

Alaska Workers' Compensation Appeals Commission

2009 Annual Report

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Alaska Workers' Compensation Appeals Commission 2009 Annual Report

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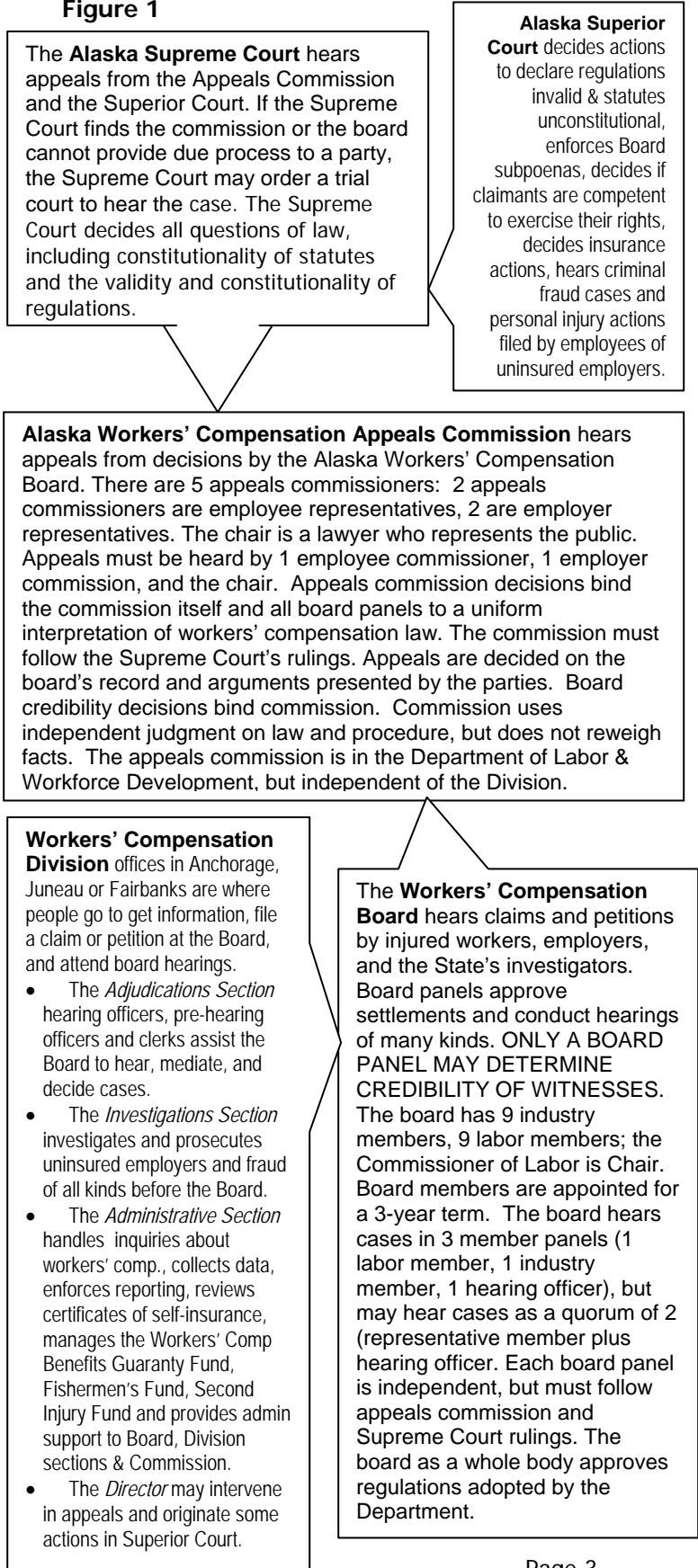
INTRODUCTION

The Alaska Workers' Compensation Appeals Commission is charged with providing fair, prompt and thoughtful adjudication of appeals from the Alaska Workers' Compensation Board. The appeal to the commission is a formal administrative appeal and appeal decisions must be published. The commission is committed to ensuring that "hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered." AS 23.30.001.

The commission chair has certain duties and goals prescribed by law. One of the chair's duties is to make available to the public and file with the lieutenant governor a report regarding the commission for the prior calendar year, including data regarding time periods between initial receipt and final decisions on appeals, not later than March 15th of each year.

Figure 1 in the next column illustrates the place of the commission in the workers' compensation adjudication system.

Figure 1



COMMISSION MEMBERS

The appeals commission consists of five members: four representative members and the chair. Each representative member must each have at least 18 months of experience as a member of the Alaska Workers' Compensation Board. Two members represent employees and two members represent employers. The chair must be an attorney who has been engaged in the active practice of law at least five years in the State of Alaska, with experience in workers' compensation law in this state.

The Chief Administrative Law Judge in the Office of Administrative Hearings announces and reviews the applications for each vacancy on the commission and forwards a list of qualified nominees to the Governor for appointment. The Alaska State Legislature must confirm appointees.

The appeals commissioners' 5-year terms are staggered, so a seat on the commission falls vacant every year. Because every appeal is heard by a full, balanced panel, and panelist may not hear cases if they have a connection with a party, avoiding vacancies is a concern of the commission.

At the time of writing, the present members of the appeals commission are, in order of expiration of term:

Kristin Knudsen, Chair, served 17 years in the Alaska Department of Law as an assistant attorney general specializing in workers' compensation law. She was also a hearing officer for the Alaska Workers' Compensation Board, an appellate brief writer for claimant's attorney Chancy Croft and a contract hearing officer for the Oregon Workers' Compensation Appeals Board. She received her J.D. degree from Santa Clara University in California and a bachelor's degree in history from the University of California Los Angeles.

The chair's term expires March 1, 2010. She will not seek reappointment.

Jim Robison, employee representative, is the former president of the Alaska AFL-CIO and the Alaska State District Council of Laborers; vice president of the Tri Trades Public Service Council and Operating Engineers; a former Commissioner of the Alaska Department of Labor under Governor Sheffield. He served as a labor member of the workers' compensation board. **His term expires on March 1, 2011.**

Stephen T. Hagedorn, employer representative, has been employed by the Alaska Railroad Corporation for 22 years as the corporate Risk Manager. He has a bachelor's degree in history from the University of Northern Iowa. He served as a member for industry on the workers' compensation board for 15 years before appointment to a five-year term on March 1, 2007. **His term expires on March 1, 2012.**

David W. Richards, employee representative, is a retired member of the Carpenters' Union Local 2247 and current member of Laborers' Local 341. He served as a member for labor on the workers' compensation board in Juneau until 1991. He was appointed to a five-year term in March 2008. **His term expires on March 1, 2013.**

Philip Ulmer, employer representative, is a registered professional engineer, currently employed as manager of safety and workers' compensation for GCI. He is a previous national president of the American Society of Safety Engineers and of the National Institute for Engineering Ethics, and a 1994 Engineer of the Year finalist with the Alaska Society of Professional Engineers. He was member for industry on the Alaska Workers' Compensation Board. He has been nominated for re-appointment to a

five-year term. If confirmed, **his term expires on March 1, 2014.**

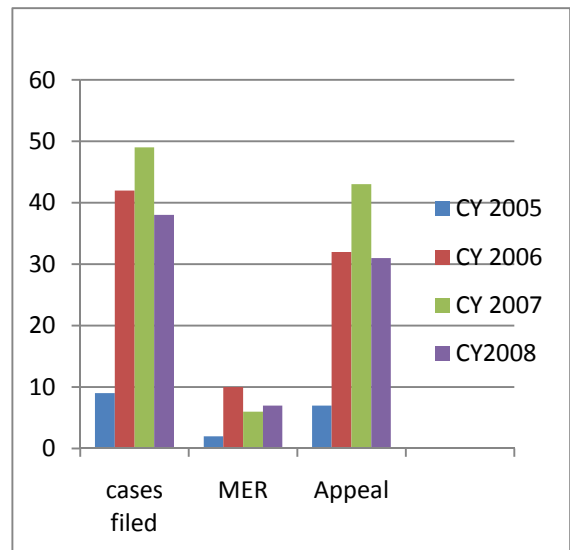
APPEALS COMMISSION CASES

Cases Filed in 2008

The commission docketed 38 new cases (appeals and motions for extraordinary review) in calendar year (CY) 2008. In addition to the cases docketed in 2008, the commission began 2008 with 35 cases on its docket, 1 filed in CY 2006 and 34 filed in CY 2007. At the end of CY 2008, the commission had 27 cases on the docket, 22 filed in 2008, 4 filed in 2007, and 1, remanded by the Supreme Court, originally filed in 2006.

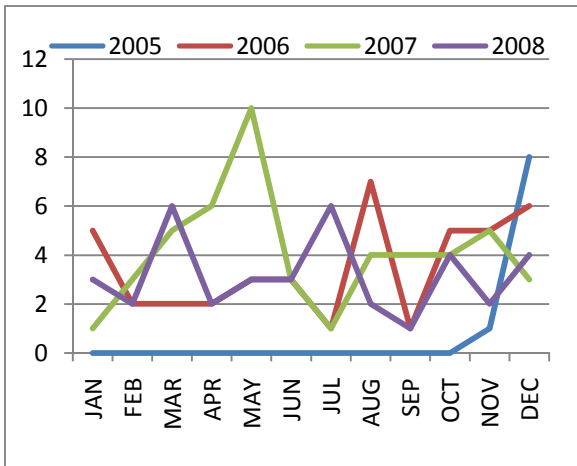
Figure 2 compares total types of cases filed from CY 2005 - 2008.

