Alaska Workers' Compensation Appeals Commission

Calvin L. McGahuey,
Appellant,

vs.

Whitestone Logging, Inc., and Alaska Timber Insurance Exchange,
Appellees.

Final Decision
Decision No. 118 October 23, 2009

AWCAC Appeal No. 08-022
AWCB Decision No. 08-0108
AWCB Case No. 200507894

Appeal from Alaska Workers Workers' Compensation Board Decision No. 08-108, issued at Anchorage, Alaska, on June 11, 2008, by southcentral panel members Patricia Vollendorf, Member for Labor, and Robert C. Weel, Member for Industry.[1]

Appearances: Calvin L. McGahuey, *pro se,* appellant, appeared telephonically. Patricia Zobel, Delisio, Moran, Geraghty & Zobel, PC, for appellees, Whitestone Logging, Inc., and Alaska Timber Insurance Exchange.

Commission proceedings: Appeal filed on July 23, 2008. Appellant ordered to remedy default on August 29, 2008. Appellant's request to waive fees granted September 26, 2008. Appellant ordered to remedy default on November 25, 2008. Appellant's request for extension of time to file reply brief granted on January 28, 2009. Appellant's motion to stay commission proceedings granted on March 11, 2009.[2] Oral argument on appeal presented July 30, 2009.[3]

Appeal Commissioners: David W. Richards, Stephen T. Hagedorn, Kristin Knudsen.

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[1] Designated Chair Rosemary Foster presided over the hearing, Apr. 24, 2008 Hrg. Tr. 3:13-14, but did not sign the decision.

[2] Appellant requested a stay to allow him to present evidence to the board to obtain board modification of its Dec. No. 08-0108. The request for modification was denied in *Calvin L. McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 09-0083 (May 6, 2009) (R. Weel, Member for Industry, P. Vollendorf, Member for Labor, J. Wright, Chair). This decision was not appealed.

[3] The appellant presented his argument telephonically from Oakville, Washington.

By: Stephen T. Hagedorn, Appeals Commissioner.

Calvin McGahuey, who worked for Whitestone Logging, appeals the board's decision to deny his claim for failure to give timely notice pursuant to AS 23.30.100. He claims that his late filing of a written injury report should be excused under AS 23.30.100(d)(1) because his employer was advised of his injuries shortly after the fight with co-workers that caused the injury. He also argues that the board denied him due process by failing to help him locate his witness, Joe Bovee, and that the board erred in finding that even if his claim had been timely, it was not work-related.

The appellees, Whitestone Logging, Inc., and Alaska Timber Insurance Exchange,[4] contend the board properly dismissed McGahuey's claims based on his failure to file a timely notice of his injuries. Whitestone relies on evidence that it had no knowledge that McGahuey injured his low back, hip, and neck during the fight, and that it was prejudiced by the delay in notice. Whitestone also argues that the board properly decided McGahuey's claim was not compensable. Finally, Whitestone argues that it satisfied its discovery obligations to the appellant and the board owed no further duty to locate the appellant's witness for him.

The parties' contentions require the commission to decide whether substantial evidence supports the board's decision to dismiss McGahuey's claim as time-barred and not work-related. We conclude that the board had substantial evidence on which to base its findings that McGahuey had failed to report the injuries to Whitestone Logging or Whitestone's agent. We conclude the board erred by assessing credibility before determining if the statutory presumptions attached to McGahuey's claim, but we find the errors are harmless because the board completed its analysis as if the presumptions had been raised. We conclude the board had substantial evidence in the record as a whole to support its findings that McGahuey's claim was not work-related. Finally, we conclude that the board was not obligated to locate appellant's witness. Therefore, the board's decision is affirmed.

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[4] Collectively referred to in this decision as "Whitestone" or "Whitestone Logging."

1. Factual background.

Calvin McGahuey worked for Whitestone Logging, Inc., on Afognak Island starting in February 2004.[5] McGahuey and two other employees had a fistfight in March 2004.[6] McGahuey testified that he was attacked and pushed against a table in the bunkhouse, injuring his back.[7] He also testified that he did further injury to his left ear, which was already infected, and that he hurt his hip when he jumped out of a second-story window to escape the assault.[8] He testified that he talked to his supervisor, John Rivers, the next day and told him about his injuries and that he was dissuaded from filing an injury report because Rivers was short-handed.[9] He also testified he reported the fight to Mike Knudsen, a supervisor.[10] He testified that he was limping after the fight but could not get off the island to see a doctor for two weeks because of fog.[11] He testified that when he saw a doctor in Kodiak, he told him about the fight.[12]

McGahuey testified that he informed Joe Bovee that he was hurt,[13] but he claimed he "had no idea" where to locate Bovee so he could be compelled to testify as his witness at his hearing.[14] McGahuey testified that he was directly supervised by Bovee.[15]

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5 R. 0880.

