Alaska Workers' Compensation Appeals Commission

State of Alaska, Workers' Compensation Benefits Guaranty Fund, Petitioner, vs. Eugene H. Shepard, III and New City Painting, LLC, Respondents.	Decision on Petition for Review Decision No. 190 December 20, 2013 AWCAC Appeal No. 13-003 AWCB Decision No. 13-0001 AWCB Case No. 200703024

Decision on petition for review of Alaska Workers' Compensation Board Interlocutory Decision and Order No. 13-0001, issued at Anchorage, Alaska, on January 10, 2013, by southcentral panel members William Soule, Chair, Rick Traini, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: Michael C. Geraghty, Attorney General, and Toby N. Steinberger, Assistant Attorney General, for petitioner, State of Alaska, Workers' Compensation Benefits Guaranty Fund; Steven D. Smith, Law Office of Steven D. Smith, P.C., for respondent, Eugene H. Shepard, III.

Commission proceedings: Petition for Review filed January 23, 2013; order granting Petition for Review issued March 12, 2013; briefing completed October 15, 2013; oral argument held November 14, 2013.

Commissioners: David W. Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

A hearing panel of the Alaska Workers' Compensation Board (board) issued an Interlocutory Decision and Order (ID&O) in this matter.[1] Respondent, Eugene H.

[1] *See Eugene H. Shepard III v. New City Painting, LLC, and Alaska Workers' Compensation Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 13-0001 (January 10, 2013)(*Shepard*).

Shepard, III (Shepard), had alleged that on or about August 8, 2007, he was injured while working for respondent, New City Painting, LLC (New City).[2] As he was taping drywall at a residence owned by Catherine Roso (Roso), he fell through a basement access panel.[3] On August 13, 2007, Shepard filed an injury report and workers' compensation claim (WCC or claim).[4] On both the injury report and claim forms, in the space provided for identifying New City's workers' compensation insurer, the word "Uninsured" appears in handwriting that is not Shepard's.[5] A prehearing conference (prehearing or PHC) was held on October 11, 2007.[6] Among other things, the PHC summary indicated that the board would "not take any action at this time"[7] on Shepard's claim.

On February 4, 2008, attorney Steven D. Smith (Smith) filed a lawsuit on behalf of Shepard against Kenneth Newcity Jr., d/b/a New City Construction, and Roso.[8] A default judgment was entered against Kenneth Newcity Jr., d/b/a New City Construction, in February 2009, in the amount of $33,399.12.[9] To date, neither Kenneth Newcity nor New City has paid Shepard any amount in satisfaction of this judgment. However, Shepard did recover $5,000 from Roso's general liability insurance carrier.[10]

On December 5, 2011, Shepard filed a second WCC, this time claiming against New City and petitioner, the Alaska Workers' Compensation Benefits Guaranty Fund

---

[2] New City did not appear or participate in these proceedings. In other documents, New City has been identified as New City Construction. Exc. 013.

[3] Exc. 003.

[4] Exc. 001-03. The injury report was erroneously dated August 13, 2008.

[5] Exc. 001, Exc. 003.

[6] Exc. 011-12.

[7] Exc. 011.

[8] Exc. 013-16. Roso and others, deeds of trust holders on her residence who were added as defendants in an amended complaint, Exc. 017, were dismissed from the lawsuit in October 2008. Exc. 022.

[9] Exc. 029.

[10] *See Shepard*, Bd. Dec. No. 13-0001 at 7.

(Fund).[11] Following prehearings on August 8, 2012, September 13, 2012, and October 23, 2012,[12] a hearing on Shepard's two claims was held on December 19, 2012.[13]

In its ID&O, the hearing panel concluded that Shepard's claims against the Fund are not barred under AS 23.30.105 or AS 23.30.055.[14] The Fund timely filed a Petition for Review of this interlocutory decision with the Workers' Compensation Appeals Commission (commission). We AFFIRM in part and REVERSE in part.

2. Factual background and proceedings.

On August 8, 2007, Shepard alleges he was, as New City's employee, taping drywall at the Roso residence when he fell through a basement access panel, injuring his left side, abdomen, and back.[15] On August 13, 2007, he filed a report of injury and WCC.[16] They both indicated, in handwriting that is distinguishable from Shepard's, that New City was "Uninsured."[17] Shepard sought temporary total disability (TTD) benefits, permanent partial impairment benefits, medical and related transportation costs, penalty, and interest.[18]

As noted in the ID&O, as of August 8, 2012, the board's file did not contain the original injury report or claim; it contained photocopies with the board's August 13, 2007,

---

[11] R. 0093-94.

[12] R. 0276-78, 0280-82, 0284-86.

[13] *See Shepard*, Bd. Dec. No. 13-0001 at 1.

[14] *See id*. at 50.

[15] Exc. 001-03.

[16] Exc. 003.

[17] Exc. 001, Exc. 003. The hearing panel also found that board personnel have a computer data base available to them with employers' workers' compensation insurance coverage information. *See Shepard*, Bd. Dec. No. 13-001 at 3.

[18] Exc. 001-02.

date stamp on them indicating the date they were filed.[19] Nevertheless, on August 20, 2007, Shepard's claim was received in the board's Juneau office and a file was opened. The following day, August 21, 2007, Shepard was sent a form letter to that effect, which also provided him with his case number and an informational brochure.[20] On August 23, 2007, the board served Shepard's claim.[21] In its ID&O, the panel found that the claim was served on New City, but not on the Fund.[22]

On October 10, 2007, Shepard and attorney Smith executed a Professional Employment Agreement which provided that Smith would represent Shepard.[23] The agreement stated in relevant part: "In the event [Shepard] elects to proceed under Workman's [sic] Compensation statutes then the fee will be $275/hr subject to approval by the W.C. Board."[24] The agreement also provided: "If [Shepard] elects to sue in tort the fee shall be contingent[.]"[25]

The following day, October 11, 2007, a PHC was held.[26] The PHC summary stated that no parties "appeared and/or participated telephonically."[27] Also, there is no indication in the summary that Smith attended,[28] even though he had been hired by Shepard the

---

[19] *See Shepard*, Bd. Dec. No. 13-0001 at 3. Shepard provided the photocopies of the injury report and claim to the board at a PHC on August 8, 2012. R. 0276-78. Apparently, these critical documents were missing from the board's file for five years.

