Alaska Workers' Compensation Appeals Commission

Fluor Alaska, Inc., CNA Surety, and Wilton Adjustment Co., Appellants/Cross-Appellees, vs. Alberto E. Rodriguez Appellee/Cross-Appellant, and Ahtna Facility Services, Inc. (Alaska National Insurance Co.), Houston Contractors (AIG/Insurance Co. of the State of Pennsylvania), Davis Constructors & Engineers, Inc. (Alaska National Insurance Co.), Houston Contracting/Arctic Slope Regional Corp. (Self-Insured), and Shaw Environmental (Zurich Insurance/Carl Warren & Co., Appellees.	MEMORANDUM DECISION AND ORDER ON MOTION TO STAY LUMP-SUM COMPENSATION PAYMENTS Decision No. 199 July 31, 2014 AWCAC Appeal No. 14-016 AWCB Decision No. 14-0080 AWCB Case Nos. 200920540M, 200324728, 200403748, 200424619, 200525006, 200623578, 200623579, and 200920539

Appearances: Donald C. Thomas, Delaney Wiles, Inc., for appellants/cross-appellees, Fluor Alaska, Inc., CNA Surety, and Wilton Adjustment Co. (Fluor); Eric Croft, The Croft Law Office, for appellee/cross-appellant, Alberto E. Rodriguez (Rodriguez); Rebecca Holdiman-Miller, Holmes Weddle & Barcott, P.C. for appellees, AHTNA Facility Services and Alaska National Insurance Company (AHTNA); Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, Davis Constructors & Engineers and Alaska National Insurance Company (Davis); Robert J. McLaughlin, Law Office of Robert J. McLaughlin, PLLC, for appellees, Houston Contracting and AIG/Insurance Company of the State of Pennsylvania (Houston I); John F. Wallace, Zimmerman & Wallace, for appellees, Houston Contracting and Arctic Slope Regional Corporation (Houston II); Constance E. Livsey, Burr, Pease & Kurtz, P.C. for appellees, Shaw Environmental and Zurich Insurance, Inc. (Shaw).

Commission proceedings: Appeal filed by Fluor June 18, 2014, with Motion to Stay Lump-Sum Compensation Payments; Houston I Non-Opposition to Stay Lump Sum

Award filed June 23, 2014; Rodriguez Opposition to Motion for Stay and Motion for Penalty filed June 27, 2014;[1] hearing on motion for stay held July 24, 2014.

Commissioners: James N. Rhodes, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

The Alaska Workers' Compensation Board (board) issued a Final Decision and Order in this matter,[2] following a hearing on April 16, 2014.[3] In its decision, the board succinctly stated the issues.

> Fluor, AHTNA, Houston I, Davis and Shaw contend [Rodriguez's] claims against them are barred under AS 23.30.100 because [Rodriguez] failed to give timely notice of his injuries. Alternately, these employers contend they did not have actual knowledge of [Rodriguez's] injury and his failure to give notice prejudiced them. These employers further contend there was no satisfactory reason why [Rodriguez] could not have given them notice, but even if the failure is excused, [Rodriguez] loses the presumption of compensability.
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> [Rodriguez] admits he never reported the 2003 Fluor injury as "work-related," but contends Fluor was aware he hurt his back. He contends he reported his 2004 Fluor injury directly to his supervisors, putting Fluor on notice. He contends Fluor eventually accepted both claims in 2006 and paid medical benefits, resolving this notice issue. As for subsequent employers, [Rodriguez] contends he could not have given them notice within 30 days because there was no specific injury and he was only made aware of the causal connection between his symptoms and his subsequent employment after Dr. Tapper's June 1, 2012 [Second Independent Medical Evaluation] report. Rodriguez contends giving notice within 30 days of June 1, 2012, for employment spanning from 2006 through 2009, would have been meaningless and would have done nothing to assist the affected employers.[4]

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[1] Rodriguez's motion for a penalty will be dealt with in a separate order.

[2] *See Rodriguez v. Fluor Alaska, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 14-0080 (June 11, 2014).

[3] *See Rodriguez*, Bd. Dec. No. 14-0080 at 1.