6 Apr. 24, 2008 Hrg. Tr. 87:21, 88:16-21.

7 Oct. 11, 2006 Hrg. Tr. 21:22-23.

8 2006 Hrg. Tr. 21:21-22.

9 2006 Hrg. Tr. 12:13-19, 21:9-10.

10 2008 Hrg. Tr. 101:24-25. Appellant said that he was directed to Mike Knudsen by the camp cook. *Id.* at 29:19-23. Mike Knudsen is no relation to the commission chair.

11 2006 Hrg. Tr. 22:11-15, 10:17-19.

12 2006 Hrg. Tr. 22:11-15, 10:17-19.

13 2008 Hrg. Tr. 145:20.

14 2008 Hrg. Tr. 26:11-15.

15 2008 Hrg. Tr. 119:20-22.

John Rivers testified that he investigated the bunkhouse fight shortly after it occurred.[16] He testified that he discussed the fight with McGahuey the night it happened or the next morning and that McGahuey did not report any injuries.[17] He testified that he did not notice a limp or any other injury besides "[h]is face was red in places so it looked like he had been involved in a fist fight but nothing real severe."[18] At the time, John Rivers was the only qualified EMT (emergency medical technician) in camp.[19] Rivers testified that Joe Bovee was a contract compliance officer for another company, and not an employee of Whitestone Logging.[20] He testified that Curt Warder was the "sort yard manager," McGahuey's supervisor.[21] Mike Knudsen was the "side rod," Warner's supervisor.[22] Bovee, he testified, was not "in the chain of command for Whitestone."[23]

Janelle Lepschat, who was an office clerk at the Afognak camp at the time the fight occurred, testified that McGahuey never told her he was hurt because of the fight and she was never asked to prepare a written injury report for McGahuey as a result of the fight.[24] Similarly, Ronald Johnson, the camp manager at the time the fight occurred, never heard from McGahuey or anyone else that McGahuey was injured as a result of the fight and never noticed McGahuey limping, and he testified that McGahuey did not miss any work as a result of the fight.[25] Johnson testified that Joe Bovee was

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16 Apr. 24, 2008 Hrg. Tr. 88:2.

17 2008 Hrg. Tr. 89:16 – 90:22.

18 2008 Hrg. Tr. 89:19-20.

19 2008 Hrg. Tr. 87:12-13.

20 2008 Hrg. Tr. 102:11-14.

21 2008 Hrg. Tr. 94:16-25, 95:13-14.

22 2008 Hrg. Tr. 102:6-8.

23 2008 Hrg. Tr. 102:11-12.

24 2008 Hrg. Tr. 113:24 – 115:9.

25 2008 Hrg. Tr. 107:5-25.

not the "overseer" of the log pond and denied he was a supervisor.[26] Lastly, Pamela Scott, the insurer's claims department manager,[27] testified that McGahuey did not report any injuries as a result of the March 2004 fight until April 6, 2005, and that the insurer did not receive this report of injury until June 9, 2005.[28]

McGahuey saw a doctor in Kodiak for complaints about his ear pain approximately two months after the fight.[29] The doctor removed impacted earwax, noting that using earplugs at the jobsite may have caused it.[30] The doctor's report makes no mention of McGahuey injuring his ear during a fight or injuring his hip or back.[31] McGahuey's employment with Whitestone Logging ended in June 2004.[32] More than a month later, McGahuey reported the ear injury.[33] McGahuey made no mention of the fight but stated that the ear problem was due to exposure to grease and leaky exhaust on a boom boat, and caused by using earplugs instead of headphones.[34]

McGahuey completed a Report of Occupational Injury or Illness relating to the March 2004 fight and dated it April 6, 2005.[35] Whitestone Logging completed the form May 20, 2005, and the Alaska Workers' Compensation Board stamped it "received" on June 8, 2005.[36] The form reported that he injured his right hip and middle lower back, and left ear as a result of the March 2004 altercation.[37]

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26 2008 Hrg. Tr. 111:8-10, 17.

27 2008 Hrg. Tr. 50:10-16.

28 2008 Hrg. Tr. 56:7-19.

29 R. 0540-41.

30 *Id*.

31 *Id*.

32 R. 0030.

33 Employer's Exhibits from April 24, 2008 hearing, Ex. 1.

34 *Id.*

35 R. 0001.

36 *Id.*

37 *Id*.