[20] Exc. 004. The hearing panel criticized board personnel for, among other things, failing to advise Shepard, in the letter of August 21, 2007, how to pursue his claim and of the existence of the Fund, despite having insurance coverage information available through the board's computer data base that would indicate New City was uninsured. *See Shepard*, Bd. Dec. No. 13-0001 at 3-4.

[21] *See Shepard*, Bd. Dec. No. 13-0001 at 4.

[22] *See id*.

[23] Exc. 006-08.

[24] Exc. 008.

[25] Exc. 006.

[26] Exc. 011.

[27] Exc. 011.

[28] Exc. 011.

previous day to represent him. The summary noted that no response to Shepard's claim had been received, that the board will "not take any action at this time," and that the parties are ordered to "proceed in accordance with the prehearing conference summary."[29] The panel also found that the summary provided no advice or direction to Shepard on how to protect his rights or pursue his claim.[30] Specifically, it found the summary did not 1) inform Shepard of the Fund's existence, 2) mention a lack of service of Shepard's claim on the Fund, 3) advise him how to cure the lack of service of his claim on the Fund, 4) advise him of any relevant filing or service deadlines, or 5) inform him how to otherwise pursue his claim against the Fund or New City.[31] The summary was served on Shepard and New City, but not on the Fund.[32]

On February 4, 2008, on behalf of Shepard, attorney Smith filed a lawsuit in superior court alleging various causes of action against Kenneth Newcity Jr., d/b/a New City Construction, and Roso, the owner of the residence where Shepard fell.[33] The complaint, among other things, alleged Kenneth Newcity owned New City Construction and employed Shepard when he was injured. It also alleged that, as an uninsured employer, New City was liable to him for all workers' compensation benefits payable under the Alaska Workers' Compensation Act. In his prayer for relief, Shepard requested all compensable damages, including those awardable in tort, or in the alternative, he requested workers' compensation benefits.[34]

In February 2009, a court master found: 1) Shepard was employed by New City on August 8, 2007, when he was injured through New City's negligence; and 2) New City did not have workers' compensation coverage and had not provided any benefits to

---

29 Exc. 011.

30 *See Shepard*, Bd. Dec. No. 13-0001 at 5. Despite Shepard having hired Smith to represent him on his claim as of October 10, 2007, the hearing panel found that Shepard was representing himself on his workers' compensation claim. *See id*.

31 *See id*.

32 Exc. 011.

33 Exc. 013-16.

34 Exc. 015.

Shepard.[35] The court master concluded that she had jurisdiction; default proof requirements as set forth in Alaska case law were met; and Shepard's proof was sufficient to justify an award of special damages for past medical expenses of $14,272.41, past lost wages of $7,246.25, general damages for pain and suffering in the amount of $9,240.00, plus applicable costs, interest, and Civil Rule 82 attorney fees.[36] Later that month, superior court judge Jack Smith signed the findings of fact and conclusions of law as recommended by the court master, and entered judgment against Kenneth Newcity Jr. d/b/a New City Construction, in the amount of $33,399.12.[37]

On December 5, 2011, Shepard filed a second WCC, claiming against New City and the Fund, and seeking TTD benefits and medical costs.[38] On December 7, 2011, board personnel served a copy of this claim on the Fund, Shepard, and New City.[39] On December 13, 2011, the Fund filed its answer to the claim, admitting that New City failed to comply with insurance coverage laws and was uninsured at the time of Shepard's alleged injury. The Fund further alleged that it had no liability for Shepard's benefits because there had been no board order 1) regarding compensability of the claim, 2) awarding benefits, and 3) requiring New City to pay Shepard benefits.[40]

On August 8, 2012, Shepard and the Fund's representatives attended a PHC, during which Shepard provided copies of his injury report and 2007 claim.[41] They were hand-served on the Fund at that time. Shepard reported that he had sued New City, however, he only collected $5,000 from the homeowner's general liability insurance.[42]

---

[35] Exc. 024-25.

[36] Exc. 024-25*.*

[37] Exc. 026-29*.*

[38] R. 0093-94.

[39] R. 0093-94.

[40] R. 0094.1-94.2.

[41] *See* n.19, *supra*.

[42] R. 0276.

The board's designee at the PHC advised him that "workers' compensation is an exclusive remedy and he cannot pursue a tort remedy and workers' compensation benefits."[43]

Even though they had executed an agreement in October 2007 for Smith to represent Shepard on his claim, it was not until a PHC took place on September 13, 2012, that Smith filed an appearance with the board.[44] With the Fund's representatives also present, Shepard's claims were reviewed and the parties agreed on November 7, 2012, as the date for a hearing on Shepard's August 13, 2007, and December 5, 2011, claims.[45]

On October 1, 2012, the Fund filed a petition seeking dismissal of Shepard's claims against the Fund under AS 23.30.105, asserting that the claim was time-barred; and under AS 23.30.055, arguing that Shepard had filed a lawsuit against New City and elected to forego his workers' compensation remedy.[46] On or about October 16, 2012, Shepard filed an opposition to the Fund's petition to dismiss his claims.[47]

The original November 7, 2012, hearing date was continued, and on December 19, 2012, the hearing was held. Shepard, his attorney, the Fund, its attorney, and other Fund representatives attended the hearing.[48] In due course, the hearing panel issued its ID&O, concluding that Shepard's claims against the Fund are not barred under AS 23.30.105 or AS 23.30.055.[49] On January 23, 2013, the Fund filed a Petition for Review of this decision with the commission.

