

Case: *Mayflower Contract Services, Inc. and Travelers Insurance Company vs. Marcie Redgrave*, Alaska Workers' Comp. App. Comm'n Dec. No. 141 (December 14, 2010)

Facts: Marcie Redgrave (Redgrave) slipped on ice and hit her head and neck on a bus in January 1994 while working for Mayflower Contract Services, Inc. (Mayflower). Mayflower paid temporary total disability (TTD) until she returned to different employment in May 1995. From 1994-2001, Redgrave was periodically examined or treated by various doctors in connection with her symptoms, which several of them attributed to the 1994 injury. After 2001, her symptoms continued, but she did not obtain medical treatment. Eventually, on June 26, 2007, Redgrave sought authorization to see a neurologist. The adjuster denied the request, and on August 7, 2007, Mayflower controverted continued medical treatment on the grounds that continued treatment was barred due to the lack of treatment for more than two years, and that there was no current recommendation for treatment. On December 11, 2008, based in part on an employer's medical evaluation (EME) done a year earlier, Mayflower controverted payment of medical treatment, TTD after April 10, 1994, vocational rehabilitation, and a permanent partial impairment (PPI) rating. The board concluded that Redgrave was entitled to ongoing medical treatment and a PPI rating. The board denied her claim for TTD after August 12, 1994. The board concluded that the employer's 2007 controversion was in bad faith, frivolous, and unfair because the employer incorrectly interpreted AS 23.30.095(a). The employer appealed.

Applicable law: AS 23.30.095(a) provides in relevant part: "It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require."

AS 23.30.155(e) states: "If any installment of compensation payable without an award is not paid within seven days after it becomes due, . . . there shall be added to the unpaid installment an amount equal to 25 percent of the installment."

AS 23.30.155(o) provides in part: "The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter."

State, Dep't of Education v. Ford, Alaska Workers' Comp. App. Comm'n Dec. No. 133, 21 (April 9, 2010) outlined the analysis to reach a determination that a controversion is frivolous or unfair within the meaning of AS 23.30.155(o):

First, examining the controversion, and the evidence on which it was based in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion, the board must decide if the controversion is a "good faith" controversion. Second, if the board concludes that the controversion is not a good faith controversion, the board must decide if it is a controversion that is frivolous or unfair. If the controversion lacks a plausible legal defense or lacks the evidence to support a fact-based controversion, it is frivolous; if it is the product of dishonesty, fraud, bias, or prejudice, it is unfair. But, to find that a

frivolous controversion was issued in bad faith requires a third step – a subjective inquiry in to the motives or belief of the controversion author.

Issues: Did the board err in concluding that Redgrave is entitled to continuing medical care for her 1994 injury? Is Redgrave's claim for medical treatment time-barred either by AS 23.30.095(a) or the doctrine of laches? Did the board err in ordering a late-payment penalty? Did the board err in concluding that the employer's 2007 controversion was in bad faith, frivolous, and unfair?

Holding/analysis: Mayflower contended that for claims filed more than two years after the last date of treatment, a current medical opinion connecting the treatment with the work-related injury must be provided to prove a claim. But the commission concluded that *Philip Weidner & Assocs., Inc. v. Hibdon*, 989 P.2d 727 (Alaska 1999) was "not precedent for the proposition that a current medical opinion is necessary for all claims for continued treatment beyond the initial two-year period. Rather, it is precedent for the proposition that if the claimant's treating physician states that his own prior opinion for treatment needs to be updated, then it may be appropriate to pre-approve treatment contingent on a renewed opinion." Dec. No. 141 at 6.

The commission concluded that Mayflower's "argument that the medical opinion is stale goes to its weight rather than to its existence." *Id.* at 7. The board has authority to determine the weight of medical opinions. The commission concluded that the board had substantial evidence to support Redgrave's need for continued medical treatment, including Redgrave's testimony that she continued to experience substantially the same symptoms (headaches and vision problems) that she did during the 1994-2001 period; Dr. Pervier's 1994 recommendation for psychological counseling and prediction that in the absence of such treatment Redgrave "would continue her symptomatology for a much prolonged time period than would normally be expected"; and multiple other recommendations for psychological counseling, most recently in 1998.

The commission concluded that AS 23.30.095(a) did not act as a statute of limitations barring medical benefits claims after two years. "That the board has been loose in its terminology [referring to it as a statute of limitations in some decisions] does not mean that the plain language of AS 23.30.095(a) may be disregarded." *Id.* at 11.

The commission concluded that Mayflower waived the laches argument because it did not raise the defense before the board and it did not attempt to show the elements of a laches defense were met, other than asserting that the claim should be denied because it was filed a long time after the injury occurred and after a substantial lapse in treatment. The commission did not reach the question of whether an employer may assert a laches defense to an otherwise valid workers' compensation claim. The commission concluded that Mayflower also waived any argument that Redgrave failed to mitigate her damages by not getting psychological treatment earlier because Mayflower never sought to terminate benefits on the ground that Redgrave had refused to obtain reasonable and necessary treatment, and it did not raise the issue before the board.

The board erred in concluding that the employer owed a penalty. Redgrave failed to present any evidence of late or unpaid medical bills. The penalty applies only when the payment is late; and in the case of medical benefits, payment is not due until after a bill or report is presented to the employer per AS 23.30.097(d).

Lastly, the commission vacated and remanded the board's frivolous, unfair, and in bad faith finding because the board did not engage in the proper analysis, per the above steps.