In October 2005, McGahuey began working with a new employer in California, Simpson Timber Company. Prior to beginning work for Simpson, he certified that he did not have a medical history of persistent back pain or a significant back injury.[38] He also demonstrated that he was able to lift 100 pounds and walk 20 feet while carrying this weight.[39]

On December 7, 2005, he experienced back pain and went to the Sutter Coast Hospital emergency room.[40] According to the doctor's notes, McGahuey reported that he had a "history of low back pain since a work-related injury in 2004" that occurred when "he was attacked at work by a man who pushed him into a table which injured him at the low back right iliac area."[41] He also stated that he had been "doing very heavy work in the past week."[42] He was diagnosed with a lumbar strain with radiculopathy.[43] He also sought medical care from Chiropractor Tracy Cole. Dr. Cole's notes reflect that McGahuey identified his work with Simpson Timber Company as aggravating his prior back injury suffered in the fight at Whitestone Logging.[44] Dr. Cole released him to return to work on December 12, 2005.[45] McGahuey quit working for Simpson Timber on January 8, 2006.[46] McGahuey then filed notice of a workers'

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38 R. 0397. He also responded "not latley [sic]" to whether he was bothered by back pain and checked "no" to a question about whether he had sought medical treatment for back pain. R. 0398.

39 R. 0397.

40 R. 0583-84.

41 R. 0583.

42 *Id.*

43 *Id.*

44 R. 0051.

45 R. 0048.

46 R. 0151.

compensation injury at Simpson Timber;[47] he later filed a workers' compensation claim against Simpson Timber under California law.[48]

Although he received no medical treatment for injuries around the time of the fight, two years later, in a March 2006 MRI (Magnetic Resonance Imaging) scan, his lumbar spine and his right hip were found to be normal.[49]

2. Board proceedings.

Whitestone Logging controverted the reported injury on the grounds that it was reported late and that it did not occur within the course and scope of employment and that compensation was barred under AS 23.30.235 because the employees involved in the fight had been drinking alcohol.[50] Later, Whitestone added to the controversion that the injury was caused by McGahuey's employment with Simpson Timber.[51]

The board heard McGahuey's claim for compensation on October 11, 2006[52] and dismissed it.[53] After providing the text of AS 23.30.100 the board stated:

> The Board finds that the employee unreasonably delayed filing a report of injury. The fighting incident where the injury occurred took place in March 2004 but the employee did not report for treatment of any back condition until December 2005. He also did not file a report of injury until June 8, 2005, which is not within 30 days as required under AS 23.30.100. None of the exceptions set out under this rule are applicable to the employee. The employer's petition to dismiss the claim pursuant to AS 23.30.100 is granted. Because of the granting of the

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47 R. 0481.

48 R. 1062-63.

49 R. 0230-31. The report indicates the procedure was an "MRI LUMBAR SPINE," but it does state in conclusion "Normal MRI *cervical* spine" (emphasis added), which may be a typographical error. R. 0230.

50 R. 0004.

51 R. 0006.

52 Oct. 11, 2006 Hrg. Tr. 4:4 – 7:6.

53 *Calvin L. McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 06-0300, 6 (Nov. 9, 2006) (R. Foster, chair).

> dismissal, the merits of the employee's claims are not addressed.[54]

McGahuey appealed. The commission concluded that the board's findings and reasoning were inadequate for a proper review and that the board erred in failing to apply the AS 23.30.100(a)(2) presumption that "sufficient notice of the claim has been given."[55] The commission remanded the case to the board with instructions to rehear the claim, "to apply a presumption analysis based on AS 23.30.120(a)(2), and to set out in its decision sufficient findings of fact, including credibility findings, and reasoning to permit future review if sought by the parties."[56]

The board held a second hearing on April 24, 2008.[57] In its decision, the board reviewed the record and once again concluded that McGahuey's claim was barred for lack of notice. The board also decided he had failed to establish a compensable claim under the Alaska Workers' Compensation Act.[58] The board found the employer's witnesses were credible and McGahuey was not credible.[59] The board recited the three-step presumption analysis before addressing the notice issue, but in applying it at the first step, reached a contradictory conclusion:

> [T]he Board finds that the employee has narrowly raised the presumption of sufficient notice as to injuries claimed from the March 2004 altercation based on his account of injury and his efforts to report the matter to the employer and subsequent reports to physicians he saw for his back pain years after the March 2004 altercation. Accordingly, based on the above, we conclude the employee failed to attach the presumption that he gave notice to the employer of his March 2004 alleged injury.

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[54] *Id*. at 5.

[55] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 10 (Aug. 28, 2007).

[56] *Id.* at 11.

[57] Apr. 24, 2008 Hrg. Tr. 3:8-13.

[58] *Calvin L. McGahuey v. Whitestone Logging*, Alaska Workers' Comp. Bd. Dec. No. 08-0108, 1-2 (June 11, 2008) (R. Foster, chair).

[59] *Id*. at 20-22.