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record. Substantial evidence is such relevant

---

43 R. 0276-78.

44 *See Shepard*, Bd. Dec. No. 13-0001 at 7.

45 R. 0280-82.

46 R. 0103-06.

47 R. 0137-40.

48 *See Shepard*, Bd. Dec. No. 13-0001 at 8.

49 *See id*. at 50.

evidence which a reasonable mind might accept as adequate to support a conclusion.[50] 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.[51] We exercise our independent judgment when reviewing questions of law and procedure.[52]

4. *Applicable law.*

a. *Statutes and regulations.*

AS 23.30.045. Employer's liability for compensation.

(a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30180—23.30.215. . . .

. . . .

AS 23.30.055. Exclusiveness of liability.

The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee. In this section, "employer" includes, in addition to the meaning given in AS 23.30.395, a person who, under AS 23.30.045(a), is liable for or potentially liable for securing payment of compensation.

---

[50] *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[51] *See Wasser & Winters Co., Inc. v. Linke*, Alaska Workers' Comp. App. Comm'n Dec. No. 138, 5 (Sept. 7, 2010).

[52] *See* AS 23.30.128(b).

AS 23.30.075. Employer's liability to pay.

(a) An employer under this chapter, unless exempted, shall either insure and keep insured for the employer's liability under this chapter in an insurance company or association duly authorized to transact the business of workers' compensation insurance in this state, or shall furnish the division satisfactory proof of the employer's financial ability to pay directly the compensation provided for. If an employer elects to pay directly, the board may, in its discretion, require the deposit of an acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred.

. . . .

AS 23.30.082. Workers' compensation benefits guaranty fund.

(a) The workers' compensation benefits guaranty fund is established in the general fund to carry out the purposes of this section. The fund is composed of civil penalty payments made by employers under AS 23.30.080, income earned on investment of the money in the fund, money deposited in the fund by the department, and appropriations to the fund, if any. However, money appropriated to the fund does not lapse. Amounts in the fund may be appropriated for claims against the fund, for expenses directly related to fund operations and claims, and for legal expenses.

. . . .

(c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter.

. . . .

AS 23.30.100. Notice of injury or death.

(a) Notice of an injury or death 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 or death, and authority to release records of medical treatment for the injury or death, and be signed by the employee or by a person on behalf of the employee, or, in case of death, by a person claiming to be entitled to compensation for the death or by a person on behalf of that person.

(c) Notice shall be given to the board by delivering it or sending it by mail addressed to the board's office, and to the employer by delivering it to the employer or by sending it by mail addressed to the employer at the employer's last known place of business. If the employer is a partnership, the notice may be given to a partner, or if a corporation, the notice may be given to an agent or officer upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

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

. . . .

(2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;

. . . .

AS 23.30.105. Time for filing of claims.

(a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, and the right to compensation for death is barred unless a claim therefor is filed within one year after the death, except that, if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, 23.30180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding.

. . . .

AS 23.30.110. Procedure on claims.

(a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability following an injury, or at any time after death, and the board may hear and determine all questions in respect to the claim.

(b) Within 10 days after a claim is filed the board, in accordance with its regulations, shall notify the employer and any other person, other than the claimant, whom the board considers an interested party that a claim has been filed. The notice may be served personally upon the employer or other person, or sent by registered mail.

. . . .

8 AAC 45.050. Pleadings. (a) A person may start a proceeding before the board by filing a written claim or petition.

(b) **Claims and petitions.**

(1) A claim is a written request for benefits . . . that meets the requirements of (4) of this subsection.

. . . .

(4) Within 10 days after receiving a claim that is complete in accordance with this paragraph, the board or its designee will notify the employer or other person who may be an interested party that a claim has been filed. The board will give notice by serving a copy of the claim by certified mail, return receipt requested, upon the employer or other person. . . .

. . . .

(e) **Amendments.** A pleading may be amended at any time before award upon such terms as the board or its designee directs. It the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if, additionally,

(1) within the period provided by AS 23.30.105 for filing a claim, the party to be bought in by amendment has received, under AS 23.30.100, such notice of the injury that the party will not be prejudiced in defending the claim; and

(2) the party to be joined by the amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

8 AAC 45.177. Claims against the workers' compensation benefits guaranty fund.

(a) Upon receipt of a report of occupational injury or illness involving an injury to an employee employed by an employer who appeared to be uninsured at the time of the injury, the division shall immediately notify the division's special investigations section and the administrator of the workers' compensation benefits guaranty fund in the division's Juneau office.

(b) The division shall send a letter to the parties advising the parties that the employer may not have had workers' compensation insurance in effect at the time of the employee's injury. In the letter, the division shall also

advise the parties of the rights and remedies available to the injured worker under the Act if the employer was not insured.

(c) A workers' compensation claim shall be filed against the fund within the same time and in the same manner as a claim filed against the employer in accordance with AS 23.30.105, AS 23.30.105, and 8 AAC 45.050. The division shall serve the claim upon the fund's administrator and advise the parties that copies of all future documents filed with the division are also to be served upon the fund's administrator.

(d) The fund is subject to the same claim procedures under the Act as all other parties.

. . . .

b. Principles of statutory construction.

The board, in its decision, observed that "[t]he instant case requires statutory construction." [53] The commission agrees. "The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."[54] A statute is interpreted according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose.[55] Statutes dealing with the same subject are *in pari materia* and are to be construed together.[56] "[A]ll sections of an act are to be construed together so that all have meaning and no section conflicts with another."[57] If one statutory "section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict, the specific section will control over the general."[58] Statutes which cause forfeiture are not favored and are narrowly construed.[59]

---

[53] *Shepard*, Bd. Dec. No. 13-0001 at 20.

