

Case: *Linda S. Rockstad vs. Chugach Eareckson Support Services, Zurich American Insurance Company, and NovaPro Risk Solutions*, Alaska Workers' Comp. App. Comm'n Dec. No. 140 (November 5, 2010)

Facts: Linda Rockstad (Rockstad) worked for Chugach Eareckson Support Services (CESS) on remote Shemya Island. She claimed that her work lead to a number of work-related conditions: de Quervian's (DQ) tenosynovitis in her right wrist, right lateral epicondylitis, right medial epicondylitis, a ganglion cyst, and injury-related mood disorder. She stopped working for CESS in April 2004 when she took a data-entry job with Nye Toyota, but was only employed by Nye Toyota for a few months. Rockstad had a number of surgeries to treat the DQ tenosynovitis.

CESS contended: 1) that her DQ tenosynovitis was a temporary aggravation of a pre-existing condition that resolved by September 10, 2003; and 2) that there was either no causal connection between the other medical conditions and her employment or no persuasive medical evidence that Rockstad suffered from the medical conditions.

The board held a hearing in September 2009. The board applied the presumption analysis, concluding that for each condition Rockstad attached the presumption and CESS rebutted it. The board next considered whether Rockstad had proved each claimed condition was work-related by a preponderance of the evidence. First, the board concluded that Rockstad was not credible, citing among other examples, her deposition testimony that contradicted her actions in a videotaped surveillance that same day. The board discounted all medical opinions that relied heavily on Rockstad's self-reporting.

The board decided that Rockstad's work for CESS caused a temporary aggravation of her pre-existing DQ in her right wrist that resolved in September 2003. The board noted a 10-month gap in treatment for DQ from September 2003 until Rockstad's emergency room visit on June 28, 2004, as evidence of a temporary aggravation. The board also declined to rely on Dr. Vermillion's opinion because he was equivocal and on Dr. Wilson's opinion because he relied too heavily on Rockstad's credibility. The board observed that none of the other doctors attributed Rockstad's DQ symptoms after September 2003 to Rockstad's work for CESS.

The board concluded Rockstad's CESS employment was not a substantial factor in causing right lateral epicondylitis after February 6, 2003. The board noted the 17-month gap in treatment for elbow pain and there were no treatments or complaints of elbow pain indicated in the medical records between February 6, 2003, and July 5, 2004. The board relied on Dr. Fuller's opinions and discredited Dr. Vermillion's and Dr. Wilson's opinions because they did not explain how "the right lateral epicondylitis can be attributed to Claimant's employment when it was asymptomatic for seventeen months, and did not appear until five months after Claimant left CESS' employ."

The board also rejected that her work at CESS was related to Rockstad's right medial epicondylitis, again noting this was first reported in July 2005, 13 months after leaving her employment with CESS. The board further stated that "[n]one of Claimant's treating physicians attributed medial epicondylitis, if they even diagnosed it, to

Claimant's employment with CESS." Only Dr. Wilson connected medial epicondylitis to Rockstad's work, but he acknowledged that this diagnosis was based on Rockstad's subjective reports of pain and noted he found no physical evidence of medial epicondylitis.

The board concluded that the ganglion cyst was not related to Rockstad's employment largely because not a single doctor had opined there was any connection. Next, the board concluded that the scar neuroma and complex regional pain syndrome (CRPS) were not related to Rockstad's work. The board discussed how these conditions were never clearly diagnosed and the weight of evidence supported that she did not have them. The surgeons, Dr. McNamara and Dr. Vermillion, noted no signs of neuroma in their operative reports after her second and third surgeries; Dr. Vermillion ruled CRPS out based on electromyography studies. Although Dr. Hinman listed CRPS in his diagnoses at one point, the board inferred that this was based on Rockstad's incorrectly reporting a diagnosis of CRPS. The board also discounted Dr. Vermillion's opinions as unpersuasive because he never diagnosed these conditions, and he "assumed any surgery which may have caused these conditions was necessitated by a work injury, which it was not, and were based almost entirely on Claimant's verbal history, rather than medical record, and Claimant has been found to lack veracity." Moreover, the board discounted Dr. Wilson's opinions because his testimony was contradictory and he misstated the names of the conditions.