> For the sake of argument, we will assume that the employee somehow attached the presumption with his own (discredited) testimony.[60]

The board found that the employer rebutted the presumption with credible testimony that McGahuey missed no work after the fight and did not otherwise tell a supervisor he was injured,[61] and thus, it had no notice of any injuries. Since the presumption no longer applied, the board considered whether McGahuey had proved by a preponderance of the evidence that he either gave the employer timely written notice or had a satisfactory reason for not providing timely written notice under AS 23.30.100(d). The board concluded that McGahuey had not proved sufficient notice because (1) he was not credible in testifying that he had told the employer of his injuries at the time of the fight; (2) the testimony of opposing witnesses was credible; and (3) McGahuey did not file a written claim with the board until June 5, 2005. The board also found that McGahuey failed to establish a satisfactory reason for failure to give notice and that the employer was prejudiced by the failure to give timely notice.[62]

The board concluded McGahuey failed to establish that a compensable injury arose from the March 2004 incident. The board again considered McGahuey's credibility in concluding that he had failed to raise the presumption that his claim was compensable.[63] Notwithstanding that determination, the board completed the presumption analysis[64] and concluded that McGahuey could not prove he suffered a compensable injury as a result of the fight:

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[60] *Id.* at 22. The contradiction between finding McGahuey "*narrowly raised* the presumption of sufficient notice" and, in the next sentence saying he "*failed to attach* the presumption that he gave notice" seems to have escaped the board members.

[61] The commission assumes that the board cites the testimony by Ms. Lepschat and Mr. Johnson because both testified that no injury was reported to them and they would have expected to be informed. *Id.* at 22-23.

[62] *Id*. at 23-24.

[63] *Id*. at 24.

[64] *Id*.

> This result is based on the Board's finding that the employee is not credible with regard to his account of injuries sustained as a result of the March 2004 altercation. The Board also bases its determination on the absence of any medical reports tying the employee's back condition to the March 2004 altercation. The Board finds the doctors who did appear to relate the employee's conditions to work did so because of the employee's account of how his physical problems occurred. The Board also relies on the testimony of the company witnesses who we found to be credible.[65]

The board did not address the merits of McGahuey's request for a Second Independent Medical Examination (SIME) because it had already decided to dismiss his claim on other grounds.

McGahuey appealed. After filing his appeal, McGahuey petitioned for modification by the board based on factual mistakes and legal errors. The appeals commission issued a stay of its proceedings so the board could consider the petition.[66] While the board found one factual error in that McGahuey settled his workers' compensation claim with Simpson Timber, rather than having that claim dismissed under California law, the board considered this error harmless because the board primarily based its decision to deny his claim on McGahuey's lack of credibility and other evidence in the record.[67] McGahuey did not appeal this decision so the commission does not consider the board's decision on modification in this appeal.

3. Standard of review.

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[68] The commission examines "the evidence objectively so as to determine whether a reasonable mind could rely upon it to support the board's conclusion."[69] However, the commission "will not reweigh

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65 *Id*. at 25.

66 Order on Mot. to Stay Proceedings, 6 (Mar. 11, 2009).

67 *Calvin L. McGahuey*, Bd. Dec. No. 09-0083 at 25, 27.

68 AS 23.30.128(b).

69 *McGahuey*, App. Comm'n Dec. No. 054 at 6 (citation omitted).

conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the Board."[70] Thus, "even when conflicting evidence exists, we uphold the board's decision if substantial evidence supports it."[71] Because the commission makes its decision based on the record before the board, the briefs, and oral argument, no new evidence may be presented.[72]

Whether the board properly applied the presumption analysis is a question of law.[73] The question whether the quantum of evidence is substantial enough to support a conclusion in a reasonable mind is a question of law.[74] The commission applies its independent judgment to questions of law.[75]

4. Discussion.

a. The board erred in assessing credibility in determining whether the statutory presumptions attached and were rebutted.

The Alaska Workers' Compensation Act contains a presumption that sufficient notice of a claim has been given and that an employee's claim is compensable.[76] The

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[70] *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 952 (Alaska 2005) (quoting *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 493 (Alaska 2003)). *See also* AS 23.30.122 (providing "[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."); AS 23.30.128(b) (providing the "board's findings regarding the credibility of testimony of a witness before the board are binding on the commission.").

[71] *Lindhag*, 123 P.3d at 952 (quoting *Bradbury v. Chugach Elec. Assoc.*, 71 P.3d 901, 905 (Alaska 2003)).

[72] AS 23.30.128(a).

[73] *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352, 356 n.5 (Alaska 1992) (noting the argument that the board misapplied the presumption of compensability is a question of law).

[74] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[75] AS 23.30.128(b).

[76] AS 23.30.120 provides in relevant part that "In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the

commission remanded McGahuey's case to the board so that it could apply the presumption analysis to whether McGahuey gave notice to Whitestone Logging of the injuries he suffered in the March 2004 fight. Application of the statutory notice presumption or the compensability presumption involves a similar three-step process.[77] To attach a presumption of sufficient notice, the employee must produce some evidence that his employer had notice of the injury.[78] To attach the presumption of compensability, the employee must first establish a "preliminary link" between his or her alleged injury and his or her employment.[79] Next, the employer may overcome either presumption by coming forward with substantial evidence to the contrary, that if believed would eliminate the reasonable possibility that the proposition established by the presumption is true or that establishes an alternate and incompatible proposition is true.[80] If the employer meets this burden, the presumption disappears and the

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absence of substantial evidence to the contrary, that (1) the claim comes within the provisions of this chapter; (2) sufficient notice of the claim has been given; . . ." The commission notes the legislature used the phrase "sufficient notice of the claim" in the presumption, instead of referring to AS 23.30.100(a) – (c) or using a phrase that limits the presumed notice to paragraphs (a) – (c), such as "adequate written notice." The question of what "sufficient notice," as used in AS 23.30.120(a)(2), means is not before the commission in this appeal and we do not decide that issue.