[54] *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).

[55] *See Municipality of Anchorage v. Adamson*, 301 P.3d 569, 575 (Alaska 2013) (citations omitted).

[56] *See Benner v. Wichman*, 874 P.2d 949, 958, n.18 (Alaska 1994).

[57] *In re Hutchinson's Estate,* 577 P.2d 1074, 1075 (Alaska 1978).

[58] *Id*.

[59] *Forest v. Safeway Stores, Inc.*, 830 P.2d 778, 782, n.10 (Alaska 1992).

"Administrative regulations which are legislative in character are interpreted using the same principles applicable to statutes. In the case of administrative regulations which deal with the same subject, their provisions should be considered together."[60]

5. Discussion.

a. Are the board's findings of fact supported by substantial evidence?

Alaska case law requires board personnel to advise claimants how to pursue their claims.[61] The hearing panel made various findings to the effect that board personnel had the opportunity to advise Shepard regarding pursuit of his claim and failed to do so.[62] However, as discussed below, Shepard was represented by counsel as of October 10, 2007, thus, in our view, relieving board personnel of any further responsibility for advising Shepard, whether they knew of the representation or not.

AS 23.30.110(b) and 8 AAC 45.050(b)(4) require board personnel, within ten days, to notify the employer and any other interested party that a claim has been filed. The hearing panel found that no such notice was provided to the Fund.[63] A related finding was that board personnel knew or should have known that New City was uninsured.[64] Connecting the dots, because board personnel had available to them the information that New City was uninsured, and given the Fund's responsibility to pay claims against uninsured employers,[65] the hearing panel found that board personnel were obligated to notify the Fund, *as an interested party*, of Shepard's claim, and did

---

60 *See State, Dep't of Highways v. Green*, 586 P.2d 595, 603, n.24 (Alaska 1978)(citation omitted).

61 *See, e.g., Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963); *Bohlmann v. Alaska Constr. & Engineering*, *Inc.*, 205 P.3d 316, 319-21 (Alaska 2009).

62 *See, e.g.*, n.20 and n.31, *supra*.

63 *See Shepard*, Bd. Dec. No. 13-0001 at 38.

64 *See* n.17, *supra*; Exc. 001, Exc. 003.

65 *See* AS 23.30.082.

not.[66] The commission concurs that there was substantial evidence in the record to support these findings by the hearing panel.

Another finding that the hearing panel made was that Shepard was not represented by counsel on his claim until September 2012, when Smith filed his appearance with the board.[67] This finding does not comport with the facts. Although substantial evidence supports a finding that Shepard was not represented when he filed his first claim in August 2007, Shepard retained Smith in October 2007, two months after he was injured, to represent him on his workers' compensation claim and/or in a lawsuit against New City.[68] Therefore, substantial evidence is lacking to support the hearing panel's finding that Shepard was unrepresented on his claim until September 2012.[69]

---

[66] *See Shepard*, Bd. Dec. No. 13-0001 at 38.

[67] *See id*. at 7, 49.

[68] Exc. 006-08.

[69] The issue is similar to one the commission decided in another appeal, *Alaska Mechanical, Inc. v. Harkness*, Alaska Workers' Comp. App. Comm'n Dec. No. 176 (Feb. 12, 2013)(*Harkness*). In that matter, the claimant had filed an Affidavit of Readiness for Hearing (ARH). At a subsequent PHC, his attorney purportedly withdrew the ARH, although the PHC took place the day before the attorney filed his appearance. The question was whether the ARH filed by the claimant had been effectively withdrawn by his attorney, despite the attorney not having filed his appearance until the following day. We quoted a board regulation, 8 AAC 45.178, which requires representatives of parties to a claim to file written appearances and withdrawals, and noted that the purpose of the regulation "is to prevent a party from later disavowing the acts of his, her, or its representative." *Harkness,* Comm'n Dec. 176 at 13 (footnote omitted). The commission held that the ARH had been effectively withdrawn by counsel. *See id*. Here we must decide if the filing of an appearance is determinative of when Shepard was represented on his claim by Smith. In our view, it is not; the attorney-client relationship commenced once the Professional Employment Agreement was executed in October 2007. As of then, Smith had contractually bound himself to represent Shepard on his claim.

b. Is Shepard's claim against the Fund barred under AS 23.30.105?

AS 23.30.105(a) states:

> The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury[.]

One of the aforementioned principles of statutory construction provides that we consider the meaning of a statute's language when interpreting it.[70] The meaning of §.105(a) seems clear to us. As the language indicates, a claim is to be filed in accordance with the subsection's deadlines. Here, with respect to New City, Shepard satisfied the requirement in §.105(a) that he file a claim within two years of having knowledge of his disability and its relation to his employment. As the record reflects, he filed that claim within a matter of days of having been injured on the job. However, Shepard did not file a claim against the Fund until December 5, 2011, more than four years after he was injured.[71] Therefore, unless some other provision of law carves out an exception to the requirement in §.105(a) that a claim must be filed in four years in any event, that subsection would appear to bar Shepard's claim against the Fund.

However, in the commission's view, a subsection of a board regulation, 8 AAC 45.050(e), provides an exception to §.105(a). The subsection reads:

> **Amendments.** A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if, additionally,(1) within the period provided by AS 23.30.105 for filing a claim, the party to be bought in by

---

[70] *See* n.55, *supra*.

[71] AS 23.30.082(c) provides that a claim against the Fund must be filed within the same time and in the same manner as any workers' compensation claim. The ensuing discussion explains the commission's reasons for concluding that Shepard's late claim against the Fund is excused in the specific circumstances of this case.

