Alaska Workers' Compensation Appeals Commission

Pacific Log & Lumber and Alaska National Insurance Co.,
Movants,

vs.

Dan Carrell,
Respondent.

Memorandum Decision
Decision No. 047 June 29, 2007

AWCAC Appeal No. 07-019
AWCB Decision No. 07-0096
AWCB Case No. 200505245

Motion for Extraordinary Review of Alaska Workers' Compensation Board Interlocutory Decision No. 07-0096, issued April 23, 2007, by the southern panel at Juneau, Robert B. Briggs, Designated Chair, Richard Behrends, Member for Industry.

Appearances: Teresa Hennemann, Holmes, Weddle & Barcott, P.C., for movants, Pacific Log & Lumber and Alaska National Insurance Co. Robert A. Rehbock, Rehbock & Rehbock, for respondent, Dan Carrell.

This decision has been edited to conform to technical standards for publication.

Commissioners: Stephen T. Hagedorn, Jim Robison, Kristin Knudsen.

By: Kristin Knudsen, Chair.

The appeals commission heard oral argument on Pacific Log's motion for extraordinary review on June 15, 2007. The commission agreed to issue a summary decision in view of pending board action.

Pacific Log seeks extraordinary review of a decision by the board reversing the reemployment benefits administrator's decision denying Carrell an eligibility evaluation. The administrator had denied Carrell an eligibility evaluation because Carrell failed to request an evaluation within 90 days of his injury[1] on March 31, 2005, and presented

[1] AS 23.30.041(c), at the time of the employee's injury, stated:

> If an employee suffers a compensable injury that may permanently preclude an employee's return to the employee's

no "unusual and extenuating circumstances" excusing the delay.[2] Carrell appealed the administrator's decision to the board, arguing that he did present evidence of qualifying circumstances under 8 AAC 45.520(b). Pacific Log argued that Carrell did not request an evaluation in a timely fashion once informed of a physician's prediction he could not return to his occupation at the time of injury. Neither party argued that the version of AS 23.30.041(c) in effect at the time of injury did not apply to the employee's request for a reemployment eligibility evaluation. Without informing the parties or requesting briefs on the issue, the board held that § 17, ch 10 FSSLA 2005[3] applied retroactively

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> occupation at the time of injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request. The administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation.

[2] 8 AAC 45.520(b).

[3] § 17, ch 10 FSSLA 2005 provided that:

AS 23.30.041(c) is repealed and reenacted to read:

> (c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the

because it was a procedural rather than substantive enactment, and that the administrator therefore abused her discretion by applying the wrong law.

Pacific Log makes two strong arguments for review. First, Pacific Log argues that by failing to inform the parties of the question of retroactivity of the 2005 amendment, the board denied it an opportunity to argue its position, thus denying it the "opportunity to be heard . . . and for their arguments . . . to be fairly considered."[4] Pacific Log argues this was a denial of due process, so review should be granted under 8 AAC 45.076(a)(3). Second, Pacific Log argues that there is a conflict in board decisions on the issue of retroactivity of section 17 and that the board's retrospective application of section 17 raises an important question of law. Immediate review may materially advance the ultimate termination of the litigation. Therefore, Pacific Log argues, review should be granted under 8 AAC 45.076(a)(2).

Carrell responds that because Pacific Log exercised its right to request reconsideration, it was not denied due process.[5] As to the question of retrospective application of section 17, Carrell contends that immediate review will not materially advance the termination of the litigation, particularly as Pacific Log now has controverted payment on the grounds that it is not the employer at the time of the second injury (disclosed by the employee in hearing) in October 2005. Because the

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> injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.

[4] AS 23.30.001(4).

[5] The parties informed the commission in oral argument that the petition for reconsideration was denied by board inaction July 10, 2007.

board relied on the period of disability *after October 2005* to establish eligibility under amendments effective November 7, 2005, Carrell argues, the subsequent employer and insurer may be liable for payment of the benefit, and Pacific Log may have no actual stake in the matter appealed. Interruption of the board's proceedings in these circumstances will only prolong the ultimate resolution of the claim.