[4] *Rodriguez*, Bd. Dec. No. 14-0080 at 2.

Based on the board's decision, generally speaking, it appears that the central issues in the proceeding were whether Rodriguez gave his employers timely and appropriate notice of his work injuries, whether he timely pursued his claims, and whether his employers subsequent to Fluor were liable for any benefits. Of relevance here, the board held that Rodriguez's claims were not subject to dismissal for lack of proper notice, that Rodriguez had claims only against Fluor, that Fluor owed him approximately $199,000 in past permanent total disability (PTD) benefits, plus interest, and that Fluor owed Rodriguez's health insurer approximately $135,000 for past medical expenses, plus interest.[5]

Fluor appealed the board's decision to the Workers' Compensation Appeals Commission (commission) on June 18, 2014, and contemporaneously filed its motion for stay of the board's orders to pay past PTD plus interest and to pay past medical expenses plus interest.[6] Rodriguez filed an Opposition to Motion for Stay and Motion for Penalty on June 27, 2014.[7] Houston I filed a non-opposition; the other appellees, AHTNA, Houston II, Davis, and Shaw, filed no responses to the motion for stay.

2. 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 23.30.180 – 23.30.215. . . .

. . . .

AS 23.30.095. Medical treatments, services, and examinations.

(a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires[. . . .]

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[5] *See* Bd. Dec. No. 14-0080 at 90 and Fluor's Motion to Stay Lump-Sum Payments (motion for stay) at 2.

[6] *See* Notice of Appeal and motion for stay at 1.

[7] *See* Rodriguez's opposition at 1.

. . . .

AS 23.30.097. Fees for medical treatment and services.

. . . .

(d) An employer shall pay an employee's bills for medical treatment under this chapter, . . . , within 30 days after the date that the employer receives the provider's bill[. . . .]

. . . .

(f) An employee may not be required to pay a fee or charge for medical treatment or service provided 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

(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 or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;

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

(3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

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, 23.30.180, 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.

(b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard.

. . . .

AS 23.30.125. Administrative review of compensation order.

. . . .

(c) If a compensation order is not in accordance with law or fact, the order may be suspended or set aside, in whole or in part, through proceedings in the commission brought by a party in interest against all other parties to the proceedings before the board. The payment of the amounts required by an award may not be stayed pending a final decision in the proceeding unless, upon application for a stay, the commission, on hearing, after not less than three days' notice to the parties in interest, allows the stay of payment, in whole or in part, where the party filing the application would otherwise suffer irreparable damage. Continuing future periodic compensation payments may not be stayed without a showing by the appellant of irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments. The order of the commission allowing a stay must contain a specific finding, based upon evidence submitted to the commission and identified by reference to the evidence, that irreparable damage would result to the party applying for a stay and specifying the nature of the damage.

. . . .

8 AAC 57.100. Applications for stays.

(a) In connection with the filing of an appeal or petition for review, the appellant may apply for a stay by filing and serving a motion.

. . . .

(f) To stay continuing future periodic compensation payments, the appellant must demonstrate by affidavit or other evidence

(1) that it would suffer irreparable damage; and

(2) the existence of the probability that the merits of the appeal will be decided adversely to the compensation recipient.

(g) To stay lump sum payments, the appellant must demonstrate by affidavit or other evidence that it would suffer irreparable damage.

. . . .

AS 23.30.155. Payment of compensation.

(a) Compensation . . . shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer[. . . .]

. . . .

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment[. . . .]

b. The standards for stays of board orders.[8]

Three Alaska Supreme Court (supreme court) cases have been consistently cited as developing the legal standards pertaining to stays of board orders, as provided for in

[8] This discussion of standards for stays is *adapted* from the commission's memorandum decision in *Utility Technologies, Inc. v. King*, Alaska Workers' Comp. App. Comm'n Dec. No. 193 at 7-10 (Oct. 29, 2013)(*King*).