[77] *McGahuey*, App. Comm'n Dec. No. 054 at 9-10 (citing *Harp,* 831 P.2d at 356 for the proposition that the board must explicitly set out the three-part presumption analysis in its decision).

[78] *McGahuey*, App. Comm'n Dec. No. 054 at 10 (the presumption of sufficient notice requires a "parallel presumption-based analysis.").

[79] *E.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999); *Grainger v. Alaska Workers' Comp. Bd.*, 805 P.2d 976, 977 (Alaska 1991); *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981).

[80] *E.g., Tolbert*, 973 P.2d at 611; *Grainger*, 805 P.2d at 977; *Smallwood*, 623 P.2d at 316. "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *E.g., Tolbert*, 973 P.2d at 611. An employer may overcome the presumption: "through (1) affirmative evidence that the disability was not work-related, or (2) elimination of all reasonable possibilities that the injury was work connected." *Fox v. Alascom, Inc.*, 718 P.2d 977, 984 (Alaska 1986) (citation omitted).

employee must prove all elements of his or her case by a preponderance of the evidence.[81]

The board found that the presumption of sufficient notice had been "narrowly raised" but did not "attach" in McGahuey's case because his testimony was not credible.[82] However, the Supreme Court has held credibility determinations are not made at the first or second stage of the presumption analysis.[83] There is no distinction to be drawn between raising or attaching the presumption, or sufficiency of the evidence necessary to do either. As the Supreme Court has held:

> To establish such link, "the claimant need not present substantial evidence that his or her employment was a substantial cause of … disability." Rather, an offer of "some evidence" that the claim arose out of the worker's employment is sufficient. For purposes of determining whether the claimant has established the preliminary link, only evidence that tends to establish the link is considered — competing evidence is disregarded.[84]

In McGahuey's case the board erred by considering McGahuey's credibility and the competing witness testimony at the preliminary link stage of its analysis, rather

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[81] *E.g., Tolbert*, 973 P.2d at 611; *Smallwood*, 623 P.2d at 316.

[82] *Calvin L. McGahuey,* Bd. Dec. No. 08-0108 at 22.

[83] *E.g., Tolbert,* 973 P.2d at 610 (noting that "credibility plays no part in the process" in determining whether there is a preliminary link); *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994) (holding weighing of testimony and credibility determinations should not occur at the presumption rebuttal stage but rather the board should ask whether the employer presented evidence that a reasonable person might accept as adequate to support the contested conclusion); *Resler v. Universal Servs., Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989) (holding "[i]n making its preliminary link determination, the Board need not concern itself with the witnesses' credibility"). *See also Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007) (noting that "there is a distinction between devaluing testimony because it has no probative value, even if true, and deciding that testimony is not credible.").

But see Osborne Constr. Co. v. Jordan, 904 P.2d 386, 392 (Alaska 1995) (noting that "[i]f a claimant's testimony proved totally unreliable, [the preliminary] link would not be established. However, where there is corroborating evidence, as in this case, the link is clearly established" and concluding that in such a case a lack of credibility alone is not enough to rebut the presumption.).

[84] *Tolbert*, 973 P.2d at 610 (citations omitted).

than waiting to decide any credibility issues after the presumption dropped out. McGahuey presented the minimal evidence necessary to establish the preliminary link by testifying about the fight, his injuries, and the supervisors that he informed about those injuries. Moreover, Rivers corroborated the fact that a fight occurred in March 2004, although Rivers denied that he knew of any serious injuries to McGahuey. The board recognized that McGahuey "narrowly raised" the presumption of notice; because sufficient evidence was presented to rebut the presumption of notice, and the board completed an analysis assuming that the employee had raised the presumption, the board's error does not require reversal.

The board then analyzed whether McGahuey had proved his claim by a preponderance of the evidence and concluded that he had not done so. Because we affirm the board on the grounds that there is substantial evidence in the record to support its decision that McGahuey's claim is time-barred and not compensable, these errors do not affect the outcome of McGahuey's case.[85]

b. The board had substantial evidence to support its finding that McGahuey's claim was barred for failure to give notice of the injury.