Figure 2



There is substantial seasonal variation in filing of appeals, as shown in Figure 3.

Figure 3



Case Closure Rate

The current average time from filing a case to final decision is 271 days. The commission continues to close most cases within one year. 35 cases were on the docket at the beginning of CY 2008. Only four of these 35 remained on the docket at the end of 2008, one for a final award of attorney fees, one due to repeated defaults by a pro se appellant, and two because the parties requested delays. In addition, one 2006 case was returned to the docket on Supreme Court remand. Of the 38 cases filed in CY 2008, 22 remained open on January 1, 2009.

Taken together, this means that 65% of cases that appeared on the 2008 docket were closed in 2008.

2008 Commission Docket

The commission's complete CY 2008 docket is found at Appendix A.

Figure 4 shows the number of active cases on the commission docket at the end of each month, the new cases filed and production by the commission, from January 2008 through December 2008.

Figure 4

Month	Active Cases on Docket	New Cases Filed	Hearings Held	Decisions	Orders	Default Notices
Jan	35	3	6	2	14	2
Feb	35	2	1	7	12	0
Mar	30	6	6	1	8	0
Apr	32	2	4	0	10	1
May	31	3	1	4	6	0
Jun	32	3	3	3	10	0
Jul	28	6	3	3	12	1
Aug	32	2	4	2	12	1
Sep	30	1	3	2	8	0
Oct	27	4	1	2	16	0
Nov	25	2	3	1	10	3
Dec	25	4	4	3	9	1
Totals		38	39	30	127	9

Indigent Participants

In CY 2008, seven motions to waive fees due to indigence were filed. The commission found five appellants were indigent and granted full or partial waiver of fees. The commission paid \$2,029 for transcripts of board hearings in indigents' appeals.

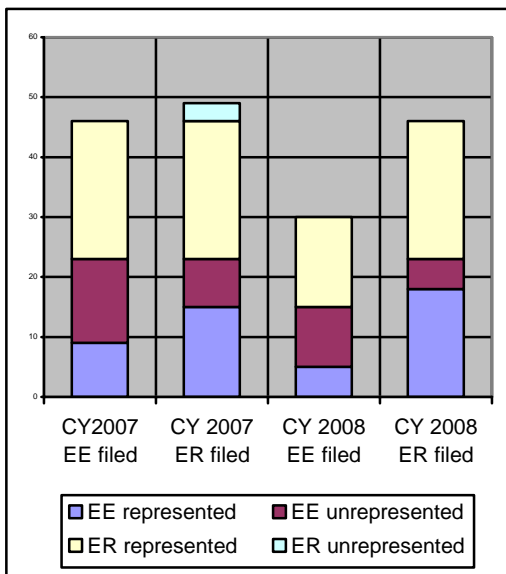
In addition, the commission entered into contract for translation of documents into and from other languages and interpreter service in hearings. Translation services cost the commission \$499.80 in CY 2008.

Attorney Representation

Self-represented employees filed 10 of the 38 cases filed in CY 2008. Five (5) cases were filed by employees represented by counsel. The remaining appeals or motions for review were filed by employers or other parties who were represented. In all of the self-represented appeals, the opposing party was represented by legal counsel; of the 27 appeals or motions filed by represented parties, five (5) appellees or respondents were self-represented.

Figure 5 compares represented to unrepresented appeal participants. In most employer appeals of compensation awards, the employee is represented. The number of appeals filed by represented employees declined sharply in 2009.

Figure 5



APPEALS COMMISSION DECISIONS

Published Decisions

In 2008, 30 published decisions were issued by the end of the reporting period. Appendix B lists the commission's 2008 published decisions, with days to decision and appeals to the Alaska Supreme Court noted. Decisions issued in 2009 on cases heard in 2008 are also listed in Appendix B.

Appendix D is list of the significant holdings of the commission in 2008, with case name and decision number.

The CY 2008 average time from oral argument (or close of briefing if no hearing was held) to decision distribution for decisions issued in 2008 is 71 days, well within the statutory allowance of 90 days. Notice was given to the parties in any case requiring delay more than 90 days owing to absence of commissioners during deliberation or draft circulation.

Orders on Motions

The commission held 39 hearings in 2008, but not all were hearings of oral argument on an appeal. Not all hearings result in a published decision.

The commission issues orders on non-routine or contested motions, such as motions for stay pending appeal, motions for recusal or objection to the panel, motions to dismiss appeal for

lack of jurisdiction, motions to waive fees for indigence, and motions for attorney fee awards. The commission chair may also issue orders on motions for extension of time, notices of default with orders to comply, and similar procedural matters.

Most motions are decided without a formal hearing. Unless the commission's order on such motions provides guidance by illuminating a point of law, or is otherwise significant to the commission's jurisprudence, these orders are not published.

The commission issued 127 unpublished orders of various types during CY 2008, a 7 % increase over CY 2007. Three of these orders were scheduled to be published at a later date as memorandum orders.

In addition to sitting with the panel in formal hearings, the commission chair held status hearings and calendaring conferences by telephone. These may result in a calendaring order or notice.

One case filed in CY 2008 called for appointment of a chair *pro tem* due to the chair's conflict (representation by the chair's spouse of the opposing party in another matter involving the similar subject area). The chair *pro tem* was drawn from the Office of Administrative Hearings.

Case Resolution

35 cases on the CY 2008 docket were closed in 2008 following a decision on the merits. In addition to cases closed by decisions on the merits, 13 cases were closed by order of dismissal due to settlement, two appeals were voluntarily dismissed by the appellant without settlement, and one case was dismissed after notice of default due to failure to prosecute the appeal. These numbers do not include cases decided but not yet closed.

The commission examined its action on the decisions issued in CY 2008. In 10 decisions it affirmed the board outright or on different grounds, in eight (8) decisions it reversed the board or vacated a board decision and remanded, in six (6) decisions, it reversed in part and affirmed in part, and in 11 decisions it dismissed the appeal or motion for extraordinary review on other grounds. The commission also granted two motions for extraordinary review, but these did not result in case closure in CY 2008. The numbers are small, but the commission found board error requiring remand or reversal in 40 % of cases decided.

The commission received six motions for extraordinary review in CY 2008, but granted only two motions for extraordinary review. The commission does not consider grant or denial of a motion for extraordinary

review to be a decision on the merits of the challenged board order. Filing a motion for extraordinary review does not take jurisdiction from the board unless the motion is granted.

In CY 2007, the commission adopted the example of the Alaska Labor Relations Agency of issuing Bench Orders, delivered verbally by the panel in a recorded hearing, or a written Notice of Decision, when there are reasons (such as a pending board hearing) requiring notice of the commission's decision before the written decision is published. This continues to be done rarely.

Supreme Court Appeals in 2008

Six commission decisions were appealed to the Supreme Court in CY 2008. Two of these appeals settled without argument being filed and the commission is advised that another is in settlement negotiations. In March 2008, the Alaska Supreme Court granted a petition for review of a decision the commission issued in CY 2007. One petition for review filed in CY 2008 was denied in CY 2009.

Appendix B, the list of 2008 commission decisions, contains notes indicating which decisions were appealed. Including appeals filed in prior years, eight commission decisions presently await a Supreme Court decision on appeal.

The Supreme Court decided two appeals from the commission in CY 2008. In *Barrington v. Alaska Commc'ns Sys. Group, Inc.*, 198 P.3d 1122 (Alaska 2008), the Supreme Court reversed the appeals commission's decision, which had affirmed the board's dismissal of a physician's claim against employer filed after employee settled her claim for medical benefits and compensation in a board-approved compromise and release. The Supreme Court held that the physician should have been given notice of the pending settlement.

In *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, (Alaska 2008) the Supreme Court reversed the commission's decision that had affirmed the board's dismissal of a claim for failure to file a timely affidavit of readiness for hearing. The Supreme Court held that statutory language (in AS 23.30.110(c) establishing a time-bar for failing to request a hearing in two years) is directory rather than mandatory, so substantial compliance is sufficient to toll the time-bar, and the board has discretion to extend the statutory deadline for good cause.

The Supreme Court issued four other decisions on workers' compensation cases in CY 2008, on board decisions appealed through the Superior Court prior to the commission's existence. In *Carter v. B & B Const., Inc.*, 199 P.3d 1150, (Alaska 2008), the Supreme Court

reversed board denial of claim for permanent total disability compensation because substantial evidence did not support the board's decision and held the employee was entitled to additional interest on reemployment benefits. In a memorandum decision that does not establish precedent, *Adepoju v. Fred Meyer Stores*, Not Reported in P.3d, 2008 WL 5101811, (Alaska 2008), the Supreme Court affirmed the board's denial of the worker's claim. *VECO Alaska, Inc. v. State, Dep't of Labor, Second Injury Fund*, 189 P.3d 983, (Alaska 2008), reversed a board decision that VECO had not produced written records from which it could reasonably be inferred that VECO had prior knowledge of worker's qualifying impairment. And, in *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079 (Alaska 2008), the Supreme Court reversed board denial of the worker's petition to set aside a settlement agreement because the board applied an incorrect legal standard when it evaluated his misrepresentation claim.