AS 23.30.125(c).[9] Reviewing these cases, in *Bignell*, the supreme court stated: "We held in *Johns*, 431 P.2d at 154, that the employer must make a showing of 'irreparable damage' in order to obtain a stay. We interpreted the statutory term 'irreparable damage' to require a showing both of the financial irresponsibility of the claimant and the existence of the probability that the merits of the appeal will be decided adversely to him."[10] In *Olsen Logging*, the majority traced the development of the standards for stays of board orders. After noting that irreparable damage can also consist of an inability on the part of the employer to recoup amounts paid from future compensation payments,[11] the majority held that "the 'irreparable damage' component of the statute

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[9] *See Johns v. State, Dep't of Highways*, 431 P.2d 148 (Alaska 1967); *Wise Mechanical Contractors v. Bignell*, 626 P.2d 1085 (Alaska 1981)(*Bignell*); *Olsen Logging Co. v. Lawson*, 832 P.2d 174 (Alaska 1992). When *Johns* was decided, AS 23.30.125(c) read:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings in the superior court brought by a party in interest against the board and all other parties to the proceedings before the board. The payment of the amounts required by an award may not be stayed pending final decision in the proceeding unless upon application for an interlocutory injunction the court on hearing, after not less than three days' notice to the parties in interest and the board, allows the stay of payment, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing a stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference to it, that irreparable damage would result to the employer, and specifying the nature of the damage. *Johns*, 431 P.2d 149-150.

[10] *Bignell*, 626 P.2d at 1087.

[11] *See Olsen Logging*, at 176, citing *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991).

[was] expanded in *Bignell* and *Johns* to include the probability of success on the merits requirement[.]"[12]

The other notable aspect of the *Olsen Logging* decision was that the supreme court distinguished between two broad categories of benefits potentially subject to stays on appeal of workers' compensation board orders, 1) awards consisting of ongoing periodic disability payments, and 2) awards of lump sums,[13] and wondered whether it "should adopt a more lenient standard for stays of lump sum workers' compensation awards[,]"[14] the type of award that was at issue.[15] As part of its analysis, the supreme court discussed the "balance of hardships" approach to stays.[16]

> If the balance of hardships approach were applied to stays of workers' compensation awards, it would almost invariably result in application of the "probability of success on the merits" standard when the award consists of ongoing periodic disability payments on which an employee relies as a salary substitute. The employee is presumed to be inadequately protected in this situation because the hope of a future award is a meager substitute for life's daily necessities. This is the justification for the rule that in order to obtain a stay in such cases, the

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[12] *Olsen Logging*, 832 P.2d at 175. However, in his partial dissent, Justice Burke stated:

> I would revise the interpretation of "irreparable damage" which we embraced in [*Bignell*]. *Bignell* and [*Johns*] established a two-prong test for stays of workers' compensation. The test requires a showing of both the employee's financial irresponsibility and the probability that the employer's appeal will succeed on the merits. While this standard is adequate for most situations, the two prongs should not have been stated as elements of "irreparable damage," as *Bignell* suggests. *Bignell*, 626 P.2d at 1087; *see also Johns*, 431 P.2d at 151. "Irreparable damage" is unquestionably a term of art describing one of the equitable requirements for injunctive relief. The "irreparable injury" requirement should not be conflated with the separate and distinct "likelihood of success on the merits" requirement. *Olsen Logging*, 832 P.2d at 177 (J. Burke, dissenting opinion.)

[13] *See Olsen Logging*, 832 P.2d at 176.

[14] *Id*. at 175.

[15] *See id*. at 174.

[16] *See id*. at 175-176.

> employer must show both irreparable damage and the probability of success on the merits. *Bignell*, 626 P.2d at 1087.
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> However, in most cases involving lump sum awards the balance is different. The employee can be adequately protected and the employer generally stands to suffer the greater hardship. In both periodic payment and lump sum payment cases, a supersedeas bond will insure payment if the employee prevails on appeal. However, an employee is usually not dependent on lump sum awards for his daily living expenses. On the other hand, the employer's opportunity to recover amounts paid the employee is either limited or non-existent, even if the employee is financially able to repay them.[17]

After briefly discussing the difficulties employers would have in recouping amounts paid as lump sum awards,[18] the supreme court ultimately concluded "that the lesser 'serious and substantial questions' standard be used when a lump sum award is sought to be stayed."[19]

Thus, in the wake of the *Olsen Logging* decision, to obtain a stay of an award of ongoing periodic disability payments, an employer would have to show irreparable damage, that is, demonstrate 1) either the claimant's financial irresponsibility or the employer's inability to recoup benefits paid, and 2) the probability that the merits of the appeal would be decided adversely to the claimant. To obtain a stay of a lump sum award, an employer would have to show irreparable damage, namely: 1) either the claimant's financial irresponsibility or the employer's inability to recoup benefits paid; and 2) that the appeal presented serious and substantial questions.