Alaska Statute 23.30.100 provides in relevant part that:

> (a) Notice of an injury . . . in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.
>
> (b) The notice must be in writing, contain the name and address of the employee, a statement of the time, place, nature, and cause of the injury . . . , and authority to release records of medical treatment for the injury . . . , and be signed by the employee or by a person on behalf of the employee . . . .
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> * * *

[85] *See Carlson v. Doyon Universal-Ogden Servs.*, 995 P.2d 224, 228 (Alaska 2000) (holding board's error in failing to attach compensability presumption was harmless where it conducted alternative analysis and concluded the presumption was rebutted in any event); *DeYonge v. NANA/Marriot*, 1 P.3d 90, 94-98 (Alaska 2000) (holding board's error in failing to attach compensability presumption was reversible error because employer did not present sufficient evidence to rebut the presumption).

(d) Failure to give notice does not bar a claim under this chapter

> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury . . . and the board determines that the employer or carrier has not been prejudiced by failure to give notice;[86]

The board found that McGahuey had not given written notice within 30 days of the injuries to Whitestone Logging. McGahuey does not assert that he gave *written* notice within 30 days of his injuries. He claimed that verbal notice of the altercation to Mike Knudsen and John Rivers, verbal notice of his injury to Joe Bovee, and his observable limping, together were *sufficient* notice of an injury.

Whitestone presented evidence that directly contradicted McGahuey's testimony: testimony that he was not observed to limp, Rivers' denial of a verbal report of the injury, Johnson's testimony that McGahuey's supervisor was Curt Warner, the absence of a report of back or hip pain by the Kodiak physician who saw McGahuey in May 2004, and testimony that Bovee was not a Whitestone employee or agent. Whitestone also presented other evidence that could support findings that Whitestone lacked actual knowledge of the injuries. Scott and Lepschat both testified that McGahuey did not submit a timely written claim.[87] The claim form was dated April 5, 2005 by McGahuey and date-stamped "received" by the board on June 8, 2005.[88] Whitestone's witnesses testified that they had no actual knowledge that McGahuey had injured his back, right hip, and ear in the March 2004 fight, because McGahuey was not observed limping, he did not inform them that he was hurt, and he did not miss any work. Ron Johnson testified that had Mike Knudsen been told of an injury, he would have reported it to him. Lepschat, the office clerk, testified that if there had been a report of injury to McGahuey's supervisors, they would have brought the information to her to get reports

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[86] *See also Dafermo v. Municipality of Anchorage*, 941 P.2d 114, 118 (Alaska 1997) (laying out these two conditions to satisfy AS 23.30.100(d)(1)).

[87] 2008 Hrg. Tr. 56:7-19, 113:25 – 115:9.

[88] R. 0001.

filled out.[89] Johnson denied any recollection of McGahuey telling him he was injured.[90] Lepschat denied receiving information that McGahuey injured his back or hip.[91] She added that she drove McGahuey to the marina where he collected his belongings, and she thought she may have driven him to the airplane.[92] He did not tell her he was leaving because of an injury or inability to work.[93]

Whitestone's evidence directly contradicts McGahuey's accounts. For example, McGahuey said he reported the injury to John Rivers, but Rivers flatly denied he did so, or that anyone else told him McGahuey was injured.[94] As the EMT in camp, he would have been the likely person to inform. McGahuey said he reported the injury to Mike Knudsen, but Johnson testified Knudsen made no such report to him, and Lepschat testified Knudsen did not bring such information to her to file a report. Johnson testified he saw McGahuey his last day, and he said nothing about an injury. McGahuey testified he reported the injury to Joe Bovee, who he asserted was his supervisor, but, even if he did, Whitestone's witnesses testified Bovee did not work for Whitestone. Johnson also testified that Curt Warner, not Joe Bovee, was McGahuey's supervisor. McGahuey testified he told a physician in Kodiak, but there is no mention of the injury in the physician's report. The commission concludes that this evidence, because it directly contradicts McGahuey's account on significant points, was sufficient to overcome a presumption of sufficient notice. Therefore, McGahuey was required to prove by a preponderance of the evidence that he gave sufficient notice of injury and that any failure to do so was excusable under AS 23.30.100(d).

The board also had substantial evidence to support a finding that McGahuey's delay in reporting the injuries prejudiced the employer. The Supreme Court has stated:

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89 2008 Hrg. Tr. 114:1-5.

90 2008 Hrg. Tr. 111:1-2.

91 *Id.* at 114:6-11.

92 *Id.* at 114:18-25.

93 *Id.* at 115:6-9.

94 *Id.* at 93:19 — 94:9.