The Supreme Court also issued an important decision in *Glover v. State, Dept. of Transp., Alaska Marine Highway System*, 175 P.3d 1240, 2008 A.M.C. 183, 27 IER Cases 811, (Alaska 2008). The Supreme Court upheld the legislature's 2003 amendment to AS 09.50.250(5), revoking the state's waiver of sovereign immunity to

maritime suits by state-employed seamen and bringing state-employed seamen into the workers' compensation system, as constitutional because it does not violate article II, section 21 of the Alaska Constitution, is not preempted by the Jones Act, and does not violate seaman's rights to due process, court access, jury trial, or equal protection under the Alaska Constitution.

OTHER APPEALS COMMISSION ACTIVITY

Commissioner Training

The commission established a regular schedule of periodic training for the appeals commissioners. Formal training was provided this year by one of the National Judicial College's instructors in judicial writing, retired Alaska Superior Court Judge Karen Hunt, who directed training for the commission in 2008. Ethics training was provided by Judy Bockmon, Assistant Attorney General. The chair also provides informational readings on adjudication and circulates Supreme Court decisions to the commissioners.

The chair attended a National Judicial College web-based course on Ethics for Administrative Law Judges.

Summer Law Interns

The appeals commission is keen to provide summer law clerkships to expose interested law students to

workers' compensation and labor law. Summer law interns are given 150 to 180 hours of supervised research and writing experience and instruction by the appeals commission chair and the Alaska Labor Relations Agency (ALRA) administrator.

In CY 2008, the commission was pleased to host summer law interns Adam Sadoski of the University of Seattle School of Law and Matthew Prieksat of the University of Iowa College of Law.

The commission, with the Alaska Labor Relations Agency, will again host two volunteer law student summer interns from the University of Seattle School of Law's "Summer in Alaska" program. Summer in Alaska interns are enrolled in one class taught at UAA by a University of Seattle law professor, receive credit for their service at governmental or non-profit organizations, are housed at UAA and pay their own housing costs.

The commission expects that at least one out of six summer student interns will return to practice in Alaska.

Commission Externship

The appeals commission's interest in providing training and internship opportunities is spurred by the number of injured workers unable to obtain legal help and the increasing age of the claimant bar. Most claimant attorneys are sole practitioners who do

not have the time or facilities to provide training to law students who probably will not return.

The commission has undertaken, with the Alaska Labor Relations Agency and Office of Administrative Hearings to provide a pool of students who have been given greater experience in the workers' compensation and labor relations field, trained in the Alaska adjudications process, and instructed in good legal writing and analysis.

To that end, the commission secured curriculum and supervision approval from Seattle University School of Law for a 15-credit Alaska Labor externship coordinated with the Office of Administrative Hearings (OSHA) and the Alaska Labor Relations Agency, with the aid of Prof. Susan McClellan. The internship, titled the Alaska Labor Externship, requires a full semester of work with the 3 agencies, a publishable paper on a topic in Alaska labor law, and weekly conferences with the supervising law professor.

This externship was funded originally by a college internship, but it was discovered that the accreditation standards bar payment of a salary to law school externs. Therefore, the position was converted to a housing allowance and transportation, the only support the commission may provide to an accredited law extern.

Although the commission was unable to secure an extern from the

University of Seattle School of Law in 2008, achieving accreditation means the commission will be able to expand the offering to other law schools on the same terms.

Anonymous Participant Surveys

In CY 2008, in cooperation with the Office of Administrative Hearings, the chair began providing the Office of Administrative Hearings data allowing the Office to send anonymous surveys of the participants in the commission process, after final decisions are issued.

The first survey responses were not received until CY 2009. They revealed confusion by the respondents between the board, the commission and other agencies. Surveys do not clearly address hearings conducted by panels (instead of a single hearing officer). Surveys do not list the agency, and the cover letter requesting a response lists every state agency subject to reporting. The Office of Administrative Hearings agreed to amend its surveys to better direct questions to commission participants. The first survey results are summarized in Appendix C.

Translation/Interpretation

The commission contracted with a legal translation service provider to support translation of commission pleadings from languages other than English and provide interpreters in

commission hearings. One case required translation in CY 2008.

Challenges Facing the Appeals Commission in 2009

Continuing Labor and Industry Participation

The Alaska Workers' Compensation adjudication system depends on the stakeholders' commitment to the adjudication process, the commission organization, and the goals of workers' compensation. It also depends on participant ability to identify with stakeholder groups.

When stakeholders participate equally, there is equal "ownership" of the system. Workers' compensation fails as a system when labor, industry, the courts, or the general public, adopts the belief that the system is inherently unfair or that either side of a dispute is routinely denied the benefits of the system. A fair result is desired in all cases, but it is also critical that the hearing and appeal *process* be perceived to be fair by all those who are stakeholders in the system.

The design of the workers' compensation system builds the perception of procedural fairness several levels. At the board level, both labor and industry have the opportunity to participate in the adjudication process though which

individuals have a hearing with a fair opportunity to present evidence and have their arguments considered. As the full board, labor and industry may participate equally in approving regulations to implement the statutes.

At the appeals commission level, an appeal of right, self-binding decisions, formal procedural rights, a right of Director intervention, and Supreme Court review are avenues to fairness. In the commission, labor and industry *must* equally participate in appeals through their representative members. The commission's internal procedures support the contribution of representative members in consideration of appeals and encourage their full, serious, and thoughtful participation. Through their *active* involvement in deliberation and writing decisions, labor and industry equally share in developing a consistent interpretation of Alaska's workers' compensation law. Thus, the commission's credibility as being fair rests on the strength of its representative members.

The workers' compensation adjudication participant who sees an employee representative and an employer representative on the dais, taking an equal and active role in the proceeding, and the chair clearly showing respect for the representative commissioners, knows that his or her voice is being heard *and* understood. Public confidence in the system is

reinforced when the participation of labor and industry is active at hearings and visibly demonstrated in the written decisions of the commission. To maintain this confidence, stakeholder organizations in labor and industry must commit to developing a pool of representative board members who are ready and able to assume the increased demands of work at the commission level as vacancies occur.

Educating the Public: Labor and Industry Voices

A system that depends on cooperative stakeholder participation, like the workers' compensation adjudication system, breaks down when parties to disputes do not accept the system's authority because they do not see themselves as belonging to, or accepted by, either labor or industry stakeholders. Participants who have no experience as part of a larger employment group, such as a union, occupation association, manufacturers' organization, or of any other autonomous group supporting the aims of its membership, are more ready to doubt that their dispute may be fairly resolved through accepted mechanisms of cooperative industrial self-governance. They are more ready to see themselves as individual victims of uncaring insurance companies, employer conspiracy, board or commission bias, arbitrary state agencies - any organized power

against which they are powerless, especially if they are unrepresented.

Participants who are also marginalized from Alaskan society by mental disability, lack of education or English literacy, entrenched poverty, or ingrained distrust of government are more likely to have cases complicated by grievances that cannot be addressed to their satisfaction in the workers' compensation system.

The commission has made serious efforts to assure all participants that their rights will be respected and that they will have a fair hearing of their appeal. The commission's assurance that employees and employers are heard equally in the commission's work will have greater force if stakeholder organizations increase public education about the participatory role of representative members as a guarantor of fairness for all, even those who are not members of a specific union or business association.

Help for Those with Limited English Literacy

Since it began in November 2005, the commission has designed respect for the participants and the cases they bring into the adjudication process. For example, the hearing room was designed to demonstrate the commission's regard for the importance of the appeal. Proceedings in the commission are more formal than board hearings, in order to foster

equal status and respect between represented and unrepresented parties, and understanding of the commission's role. The commission has also provided facilities to help self-represented litigants prepare their presentation to the commission.

These efforts to assure fairness may be criticized by observers who fear the commission's efforts will move the "fairness mark" too far toward benefitting the unrepresented party beyond the historical intent of the workers' compensation statutes. But, the commission has favored a policy of exploring all avenues to fairness when a party must speak without counsel at the commission.

The commission cannot solve all the problems that create barriers to full participation in the adjudication system – but it can do more to make the appeal process more accessible to those who lack English literacy or writing skills. The commission recognizes the special challenges faced by appeal participants with limited English literacy. When an unrepresented party cannot speak English, the commission recognized that a fair appeal requires additional services. In CY 2008, the commission secured a contract for translation and interpretation services in commission proceedings.

The chair's final task before her term expires will be to complete a very

simple English guide for participants, with drawings and charts, and improve online forms and instructions. In the future, such a guide may be translated into other languages too.

Reaching Outside Anchorage

The commission's only office is in Anchorage and the cost of travel in Alaska is high. The commission's travel budget is funded to bring an appeals commissioner to Anchorage when he or she resides elsewhere or is working in another town – not to take three commissioners and staff to other towns for hearings.

An appellant may not believe that he will get a fair hearing if he cannot see the people conducting and participating at the hearing. The appeals commission has attempted to set a docket outside Anchorage in the past, only to find cases settle. Finding a way to bridge the distance divide without increasing costs and improve the visibility of the commission outside Anchorage is another area the commission may improve.

Since its inception, the commission has believed in the important benefits of all parties meeting at one location, despite the limitations inherent in telephone bridging. Video conferencing will add the dimension of visual presence lacking in telephone bridges, and the economic viability of video conferencing is fast approaching. The psychological benefit of seeing a

live image of the parties present in argument will promote a sense of fairness and help the parties understand the proceedings. Video conferencing technology is already used in some legal venues in Alaska.