As part of the 2005 amendments to the Alaska Workers' Compensation Act (Act), which included the creation of the commission,[20] AS 23.30.125(c) was amended. "Irreparable damage" was retained as the general standard for stays.

> The payment of the amounts required by an award may not be stayed pending a final decision in the proceeding unless, upon application for a stay, the commission . . . allows the stay of payment, in whole or in part,

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17 *Olsen Logging*, 832 P.2d at 176.

18 *See id*.

19 *Id*. at 176.

20 *See* AS 23.30.007.

> where the party filing the application would otherwise suffer *irreparable damage*.[21]

However, §.125(c) as amended also expresses a specific standard for stays of continuing future periodic compensation payments.

> Continuing future periodic compensation payments may not be stayed without a showing by the appellant of irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments.

The statute, as amended, does not otherwise specify a standard for stays of lump sum payments.

Construing the statute as amended, we presume that the Alaska Legislature (legislature) was aware of existing case law when it enacted the 2005 amendments to the Act.[22] Therefore, the legislature is presumed to have been familiar with the supreme court's decisions in *Johns, Bignell*, and *Olsen Logging* when it amended AS 23.30.125(c). Yet the legislature appears to have stated the standards for stays of both continuing future periodic compensation payments and lump sum payments differently than the aforementioned cases, in particular, *Olsen Logging*.

For continuing future periodic compensation payments the statute requires the appellant/employer to show irreparable damage and the probability that the appeal will be decided adversely to the claimant. There is no mention of a component requiring the employer to also show either the claimant's financial irresponsibility or the employer's inability to recoup benefits paid, as discussed in *Olsen Logging*. Similarly, for stays of any other benefits, which presumably would include stays of lump sum payments, the statute merely requires a showing of irreparable damage. It omits any reference to the two case law components which would otherwise constitute irreparable damage for purposes of lump sum payments. In accordance with the supreme court's decision in *Olsen Logging*, the two components that must be demonstrated are:

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[21] AS 23.30.125(c)(italics added).

[22] *See Young v. Embley*, 143 P.3d 936, 945, n.51 (Alaska 2006).

1) either the claimant's financial irresponsibility or the employer's inability to recoup benefits paid, and 2) that the appeal presents serious and substantial questions.

Nevertheless, we think that the language in AS 23.30.125(c), as amended, can be construed harmoniously with the supreme court's pronouncements on the standards for stays in *Johns, Bignell*, and *Olsen Logging*. Justice Burke, in his dissent in *Olsen Logging*, cautioned against conflating "irreparable damage" with the other components which must be demonstrated in order to obtain a stay. Even though stated in a dissent, the commission believes Justice Burke's point has validity. Therefore, in the context of the standard for stays of lump sum benefits, "irreparable damage" should not be conflated with the two case law components that must be shown, namely 1) either the claimant's financial irresponsibility or the employer's inability to recoup benefits paid, and 2) that the appeal presents serious and substantial questions. For stays of lump sum payments, if we do not conflate "irreparable damage" with those two components, but instead consider those two components as comprising irreparable damage, the statute's standard for stays of lump sum payments is satisfied.

