

# Alaska Workers' Compensation Appeals Commission

Utility Technologies, Inc. and Liberty  
Northwest Insurance Company,  
Appellants,

vs.

Dale D. King,  
Appellee.

ORDER ON MOTION FOR STAY  
Memorandum Decision No. 193

October 29, 2013

AWCAC Appeal No. 13-021  
AWCB Decision No. 13-0110  
AWCB Case No. 200909645

Motion for Stay of Alaska Workers' Compensation Board Final Decision and Order No. 13-0110, issued September 6, 2013, at Anchorage, Alaska, by southcentral panel members Linda M. Cerro, Chair, Patricia Vollendorf, Member for Labor, and Dave Kester, Member for Industry.

Appearances: Rebecca Holdiman Miller, Holmes Weddle & Barcott, P.C., for appellants, Utility Technologies, Inc. and Liberty Northwest Insurance Company; Keenan R. Powell, for appellee, Dale D. King.

Commission proceedings: Appeal filed September 16, 2013, with motion for stay; opposition filed September 25, 2013; hearing on motion for stay held October 10, 2013.

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

## *1. Introduction and Factual Background.*

Appellee, Dale D. King (King), was employed by appellant, United Technologies, Inc. (UT), as an operating engineer when, on April 27, 2009, he injured his back.<sup>1</sup> He filed a workers' compensation claim on July 16, 2009; UT controverted all benefits on August 7, 2009.<sup>2</sup> At UT's request, King submitted to an employer's medical evaluation

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<sup>1</sup> See *Dale D. King v. United Technologies, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 13-0110 at 3 (Sept. 6, 2013). The other appellant in this appeal is UT's workers' compensation insurance carrier, Liberty Northwest Insurance Company (Liberty Northwest).

<sup>2</sup> See *id.*

(EME) by Timothy Borman, D.O., orthopedic surgeon, which took place on October 19, 2009.<sup>3</sup> Dr. Borman's report indicated that, despite King's pre-existing lumbar degenerative disc disease, his herniated nucleus pulposus and radiculopathy were the result of the April 27, 2009, work event.<sup>4</sup> UT/Liberty Northwest then accepted the compensability of King's claim.<sup>5</sup>

Thereafter, following multiple back surgeries performed by orthopedic surgeon James Eule, M.D., in October 2011, King was referred to Shawn Johnston, M.D., a physiatrist, for chronic pain management.<sup>6</sup> At the time, King was prescribed Lyrica, Nucynta, a pain medication, and Flexeril, a muscle relaxant.<sup>7</sup> Dr. Borman performed a follow-up EME on November 3, 2011, after which he concluded that the April 27, 2009, work event was the substantial cause of King's lumbar symptoms and need for treatment, and that the treatment was reasonable and necessary.<sup>8</sup> It was also Dr. Borman's opinion that, as a result of the April 27, 2009, work event, King would need monthly treatment for pain control for the rest of his life and monthly treatment to help adjust his medications.<sup>9</sup> Thereafter, Dr. Johnston wrote Nucynta prescriptions at semi-monthly intervals.<sup>10</sup> The cost of a fifteen-day supply of Nucynta exceeds \$400.<sup>11</sup> At some time prior to June 4, 2012, Dr. Johnston changed King's muscle relaxant medication from Flexeril to Zanaflex, which he prescribed at monthly intervals.<sup>12</sup>

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<sup>3</sup> See *King*, Bd. Dec. No. 13-0110 at 3.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at 4.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 5.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* at 5, 6, 8, 9, 12.

<sup>11</sup> See *id.* at 5.

<sup>12</sup> See *id.* at 6, 8, 9, 12. "King receives the generic equivalent, tizanadine, for the Zanaflex prescriptions." *Id.* at 6.

On or about May 21, 2012, King presented Dr. Johnston's May 18, 2012, Nucynta prescription to his pharmacy for a refill. The pharmacist declined to refill it, indicating the insurer would not authorize payment until further information was received from Dr. Johnston.<sup>13</sup> That same day, King filed a workers' compensation claim for prescription medicine costs, penalty, interest, unfair or frivolous controversion, attorney fees and costs.<sup>14</sup> The authorization was received between 5 to 7 days later and the prescription was refilled.<sup>15</sup> On May 23, 2012, a representative of Liberty Northwest wrote to Dr. Johnston stating that King's claim remained open for medical benefits and requested information regarding his current medications, their fill frequency, the diagnosis, and the prescribing physician.<sup>16</sup> Dr. Johnston provided a written response dated June 4, 2012, in which he indicated he was prescribing Nucynta semi-monthly and Zanaflex monthly for King's lower back.<sup>17</sup>