Uniform Format, Unified Website, Coordinated Accessible Docket

The commission has worked diligently to write decisions in a format consistent with the best practices established by the National Judicial College. However, the lack of a single unified-format website to post all workers' compensation administrative decisions, in a free searchable index compliant with anti-discrimination and security requirements continues to be a concern. The Department of Labor and Workforce Development agencies do not share a single publication format and some decisions are not published online at all.

The commission therefore supports the Division's effort to obtain an updated, unified, single format, searchable website for publication of all workers' compensation dockets and decisions, as part of a modern case management data system. This will result in better communication with adjudication participants, better movement of case information and improved public understanding of the workers' compensation adjudication process.

Transition Planning

The commission provides training for new appeals commissioners as they are appointed, but it takes about two years for an appeals commissioner to become comfortable in all aspects of the work assigned to them. The commission's staggered terms means that training is a *constant* need to ensure full participation by representative appeals commissioners. An important part of the chair's duties is to coordinate commission training.

In CY 2009, the chair will prepare the commission for the transition that will occur when she leaves no later than Sunday, February 28, 2010. The Chief Administrative Law Judge intends to open the search for new chair applicants in July 2009 so that a nominee may have time to prepare to take the position. The chair will compose a guide book for the next chair, organize commission research

and training files, and make sure that staff desk manuals are current.

CONCLUSION

In CY 2008, the commission focused on establishing good practices in hearings, deliberations, and decisions and establishing production stability and consistency. The commission also put in place institutional mechanisms for performance-monitoring. In 2009, the commission will improve public information, prepare a simple English guide to appeals, expand the training program, and prepare for transition, so that the next chair will join a smooth-running, fully-staffed commission on March 1, 2010.

Submitted March 9, 2009.

Kristin S. Knudsen, Chair

APPENDIX A: 2008 APPEALS COMMISSION DOCKET

Docket number	Date filed	Case type	Case Title	App'nt att'y	App'ee att'y	Result/Status
06-015	6/2/06	Appeal	<i>Barrington v. Alaska Commc'n Group, Inc.; Noelle Williams</i>	Yes	ACGI: Yes Wlms: Yes	<i>aff'd bd diff. grounds, appealed, Supreme Court rev'd, pet. for rehr'g den. remand to bd pending comm'n order on att'y fee</i>
06-036	11/27/06	Appeal	<i>Sourdough Express, Inc. & Alaska Nat'l Ins. Co. v. Barron</i>	Yes	Yes	<i>rev'd /aff'd remanded</i>
07-004	2/28/07	Appeal	<i>Peratrovich v. Quality Asphalt Paving & Liberty Nw Ins. Co.</i>	Yes	Yes	<i>aff'd bd</i>
07-005	3/2/07	Appeal	<i>Witbeck v. Superstructures, Inc. & Alaska Nat'l Ins. Co.</i>	Pro se	Yes	<i>aff'd bd dif. grds</i>
07-008	3/20/07	Appeal	<i>DeNino v. Yukon Flats Sch. Distr. & Alaska Pub. Entity Ins.</i>	Pro se	Yes	<i>aff'd bd, appealed to Supreme Ct.</i>
07-009	5/24/07	Appeal	<i>Hope Comty Res. & Liberty Nw Ins. Co. v. Rodriguez</i>	Yes	Pro se	<i>granted MER 2007, bd dec. final, Appeal dismissed, moot</i>
07-010	4/2/07	Appeal	<i>Seiler v. F.R. Bell & Assoc., & Alaska Nat'l Ins. Co.</i>	Yes	Bell:Yes ANIC:Yes	<i>aff'd board</i>
07-012	4/18/07	Appeal	<i>Voorhees Concrete Cutting & Alaska Nat'l Ins. Co. v. Monzulla</i>	Yes	Pro se	<i>aff'd/ rev'd bd, remanded</i>
07-013	4/18/07	Appeal	<i>Municipality of Anchorage v. Monfore</i>	Yes	Yes	<i>rev'd bd, vacated remanded</i>
07-015	4/30/07	Appeal	<i>Kennecott Greens Creek Mining Co. & Sedgwick Claims Mgt. Serv., Inc. v. Clark & Second Injury Fund</i>	Yes	Clark: Yes SIF:AGO	<i>Bd aff'd in part, rev'd in part, remanded for additional findings</i>
	5/4/07	Cross Appeal	<i>Clark & Second Injury Fund v. Kennecott Greens Creek Mining Co. & Sedgwick Claims Mgt. Serv., Inc.</i>	Clark: Yes SIF:AG O	Yes	
07-016	5/3/07	Appeal	<i>Martin v. Nabors Alaska Drilling, Inc. & N. Adjusters</i>	Pro se	Yes	<i>aff'd bd, appealed to Supreme Ct., vol. dismissal</i>
07-017	5/3/07	Appeal	<i>Robinson v. Ketchikan Credit Bureau, Inc. & Alaska Nat'l Ins. Co.</i>	Pro se	Yes	<i>dismissed no jurisdiction</i>
07-018	5/3/07	Appeal	<i>Sushi Garden, Inc. v. Cummings & Alaska Nat'l Ins. Co.</i>	Yes	Cum'ngs Yes ANIC:Yes	<i>Notice of default, settled</i>
07-020	5/8/07	Appeal	<i>Chugach Eareckson Support Serv. & Zurich Am. Ins. Co. v. Stokes</i>	Yes	Yes	<i>Settled, vol. dismissal</i>
07-021	5/16/07	Appeal	<i>Shehata v. Salvation Army & N. Adjusters</i>	Yes	Yes	<i>aff'd bd, appealed to Supreme Court</i>
07-023	5/21/07	Appeal	<i>University of Alaska v. Hogansen</i>	Yes	Pro se	<i>aff'd Bd, modified</i>
07-025	5/25/07	Appeal	<i>Coalition, Inc. v. State, Workers' Comp. Div.</i>	Yes	AGO	<i>reversed Bd</i>
07-027	6/13/07	Appeal	<i>Bah v. Trident Seafoods, Corp. & Liberty Nw Ins. Co.</i>	Pro se	Yes	<i>aff'd Boad</i>

Docket number	Date filed	Case type	Case Title	App'nt atty	App'ee att'y	Result/Status
07-028	6/27/07	Appeal	<i>Municipality of Anchorage v. Faust</i>	YES	Yes	<i>reversed bd, app'd to Supreme Ct, settled</i>
07-030	8/6/06	Appeal	<i>Village Inn Rest., Spenard Inns, Inc. & Liberty Nw Ins. Co. v. Davis, S. Vendetti, Vendetti's Inc., & Alaska Workers' Comp. Benefits Guar. Fund</i>	YES	Davis:Yes Vendetti: Yes AWCBF: No	<i>settled, vol. dismissal</i>
07-031	8/7/07	Appeal / MER	<i>Augustyniak v. Carr Gottstein Foods, Co., Safeway, Inc.</i>	NO	YES	<i>mtn for lay rep denied, lat app allowed as MER, MER denied</i>
07-032	8/27/07	Appeal	<i>Velderrain v. Alaska Workers' Comp. Div.</i>	NO	AGO	<i>mtn late app grtd, bd aff'd, rev'd in part, remanded</i>
07-035	9/10/07	Appeal	<i>Talcott v. Municipality of Anchorage</i>	NO	YES	<i>notice of default</i>
07-036	9/13/07	Appeal	<i>Schouten v. Alaska Ind. Hardware & AIG Claims Serv.</i>	YES	YES	<i>bd dec. vacated, remanded</i>
07-037	9/26/07	Appeal	<i>P.Pietro v. Unocal Corp.</i>	YES	YES	<i>dismissed, Super. Ct. jurisdiction</i>
07-038	10/9/07	Appeal	<i>K. Cameron v. Tab Electric & Liberty Nw Ins. Co.</i>	NO	YES	<i>aff'd in part, rev'd in part, remanded</i>
07-040	10/24/07	Appeal	<i>Rodda Paint Co. & Wausau Ins. Co. v. Inscho</i>	YES	YES	<i>vol. dismissal, settlement</i>
07-041	10/25/07	Appeal	<i>Moore v. Afognak Native Corp. & Zurich Am. Ins. Co.</i>	YES	YES	<i>aff'd bd, appealed to Supreme Ct</i>
07-042	11/5/07	Appeal	<i>Agrium U.S. Inc. & ACE Am. Ins. Co. v. Helselius</i>	YES	YES	<i>vol. dismissal, settlement</i>
07-043	11/20/07	Appeal	<i>Alaska R & C Commc'ns, LLC v. Alaska Workers' Comp. Div.</i>	YES	AGO	<i>rev'd, remanded, reconsid granted & heard</i>
07-044	11/30/07	Appeal	<i>I. Moore d/b/a I. Moore Research v. Alaska Workers' Comp. Div.</i>	NO	AGO	<i>rev'd bd, mod. order</i>
07-045	11/30/07	Appeal	<i>Tire Distrib. Sys., Inc. & Travelers Prop. Cas. Co. of Am. v. Chesser</i>	YES	YES	<i>aff'd bd, appealed to Supreme Ct</i>
07-046	11/30/07	Appeal	<i>Terrasond, Ltd. & Alaska Nat'l Ins. Co. v. Iversen</i>	YES	YES	<i>settled & vol. dismissal</i>
07-047	12/3/07	Appeal	<i>Soldotna Elks Lodge #2706 & Alaska Nat'l Ins. Co. v. Koerber</i>	YES	NO	<i>settled & vol. dismissal</i>
07-048	12/17/07	Appeal	<i>O'Hara v. Carr Gottstein Foods Co., Safeway Inc.</i>	YES	YES	<i>affirmed board</i>
07-049	12/17/07	Appeal	<i>Giles v. Alaska Workers' Comp. Div.</i>	NO	AGO	<i>susp'd for bd settlement approval</i>
08-001	1/8/08	Appeal	<i>Marsh Creek v. Bentson</i>	YES	YES	<i>heard, decision pending</i>
08-002	1/15/08	Appeal	<i>Ketchikan Credit Bureau v. Robison</i>	YES	NO	<i>dism'd, Superior Ct jurisdiction</i>