> amendment has received, under AS 23.30.100, such notice of the injury that the party will not be prejudiced in defending the claim; and
>
> (2) the party to be joined by the amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

As the following discussion demonstrates, if the criteria in this subsection are satisfied such that it applies here, the December 5, 2011, claim against the Fund would arguably relate back to the August 13, 2007, claim against New City, which would make Shepard's claim against the Fund timely.

The statute, AS 23.30.105(a), and the regulation, 8 AAC 45.050(e), address the same subject: the timeliness of claims. They should be construed together.[72] Second, if we were to construe §.105(a) as barring Shepard's claim against the Fund, the result would be forfeiture of that claim, which is to be avoided, if possible.[73] Based on these principles of statutory construction, we conclude that if the regulation applies in the circumstances of this case, it constitutes an exception to §.105(a) and the statute's general four-year deadline on claims "in any event."

In deciding whether 8 AAC 45.050(e) applies to Shepard's claim against the Fund, we note that the regulation itself sets forth criteria, in the form of two conditions precedent, for allowing the amendment of a claim changing the party claimed against.[74] They are: 1) within the deadlines set forth in AS 23.30.105 for filing a claim, the party to be bought in by amendment received, under AS 23.30.100, such notice of the injury that the party will not be prejudiced in defending the claim; and 2) the party to be joined by the amendment knew or should have known that, but for a mistake

---

72 *See* n.60, *supra*.

73 *See* n.59, *supra*.

74 Strictly speaking, Shepard did not seek to change the party claimed against, New City, he sought to add a party to be claimed against, namely the Fund. We conclude that the regulation applies in these circumstances. As a practical matter, Shepard was changing the party claimed against from New City to the Fund, owing to New City's uninsured status.

concerning the identity of the proper party, the action would have been brought against the party.[75]

With respect to the first condition precedent, the hearing panel found that New City was uninsured and that board personnel knew or should have known it was not insured. Yet board personnel did not notify the Fund, as an interested party, within ten days of the filing of the original claim on August 13, 2007, as required by AS 23.30.110(b) and 8 AAC 45.050(b)(4).[76] In these circumstances, one of the requirements in 8 AAC 45.050(e)(1), that within the AS 23.30.105 deadlines for filing a claim the Fund must receive notice of the claim pursuant to AS 23.30.100, was not satisfied. However, Shepard was not responsible for providing that notice, board personnel were.

Considering a related statutory subsection, AS 23.30.100(d)(2), it provides that failure to give notice does not bar a claim if the board excuses the failure on the ground that for some satisfactory reason, notice could not be given. It appears that the hearing panel implicitly excused the lack of notice to the Fund for what it considered to be a satisfactory reason: those responsible for that notice, board personnel, failed to provide it. In support of its position, the hearing panel quoted the Alaska Supreme Court's (supreme court) decision in *Richard* for the proposition that, when board personnel err, the claimant should not have to bear the consequences of that error:

> If anyone deserves to be criticized for the manner in which this case was handled, it is the Board because of its failure to promptly advise the appellant on how to proceed when it was informed by Dr. Leer of the appellant's urgent need for additional surgery by an out-of-state doctor. We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to

---

[75] *See* 8 AAC 45.050(e)(1) and (2).

[76] It is undisputed that Shepard was not represented by counsel in this timeframe, which makes his reliance on board personnel to properly process and serve his claim all the more compelling.

compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.[77]

The commission has already acknowledged that there was substantial evidence to support the hearing panel's finding that board personnel failed to notify the Fund, as an interested party, of Shepard's claim.[78] We now state our agreement with the panel's legal analysis that 1) Shepard should not have to suffer the consequences for board personnel's failure to timely notify the Fund, and 2) the late notice is excused for a satisfactory reason under AS 23.30.100(d)(2).

8 AAC 45.050(e)(1) also provides that, for an amendment changing the party against whom the claim is made to be effective and relate back, that party cannot be prejudiced by the lack of notice. Here, the commission concludes that the Fund is not prejudiced. The record is devoid of any evidence of prejudice to the Fund as far as its ability to defend itself against Shepard's claim. Moreover, we do not consider the prospect that the Fund may ultimately have to pay him benefits to be prejudicial. The Fund was established to pay claims against uninsured employers.[79] The Fund's assertion of certain legal defenses notwithstanding,[80] like any other litigant, it must accept the consequences in the event those defenses are denied and Fund liability ensues.

As for the second condition precedent, in the context of this case, it requires that, but for a mistake concerning the Fund's identification as a proper party, the Fund should have known that Shepard's claim would have been brought against it. Again, because the information that New City was uninsured was available to board personnel when Shepard filed his claim, their failure to notify the Fund, as an interested party, violated AS 23.30.110(b) and 8 AAC 45.050(b)(4). Had board personnel followed through and within ten days notified the Fund of Shepard's claim, presumably the Fund would have taken a proactive approach and set the machinery in motion to deal with

---

77 *Shepard*, Bd. Dec. No. 13-0001 at 10 *quoting Richard*, 384 P.2d at 449.

78 *See* Part 5(a), *supra*.

79 *See* AS 23.30.082.

80 *See* AS 23.30.082(c).

the claim. Again, we agree with the hearing panel's legal analysis that 1) board personnel should have known New City was uninsured, in which case the Fund would be an interested party, 2) as an interested party the Fund should have gotten notice of Shepard's claim, and 3) having gotten notice, the Fund should have known that Shepard had a potential claim against it. Shepard should not have to bear the consequences of board personnel's failure to notify the Fund of his claim, namely, dismissal of that claim as untimely.[81]

c. Is Shepard's claim against the Fund barred by AS 23.30.055?

