

Case: *University of Alaska Fairbanks and University of Alaska Statewide Office of Risk Management vs. Norman E. Hogenson*, Alaska Workers' Comp. App. Comm'n Dec. No. 074 (February 28, 2008)

Facts: Hogenson filed a claim on June 19, 2001, that stated that the "University of Alaska Fairbanks, Risk Management has stoped [sic] payment on my claim! I am requesting immediate action on this claim! And also the 25% penalty for being late!" On this claim form, Hogenson requested temporary total disability (TTD) from August 21, 2000, and continuing; permanent partial impairment (PPI); interest, attorney's fees and costs. The claim was answered and controverted. The controversion listed the benefits controverted as: "PPI, TTD, PTD, eligibility review, penalty, interest or fees." Dec. No. 074 at 5.

A year later, on June 25, 2002, Hogenson filed another claim that stated:

At this time 6/24/02: I am asking that the Permanent Partial Rating of 6/22/00 by Dr. Pierson be removed! And my by [sic] weekly benefits be reinstated; plus the 25% penalty! The reason; My employer, UAF risk management use there [sic] Dr., Dr. John Joosse, to influence my Doctor's in a negative way. *Id.* at 6.

On the reverse of the form, Hogenson checked the box for "Temporary Total Disability" and wrote below, "from June 22, 2000 through continuing." This claim was answered, but no further controversion was filed until November 6, 2002. This controversion was limited to "the SIME PPI rating," and stated: "Prior controversions addressing PPI are adopted and incorporated herein."

The board found that Hogenson first requested a hearing on his 2001 claim when he filed an Affidavit of Readiness for Hearing on January 24, 2007, well beyond the two years required by AS 23.30.110(c). However, the board found that the employee was asserting an "essentially different, and new, basis for claiming TTD benefits in the Workers' Compensation Claim of June 25, 2002." The June 25, 2002, claim had not been controverted "on a board-prescribed controversion notice." Therefore, the board found, the two-year time limit had not yet begun to run against the June 25, 2002, claim.

Applicable law: AS 23.30.110(c) states: "If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied."

The commission

conclude[d] that 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 may not revive the expired claim, but that 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. Dec. No. 074 at 10.

Based on the Supreme Court's decision in *Bailey v. Texas Instruments, Inc.*, [111 P.3d 321, 324-25 (Alaska 2005)] we hold that denial and dismissal of a particular claim under AS 23.30.110(c), after the dilatory party is given notice and opportunity to present evidence and argue against dismissal of the claim, has the effect of dismissal with prejudice, and precludes raising a later claim for the *same* benefit, arising from the *same* injury, against the *same* employer, based on the *same* theory (nature) of injury. *Id.* at 14.

The commission noted that

unlike plaintiffs in actions at law, a workers' compensation claimant is not restricted to filing a single, unified claim for *all* compensation and damages he or she is owed, now and in the future, as a result of the injury, nor need he or she put them to trial all at once, hazarding the future on one jury's estimation of the evidence. Over the lifetime of a workers' compensation case, many claims may be filed as new disablements or medical treatments occur. *Id.* at 14 n.77.

Holding/analysis: First, the employer argued that it controverted the 2002 claim in November 2002. But because the controversion specifically controverted only the "SIME PPI rating" and the SIME doctor did not address when medical stability was reached (which would mean the end of entitlement to TTD), the commission concluded the employer's November 2002 controversion of the SIME PPI rating was not a controversion of TTD benefits. Additionally, the controversion did not address Hogenson's claim of undue influence. The commission thus concluded a partial controversion will not suffice to time-bar uncontroverted benefits.

Second, the employer argued that the 2002 claim was the same as the 2001 claim that was time-barred and thus the 2002 claim should have been barred as well. The commission concluded that the 2002 claim was barred to the extent that it duplicated the benefits sought in the 2001 claim. But that the different benefits in the 2002 claim – a 25% penalty and TTD compensation from June 22, 2000, and continuing (instead of from August 21, 2000, and continuing) – were not time-barred to the extent that they were not duplicated. (Thus, Hogenson could seek about two months of TTD benefits.)

Finally, the commission also concluded that Hogenson's claims were not time-barred to the extent that they relied on an alternative theory of injury, that his own physician's opinion is invalid owing to interference by the employer's medical evaluator. The commission concluded that this theory did not rely on the same core set of facts as for the original injury and initial treatment because the theory was based on subsequent interference of Hogenson's right to medical treatment. Because the employer did not controvert the undue influence claim, it was not time-barred, and, thus, that claim could also proceed to hearing.