. Wolverine is at a similar disadvantage in terms of the third phase of the presumption analysis. Because it cannot produce *any* evidence that the 2007 report did *not* exist, Winkelman would have little difficulty meeting his burden of proof by a preponderance of the evidence that the report existed. In the interest of fairness, the presumption analysis was simply ill-suited to resolving the issue whether a 2007 x-ray report from Dr. Langen existed.

In light of the record as a whole, is there substantial evidence that a reasonable mind might accept as adequate to support the conclusion that the report existed?[77] The commission thinks not. Winkelman, to date, has not produced the 2007 report. We have his word that it existed and that he filed and served it. He also maintains that the certified mail receipts and post office receipts he produced demonstrate that he

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[75] As additional evidence, the board might have, but did not cite Dr. Langen's May 11, 2010, letter to the effect that in 2007, he had given Winkelman an x-ray report.

[76] *See Winkelman II,* Bd. Dec. No. 10-0115 at 16-17.

[77] *See* n.56, *supra.*

filed and served the report,[78] yet there was no such report in the board's file and Wolverine's counsel denies having ever been served with it. The only evidence that the report existed from a source other than Winkelman is Dr. Langen's May 11, 2010, letter. 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.[79] 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.

c. The record as a whole does not provide substantial evidence that the 2007 report from Dr. Langen, assuming it existed, was timely filed and served.

The board bifurcated its discussion whether there was evidence that x-ray reports were timely filed and served prior to the April 17, 2008, hearing.[80] First, applying the presumption analysis, the board found that Winkelman had not proven by a preponderance of the evidence that x-ray reports or his doctors' pre-2008 comments on those reports were timely filed and served. Second, the board noted that there was no factual dispute whether the medical summary with Dr. Freeman's and Dr. Langen's handwritten comments was timely filed and served on April 11, 2008. It was not.[81]

As previously stated, by process of elimination, the only document that could have been the subject of the commission's remand was Dr. Langen's 2007 report,

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[78] Winkelman argues that the postmark for the certified mail receipt and the post office's receipt showing payment for the certified mail dated August 23, 2007, correspond to filing Dr. Langen's 2007 report with the board. In contrast, the postmark for the certified mail receipt and the post office's receipt showing payment for the certified mail dated October 20, 2007, correspond to serving Dr. Langen's 2007 report on Wolverine, according to Winkelman. *See* Appellees' Exc. 043-45. Winkelman has not explained why he supposedly served the report two months after he supposedly filed it.

[79] *See* Appellees' Exc. 042.

[80] *See Winkelman II,* Bd. Dec. No. 10-0115 at 17-18.

[81] *See id.* at 18.

provided there was substantial evidence of its existence. We have found that there is inadequate evidence that the report exists, which should render the issue whether it was timely filed and served moot. However, assuming it existed, we affirm the board's ruling that it was not timely filed and served.

Applying the second step of the presumption of compensability analysis, with respect to any such report predating 2008, the board found that Wolverine had presented substantial evidence to rebut the presumption.

> [Wolverine] . . . show[ed] the missing records are not found in the file, it has not received them, and the certified mail receipts and "green cards" [Winkelman] claims prove he filed and served these documents do not expressly prove his case, because [Winkelman] cannot clearly show what was attached to the various "green cards" and receipts he provided as evidence of filing and service.[82]

The board then found that, in terms of the third step in the analysis, Winkelman failed to prove by a preponderance of the evidence that he had timely filed and served any report.

> [Winkelman] cannot convincingly prove with his testimony, or with his postal service records, he filed and served any x-ray reports or pre-2008 reports from his physicians addressing these x-rays. The x-ray reports are not found in the file and neither [Winkelman] nor [Wolverine] has them. [Winkelman] admitted at the May 4, 2010 hearing he was a poor record keeper and did not have a reliable way to match the certified mail receipts and "green cards" he filed with the documents he claims were associated with those postal documents. Furthermore, [Winkelman] could not provide copies of what he filed, as proof.[83]

We agree with the board's findings, irrespective of its application of the presumption analysis. Like the issue whether the report existed, we believe the issue whether it was timely filed and served is not particularly well-suited to the resolution of this factual issue either. Instead, were we to assume that Dr. Langen's 2007 report existed, we find that the record as a whole does not provide substantial evidence that it was timely filed and served.

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82 *Winkelman II,* Bd. Dec. No. 10-0115 at 18.

83 *Id.*

5. Conclusion.

The commission REVERSES the board's ruling in *Winkelman II* that a 2007 x-ray report from Dr. Langen existed. We AFFIRM the board's ruling in *Winkelman II* that Winkelman did not timely file and serve any report.

Date: *21 March 2011* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
S.T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission reverses and affirms the board. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. 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

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days of this decision being distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal 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).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the Final Decision No. 149 issued in the matter of *Winkelman v. Wolverine Supply, Inc.*, AWCAC Appeal No. 10-025, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 21, 2011.

Date: *March 22, 2011*

Signed

B. Ward, Commission Clerk