On or about July 2, 2012, King attempted to have his Zanaflex prescription refilled. He was told by the pharmacist that the insurer declined to do so.<sup>18</sup> King filed another workers' compensation claim on July 19, 2012, for prescription medicine costs, penalty, interest, unfair or frivolous controversion, attorney fees and costs.<sup>19</sup> On November 2, 2012, King's attempt to have his Nucynta prescription refilled was unsuccessful. He was informed by the pharmacist that the insurer had denied payment for the prescription because it needed prior approval.<sup>20</sup>

On December 31, 2012, following a mediation, the parties filed a settlement agreement with the board which resolved King's claims for all benefits except

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<sup>13</sup> See *King*, Bd. Dec. No. 13-0110 at 6-7.

<sup>14</sup> See *id.* at 7.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 8.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at 9.

<sup>20</sup> See *id.* at 10.

permanent total disability (PTD) and medical benefits, the latter remaining open.<sup>21</sup> On January 4, 2013, King again presented a prescription for a Nucynta refill, which the pharmacist declined to provide.<sup>22</sup>

The prescriptions at issue in this appeal dated May 18, 2012, July 2, 2012, November 2, 2012, and January 4, 2013, were all refilled in 5 to 7 days.<sup>23</sup>

On June 6, 2013, the Alaska Workers' Compensation Board (board) held a hearing on King's claim for medical costs, specifically preauthorization and payment for prescription medications, unfair or frivolous controversion, penalty, interest, attorney fees and costs.<sup>24</sup> The board issued its decision on September 6, 2013. A majority concluded: 1) that King "is entitled to continuing, uninterrupted care in the form of preauthorized prescription pain and muscle relaxant medications[;]" 2) that King "is entitled to have his prescriptions filled upon presentment to the pharmacy[;]" 3) that UT's failure to refill his prescriptions on the four dates at issue constituted controversions in fact; 4) that King is not entitled to penalty or interest; 5) that UT's controversions were utterly frivolous and merit referral to the Division of Insurance as potential unfair claim settlement practices; and 6) that King is entitled to an award of attorney fees and costs totaling \$10,951.32.<sup>25</sup> The third board member concurred 1) that King is entitled to continuing, uninterrupted care in the form of prescription pain and muscle relaxant medications; 2) that UT's failure to refill King's prescriptions on May 21, 2012, and July 2, 2012, constituted controversions in fact; and 3) that King is not entitled to a penalty or interest.<sup>26</sup> That board member dissented with respect to the majority's conclusions that 1) King's prescriptions must be filled on presentment; 2) UT's controversions merit referral to the Division of Insurance; and 3) King is entitled

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<sup>21</sup> *See King*, Bd. Dec. No. 13-0110 at 10.

<sup>22</sup> *See id.* at 11.

<sup>23</sup> *See id.* at 41 (concurring and dissenting opinion).

<sup>24</sup> *See id.* at 1.

<sup>25</sup> *See id.* at 37.

<sup>26</sup> *See id.* at 40-42.

to an award of fees and costs in the amount of \$10,951.32.<sup>27</sup> He would award fees and costs of \$5,475.66.<sup>28</sup>

UT appealed the board's decision to the Workers' Compensation Appeals Commission (commission). In connection with that appeal, UT filed a motion for stay. The commission held a hearing on the motion on October 10, 2013.<sup>29</sup>

*2. Applicable law.*

**AS 23.30.125. Administrative review of compensation order.**

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

**8 AAC 57.100. Applications for stays.**

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

. . . .

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

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<sup>27</sup> See *King*, Bd. Dec. No. 13-0110 at 40-42.

<sup>28</sup> See *id.* at 42.

<sup>29</sup> At oral argument, the parties notified the commission that King's attorney fees had been paid, thus eliminating the board's attorney fees award as an issue in contention between the parties and one to be considered and ruled upon by the commission.

- (1) that it would suffer irreparable damage; and
- (2) the existence of the probability that the merits of the appeal will be decided adversely to the compensation recipient.

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

**AS 23.30.095. Medical treatments, services, and examinations.**

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

**AS 23.30.097. Fees for medical treatment and services.**

. . . .