We agree that the movants raise an important question of law on which board panels have issued different opinions and on which there is substantial ground for difference of legal opinion. Our decision that there are important questions of law raised in the appeal does not mean that we conclude the board's decision was, or was not, erroneous. We only conclude that the questions raised by the challenge to the board's decision are significant and require further investigation and deliberation.

We note that the board neglected to begin its analysis with AS 01.10.090, which provides that, "No statute is retrospective unless expressly declared therein." This statute embodies a general legislative policy against retrospective operation of statutes; therefore, the Alaska Supreme Court will not infer retrospective operation of statutes in ambiguous circumstances. Nowhere in ch 10 FSSLA 2005 is there an express declaration of retrospective application of section 17. Presumptively, then, section 17 operates prospectively.

Nonetheless, an amendment that is merely procedural may be applied retrospectively. However, section 17 repealed AS 23.30.041(c), it did not merely amend it. The effect of a repeal, and the savings clause in § 80 ch 10 FSSLA 2005, should not be ignored in determining whether section 17 is retrospective.

In reaching its decision that the new provision (requiring an eligibility evaluation on the passage of 90 days of continuous total disability) is merely procedural, the board did not engage in a thorough analysis of the parties' rights under former AS 23.30.041(c) and how those rights were affected by enactment of section 17. The determination whether a statute is retrospective, or prospective only, requires it to examine whether old rights have been impaired or taken away, and whether the new statute grants or creates new obligations, a new duty, or attaches a new disability in respect to the parties past conduct and transactions. Only after fully analyzing the

quality of the rights impacted can the board address whether the repeal and new act is merely procedural. The question unaddressed by the board's decision is whether the substitution of an entirely new regime of qualification for a benefit, and the imposition of new obligations to pay for the benefit, is merely procedural because the end benefit is unchanged.

Also, the board's recognition that section 17 conferred some new rights raises the question whether, when a statute is repealed and re-enacted, some portions of the new statute function as procedural amendments to the repealed statute, but others, in the same section, are only applied prospectively. The board did not address this question.

Finally, the board failed to adequately explain why it decided to apply the new act instead of the old act to find the employee eligible for an evaluation, given the findings it made in its decision,[6] especially as neither party was made aware of the possibility that the board would apply the new act, neither party was invited to provide argument on the issue, and neither party asked that it be applied.

As important as these questions are, however, we are persuaded by the respondent's argument that a grant of extraordinary review will not materially advance the termination of the litigation in the circumstances of this case, where there are questions whether the employee suffered a second injury and another employer who may be liable for the benefit awarded by the board is not before the commission. The discovery and assertion of an October 2005 injury may fundamentally alter the parties'

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[6] We note that, according to the pre-hearing conference summary of February 5, 2007, (Movants' Ex. M), the employee's claim includes a claim for temporary total disability compensation for 108 days from April 15, 2005 to July 31, 2005, and again from October 25, 2005 to November 21, 2006. The employer argued the employee's right to file a request expired at the very latest in September 2006. But, by finding that the employee's "time clock had not run," and that his testimony that he was led to believe a knee replacement would allow him to return to work was credible and reasonable, the board essentially found that there were unusual and extenuating circumstances excusing the delay. The board did not explain when the "clock" would have run on the March 31, 2005 injury and why the board was forced to turn to the new act to find the employee entitled to an eligibility evaluation.

positions and legal relationships, with each other as well as another employer. In these circumstances, an appeal would deprive the board of jurisdiction to resolve that dispute, leaving unaddressed questions that could render the appeal moot, and possibly result in a waste of the parties' resources and impairment of the last employer's rights.[7]

However important the questions raised by the movant, the parties to an appeal must have a recognized interest in the outcome of the appeal. This requirement serves as a check on the commission's exercise of its power of review – it prevents the commission from giving general advisory opinions and thereby intermeddling in the board's power to approve, and the department's authority to adopt, regulations that interpret and enforce the workers' compensation statutes.[8]