Here, in the interest of brevity, we paraphrase certain statutes that have been quoted verbatim elsewhere,[82] in the process of interpreting them and deciding whether AS 23.30.055 bars Shepard's claim against the Fund. Employers are liable for the payment of compensation.[83] Ordinarily, they insure themselves against that liability.[84] In the event an employer fails to pay compensation, which can occur when it is uninsured, §.055 provides that an injured employee may elect to claim compensation or sue his or her employer for damages.[85] If the election is to claim compensation, the employee may file a claim with the Fund for payment of compensation.[86]

---

[81] 8 AAC 45.177, a board regulation that is more detailed than AS 23.30.110(b) and 8 AAC 45.050(b)(4) in terms of notice requirements to the Fund when a claim is filed against an uninsured employer, went into effect on February 28, 2010, long after the events that transpired when Shepard filed his original claim in August 2007. The hearing panel assumed its retroactive application, *see Shepard*, Bd. Dec. No. 13-0001 at 38-39, and it may be that the regulation should be applied retroactively. Nevertheless, its retroactivity is an issue the commission need not decide here. We conclude that, at the time, AS 23.30.110(b) and 8 AAC 45.050(b)(4) provided sufficient guidance to board personnel in terms of the notice they were required to give New City, the employer, and the Fund, as an interested party.

[82] *See* Part 4(a), *supra*.

[83] *See* AS 23.30.045(a).

[84] *See* AS 23.30.075.

[85] *See* AS 23.30.055.

[86] *See* AS 23.30.082(c).

The hearing panel bifurcated its discussion of the issue whether Shepard's lawsuit against New City is an election that bars him from claiming compensation from the Fund. In one portion of its decision, the panel surveyed the law on election of remedies from Alaska and other jurisdictions.[87] In a subsequent section, after pointing out that the issue is one of first impression in Alaska and case law from other jurisdictions may be of limited value in analyzing the issue,[88] the panel set about interpreting and applying AS 23.30.055.[89]

In beginning its survey of the law on the election of remedies, the hearing panel cited a Kentucky case,[90] *Brown v. Diversified Decorative Plastics, LLC*,[91] which provides a succinct description of this doctrine. It means that when a person has at his disposal two modes of redress, which are contradictory and inconsistent with each other, his deliberate and settled choice and pursuit of one, will preclude his later choice and pursuit of the other.[92] Its purposes are to prevent vexatious litigation[93] and shield a defendant from multiple actions arising out of the same subject matter.[94] The purpose is not to prevent recourse to alternate remedies,[95] but to prevent double recovery or redress for a single wrong.[96] Then summarizing the authority found in 6 A.L.R.2d 10

---

[87] *See Shepard*, Bd. Dec. No. 13-0001 at 21-36.

[88] *See id*. at 41. We agree with the panel that cases from other jurisdictions are of limited analytical value on account of differences in the law from state to state.

[89] *See id*. at 41-50.

[90] *See id*. at 21.

[91] 103 S.W.3d 108 (Ky. Ct. App. 2003).

[92] *See Shepard*, Bd. Dec. No. 13-0001 at 21.

[93] *See id.* at 22 *citing Prudential Oil Corp. v. Phillips Petroleum Co.*, 418 F.Supp. 254 (S.D.N.Y. 1975).

[94] *See id.*, *citing Cleary v. U.S. Lines, Inc.*, 555 F.Supp. 1251 (D.N.J. 1983) *affirmed* 728 F.2d 607 (3d Cir. 1984).

[95] *See id.*, *citing American Service Center Associates v. Helton*, 867 A.2d 235 (D.C. 2005).

[96] *See id.*, *citing MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999).

§3[b], the panel noted that in some cases, commencement of a lawsuit is considered a conclusive election precluding the plaintiff from subsequently pursuing an inconsistent remedy.[97] However, in others, the courts have held that a conclusive election is made when the lawsuit is pursued to judgment or the adverse party is otherwise prejudiced.[98]

In its discussion of election of remedies, the hearing panel cited several Alaska cases which provide insight into the panel's analysis. In *Barber v. New England Fish Company*,[99] "[t]he sole issue . . . was whether Barber's collection of workers' compensation benefits precluded further recovery against his employer on a subsequent unseaworthiness claim."[100] The supreme court held that it did not.[101] However, *Barber* does not stand for the proposition that, in *all* cases, an injured worker has both an administrative remedy and a judicial one. On the contrary, the analysis in *Barber* merely underscores that traditionally, pursuit of workers' compensation benefits does not bar a subsequent action for damages for unseaworthiness.[102] The benefits that are recoverable pursuing the administrative remedy are not coextensive with the damages recoverable in the lawsuit.

> It is clear that [Barber] is not to be permitted double recovery. If [Barber] succeeds in this effort and ultimately in his suit, the employer may recoup those amounts already paid by deducting them when satisfying the judgment. In the event the compensation was paid by one insurer and the judgment becomes payable by another, the employer as legal debtor in both instances may retain from the settlement of the judgment the sums necessary to reimburse the compensation carrier. The two remedies are thus complimentary.[103]

---

[97] *See* Shepard, Bd. Dec. No. 13-0001 at 21.

[98] *See id.* at 22.

[99] 510 P.2d 806 (Alaska 1973).

[100] *Shepard*, Bd. Dec. No. 13-001 at 24. An unseaworthiness claim is a general maritime cause of action. *See, e.g., Rowe v. Hornblower Fleet*, 2012 WL 5833541, 2013 A.M.C. 873 (N.D.Cal., Nov. 16, 2012).

[101] *See Barber*, 510 P.2d at 813.

[102] *See id.* at 812 (footnotes omitted).

[103] *Barber*, 510 P.2d 813, n.39.