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

(g) Unless the employer controverts the prescription charges the employer shall reimburse an employee's prescription charges under this chapter within 30 days after the employer receives the health care provider's completed report and an itemization of the prescription charges for the employee.

**8 AAC 45.082. Medical Treatment.**

. . . .

(d) Medical bills for an employee's treatment are due and payable no later than 30 days after the date the employer received the medical provider's bill, a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and a completed report in accordance with 8 AAC 45.086(a). Unless the employer controverts the prescription charges or transportation expenses, an employer shall reimburse an employee's prescription charges or transportation expenses for medical treatment no later than 30 days after the employer received the medical provider's completed report in accordance with 8 AAC 45.086(a), a written justification of the medical necessity for dispensing a name-brand drug product if required for the filling of a prescription that was part of the treatment, and an itemization of the prescription numbers or an itemization of the dates of travel, destination, and transportation expenses for each date of travel.

### 3. *Standard of review.*

We exercise our independent judgment when reviewing questions of law and procedure.<sup>30</sup> We review the board's application of its regulation to the facts to determine whether the board's decision was arbitrary, unreasonable, or an abuse of discretion.<sup>31</sup> An abuse of discretion occurs if we are left with a "definite and firm conviction" that the decision reviewed was a mistake.<sup>32</sup>

### 4. *Discussion.*

#### a. *The standards for stays of board orders.*

In the past, three Alaska Supreme Court (supreme court) cases have been consistently cited as developing the legal standards pertaining to stays of board orders, as provided for in AS 23.30.125(c).<sup>33</sup> Reviewing these cases, in *Bignell*, the supreme court stated: "We held in *Johns*, 431 P.2d at 154, that the employer must make a showing of 'irreparable damage' in order to obtain a stay. We interpreted the statutory

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<sup>30</sup> See AS 23.30.128(b).

<sup>31</sup> See *Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 960 (Alaska 1998).

<sup>32</sup> See *Municipality of Anchorage v. Devon*, 124 P.3d 424, 429 (Alaska 2005).

<sup>33</sup> See *Johns v. State, Dep't of Highways*, 431 P.2d 148 (Alaska 1967); *Wise Mechanical Contractors v. Bignell*, 626 P.2d 1085 (Alaska 1981)(*Bignell*); *Olsen Logging Co. v. Lawson*, 832 P.2d 174 (Alaska 1992). When *Johns* was decided, AS 23.30.125(c) read:

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

term 'irreparable damage' to require a showing both of the financial irresponsibility of the claimant and the existence of the probability that the merits of the appeal will be decided adversely to him."<sup>34</sup> In *Olsen Logging*, the majority traced the development of the standard for stays of board orders. After noting that irreparable damage can also consist of an inability on the part of the employer to recoup amounts paid from future compensation payments,<sup>35</sup> the majority held that "the 'irreparable damage' component of the statute [was] expanded in *Bignell* and *Johns* to include the probability of success on the merits requirement[.]"<sup>36</sup>

The other notable aspect of the *Olsen Logging* decision was that the supreme court distinguished between two broad categories of benefits potentially subject to stays on appeal of workers' compensation board orders, 1) awards consisting of ongoing periodic disability payments, and 2) awards of lump sums,<sup>37</sup> and wondered whether it "should adopt a more lenient standard for stays of lump sum workers'

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<sup>34</sup> *Bignell*, 626 P.2d at 1087.

<sup>35</sup> *See Olsen Logging*, at 176, citing *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991).

<sup>36</sup> *Olsen Logging*, 832 P.2d at 175. However, in his partial dissent, Justice Burke stated:

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

<sup>37</sup> *See Olsen Logging*, 832 P.2d at 176.

compensation awards[,]”<sup>38</sup> the type of award that was at issue.<sup>39</sup> As part of its analysis, the supreme court discussed the “balance of hardships” approach to stays.<sup>40</sup>

If the balance of hardships approach were applied to stays of workers' compensation awards, it would almost invariably result in application of the “probability of success on the merits” standard when the award consists of ongoing periodic disability payments on which an employee relies as a salary substitute. The employee is presumed to be inadequately protected in this situation because the hope of a future award is a meager substitute for life's daily necessities. This is the justification for the rule that in order to obtain a stay in such cases, the employer must show both irreparable damage and the probability of success on the merits. *Bignell*, 626 P.2d at 1087.