Finally the board concluded that Rockstad's employment was not a substantial factor in causing Rockstad to develop an injury-related mood disorder. Because the board concluded none of the diagnoses, other than a temporary aggravation of DQ tenosynovitis, could be attributed to her work, that there was "no legal basis for attributing any mood disorder . . . to her employment for CESS." The board further concluded that even if the diagnoses were related to her employment, her work still would not be a substantial factor in causing her psychiatric problems. The board observed that Drs. Beard, Fuller, Reimer, and Glass concluded she suffered from somatoform disorder, which was related to "inherent psychological factors and not to her work," and Dr. Holladay did not diagnose any injury-related mood disorder. In terms of Ms. Judd's diagnoses, the board noted: "Although references appear in some of Ms. Judd's records suggesting that Claimant's reported pain was a result of her work, or surgeries undertaken for work injuries, these are based on patient reporting, and Ms. Judd has never made any independent assessment of the work-relatedness of any of Claimant's reported pain." Lastly, the board discounted Dr. Ling's opinion as unpersuasive because it was equivocal and depended on the accuracy of Rockstad's reporting.

Applicable law: AS 23.30.122 provides:

Credibility of witnesses. The 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. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

AS 23.30.128(b) provides that "The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission."

AS 23.30.120(a) and case law applying the three-step presumption of compensability analysis.

Issues: Is AS 23.30.122 unconstitutional? Did the board have substantial evidence and apply the correct legal analysis to deny Rockstad's claim for benefits related to her DQ tenosynovitis after September 2003? Did the board have substantial evidence and apply the correct legal analysis in denying the compensability of all of Rockstad's other medical conditions? Did the board properly find that the employer did not withhold or destroy evidence?

Holding / analysis: The commission decided it lacked jurisdiction to address Rockstad's constitutional arguments concerning the validity of AS 23.30.122 per *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

The commission concluded that the board properly applied the compensability presumption analysis and had substantial evidence to deny each of her claims for each of her medical conditions (see the facts summarized above). The commission deferred to the board's findings that Rockstad was not credible and the subsequent discrediting of doctors' opinions that relied too heavily on Rockstad's self-reporting or subjective complaints.

The commission adopted the board's analysis in deciding a number of legal and evidentiary issues, including that (1) it was not an abuse of discretion for the board to accept Dr. Fuller's testimony even though he was retired from performing surgery; (2) the employee's non-attorney representative was not subject to unlawful discrimination when she was required to swear a modified oath; (3) it was not an abuse of discretion to allow the employer to display evidence via a video monitor and to accept the employer's hearing brief in a three-ring binder; (4) the better practice would have been for the board to ask both parties to resubmit misplaced evidence but any *ex parte* communication was not improper; (5) it was not a mistake of law to appoint a new chair to hear the merits of Rockstad's claims; (6) the remote site doctrine was not incorrectly applied; (7) the employer did not unlawfully change employer's medical evaluation doctors; and (8) CESS did not withhold or destroy evidence. On withholding evidence, the board decided:

If understood correctly from Claimant's January 20, 2010, Reply, Claimant avers Employer's failure to provide her with two documents she authored, a generic company email explaining the procedure to follow upon receipt of requests for personnel files, and an email transmitting Claimant's request for a copy of her personnel file to CESS' legal department, in conjunction with the depositions of co-workers Sharry Christiansen and Mary McCully, constitute substantial evidence Employer intentionally and

knowingly withheld from Claimant and the Board medical records from continuing care Claimant alleges she received at Shemya Clinic after August 4, 2003. . . . Given the testimony of Christiansen and McCully, and considering the allegations made here, there is no substantial evidence Shemya Clinic medical records were withheld from Claimant. Dec. No. 140 at 50.

Note: This case was appealed to the Alaska Supreme Court, which affirmed the commission's decision in a Memorandum Opinion and Judgment (MO&J). Because MO&Js do not create legal precedent and because AS 23.30.008(a) provides that "Unless reversed by the Supreme Court, decisions of the commission have the force of legal precedent," the commission decision may still serve as legal precedent for the board and appeals commission. *See Alaska Public Interest Research Group v. State*, 167 P.3d 27, 45 (Alaska 2007) (stating "we construe the provision that decisions of the Appeals Commission have the force of legal precedent as meaning that they serve as legal precedent for the Board and the Appeals Commission only.")

Dec. No. 100 denied Rockstad's motion for extraordinary review (MER) and Dec. 108 denied the respondents' motion for attorney fees related to the MER.