Docket number	Date filed	Case type	Case Title	App'nt att'y	App'ee att'y	Result/Status
08-003	1/23/08	MER	<i>BP Exploration v. Stefano</i>	YES	YES	<i>MER denied</i>
08-004	2/12/08	Appeal	<i>Olekszyck v. Smyth Moving</i>	NO	YES	<i>Late filed appeal dism'd</i>
08-005	2/12/08	Appeal	<i>Kinross Gold USA v. Denny</i>	YES	YES	<i>vol. dismissal, settled</i>
08-006	2/29/08	Appeal	<i>Kornell v. Bald Mountain</i>	YES	YES	<i>vol. dismissal, settled</i>
08-007	3/10/08	Appeal	<i>Abonce v. Yardarm Knot Fisheries & Commerce & Indus. Ins. Co.</i>	NO	YES	<i>ready for hearing, hearing scheduled</i>
08-008	3/10/08	Appeal	<i>Parker Drilling v. Melchor</i>	YES	YES	<i>bd rev'd remanded</i>
08-009	3/11/08	Appeal	<i>Pietro v. Unocal</i>	YES	YES	<i>dism'd Super. Ct jurisdiction</i>
08-010	3/25/08	Appeal	<i>Harnish Group v. Moore</i>	YES	YES	<i>Rev'd, remand to bd for rehr'g</i>
08-011	3/25/08	Appeal	<i>Johnson's Tire v. Syvinski</i>	YES	YES	<i>vol. dismiss'd</i>
08-012	4/3/08	Appeal	<i>Nnoli v. Trident Seafood</i>	NO	YES	<i>dismissed lack of prosecution</i>
08-013	4/3/08	Appeal	<i>Wilson v. Eastside Carpet *attorney w/drew after briefing filed</i>	YES*	YES	<i>rev'd bd denial of comp rate adj.</i>
08-014	5/7/08	Appeal	<i>McCullough v. Job Ready Inc. & N. Am. Specialty Inc. Co.</i>	NO	YES	<i>multiple applt mot. for time extn., app. suspended</i>
08-015	5/23/08	MER	<i>Alcan Elec. v. James</i>	YES	YES	<i>MER denied</i>
08-016	5/30/08	MER	<i>Interior Fuels v. Hornbeck</i>	YES	NO	<i>MER denied</i>
08-017	6/18/08	Appeal	<i>Alaska Mechanical v. McCarty</i>	YES	YES	<i>vol. dismissal, settled</i>
08-018	6/18/08	Appeal	<i>Alaska Mechanical v. Lisenbury</i>	YES	YES	<i>vol. dismissal, settled</i>
08-019	6/27/08	Appeal	<i>Fairbanks Mem'l Hosp. v. State, SIF</i>	YES	YES	<i>heard, dec. pending</i>
08-020	7/17/08	Appeal	<i>McKenzie v. Assets Inc. & Comm. & Indus. Ins. Co.</i>	NO	YES	<i>heard, dec. pending</i>
08-021	7/16/08	MER	<i>City of Petersburg v. Tolson</i>	YES	NO	<i>MER denied</i>
08-022	7/23/08	Appeal	<i>McGahuey v. Whitestone Logging, Inc.</i>	NO	YES	<i>briefing done, arg. scheduled</i>
08-023	7/29/08	Appeal	<i>Swiss Log USA, Inc. v. Sarbacher</i>	YES	YES	<i>vol. dismissal, settled</i>
08-024	7/29/08	Appeal	<i>Hummel v. Tlingit Haida Reg'l Housing Auth.</i>	NO	YES	<i>default notice, appeal dismissed</i>
08-025	7/30/08	Appeal	<i>Wilder Constr. Co. v. Smith</i>	YES	NO	<i>vol. dismissal, settled</i>
08-027	8/12/08	Appeal	<i>Bates v. Fairbanks Mem. Hosp.</i>	YES	YES	<i>vol. dismissal</i>

Docket number	Date filed	Case type	Case Title	App'nt att'y	App'ee att'y	Result/Status
08-028	9/4/08	Appeal	<i>Champion Builders v. Dennis</i>	YES	YES	<i>briefing</i>
08-029	10/13/08	Appeal	<i>Stepovich v. State, Workers' Comp Div.</i>	YES	YES	<i>Appeal dismissed, MER filed, susp'd for bd. settlement</i>
08-030	10/16/08	Appeal	<i>Winkleman v. Wolverine Supply</i>	NO	YES	<i>briefing</i>
08-031	10/23/08	MER	<i>Alcan Elec. & Eng'ring v. Hope</i>	YES	YES	<i>MER granted, appeal briefing</i>
08-032	10/24/08	MER	<i>Voorhees Concrete Cutting v. Monzulla</i>	YES	NO	<i>MER granted, reconsid heard</i>
08-033	11/18/08	MER	<i>Rockstad v. Chugach Eareckson</i>	NO	YES	<i>MER denied</i>
08-034	11/28/08	Appeal	<i>Soule v. Municipality</i>	YES	YES	<i>briefing</i>
08-035	12/8/08	Appeal	<i>Griffiths v. Andy's Body & Frame</i>	YES	YES	<i>record prep.</i>
08-036	12/22/08	Appeal	<i>Olson v. FedEx</i>	NO	YES	<i>chair recused, OAH pro tem</i>
08-037	12/30/08	Appeal	<i>Fred Meyer, Inc. v. Updike</i>	YES	NO	<i>record prep.</i>
08-038	12/31/08	Appeal	<i>Gibson v. Arco Alaska, Inc.</i>	YES	YES	<i>record prep.</i>

APPENDIX B TABLE OF 2008 PUBLISHED DECISIONS

DECISION NO.	APPEAL NO.	TITLE	DAYS TO DECISION	DECISION/APPEALED
66	07-005	Witbeck vs. Superstructures, Inc.	89	affirmed board decision denying medical trans. costs to Seattle, consult fee, on different grounds
67	07-004	Peratrovich vs. Quality Asphalt Paving	90	affirmed board decision denying claim
68	07-012	Voorhees Concrete Cutting vs. Monzulla	90	affirmed in part, reversed in part, remanded
69	06-036	Sourdough Express, Inc. vs. Barron	90	reversed in part, affirmed in part, remanded
70	07-016	Martin vs. Nabors Alaska Drilling, Inc	90	affirmed board decision denying claim for coverage of motorcycle accident in California
71	07-025	Coalition, Inc. vs. State, Div. of Workers' Comp.	78	vacated board decision (witness not sworn), remanded
72	07-008	Kevin DeNino vs. Yukon Flats Sch. Distr.	50	affirmed board denial of claim of injuries from carbon monoxide exposure
73	07-027	Oumar P. Bah vs. Trident Seafoods Corp	29	Board denial of petition for Second Ind. Med. Eval. Affirmed
74	07-023	Univ. of Alaska Fairbanks v. Hogenson	84	affirmed board's denial of employer's petition to dismiss claim as untimely, with modification
75	07-021	Victor Shehata vs. Salvation Army	58	Comm'n majority granted appeal for atty fees. Comm'n Chair dissented.
76	08-003	BP Exploration Alaska, Inc. vs. Stefano	63	MER denied
77	07-010	Edward Seiler vs. F.R. Bell and Assoc.	72	Affirmed board decision that applt's illness not work related
78	07-028	Municipality of Anchorage vs. Faust	77	Board's decision reversed, appendix Order on mtn for recusal of chair denied
79	08-004	Thomas Olekszyk vs. Smyth Moving Service, Inc.	34	Late-filed appeal denied and dismissed
80	07-015	Kennecott Greens Creek Mining Co. vs. Clark & SOA	90	Affirmed board decision in part, reversed vacated and remanded in part, reversed atty fees, affirmed on different grounds.
81	07-013	Municipality of Anchorage vs. Monfore	92	Affirmed board's decision in part, vacated in part and remanded for further findings
82	08-009	Paul Pietro vs. Unocal Corp.	57	dismissed super. ct. jurisdiction
83	07-032	Mario Velderrain vs. SOA, WCD	83	Vacated board's decision, third comm'ner concurred
84	08-015	Alcan Electric vs. Alan James	28	MER denied
85	08-016	Interior Fuels vs. David Hornbeck	29	MER denied
86	07-009	Hope Community Resources vs. Rodriguez	112	Dismissed as moot (stayed after oral arg at appellee's request)
87	07-041	Ralph Moore vs. Afognak Native Corp.	98	Affirmed board's decision
88	07-043	Alaska R & C Communications, LLC vs. SOA, WCD	91	Reversed, vacated, remanded, recons. granted
89	07-022/07-038	Karl Cameron vs. TAB Electric	90	Affirmed on other grounds in part, board's decision vacated in part and remanded
90	07-045	Tire Distribution Systems, Inc. vs. Chesser	87	Affirmed board's decision
91	08-008	Parker Drilling Co. vs. Melchor	91	Board's decision reversed
92	07-044	Ivan Moore d/b/a Ivan Moore Research vs. SOA	81	Reversed in part, affirmed in part, modified
93	07-048	Denise O'Hara vs. Carr-Gottstein Foods Safeway	92	Affirmed board's decision
94	07-036	Linda Schouten vs. Alaska Industrial Hardware	86	Vacated and remanded to board
95	08-010	Harnish Group, Inc. d/b/a N-C Machinery vs. Moore	99	Reversed, remanded for rehearing
96	08-021	City of Petersburg vs. Tolson	35	MER denied
97	08-031	Alcan Electrical vs. Hope, Redi Electric, Novapro	21	Granted MER, stays board order in part, third comm'ner dissented in part
98	08-013	Bradford Wilson vs. Eastside Carpet Co.	29	denied motion to remove appeal (First issued as order on motion)
99	08-013	Bradford Wilson vs. Eastside Carpet Co.	90	rev'd. bd. denial of comp. rate, remand for recal. of comp. rate.