However, in most cases involving lump sum awards the balance is different. The employee can be adequately protected and the employer generally stands to suffer the greater hardship. In both periodic payment and lump sum payment cases, a supersedeas bond will insure payment if the employee prevails on appeal. However, an employee is usually not dependent on lump sum awards for his daily living expenses. On the other hand, the employer's opportunity to recover amounts paid the employee is either limited or non-existent, even if the employee is financially able to repay them.<sup>41</sup>

After briefly discussing the difficulties employers would have in recovering amounts paid as lump sum awards,<sup>42</sup> the supreme court ultimately concluded “that the lesser ‘serious and substantial questions’ standard be used when a lump sum award is sought to be stayed.”<sup>43</sup>

Thus, in the wake of the *Olsen Logging* decision, to obtain a stay of an award of ongoing periodic disability payments, an employer would have to show irreparable damage, that is, demonstrate 1) either the financial irresponsibility of the claimant or

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<sup>38</sup> *Olsen Logging* at 175.

<sup>39</sup> *See id.* at 174.

<sup>40</sup> *See id.* at 175-76.

<sup>41</sup> *Id.* at 176.

<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

the employer's inability to recoup benefits paid, and 2) the existence of the probability that the merits of the appeal would be decided adversely to the claimant. To obtain a stay of a lump sum award, an employer would have to show that the appeal presented a serious and substantial question.

As part of the 2005 amendments to the Alaska Workers' Compensation Act, which included creation of the commission,<sup>44</sup> AS 23.30.125(c) was amended. "Irreparable damage" was retained as the general standard. For stays of continuing future periodic compensation payments, an employer must demonstrate "irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments."<sup>45</sup> The statute, as amended, does not otherwise specify a standard for stays of lump sum awards.<sup>46</sup> Recently, the supreme court handed down a decision construing §.125(c) as amended.<sup>47</sup> In *Adamson*, the court held that future medical benefits are continuing future periodic compensation payments.<sup>48</sup> Because we conclude that receipt of the prescription medications at issue in this proceeding are future medical benefits, pursuant to the holding in *Adamson*, they may be subject to a stay on appeal, provided that the employer can demonstrate irreparable damage, that is 1) either the financial irresponsibility of the claimant or the inability to recoup benefits paid, and 2) the

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<sup>44</sup> See AS 23.30.007.

<sup>45</sup> AS 23.30.125(c).

<sup>46</sup> A principle of statutory construction provides that legislatures are presumed to be aware of court decisions when amending statutes. See *Young v. Embley*, 143 P.3d 936, 945, n.51 (Alaska 2006). Here, the only lump sum award that the board made was for attorney fees and costs, which have since been paid and are no longer at issue. Because this issue is now moot, there is no longer the need, in connection with this appeal, for the commission to construe whether §.125(c), as amended, has eliminated the "serious and substantial question" standard for stays of lump sum awards.

<sup>47</sup> See *Municipality of Anchorage v. Adamson*, 301 P.3d 569, 577-78 (Alaska 2013)(*Adamson*).

<sup>48</sup> See *Adamson*, 301 P.3d at 578-79.

probability that the merits of the appeal will be decided adversely to the compensation recipient.<sup>49</sup>

*b. What is the applicable standard for a stay of the board's orders that King is entitled to 1) continuing, uninterrupted care in the form of preauthorized prescription pain and muscle relaxant medications; and 2) have his prescriptions filled upon presentment to the pharmacy?*

First, we consider whether UT/Liberty Northwest are likely to prevail on the merits of the prescription issues in this appeal. To decide the merits, that is, whether King is entitled to preauthorization of his prescriptions and having them filled upon presentment to the pharmacy, it would be necessary for the commission to construe and apply AS 23.30.097(g) and 8 AAC 45.082(d). "The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."<sup>50</sup> Statutes are interpreted according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose. Words in statutes are construed using their common meanings unless they have acquired a peculiar meaning, by virtue of statutory definition or judicial construction.<sup>51</sup>

AS 23.30.097(g) provides in relevant part: ". . . *the employer shall reimburse an employee's prescription charges under this chapter within 30 days after the employer receives the health care provider's completed report and an itemization of the prescription charges for the employee.*"<sup>52</sup> Similarly, the board's regulation, 8 AAC 45.082(d) states in part: ". . . *an employer shall reimburse an employee's prescription charges . . . for medical treatment no later than 30 days after the employer received*

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<sup>49</sup> See *Adamson*, 301 P.3d at 578-79.