> Timely written notice of an injury is required because it lets the employer provide immediate medical diagnosis and treatment to minimize the seriousness of the injury, and because it facilitates the earliest possible investigation of the facts surrounding the injury. A failure to provide timely notice that impedes either of these two objectives prejudices the employer.[95]

Substantial evidence was presented that the failure to give timely notice impeded these goals. Scott, the claims department manager, testified that because the injury was not timely reported, it would now be difficult for a doctor to assess whether the altercation was responsible for any unresolved injuries that McGahuey might have, and the employer was unable to provide him with any medical treatment he may have needed at the time of the alleged injuries.[96] Rivers also testified that if he had known that McGahuey had injured his back, "I would have sent him into town to the doctor as soon as a plane was available."[97] Finally, Scott testified that her investigation was impeded by the lack of timely notice "because Whitestone is no longer a -- a -- a viable company and a lot of the people that were there at that time are gone and it -- and it was hard to locate the ones that we were able to locate."[98]

The board found, at the third stage of the presumption analysis, that McGahuey's testimony was not credible and that the employer's witnesses, Rivers, Johnson, Scott and Lepschat, were credible.[99] The credibility of witnesses testifying before the board is a question solely for the board, and the board's determinations are binding on the commission.[100] Although we may disagree with the board's credibility determinations or the weight the board gives to evidence, we must affirm the board when substantial

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95 *Dafermo*, 941 P.2d at 118 (citations omitted).

96 2008 Hrg. Tr. 67:5 – 68:1.

97 *Id.* at 90:14-15.

98 *Id.* at 68:5-8.

99 *McGahuey*, Bd. Dec. No. 08-0108 at 23.

100 AS 23.30.122, 23.30.128(b). *See also Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 020, 5 (Oct. 5, 2006).

evidence supports its findings of fact and those findings are not clearly erroneous.[101] A finding is clearly erroneous when we are left with the definite and firm conviction on the entire record that a mistake has been made.[102] Here, we are not left with that conviction.

Therefore, because the board alone determines witness credibility, because McGahuey did not file a written report of injury and presented no evidence to excuse his failure, and because there is substantial evidence to support a finding that the employer lacked actual knowledge of the injuries and was prejudiced by the one-year delay, the commission affirms the board's decision that McGahuey's claim was barred by failure to give timely written notice of the injury.

c. The board had substantial evidence to support its finding that, assuming McGahuey's notice was timely, it was not work-related.

The commission does not repeat its discussion of the board's errors in working through the presumption analysis on the merits of McGahuey's claim. It is a close question whether the board erred in determining that McGahuey failed to raise the presumption of compensability because of "his lack of credibility to effectively raise the presumption."[103] The Supreme Court in *Osborne Constr. Co. v. Jordan* held that "[i]f a claimant's testimony proved totally unreliable, [the preliminary] link would not be established."[104] Unlike the injured employee in *Osborne*, McGahuey presented no contemporaneous corroboration of complaints of a hip, back, or ear injury to add to his testimony.[105] The commission need not address if the board established that

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[101] *See* Alaska R. Civ. P. 52(a) (stating "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

[102] *See, e.g., Borchgrevink v. Borchgrevink*, 941 P.2d 132, 134 (Alaska 1997).

[103] *Calvin L. McGahuey,* Bd. Dec. 08-0108 at 24.

[104] *Osborne Constr. Co.*, 904 P.2d at 392.

[105] The commission noted previously that there was corroborating evidence of notice of the event (the fight in the bunkhouse). For this reason, the commission held McGahuey presented enough evidence to raise the presumption of sufficient notice. In

McGahuey's testimony is so "totally unreliable" as a matter of law that it fails to raise the presumption, because there is sufficient evidence to overcome the presumption.

First, there is testimony that flatly contradicts McGahuey's account, including his statements that he told Rivers he was injured and that he was observably limping. Second, there is no evidence that McGahuey, who described his injuries as traumatic and very serious,[106] sought or required immediate medical attention or discussed his injuries with the physician he saw for earwax impaction two months later. Finally, there is evidence that he had no back or hip injury evident in the normal MRI scan, or an ear injury attributable to the fight. Given the nature of the injuries McGahuey claimed he suffered (e.g., his hip knocked out in a 14-foot jump), evidence that he continued to work steadily, was not observed limping, and did not report he was injured to the camp EMT or even to a physician in Kodiak, if believed would eliminate a reasonable possibility that he suffered the traumatic injury to his hip and back that he claims. The board was then free to weigh the credibility of the witnesses who testified before it and decide if it believed McGahuey.

Even if McGahuey's lack of timely written notice of injury had been excused under AS 23.30.100(d)(1), the board concluded that his injuries were not compensable because McGahuey did not persuade the board by a preponderance of the evidence that he had suffered disabling injuries in the March 2004 fight. The only evidence in

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Kolkman v. Greens Creek Mining Co., 936 P.2d 150, 156 (Alaska 1997), the Supreme Court drew a line between the presumption of notice and the presumption of compensability when it held that employer knowledge of work-relationship of the injury is not required in determining whether the AS 23.30.100(d)(1) exception to the notice rule applies. The Supreme Court also stated that "a restrictive interpretation of the exceptions to this rule [requiring written notice within 30 days] carries a substantial possibility of injustice." *Id.* at 155. But, the presumption of compensability exists to establish a relationship between work and an injury. Here, there is no corroborating contemporary evidence that an *injury* occurred as a result of the event.