Shaded areas indicate cases heard in 2008, but the decisions were issued in 2009

APPENDIX C RESPONSES TO OFFICE OF ADMINISTRATIVE HEARINGS SURVEYS

Question	Number Responding				
	Private Party	Agency Party	Attorney		
What was your role in this case?	6	3	0		
Where do you live?	Rural Alaska	City in Alaska	Outside Alaska		
	0	8	1		
Including this one, in how many hearings have you participated?	One	2-5	6-10	11-20	20 or more
	4	3	3	0	0

Administrative Law Judge/Hearing Officer	Yes	No	N/A
1. Did the judge/hearing officer start the proceedings on time?	9	1	0
2. Was the judge/hearing officer familiar with the issues in the case?	10	0	0
3. Did the judge/hearing officer pay attention during the proceedings?	10	0	0
4. Did the judge/hearing officer show you respect?	10	0	0
5. Did the judge/hearing officer remain even-tempered in the proceedings?	10	0	0
6. Did the judge/hearing officer give you (or your attorney) opportunities to speak?	9	0	1
7. Did the judge/hearing officer make clear decisions and rulings during the hearing, such as when objections were raised or requests were made?	9	1	0
8. Did the judge/hearing officer resolve problems that came up during the case fairly and efficiently?	8	1	1
9. Did the judge/hearing officer issue written decisions and orders in a timely fashion?	8	1	0

Written Documents	Yes	No	N/A
1. Was information provided in notices useful?	10	0	0
2. Were decisions and orders written in clear, understandable language?	7	2	1
3. Did the decision describe the facts clearly and accurately?	6	3	1
4. Did the decision and any orders include clear explanations of the law?	6	3	1
5. Did the decision's analysis include enough detail to explain the result?	5	3	1

Facilities and Staff	Yes	No	N/A
1. Were hearing support staff helpful in answering general (non-legal) questions or redirecting calls to others who could answer them?	4	1	5
2. Was the location of the hearing room accessible?	8	0	1
3. For in-person hearings: was the hearing room (size, set up, temperature) suitable for the type of proceeding?	7	0	2
4. For telephone hearings: was the sound quality of the telephone connection good?	2	0	8
5. For participants who listened to a recording of the hearing or other proceedings: was the sound quality of the recording adequate?	3	0	7

Overall Satisfaction	Yes	No
Do you agree with the final result in the case?*	3	5
Whether or not you agree with the final result, were you satisfied with the hearing process overall?	6	3

*Many narrative responses described events or persons at the board level.

APPENDIX D SIGNIFICANT HOLDINGS IN 2008 COMMISSION DECISIONS

Harnish Group, Inc. v. Moore, Alaska Workers' Comp. App. Comm'n Dec. No. 095 (Dec. 24, 2008). Board may not award a "reasonable fee" to employee's attorney under AS 23.30.145(b) without evidence from the attorney of the work the attorney did, unless the attorney establishes good cause to excuse compliance with 8 AAC 45.180(d).

Harnish Group, Inc. v. Moore, Alaska Workers' Comp. App. Comm'n Dec. No. 095 (Dec. 24, 2008). If good cause is established, the board may look at awards in similar cases contemporaneous with the case on which the fee award is based.

Harnish Group, Inc. v. Moore, Alaska Workers' Comp. App. Comm'n Dec. No. 095 (Dec. 24, 2008). Destruction of billing records is cause to allow the attorney to estimate his time based on his work product, but not good cause to allow him to avoid requirement that there be *some evidence* of the time and hours the attorney spent.

Schouten vs. Alaska Industrial Hardware, Alaska Workers' Comp. App. Comm'n Dec. No. 094 (Dec. 5, 2008). The board may not decide questions the parties do not raise without giving the parties notice of the issue and allowing them the opportunity to present evidence and arguments on the issue.

Schouten vs. Alaska Industrial Hardware, Alaska Workers' Comp. App. Comm'n Dec. No. 094 (Dec. 5, 2008). If the parties both clearly ask the board to decide a dispute regarding a benefit under the act, the board may not ignore the dispute and avoid making a decision.

Schouten vs. Alaska Industrial Hardware, Alaska Workers' Comp. App. Comm'n Dec. No. 094 (Dec. 5, 2008). The board may not retroactively suspend [past due] benefits upon condition of future behavior.

O'Hara vs. Carr-Gottstein Foods Safeway, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 093 (Dec. 4, 2008). *DeYonge's* rejection of a distinction between aggravation of symptoms and the aggravation of the underlying condition in the context of an aggravation claim is not dispositive of a claim for medical benefits based on assertion that a specific injury occurred that required surgical treatment.

O'Hara vs. Carr-Gottstein Foods Safeway, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 093 (Dec. 4, 2008). The board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment; use of the disjunctive "or" means the board must evaluate claimed benefits separately.

O'Hara vs. Carr-Gottstein Foods Safeway, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 093 (Dec. 4, 2008). Board is not required to decide an aggravation claim if it is not properly raised and argued.

Ivan Moore vs. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 092 (Nov. 17, 2008). A penalty that exceeds four times the premium not paid by uninsured employers is "presumptively unreasonable" if assessed for first violation against uninsured employer where board found no aggravating factors or where minor aggravating factors are outweighed by mitigating factors.

Ivan Moore vs. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 092 (Nov. 17, 2008). Pattern of disparity among decisions based on assigned hearing officer is not evidence indicative of improper board bias, but lack of penalty guidelines may lead to a lack of consistency and fairness in assessing penalties.

Ivan Moore vs. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 092 (Nov. 17, 2008). Board has no authority to impose lifetime suspended penalty without a final discharge date.

Parker Drilling Co. vs. Melchor, Alaska Workers' Comp. App. Comm'n Dec. No. 091 (Oct. 28, 2008). Allowable recalculation of gross wages based on gross unfairness under rationale of *Peck v. Alaska Aeronautical, Inc.* does not support a retrospective application of increases in maximum compensation rates established in AS 23.30.175(a) to persons injured before they became effective.

Parker Drilling Co. vs. Melchor, Alaska Workers' Comp. App. Comm'n Dec. No. 091 (Oct. 28, 2008). AS 23.30.220(a)(10) does not provide a maximum permanent total disability compensation rate that exceeds the applicable maximum compensation rate in AS 23.30.175(a).

Parker Drilling Co. vs. Melchor, Alaska Workers' Comp. App. Comm'n Dec. No. 091 (Oct. 28, 2008). Gross earnings adjustment for permanent total disability compensation rate requires a detailed inquiry into the employee's lifetime earning capacity, including diminishment during retirement, but permanent total disability compensation continues at a level rate beyond retirement.

Tire Distr. Sys. vs. Chesser, Alaska Workers' Comp. App. Comm'n Dec. No. 090 (Oct. 10, 2008). Where board did not find that the claim was based on highly technical medical considerations, medical evidence was not required to attach the presumption of compensability.

Cameron v. TAB Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 089 (Sept. 23, 2008). Board may vary its procedures if manifest injustice to a party would result from a strict application of the board's regulations, but improper failure to vary will not be overturned as abuse of discretion in the absence of a showing of prejudice on appeal.

Cameron v. TAB Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 089 (Sept. 23, 2008). Refusal to admit records not abuse of discretion when evidence demonstrated lack of good faith attempt to comply with the regulations regarding medical records or due diligence, and proponent did not request the records until less than 20 days before the hearing.

Cameron v. TAB Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 089 (Sept. 23, 2008). Board not required to grant lesser sanction or continuance to proponent of late evidence when proponent had 2 weeks earlier vigorously objected to opposing party's request for continuance and asserted he was ready for hearing.

Cameron v. TAB Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 089 (Sept. 23, 2008). At first step of presumption analysis, board should not weigh the credibility of the evidence; the board must simply decide if the evidence, including employee testimony, would be sufficient to attach the presumption if it were believed. Rejection of testimony as insufficient to attach presumption because not credible required remand.

Alaska R & C Communications vs. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 088 (Sept. 16, 2008). Board abused its discretion in denying uninsured, unrepresented employer opportunity for rehearing on modification in order to allow employer to present his exculpatory or mitigating evidence when board gave no prior notice of kinds of evidence it would consider in assessing penalty, had previously cancelled without warning hearings employer attended, and board based decision in part on employer's credibility.