<sup>50</sup> *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).

<sup>51</sup> See *Adamson*, 301 P.3d 575 (citations omitted).

<sup>52</sup> Italics added.

the medical provider's completed report in accordance with 8 AAC 45.086(a) . . . and an itemization of the prescription numbers[.]”<sup>53</sup>

The word “reimburse” is not defined by statute or regulation,<sup>54</sup> nor is the commission aware of any judicial decision construing “reimburse” such that it has acquired a peculiar meaning. The dictionary defines “reimburse” as “to pay back (an equivalent for something taken, lost, or expended)[.]”<sup>55</sup>

The board, in its decision, and the parties, in their briefing, have not cited or discussed AS 23.30.097(g) in connection with whether King is entitled to preauthorization and filling of his prescriptions upon presentment to the pharmacy. Instead, the board majority based its orders in these respects on AS 23.30.155(a), which requires compensation to be paid “promptly,” and AS 23.30.097(f), which provides that “[a]n employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter.”<sup>56</sup> Because the board majority’s analysis involved the application of these other statutory subsections, principles of statutory construction that pertain to the interpretation of multiple statutes or statutory subsections come into play. “[A]ll sections of an act are to be construed together so that all have meaning and no section conflicts with another.”<sup>57</sup> If one statutory “section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict, the specific section will control over the general.”<sup>58</sup>

We believe the board majority likely erred in failing to consider AS 23.30.097(g), which addresses paying for prescriptions in a more detailed way than AS 23.30.155(a) or AS 23.30.097(f). But at this point, whether or not the three subsections are in

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<sup>53</sup> Italics added.

<sup>54</sup> See AS 23.30.395 and 8 AAC 45.900.

<sup>55</sup> *Webster’s Third New International Dictionary* (2002).

<sup>56</sup> See *King*, Bd. Dec. No. 13-0110 at 28-29.

<sup>57</sup> *In re Hutchinson’s Estate*, 577 P.2d 1074, 1075 (Alaska 1978).

<sup>58</sup> *Id.*

conflict or can be construed harmoniously is an open question. However, we note that neither §.097(g), nor its implementing regulation, 8 AAC 45.082(d), specifies that an employer/carrier must preauthorize the prescriptions and pay for them upon presentment to the pharmacy. The board's imposition of these requirements here appears to be contrary to the plain wording of the statute and regulation and thus may constitute an abuse of discretion.<sup>59</sup> The undisputed testimony was that King was reimbursed for each of the four prescriptions at issue within 7 days, which was otherwise well within the 30-day deadline.<sup>60</sup>

Irrespective of any other consideration, it appears that UT/Liberty Northwest were held to a stricter standard than AS 23.30.097(g) and 8 AAC 45.082(d) impose. Therefore, we assume, without deciding, that the probability exists that the merits of the two prescription-related issues in this appeal will be decided adversely to King.

Second, the commission must consider whether UT/Liberty Northwest may suffer irreparable damage if a stay is not granted. As pointed out earlier in this order, there is only one means for an employer/insurer to recoup benefits paid that are ultimately determined not to be owed: it is to deduct them from continuing payments of other benefits.<sup>61</sup> Here, the present status before the board of King's claim is that his entitlement to continuing future periodic compensation payments in the form of PTD benefits and medical benefits, other than prescriptions, is undecided. Therefore, it is problematic whether he will be awarded more benefits from which overpayments can be deducted. These circumstances constitute irreparable damage.

Consequently, the commission concludes that a stay of these orders is warranted.

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<sup>59</sup> See n.31, *supra*.

<sup>60</sup> See *King*, Bd. Dec. No. 13-0110 at 41 (concurring and dissenting opinion).

<sup>61</sup> See n.35, *supra*.

c. *What is the applicable standard for a stay of the board's orders 1) that UT's failure to refill King's prescriptions on the four dates at issue constituted controversions in fact and 2) that UT's controversions were utterly frivolous and merit referral to the Division of Insurance as potential unfair claim settlement practices?*

The two board orders that relate to the controversions are not awards of continuing future periodic compensation payments, nor are they awards of lump sums. Therefore, the question arises: What is the standard for a stay of such orders?