Elliott v. Brown[104] was a case in which two employees, Elliott and Olson, were assaulted by their supervisor. First, Olson brought a workers' compensation claim, although Elliott did not, and was awarded benefits. Thereafter, they both sued their corporate employer and supervisor. The supreme court held that they could pursue a lawsuit against the supervisor, but not the employer.[105] Because the matter involved harmful conduct by a fellow employee, the supervisor, the supreme court set about deciding whether the "fellow employee" language in AS 23.30.055 was analogous to the "fellow employee" language in AS 23.30.015(a), a statutory subsection which pertains to recoveries where a third person may be liable for the employee's injuries and damages.[106] The court concluded that, despite language in both statutes which, on its face, shields a fellow employee as well as the employer from liability for damages, owing to the supervisor's commission of an intentional tort, he can be sued.[107]

Another Alaska case that the hearing panel referenced briefly in its survey was *King v. Brooks*.[108] In that matter, the employee, King, sued his supervisor, Brooks, for intentional infliction of emotional distress.[109] Like *Elliott*, the issue was whether the supervisor could be sued for an intentional tort. The supreme court commented: "[In *Elliott*] we held that workers' compensation was the exclusive remedy against the

---

[104] 569 P.2d 1323 (Alaska 1977).

[105] *See Elliott*, 569 P.2d at 1327

[106] The subsection reads in its entirety:

AS 23.30.015. Compensation where third persons are liable.

(a) If on account of disability or death for which compensation is payable under this chapter the person entitled to the compensation believes that a third person other than the employer or a fellow employee is liable for damages, the person need not elect whether to receive compensation or to recover damages from the third person.

[107] "We have concluded that the compensation remedy should not be exclusive when an employee commits an intentional tort on a fellow worker." *Elliott*, 569 P.2d at 1327.

[108] 788 P.2d 707 (Alaska 1990).

[109] *See King*, 788 P.2d 707.

employer, but that it 'should not be exclusive when an employee commits an intentional tort on a fellow worker.'"[110] Concluding its discussion of *Elliott*, the court stated: "We further held, contrary to the general rule in other states, that an employee need not elect either the common-law or the statutory remedy."[111]

We infer that, on the basis of the holdings in *Elliott* and *King*, the hearing panel concluded that the supreme court had announced a blanket rejection of the requirement that a claimant make an election of remedies. If that is the case, in our view, the panel has taken that holding out of context. First, such a conclusion appears to contradict the language used in AS 23.30.055, which states that an injured worker "may elect to claim compensation . . . or to maintain an action against the employer at law or in admiralty for damages[.]" Second, clearly, the supreme court was confining its holding to "when an employee commits an intentional tort on a fellow worker."[112] There is no indication a wider application of the holding was contemplated or intended.

The hearing panel also cited and discussed *Forest v. Safeway Stores, Inc.*,[113] in which the claimant was receiving workers' compensation benefits while he pursued a malpractice lawsuit against the surgeon who treated him for his work-related injury.[114] Eventually, Forest stipulated to dismissal of the lawsuit.[115] Safeway then petitioned the board to dismiss the workers' compensation claim, on the grounds that Forest had not sought its approval when he dismissed the lawsuit,[116] as required by

---

110 *King*, 788 P.2d 709.

111 *See id.*, 788 P.2d at 709.

112 *King*, 788 P.2d 709.

113 *See Shepard*, Bd. Dec. No. Dec. No. 13-001 at 28-29.

114 *See Forest*, 830 P.2d at 779.

115 *See id.* at 780.

116 *See id.*

AS 23.30.015(h).[117] The board's dismissal of Forest's claim was affirmed by the superior court.[118] Construing §.015(h), a majority of the supreme court held that Forest had not forfeited his right to compensation from Safeway.[119]

The statute at issue here, AS 23.30.055, is not the statute that was at issue and construed in *Forest*, AS 23.30.015, which makes the hearing panel's inclusion of it in its survey of the law perplexing to us. If it was cited as persuasive authority for the proposition that, as the hearing panel ruled here, Shepard is entitled to both an administrative remedy and a judicial remedy, the case does not support such a conclusion. In terms of the election of remedies language in the two statutes, it could not be more different. Section .055 provides, in relevant part, that "an injured employee . . . may elect to claim compensation under this chapter, or to maintain an action against the employer . . . for damages", whereas the election of remedies language in §.015(a) states just the opposite, that the employee "need not elect whether to receive compensation or to recover damages from the third person." Therefore, we think it is doubtful whether the supreme court would utilize AS 23.30.015 as any kind of authority for construing AS 23.30.055.

More recently, in *Nickels v. Napolilli*,[120] the supreme court shed more light on the election of remedies issue. Nickels had sued her employer, alleging both tort and contract claims, but she abandoned her tort claims before trial. The supreme court held that the contract claims could not sustain a separate lawsuit against the

---

117 AS 23.30.015(h) reads:

> If compromise with a third person is made by the person entitled to compensation or the representative of that person of an amount less than the compensation to which the person or representative would be entitled, the employer is liable for compensation stated in (f) of this section only if the compromise is made with the employer's written approval.

118 *See Forest*, 830 P.2d at 780.

119 *See id.* at 782.

120 29 P.3d 242 (Alaska 2001).

employer,[121] thus, Nickels' judicial remedy, and any recovery that might result from it, was foreclosed to her. According to the court, her only option was to have her claims administratively adjudicated by the board.[122] In the process, the supreme court stated that "[t]he administrative remedy . . . is only one of the two options available under AS 23.30.055; an employee may also sue the employer for damages resulting from the underlying injury sustained."[123]

In the commission's view, there are two possible inferences that may be drawn from this statement by the court. One is that an injured employee has the option of pursuing an administrative remedy *or* a lawsuit. This inference closely matches the actual language of the statute. The other inference is that, not only is an administrative remedy available, the employee "may also sue the employer for damages."[124] However, we believe that the latter inference is best explained by the syntax of the supreme court's statement. The judicial remedy is not in addition to the administrative remedy; instead, we understand the supreme court to be saying that, of the two available options, "only one"[125] is an administrative remedy – there is "also"[126] an alternative option available, namely a judicial remedy.