Alaska R & C Communications vs. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 088 (Sept. 16, 2008). The factors to be considered in assessing a penalty are set out in 4 broad categories: factors to be considered on a sliding scale; factors bearing on culpability; the community interest; and, employer's ability to pay.

Alaska R & C Communications vs. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 088 (Sept. 16, 2008). Penalty order vacated where board did not consider the nature of the business and lacked substantial evidence that the business would survive imposition of a penalty to pay that exceeds its average quarterly payroll and that totals, with the suspended portion, approximately 80% of its annual payroll.

Moore vs. Afognak Native Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 087 (Aug. 25, 2008). The presumption in a claim for permanent replacement of a joint may be rebutted by medical expert testimony that the need for the joint replacement is not the result of a temporary exacerbation of the pre-existing condition.

Moore vs. Afognak Native Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 087 (Aug. 25, 2008). When the board makes a mistake in the application of the law, or lacks substantial evidence to support a finding of fact, the commission determines if the board's error prejudices the substantial rights of a party before reversing the board's decision. Board mistake is not grounds for reversal if the erroneous finding or conclusion of law is not necessary to the board's decision.

Moore vs. Afognak Native Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 087 (Aug. 25, 2008). Board lacked evidence on which to base a finding of bias in the sense of medical opinion expert testimony being tangential to question before board, or bias in the sense of being influenced by personal preference, dislike or financial interest in the outcome, so board rejection of opinion because it "may be biased" is error.

Hope Community Resources vs. Estate of Rodriguez, Alaska Workers' Comp. App. Comm'n Dec. No. 086 (Aug. 8, 2008). Death of employee moots appeal of board order directing SIME and reemployment benefits as no liability imposed by the board's order survives; public interest exception does not apply.

Interior Fuels v. Hornbeck, Alaska Workers' Comp. App. Comm'n Dec. No. 085 (July 31, 2008). Adherence to the time limit for filing a motion for extraordinary review and requirement that it be filed before a petition for reconsideration will not produce injustice where the board's legal error (based on misreading Commission's holding in *Univ. of Alaska v. Hogenson*) denying petition to dismiss claims may be readily corrected on appeal and movants were fully prepared to go to hearing on the merits of the claims.

Interior Fuels v. Hornbeck, Alaska Workers' Comp. App. Comm'n Dec. No. 085 (July 31, 2008). The commission's regulations establishing extraordinary review were designed to avoid interference in the board's fact-finding process and to favor review after the parties have exercised their rights to present and challenge evidence and the board has an opportunity to fully develop the record and weigh the evidence.

Alcan Elec. vs. James, Alaska Workers' Comp. App. Comm'n Dec. No. 084 (July 18, 2008). Factors to be considered by designated officer in determining if good cause exists to depart from the regulations with regard to setting hearing dates for dispositive petitions are:

- 1 the complexity of the case as a whole and severability of contested factual or legal disputes;
- 2 the contribution of the parties to fair, orderly and economical resolution of the case;
- 3 if a party has alleged all the elements (presents a prima facie case) of a defense in a petition to dismiss the claim that would, if valid, dispose of entire claim;
- 4 if the parties would be saved considerable time and expense to prepare for hearing, as well as the imposition on witnesses ordered to appear and testify, if the dispositive petition is successful and the possibility of settlement exists if the dispositive petition is not successful;
- 5 the board's calendar and whether the possible benefits of hearing the dispositive petition first and separately outweigh the burden to the claimant associated with any delay of the hearing on the merits and the burden to the defendants if presentation of evidence on the merits affects fair consideration of the dispositive petition.

Alcan Elec. vs. James, Alaska Workers' Comp. App. Comm'n Dec. No. 084 (July 18, 2008). Where pre-hearing conference summary did not provide a basis for her decision to depart from the regulations, but movants agreed to the process outside the regulations, movants did not preserve their objections, and later events provided opportunity for correction of error, the movants failed to establish prejudicial error requiring immediate review.

Alcan Elec. vs. James, Alaska Workers' Comp. App. Comm'n Dec. No. 084 (July 18, 2008). Board's decision affirming a prehearing officer's denial of bifurcation contains possible error, but, because the movants did not demonstrate what material evidence would have been provided to the board or officer relevant to the factors favoring bifurcation, failure to consider those factors by officer or the board did not prejudice movants.

Alcan Elec. vs. James, Alaska Workers' Comp. App. Comm'n Dec. No. 084 (July 18, 2008). Board may not consider the likelihood of employee's attorney receiving payment for his services when deciding hearing dates on dispositive motions, or that the hearings ought to be arranged with a view to encouraging the best opportunity for employee's success because his attorney is paid on a contingent fee. Doing so encourages a pre-judgment of which party ought to prevail at hearing.

Velderrain vs. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 083 (July 9, 2008). Stop order against uninsured employer must be in writing to be effective.

Velderrain vs. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 083 (July 9, 2008). In assessing penalty for stop order violation, board must have substantial evidence that employer used employee labor for every day penalty is assessed, and not simply count calendar days between order and compliance. Penalty is for violation of order barring use of employee labor, not being an uninsured business.

Velderrain vs. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 083 (July 9, 2008). The power to declare statute setting penalty of \$1000 per day unconstitutional is reserved to the courts but the commission notes that a penalty of \$1000 per day for violation of a state order not to use employee labor is not outside the range of other fines levied for violation of protective administrative stop orders issued by the state, as in occupational safety and health penalties for unsafe working conditions.

Municipality v. Monfore, Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008). In AS 23.30.095(c), the word "claim" in the first sentence of means "right."

Municipality v. Monfore, Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008). Failure to provide notice of treatment acts as a claim-bar; but "notice" means sufficient notice adequate to alert the board and the employer of the general scope of treatment.

Municipality v. Monfore, Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008). Notice by the employee, if provided to the employer and the board, and adequate to alert the board and the employer of the general scope of treatment, is sufficient to avoid the claim-bar.

Municipality v. Monfore, Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008). Compliance with AS 23.30.095(l) (substantially reenacted as AS 23.30.097(d)) and 8 AAC 45.082, requires a written report from the provider to trigger the employer's obligation to pay the provider.

Municipality v. Monfore, Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008). Statutes place the burden of reporting on the treatment provider; board may not assess a penalty based on the employer's failure to "secure" reports and statements from provider.

Municipality v. Monfore, Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008). Penalties on late paid medical expenses are owed to the recipient of the payment of the medical expense, not the recipient of the medical benefit.

Municipality v. Monfore, Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008). Where medical provider was not a party to the proceeding before the board, and there is no evidence that the employee was authorized to act on its behalf, the board should have required provider, as the real party in interest, to appear before adjudicating provider's interests where provider's conduct is alleged to result in a bar to the claim for payment.

Greens Creek Mining Co. v. Second Inj. Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 080 (June 9, 2008). The presumption that an employee's claim is compensable in AS 23.30.120(a)(1) does not extend to an employer's request for reimbursement from the Second Injury Fund.

Greens Creek Mining Co. v. Second Inj. Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 080 (June 9, 2008). Second Injury Fund liability for reimbursement of compensation under AS 23.30.205 includes compensation paid pursuant to AS 23.30.041(k), but that liability for reimbursement is not triggered until 104 weeks of disability compensation has been paid.

Greens Creek Mining Co. v. Second Inj. Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 080 (June 9, 2008). Board may not award attorney fees against the Second Injury Fund under AS 23.30.145.

Olekszyck v. Smyth Moving Co., Alaska Workers' Comp. App. Comm'n Dec. No. 079 (May 28, 2008). There is no statutory presumption that an appeal is filed on time, so, to establish good cause to excuse late filing, the appellant must produce sufficient evidence to persuade the commission by a preponderance of the evidence that he should be excused from compliance with the statutory time period of 30 days.

Municipality v. Faust, Alaska Workers' Comp. App. Comm'n Dec. No. 078 (May 22, 2008). The 2005 amendment to AS 23.30.041(c) establishing mandatory eligibility evaluation on occurrence of 90 consecutive days of disability, is substantive, not merely procedural. The board erred in directing the administrator to apply the amended version of AS 23.30.041(c) retrospectively to employee injured before effective date of amendment who failed to file a timely request for evaluation under law in effect at the time of injury.

Municipality v. Faust, Alaska Workers' Comp. App. Comm'n Dec. No. 078 (May 22, 2008). Chair may advise commission, but not rule, on matters of law; to do otherwise diminishes the role of the other appeals commissioners. Appeals commission's special authority rests in the knowledge and experience of all members of the commission panel collectively. The collective will and judgment of the commission is expressed in its decisions.

Municipality v. Faust, Alaska Workers' Comp. App. Comm'n Dec. No. 078 (May 22, 2008). Appeals commissioners are obligated by the oath of office to consider and decide all matters assigned to him or her except those in which the commissioner's disqualification is required. Code of Hearing Officer Conduct applies to appeals commissioners in hearing cases.

Seiler vs. F.R.. Bell and Assoc., Alaska Workers' Comp. App. Comm'n Dec. No. 077 (May 22, 2008). Remote site doctrine does not eliminate requirement that the claimant demonstrate link between employment and an injury.