In summary, the majority decision in *Olsen Logging* set forth two case law components to obtain a stay of lump sum payments. An employer must demonstrate 1) either the claimant's financial irresponsibility or the employer's inability to recoup benefits paid; and 2) that the appeal presents serious and substantial questions. Even though they are not expressly stated in AS 23.30.125(c), as amended, the commission construes the phrase "irreparable damage" in the statute as encompassing these two components for purposes of stays of lump sum payments. Accordingly, they constitute the showing Fluor must make in order to obtain a stay of the lump sum payments the board ordered here.[23]

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[23] More recently, the supreme court decided *Municipality of Anchorage v. Adamson*, 301 P.3d 569 (Alaska 2013), in which the court extended the standard for obtaining stays of continuing future periodic compensation payments to stays of future medical benefits. Because a stay of future medical benefits is not being sought here, the decision is not pertinent to our discussion.

c. The last injurious exposure rule.

This case implicates the last injurious exposure rule. As it happens, the rule was also at issue in another appeal involving Olsen Logging and Lawson.[24] In its decision in that case, the supreme court stated:

> In *Ketchikan Gateway Borough v. Saling,* 604 P.2d 590 (Alaska 1979), we adopted the last injurious exposure rule, which holds that when an employee suffers successive injuries while working for different employers, both of which contribute to the employee's disability, full liability is imposed on the later employer.
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> Two determinations must be made under the last injurious exposure rule in order to impose liability on the second employer:
>
> (1) whether employment with the subsequent employer "aggravated, accelerated, or combined with" a pre-existing condition; and, if so, (2) whether the aggravation, acceleration, or combination was a "legal cause" of the disability, i.e., "a substantial factor in bringing about the harm."[25]

In its decision in this matter, the board made the following observation with respect to the last injurious exposure rule.

> On July 18, 2005, Scott Nordstrand, Deputy Attorney General, wrote to then Gov. Frank Murkowski concerning Senate Bill 130, under consideration by the Alaska Legislature. Gov. Murkowski had requested the Department of Law review this bill and explain its intent and effect. Among other things, the "new law" would change an injured worker's burden of proof from showing his employment was "a substantial factor" in his need for treatment or disability to "the substantial cause." In respect to the "last injurious exposure rule," Nordstrand explained this rule was not abrogated by these changes and party would have to show the "last injury" in a stream of injuries was "the substantial cause," rather than "a substantial factor" causing the need for medical treatment or disability for the last injurious exposure rule to place liability on the last employer under the "new law[.]"[26]

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[24] *See Olsen Logging Co. v. Lawson*, 856 P.2d 1155 (Alaska 1993) (*Olsen Logging II*).

[25] *Olsen Logging II*, 856 P.2d at 1159 quoting *United Asphalt Paving v. Smith,* 660 P.2d 445, 447 (Alaska 1983) (quoting *Saling,* 604 P.2d at 597, 598) (internal citation omitted).

[26] *Rodriguez*, Bd. Dec. No. 14-0080 at 18.

3. Discussion.

a. What standard for stays applies here?

The supreme court has long held that the exclusive means available to an employer to recoup overpayments of compensation is to deduct them from future compensation payments.[27] In this appeal, if the commission were to reverse the board and conclude that Rodriguez's claims are barred, Fluor would not have owed Rodriguez the compensation ordered by the board and would not owe him future installments of compensation. Any payments Fluor would have made would constitute overpayments of compensation and there would be no future compensation payments from which Fluor could recover the overpayments of compensation.

There can be no dispute that Fluor seeks a stay of its obligation to pay lump sums to Rodriguez, for past PTD and interest, and to Rodriguez's health insurer, for past medical expenses and interest. We have noted earlier in this order that, at the latest since *Olsen Logging* was decided, for stays of continuing future periodic compensation payments or lump sum payments, one of the two showings an employer must make is either the claimant's financial irresponsibility or its inability to recoup overpayments under the balance of hardships analysis articulated by the supreme court in *Olsen Logging*.[28] Because Fluor would be unable to recoup overpayments even if successful in this appeal,[29] one of the components Fluor must show to obtain a stay has been satisfied under the circumstances here. It leaves one question to be answered in

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[27] *See Croft*, 820 P.2d at 1066 citing and quoting AS 23.30.155(j), which states:

> If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

[28] *See Olsen Logging*, 832 P.2d at 176.