First, we note that the board majority held: "Employer's controversions in fact were . . . 'utterly frivolous' and thus made in bad faith. The Director will be instructed [Liberty Northwest] engaged in frivolous controversion, and [Liberty Northwest] will be referred to the division of insurance to determine if its representatives committed an unfair claim settlement practice under AS 23.36.125."<sup>62</sup> Our reading of this portion of the board's decision leads the commission to conclude that the majority went so far as to determine that the controversions were unfair. Consequently, the majority's order cannot be meaningfully distinguished from the order at issue in *Crawford & Co. v. Baker-Withrow*.<sup>63</sup> In that case, the supreme court held that, when the board makes a determination that a controversion is unfair, it is a final appealable order "because the board's decision-making process has been completed and its determination has an adverse effect on the insurer since it is binding on the Division of Insurance."<sup>64</sup> Here, the board's decision-making process had been completed in terms of a determination that the controversions were unfair. Therefore, its orders that relate to the controversions and referral to the Division of Insurance are final appealable orders potentially subject to a stay.

Second, we are unaware of any supreme court or commission authority that speaks to the standard for stays of the kind of board orders at issue here.

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<sup>62</sup> *King*, Bd. Dec. No. 13-0110 at 35-36.

<sup>63</sup> 81 P.3d 982 (Alaska 2003)(*Baker-Withrow*).

<sup>64</sup> *Baker-Withrow*, 81 P.3d at 983.

Consequently, we will adopt the rule of law that is most persuasive in light of precedent, reason, and policy.<sup>65</sup>

We reiterate that the balance of hardships approach is to be applied to stays in workers' compensation cases.<sup>66</sup> In terms of the two orders in question, there is no hardship whatsoever to King if they are stayed because the orders do not relate to awards of any kind of benefits *to him*. On the other hand, those same two orders could result in disciplinary action by the Division of Insurance against Liberty Northwest because the board majority found that Liberty Northwest had frivolously controverted the filling of King's prescriptions on the four occasions in question. Applying the balance of hardships approach, the commission concludes that a stay is appropriate where there is no hardship to the employee and some identifiable hardship to the employer or its workers' compensation carrier.

Second, the ruling by the board majority that Liberty Northwest had frivolously controverted the filling of King's prescriptions was based on its conclusion, as pointed out in Part 4(b), that the filling of the prescriptions must be preauthorized and done on presentment to the pharmacy. Because the board majority may have erred in its construction and application of the workers' compensation act in these respects, a stay of its order referring the matter to the Division of Insurance is warranted.

##### *5. Conclusion and Order.*

The motion for stay is GRANTED.<sup>67</sup> We stay the board majority's orders that 1) King is entitled to preauthorized prescription pain and muscle relaxant medications and to have his prescriptions filled upon presentment to the pharmacy; 2) UT/Liberty Northwest's failure to refill his prescriptions on the four dates at issue constituted

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<sup>65</sup> See *Adamson*, 301 P.3d at 573 citing *Lewis-Walunga v. Municipality of Anchorage*, 249 P.3d 1063, 1067 (Alaska 2011).

<sup>66</sup> See *Olsen Logging*, 832 P.2d at 176.

<sup>67</sup> As was done at oral argument, the parties are encouraged to find a way, use of a prescription card, for example, that would facilitate the immediate filling of King's prescriptions, and thus eliminate disputes between them such as the present one.

controversions in fact; and 3) UT/Liberty Northwest's controversions were utterly frivolous and merit referral to the Division of Insurance as potential unfair claim settlement practices.

Date: 29 October 2013 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



*Signed*

David W. Richards, Appeals Commissioner

*Signed*

S. T. Hagedorn, Appeals Commissioner

*Signed*

Laurence Keyes, Chair

CERTIFICATE OF DISTRIBUTION

I certify that on 10/29/13 a copy of this Order was mailed to: R. H. Miller and K. Powell at their addresses of record, and faxed to: R. H. Miller, K. Powell, AWCB Appeals Clerk, and Director of DWC.

*Signed*

K. Morrison, Appeals Commission Clerk

I certify that, with the exception of the addition of the Decision No., this is a full and correct copy of the Order on Motion for Stay issued in the matter of *Utility Technologies, Inc. and Liberty Northwest Insurance Company vs. Dale D. King*, AWCAC Appeal No. 13-021, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 29, 2013. This order is published pursuant to the Order of the Commission, issued April 7, 2014, upon the stipulation of the parties to dismiss the pending appeal and publish the October 29, 2013, order on motion for stay.

Date: April 7, 2014



*Signed*

K. Morrison, Appeals Commission Clerk