In a subsequent part of its decision, the hearing panel construed the election of remedies language in AS 23.30.055 in light of case law from Alaska and other jurisdictions.[127] Having construed the statute, it concluded that §.055 does not bar Shepard's claim against the Fund.[128] We disagree with the panel's conclusion, for the following reasons.

---

121 *See Nickels*, 29 P.3d at 251.

122 *See id*.

123 *Id*. at 250-51.

124 *Id*.

125 *Id*. at 250.

126 *Nickels*, 29 P.3d at 251.

127 *See Shepard*, Bd. Dec. No. 13-0001 at 41-50.

128 *See id*. at 50.

Ehredt v. DeHavilland Aircraft Co.[129] was a case in which the supreme court had the opportunity to comment on the meaning of AS 23.30.055. It stated:

> The Workers' Compensation Act requires employers to "secure payment of compensation" for their employees. If an employer complies by procuring a policy covering its employees, it is protected from an employee's action at law by the exclusive liability provision. However, if the employer fails to secure payment, the injured employee has the option to claim workers' compensation or to file an action at law.[130]

Relatively recently, in *Lindsey v. E & E Automotive & Tire Service, Inc.*,[131] 241 P.3d 880, 884, n.3 (Alaska 2010), the court reiterated: "Having received workers' compensation benefits from Wesgro, his employer, following the accident, Lindsey was barred from suing Wesgro by the exclusive remedy provision of the Alaska Workers' Compensation Act."[132] These pronouncements notwithstanding, the hearing panel concluded that some Alaska cases merely *implied*, but did not *expressly* state, that an injured worker had to make an election under the law.[133] However, in the commission's view, the statute, AS 23.30.055, and the cited cases, provide that an election is to be made.

In further support of its construction of AS 23.30.055, the hearing panel cited *Nickels v. Napolilli*. The trial court had dismissed Nickels' lawsuit because her exclusive remedy under §.055 was to have her claims heard by the board. The supreme court upheld the trial court having granted Nickels leave to file a claim against her employer.[134] If anything, the case stands for the proposition that, if an injured worker elects to sue her uninsured employer, but the lawsuit is unsustainable, an option may still be preserved for an administrative remedy before the board. It does not stand for

---

[129] 705 P.2d 446 (Alaska 1985).

[130] *Shepard*, Bd. Dec. No. 13-0001 at 25 quoting *Ehredt*, 705 P.2d at 451 (statutory citations omitted).

[131] 241 P.3d 880 (Alaska 2010)

[132] *Lindsey*, 241 P.3d at 884, n.3.

[133] *See Shepard*, Bd. Dec. No. 13-0001 at 25.

[134] *See Nickels*, 29 P.3d at 251 (footnote omitted).

the proposition that the injured employee may pursue both a judicial remedy and an administrative remedy through to conclusion.

Moreover, unlike the hearing panel,[135] we do not think the order in which the remedies are pursued is significant. In *Nickels*, once suing her employer resulted in a dead end, the claimant was afforded the opportunity to file a workers' compensation claim. In *Elliott*, Olson claimed and obtained workers' compensation benefits, then, along with Elliott, sued his supervisor and employer. The supreme court allowed the subsequent lawsuit against the supervisor, although that outcome may be better explained as an application of the fellow-employee/intentional-tort exception to the general rule of exclusive liability. Here, after Shepard had filed his WCC, Smith filed a lawsuit on his behalf. That lawsuit resulted in a judgment. In the final analysis, we think it is significant that Shepard obtained a judgment against New City, even though that judgment remains unsatisfied. As the hearing panel pointed out, some courts hold that pursuing a judicial remedy through to judgment bars any recovery of workers' compensation benefits.[136] We subscribe to this line of reasoning.

To be clear, we hold that an injured employee of an uninsured employer may elect either to pursue an administrative remedy against the employer and/or the Fund, or to pursue a lawsuit against the employer, but may not pursue both, whether simultaneously or sequentially, to conclusion. Once a Final Decision on a claim is obtained from the board or a judgment is obtained in court, whichever comes first, an election has been pursued to finality and the claimant/plaintiff is foreclosed from pursuing the other option any further. Even though he filed a claim first, Shepard pursued his lawsuit through to judgment. His claim against the Fund is therefore barred by the exclusive liability provision in AS 23.30.055.

---

[135] *See Shepard*, Bd. Dec. No. 13-0001 at 42.

[136] *See id*, at 22 citing cases annotated in 6 A.L.R.2d 10 §3[b].

6. Conclusion.

For the foregoing reasons, we AFFIRM the decision of the board hearing panel that Shepard's claim against the Fund is not barred under AS 23.30.105. We REVERSE the decision of the board hearing panel that Shepard's claim against the Fund is not barred under AS 23.30.055.

Date: *20 December 2013* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

This is a decision on the petition for review. The appeals commission affirms the board's decision in part and reverses the board's decision in part. The commission's decision becomes effective when distributed (mailed) unless proceedings to petition the Alaska Supreme Court for review are instituted (started).[137] For the date of distribution, see the box below.

This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted (started).[138] For the date of distribution, see the box below.

---

[137] A party has 10 days after the distribution of a decision on a petition for review by the commission to petition for review to the Alaska Supreme Court. If this decision was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

[138] *See* n.88, *supra*.

PETITION FOR REVIEW

A party may file a petition for review of this decision with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401-403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this decision's distribution.[139]

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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
More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

Reconsideration of this decision on petition for review is unavailable.

I certify that this is a full and correct copy of Decision on Petition for Review No. 190 issued in the matter of *State of Alaska, Workers' Compensation Benefits Guaranty Fund vs. Eugene H. Shepard, III and New City Painting, LLC,* AWCAC Appeal No. 13-003, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 20, 2013.

Date: *December 23, 2013*

Signed
K. Morrison, Appeals Commission Clerk

[139] *See id.*