[29] It remains to be seen whether one or more of Rodriguez's subsequent employers would be found liable for benefits, which makes any possible recovery of overpayments against them by Fluor problematic.

terms of the standard for a stay of lump sum payments: Is any other showing required of an employer in order to obtain a stay of a board order that it make lump sum payments of compensation? In *Olsen Logging*, the supreme court required "that the lesser 'serious and substantial questions' standard be used where a lump sum award is sought to be stayed."[30] Despite Rodriguez's arguments to the contrary,[31] we think this pronouncement from the court settles any controversy in terms of the standard to be applied here.

b. Was Fluor able to show that this appeal presents serious and substantial questions?

We begin by pointing out the obvious. On the motion for stay, it is not necessary for the commission to decide whether or not Rodriguez's claims are barred or subsequent employers are liable for benefits. We need only decide whether a serious and substantial question is presented in this appeal.

In the context of a proceeding for a preliminary injunction, the supreme court recently reiterated what it means by "a serious and substantial question." The issue "raised cannot be frivolous or obviously without merit."[32] As we have already stated, two of the central issues presented in this appeal to the commission are whether Rodriguez gave his employers timely and appropriate notice of his work injuries and whether he timely pursued his claims. Notably, our resolution of these issues *might* dispose of Rodriguez's claims, on the one hand, or, on the other, *might* lead to an affirmation of the board's award of benefits against Fluor. Consequently, with the "stakes" as high as they are, the issues are certainly serious. Moreover, although we do not view the amounts of the benefits at issue to be a critical criterion, there is no question that they are substantial.

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30 *Olsen Logging*, 832 P.2d at 176.

31 *See* Rodriguez's opposition at 2-5.

32 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) quoting *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1273 (Alaska 1992) quoting *Messerli v. Dep't of Natural Res.*, 768 P.2d 1112, 1122 (Alaska 1989).

Continuing the analysis, based on other criteria, are the issues raised by Fluor in this appeal serious and substantial, or are they frivolous or obviously without merit? While other considerations may have a bearing on whether an issue on appeal is serious and substantial, in the commission's opinion, any issue that is fundamental to Alaska workers' compensation law should qualify. We can think of no issues that are more fundamental than 1) whether the employer received timely and appropriate notice of the injury, and 2) whether the employee pursued his claims in a timely manner. Moreover, although the issue may not be as fundamental as those just mentioned, whether subsequent employers are liable to an employee for benefits under the last injurious exposure rule, as potentially modified by the 2005 amendments to the Alaska Workers' Compensation Act, strikes us as a serious and substantial question as well. Finally, if the circumstances were reversed, that is, assuming the board ruled in Fluor's favor in terms of its liability and Rodriguez appealed, it is unlikely that Rodriguez would characterize the issues on appeal as "frivolous or obviously without merit" and *not* serious and substantial.

For the foregoing reasons, we conclude that Fluor has satisfied the showing required of it to obtain a stay of lump sum payments. If successful on appeal, Fluor would not necessarily be able to recoup overpayments and serious and substantial questions are in dispute. Fluor has met its burden and is entitled to a stay.

4. Conclusion and order.

The commission finds that Fluor would be irreparably damaged if its motion for stay is not granted. Should Fluor succeed in this appeal, it is unlikely that Fluor would

be able to recoup the lump sum benefits it has been ordered to pay pursuant to the board's decision. Furthermore, the appeal presents serious and substantial questions.

It is ordered that the motion for stay is GRANTED.

Date: *31 July 2014* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

I certify that this is a full and correct copy of Memorandum Decision and Order on Motion to Stay Lump-Sum Compensation Payments, Decision No. 199, issued in the matter of *Fluor Alaska, Inc., CNA Surety, and Wilton Adjustment Co., vs. Alberto E. Rodriguez, Ahtna Facility Services, Inc. (Alaska National Insurance Co.), Houston Contractors (AIG/Insurance Co. of the State of Pennsylvania), Davis Constructors & Engineers, Inc. (Alaska National Insurance Co.), Houston Contracting/Arctic Slope Regional Corp. (Self-Insured), and Shaw Environmental (Zurich Insurance/Carl Warren & Co.),* AWCAC Appeal No. 14-016, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 31, 2014.

Date: *August 1, 2014*

Signed
K. Morrison, Appeals Commission Clerk

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