Seiler vs. F.R.. Bell and Assoc., Alaska Workers' Comp. App. Comm'n Dec. No. 077 (May 22, 2008). Employee who conceded "chest pain" was due to pre-existing, non-work related GERD, but who claimed medevac flight was compensable because going to Prudhoe Bay medic (who advised the medevac) was "sanctioned" by the employer, did not establish that flight was a result of an injury as defined in AS 23.30.395(24).

Seiler vs. F.R.. Bell and Assoc., Alaska Workers' Comp. App. Comm'n Dec. No. 077 (May 22, 2008). No evidence before board that going to the clinic resulted in "injury."

BP Exploration Alaska, Inc., vs. Stefano, Alaska Workers' Comp. App. Comm'n Dec. No. 076 (May 6, 2008). Board may not weigh evidence on the claim merits in a ruling on a discovery petition, because in doing so the board deprives both parties of the opportunity to be afforded elements of fundamental due process: notice of the subject of the hearing, an opportunity to be heard and to call and examine witnesses, and for fair consideration of their arguments and evidence.

BP Exploration Alaska, Inc., vs. Stefano, Alaska Workers' Comp. App. Comm'n Dec. No. 076 (May 6, 2008). Strong possibility of board error demonstrated where board stated that Supreme Court recognized that employer medical evaluators are agents of employers during litigation of a claim in *Frazier v. H.C. Price/CIRI Constr. J.V.*, 794 P. 2d 103 (Alaska 1990).

BP Exploration Alaska, Inc., vs. Stefano, Alaska Workers' Comp. App. Comm'n Dec. No. 076 (May 6, 2008). To obtain extraordinary review, movant must demonstrate more than board error, must show injustice that cannot be corrected on appeal or prejudice to ability to litigate claim or right; otherwise immediate review of the board's order will do more than serve as an advisory opinion.

Shehata v. Salvation Army, Alaska Workers' Comp. App. Comm'n Dec. No. 075 (Mar. 19, 2008). Commission awarded attorney fees against appellant employee on divided opinion; two commissioners supported award, each on different grounds: (a) that appeal was vexatious and filed in bad faith as there was no legal support for it and (b) that appellant was not an "injured worker"; chair dissented from decision to award attorney fees on grounds there was insufficient evidence to show appeal was filed in bad faith merely because imprudent or unpersuasive and a strong policy favors access to appeal.

Univ. of Alaska v. Hogenson, Alaska Workers' Comp. App. Comm'n Dec. No. 074 (Feb. 28, 2008). When a claim for benefits expires under AS 23.30.110(c) and is dismissed, a later-filed claim for the same benefits for the same injury will not revive the expired claim, but a later-filed claim for the same benefits *on a different nature of injury previously unknown to the employee, or for a different benefit from the same injury*, is not extinguished with the earlier claim.

Univ. of Alaska v. Hogenson, Alaska Workers' Comp. App. Comm'n Dec. No. 074 (Feb. 28, 2008). Board properly permitted employee's claim for benefits based on allegation of physician interference to survive where viability of claim under Act not an issue before the board in employer's petition to dismiss.

DeNino v. Yukon Flats School Dist., Alaska Workers' Comp. App. Comm'n Dec. No. 072, (Feb. 27, 2008). Alaska Rule of Evidence 404, prohibiting the use of character evidence to prove conduct on a particular occasion, does not bar Board admission of evidence that contradicts a party's testimony and thus suggests the party is lying, or that presents relevant evidence of motive or intent, or that contradicts a party's theory of causation.

DeNino v. Yukon Flats School Dist., Alaska Workers' Comp. App. Comm'n Dec. No. 072, (Feb. 27, 2008). Physician witnesses must be able to frankly state opinions regarding the cause of the injury or illness and the reasons for that opinion, however uncomfortable to the claimant. If the physician's observations, data, and knowledge of medicine lead her to the conclusion that the claimant's account of how the injury occurred is not likely to be true, the physician's report is not inadmissible evidence of the claimant's bad character. It is expert opinion evidence addressing the issue of causation.

DeNino v. Yukon Flats School Dist., Alaska Workers' Comp. App. Comm'n Dec. No. 072, (Feb. 27, 2008). The board is not required to favor lay testimony over medical testimony; board must evaluate lay testimony when the lay evidence may be highly relevant to the issue of causation, even in complex medical cases.

Coalition, Inc., v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 071 (Feb. 15, 2008). The only witness against uninsured employer did not give testimony under oath or affirmation; therefore, the board's reliance on his statements as testimony was insufficient to support its findings. Overlooking requirement that witness be sworn is not harmless error.

Coalition, Inc., v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 071 (Feb. 15, 2008). Board failed to determine if policy of state contractor employer was properly cancelled under AS 23.30.030(5) where there was no evidence of insurer notice to the contracting agency of the state.

Coalition, Inc., v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 071 (Feb. 15, 2008). Mandatory statutory requirement of written notice to contracting agency may not be ignored because the division and employer neglected to address the issue in proceeding to assess penalty for failure to insure without the possibility of imposing liability upon the state and serious sanctions on employer under AS 23.30.045(d); case must reheard.

Martin vs. Nabors Alaska Drilling, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 070 (Feb. 13, 2008). Injury caused by being rear ended by third party driver while sitting on motorcycle at stop light on way to relative's home in California did not occur in course of employment notwithstanding employee's claim that he drove motorcycle to California to find and interview a physician that could successfully treat his back injury, without referral from, or knowledge of, his Alaska attending physician.

Martin vs. Nabors Alaska Drilling, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 070 (Feb. 13, 2008). Alaska law does not recognize pure positional risk as the basis for liability for workers' compensation; injury must arise out of and in the course of employment.

Martin vs. Nabors Alaska Drilling, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 070 (Feb. 13, 2008). Settlement from a personal injury, occurring after the work injury that established the employer's liability, may be the basis of an employer claim for reimbursement limited to the employer's payment of compensation and medical expenses directly attributable to the personal injury's aggravation of the work related injury, but, because employer is not liable for injuries caused by personal injury, employer is not entitled to recover amounts under AS 23.30.015(e)(1)(D).

Sourdough Express, Inc. vs. Barron, Alaska Workers' Comp. App. Comm'n Dec. No. 069 (Feb. 7, 2008). In the absence of evidence of prejudice to the employer, amendment of employee's claim to conform to newly discovered evidence was within the discretion of the board.

Voorhees Concrete Cutting, Inc. vs. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 068 (Feb. 4, 2008). An award of travel costs to a self-represented claimant to attend the hearing at which he or she prevails may be made when the board makes sufficient findings to support an award to a self-represented claimant under 8 AAC 45.180(f) and the credibility of the claimant was at issue, to ensure that the claimant's due process rights are not unfairly burdened.

Voorhees Concrete Cutting, Inc. vs. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 068 (Feb. 4, 2008). The board may not require telephonic attendance if the credibility of a party or party's witness is in issue; this is a factor that should be considered in determining if a venue change would serve the convenience of the parties and witnesses.

Voorhees Concrete Cutting, Inc. vs. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 068 (Feb. 4, 2008). The board may not disproportionately burden one party's access to the board by refusing a change of venue that would benefit both parties' convenience to serve the board's convenience.

Peratrovich vs. Quality Asphalt Paving, Alaska Workers' Comp. App. Comm'n Dec. No. 067 (Jan. 24, 2008). The party challenging the board's ruling on a point of evidence must establish that admission, or exclusion, of the evidence might have affected the outcome of the trier of fact's decision.

Peratrovich vs. Quality Asphalt Paving, Alaska Workers' Comp. App. Comm'n Dec. No. 067 (Jan. 24, 2008). Workers' compensation hearings are not popularity contests; a greater number of physicians on one side, as opposed to the other, does not mean greater weight must be assigned to the majority opinions.

Peratrovich vs. Quality Asphalt Paving, Alaska Workers' Comp. App. Comm'n Dec. No. 067 (Jan. 24, 2008). *Black v. Universal Services* does not require the board to automatically reject a medical expert opinion merely because it is not the same as other medical opinions; the Supreme Court's rejection of Dr. Pennell's report in *Black* rested as much on the "slender evidentiary support" for it as the singularity of his opinion.

Peratrovich vs. Quality Asphalt Paving, Alaska Workers' Comp. App. Comm'n Dec. No. 067 (Jan. 24, 2008). The existence of contradictory evidence, even evidence another panel might find more probative, or competing inferences that may be drawn from the evidence, does not allow the commission to overrule the board.

Witbeck v. Superstructures, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 066 (Jan. 23, 2008). 8 AAC 45.082(c)(2) allows the first designation of attending physician to be done by getting treatment, but, whether or not employer consent is required, notice of a change from the first designated attending physician must be given before the change takes effect – that is, when the employee gets "treatment, advice, an opinion, or any type of service . . . for the injury."

Witbeck v. Superstructures, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 066 (Jan. 23, 2008). Notice of change of attending physician must be writing to which, if the change is not the first change, the employer must respond within 14 days to record consent or denial.

Witbeck v. Superstructures, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 066 (Jan. 23, 2008). A workers' compensation hearing officer is not barred from having family members who own or are employed in business; hearing officer is barred from hearing cases in which the family member is a party or the business employing a family member is a party.

Witbeck v. Superstructures, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 066 (Jan. 23, 2008). Ownership or management of a business that also experiences workers' compensation claims, but which is not a party to the matter being heard, does not disqualify an industry member. Membership or holding office in a labor union whose members file workers' compensation claims, but are not a party to the matter being heard, does not disqualify a labor member.