On the other hand, the parties have the right to appeal a compensation order of the board.[9] The board's decision resolves the appeal of the administrator's decision. If the remand to the administrator in the first paragraph of the board's order stood alone, it would be clearly a final decision, regardless of the board's use of the interlocutory title, because the instruction to the administrator is ministerial and does not require the exercise of the administrator's discretion or further review by the board. However, the board also made a parallel remand to pre-hearing officer Cohen to identify the unresolved disputes, including those presented in part by, or potentially affected by, the appeal to the board.[10] Thus, pre-hearing officer Cohen is required by the board to

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[7] The last employer may elect not to pursue an appeal. Alternatively, the last employer may choose to join the appeal, or seek to be substituted as a party. Taking up the appeal now would deprive the last employer of a choice to participate, or not to participate, while leaving it potentially responsible for the costs of the movants' appeal.

[8] AS 23.30.005(h) and (l).

[9] AS 23.30.127(a).

[10] The board's decision suggests that the employee's accrual of 90 continuous days of inability to return to work *after* the November 7, 2005 effective date of amendment gives rise to application of the amendment. But, if there was a second injury in October 2005, and another employer or insurer is liable, or potentially liable, the parties' positions are fundamentally altered.

delineate those issues raised by the claim that were resolved by the board's order in the appeal from the administrator's decision, and those that were not, requiring her to exercise her discretion. We conclude, therefore, that the board's remand is not entirely ministerial.

The issues raised by the parties in regard to the pending claim may be segregated in the pre-hearing conference by officer Cohen, so that the board's determination of the issues presented to the board in proceedings on remaining claim issues are unlikely to infringe on the commission's resolution of the issues presented on appeal of the board's reversal of the administrator's decision. The movants then may request entry of a final board order for purposes of appeal after execution of the board's remand to the administrator and pre-hearing officer Cohen. Alternatively, the movants may reserve the issue for appeal on entry of a final decision on the claim.

The motion for extraordinary review is DENIED.

Date: ____*29 June 2007*_ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final administrative agency decision on the employee's claim for workers' compensation benefits. This is a final decision denying the motion for extraordinary review of the workers' compensation board decision that reversed the reemployment benefits administrator's decision denying the employee an eligibility evaluation. The board's decision on the appeal of the administrator's decision was not final because the board remanded the appeal to the administrator and a prehearing officer for further action. The board may issue a final decision on the appeal of the administrator's decision after the remand is complete, and the board's final decision respecting the appeal of the administrator's decision then may be appealed to the commission. Alternatively, the parties may reserve the issues for appeal after a final decision is made by the board on the employee's claim. In short, the commission decided not to allow an appeal at this

stage in the board's proceedings. The effect of the commission decision is to allow the board to complete its proceedings and issue a final decision on the claim.

This decision becomes effective when it is filed in the office of the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are instituted. To find the date of filing, look at the Certification by the commission clerk on the last page.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. Because this is not a final decision on all of the employee's claim, the Supreme Court may, or may not, accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. No decision has been made on the merits of this appeal, but if you believe grounds for review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

Clerk of the Appellate Courts
303 K Street,
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

You may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision. The commission will accept fax filing of a motion for reconsideration.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision was mailed to the parties, whichever is earlier. See AS 23.30.128(f).

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 047 in the matter of *Pacific Log & Lumber and Alaska Nat'l Ins. Co., v. Dan Carrell*; Appeal No. 07-019; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, his 29 day of June, 2007.

Signed
R. M. Bauman, Appeals Commission Clerk

I certify that on 6/29/07 a copy of the above Memorandum Decision in AWCAC Appeal No. 07-019 was mailed to Hennemann & Rehbock and a copy was faxed to Hennemann, Rehbock, AWCB Appeals Clerk, AWCB Juneau (Briggs) and Director WCD.

Signed
L. A. Beard, Deputy Clerk