[106] McGahuey testified he had "a hip that's been knocked out of place," Oct. 11, 2006 Hrg. Tr. 7:25 – 8:1, or that the hip had to be "popped . . . back into place." *Id.* at 17:21-22. He testified he had "a lower lumbar from right where *the table was crushed to my back* . . . ." *Id.* at 17:23-24 (emphasis added). His hip was injured jumping "out a 14-foot window." *Id.* at 21:21-22.

the record that McGahuey injured his back, hip, and ear in the March 2004 fight is his own testimony or reports based on his statements. The commission may not disturb the board's finding that McGahuey was not a credible witness.[107] The medical records indicate that McGahuey's first report of back pain after the alleged March 2004 injury was more than a year and half later in December 2005.[108] Moreover, the physicians who later examined McGahuey did not independently relate his problems to the March 2004 fight, but instead relied on McGahuey's statements. Lastly, the MRI exams of his back and hip were normal in 2006,[109] supporting a conclusion that his back and hip were not traumatically injured in March 2004 as McGahuey asserts. There is substantial evidence in light of the whole record to support the board's findings of fact; the board made an alternative analysis of the evidence using the presumption; and, the board's determination that McGahuey is not credible is binding on the commission; therefore, the board's decision denying McGahuey's claims for workers' compensation benefits must be affirmed.

d. McGahuey's argument that the board failed to help him locate a witness is without merit.

McGahuey also argues on appeal that the board failed to help him locate John Bovee, to whom McGahuey claims he reported his injuries. The employer and employee agreed to "try to locate Joe Bovey" in a prehearing conference.[110] Whitestone Logging's former owner, Cliff Walker, stated in an affidavit that Bovee was not an employee of Whitestone Logging but rather a "contract compliance person" for Transpack Fiber and that Walker did not know his whereabouts.[111] The employer was required to provide what information it had regarding Bovee. The employer was not

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[107] AS 23.30.122, 23.30.128(b). *See also Witbeck*, App. Comm'n Dec. No. 020 at 5.

[108] R. 0583-84.

[109] R. 0230-31.

[110] R. 0933. *See* 8 AAC 45.065(a) providing that "[a]t the prehearing, the board or designee will exercise discretion in making determinations on . . . (4) . . . identifying . . . witnesses . . . ."

[111] R. 0376-77.

required to seek out *new* information, and the board's support staff had no duty to find a missing witness, who is not an employee of the Division of Workers' Compensation, for a party.[112]

5. Conclusion

The board had sufficient evidence on which to base findings of fact that McGahuey did not timely report his injuries to the employer or the employer's agent, that Whitestone Logging did not have actual knowledge of the injuries, that Whitestone was prejudiced by McGahuey's failure to give notice, and that McGahuey did not suffer a disabling injury to his hip, back, and ear in March 2004. The board's decision is AFFIRMED.[113]

Date: *23 October 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
David W. Richards, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final commission decision on the merits of this appeal from the board's decision and order. This decision affirms (approves) the board's decision denying the

[112] *See* Alaska R. of Civ. P. 26(a)(1)(B) that requires parties to disclose "name and, if known, address and telephone number of each individual likely to have discoverable information relevant to disputed facts . . . ." (emphasis added). 8 AAC 45.054(a) provides that a party may take the testimony of a material witness "in accordance with the Alaska Rules of Civil Procedure." 8 AAC 45.054(b) permits the board to order other means of discovery, and 8 AAC 45.054(c) permits the board to issue subpoenas, which must be served by the person requesting the subpoena.

[113] Because the commission affirms the board's decision, and because the board never reached the merits of McGahuey's request for a SIME, we do not address McGahuey's arguments on appeal that he is entitled to a SIME.

workers' compensation claim. This decision ends all administrative proceedings in Mr. McGahuey's workers' compensation claim against Whitestone Logging, Inc. This decision becomes effective when distributed (mailed) to the parties unless proceedings to reconsider it or seek Supreme Court review are instituted. Find the date of distribution in the box below.

You have a right to appeal this decision to the Alaska Supreme Court. If you want to appeal this decision, proceedings to appeal must be instituted (started) in the Alaska Supreme Court within 30 days of the date of distribution of this final decision 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.

If a request for reconsideration of this decision is timely filed 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).

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

You can find more information online at the Alaska Appellate Courts' website:

http://courts.alaska.gov/appcts.htm

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after distribution of this decision.

CERTIFICATION

I certify that, with the exception of changes made in formatting for publication and correction of a spelling error, this is a full and correct copy of the text of the Final Decision in the matter of *Calvin L. McGahuey v. Whitestone Logging, Inc., and Alaska Timber Insurance Exchange,* AWCAC Appeal No. 08-022, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 23, 2009.

Date: *October 27, 2009*

Signed
Barbara Ward, Appeals Commission Clerk