

Case: *Rainey Landry vs. Trinion Quality Care Services, Inc., Commerce and Industry Insurance Company, and Northern Adjusters, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 137 (August 26, 2010)

Facts: Rainey Landry (Landry) claimed that she was injured in a fall while working as a personal care assistant for Trinion Quality Care Services, Inc. (Trinion). Landry contended that Kimberly Chambers, who had suffered a stroke and was partially paralyzed, fell on top of her while she was helping Mrs. Chambers climb stairs. Landry's husband, Nathaniel Landry, testified that he heard Landry's cries for help from his neighboring apartment and moved Mrs. Chambers back to her bed and carried his own wife home. Mr. Landry also testified that he had observed Landry helping Mrs. Chambers climb stairs and walk.

Bill Chambers testified that the accident never occurred because (1) Mrs. Chambers denied that it occurred before she died (although she did suffer from short-term memory loss); (2) Mrs. Chambers bruised easily and had no bruising the next day; (3) Mrs. Chambers could not walk with only Landry's assistance and could not climb stairs at all; and (4) he was not told of the fall the day it supposedly occurred but rather he fired Landry that day for damage to a medication safe which he alone had the combination to. Keirsten Smart (Smart), who provided care coordination for homebound individuals, supported Mr. Chambers' account of his wife's limitations. Additionally, there was evidence that Mr. Landry's physical limitations from a prior back injury made it unlikely he could have moved the two women. Travis Cross (Cross), a locksmith, testified regarding the instruments used to damage the safe.

Landry went to the emergency room the day after the alleged fall. The emergency room physician noted in his report: "There are no obvious external signs of trauma to my inspection. Specifically on the back there is no bruising or deformity." In addition, although Landry's history of back pain prior to the accident is extensive and she was taking a number of prescriptions for back pain and other ailments, the report indicated that she reported no history of back pain and no current prescriptions.

The board rejected Landry's claim, concluding that Landry and her husband were not credible, Mr. Chambers was credible, and the fall did not occur. The board discounted the issue of the damaged safe as not "significant in whether the employee had a work injury." Landry appeals. She argues that the board erred by failing to evaluate the testimony of Cross, who she asserts would have testified that the damage done to a medication safe could not have been done by a hammer and chisel, discrediting the testimony of Mr. Chambers. She also asserts that the board erred by disallowing the testimony of Paige Green (Green), who she maintains would have testified that she witnessed Landry walk Mrs. Chambers. Landry first mentioned Green as a potential witness in her deposition on December 17, 2008, but she did not list Green as a witness on her list filed before the hearing. After the board's hearing was continued so that one employer witness could testify and the board could hear closing arguments, Landry sought to amend the list to include Green. The board refused to allow Green to testify.

Applicable law: Per AS 23.30.122, the board has the sole power to determine the credibility of a witness and the board's findings concerning the weight to be accorded a witness's testimony is conclusive even if conflicting or susceptible to contrary conclusions. Per AS 23.30.128(b), the board's findings regarding the credibility of witness testimony are binding on the commission.

AS 23.30.120(a)(1) provides that benefits sought by an injured worker are presumed to be compensable. A three-part analysis applies to determine compensability.

AS 44.62.510 requires the board to provide a written decision with findings of fact, a determination of the issues presented and the penalty, if any. The board need only make findings of fact and conclusions of law regarding issues that are both "material" and "contested." Findings are sufficient to permit intelligent appellate review when "at a minimum, they show that the Board considered each issue of significance, demonstrate the basis for the Board's decisions, and were sufficiently detailed." *Pietro v. Unocal Corp.*, 233 P.3d 604, 610-12 (Alaska 2010).

8 AAC 45.112 on witness lists. Also, the "standard for determining whether a rebuttal witness should be allowed to testify when the witness's name was not timely identified ... [is] 'depend[er]nt on whether the testimony sought to be rebutted could reasonably have been anticipated prior to trial.'" *Sirotiak v. H.C. Price Co.*, 758 P.2d 1271, 1278 (Alaska 1988).

Issues: Does substantial evidence support the board's decision that Landry was not injured in a fall at work? Did the board evaluate Cross's testimony sufficiently to permit appellate review? Did the board abuse its discretion in excluding Green's testimony?

Holding/analysis: The board found the Landrys were not credible and Mr. Chambers was credible. These findings are binding on the commission. Moreover, the board had substantial evidence to conclude no work-related fall occurred and the Landrys were not credible, including the emergency room report, Mr. Chambers' and Smart's testimony about Mrs. Chambers' inability to walk up stairs; and Mr. Chambers' different account of the events on the day of the purported fall.

The commission concluded the board did not need to make findings on Cross's credibility or testimony because, as the board itself observed, his testimony was not material. "In the instant case, any testimony regarding what type of tools were used to damage the safe was immaterial to the controlling issue of whether Landry was injured at work on the day in question." Dec. No. 137 at 21. Landry argued that Cross's testimony would show that "[Mr.] Chambers' explanation of how the safe was damaged was not credible, and therefore, his testimony as to the events involving Rainey which occurred when he arrived at home were [*sic*] likewise not credible." The commission stated that:

While it may be possible to draw this inference from the facts, it is also possible to conclude that Mr. Chambers was simply mistaken in his initial assumption as to which tool damaged the safe, as he admitted during his testimony. The board's finding concerning the weight to be accorded a

witness's testimony is conclusive even if other conclusions could possibly be drawn. *Id.* at 22.

The commission concluded the board did not abuse its discretion in excluding Green's testimony. Landry did not timely list Green as a witness five days in advance of the hearing as the regulations required. Although Green was listed five days in advance of the continued hearing, Landry's situation was in essence one hearing with a long break, rather than two separate hearings dealing with separate issues.