

Alaska Workers' Compensation Appeals Commission

Alcan Electrical and Engineering, Inc.
and Seabright Ins. Co.,
Movants, cross-respondents,

vs.

Michael Hope,
Respondent, cross-respondent,
and Redi Electric, Inc. and Novapro
Risk Solutions,
Cross-movants, respondents.

Memorandum Decision and Order
Decision No. 097 January 23, 2009

AWCAC Appeal No. 08-031
AWCB Decision No. 08-0212
AWCB Case No. 200511005

Motions for Extraordinary Review from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 08-0212, given verbally in hearing on October 16, 2008, and issued in writing on November 12, 2008, by southcentral panel members William J. Soule, Chair, and Robert C. Weel, Member for Industry.

Appearances: Joseph M. Cooper, Russell Wagg Gabbert & Budzinski, for movants and cross-respondents Alcan Electrical and Engineering, Inc. and Seabright Ins. Co. Chancy Croft, Croft Law Office, for respondent Michael Hope. Patricia Zobel, DeLisio Moran Geraghty & Zobel, for cross-movants and respondents Redi Electric, Inc. and Novapro Risk Solutions.

Proceedings: Motion for Extraordinary Review of board's October 16, 2008, verbal order filed on October 23, 2008, with Motion for Stay of the board's order. Opposition to motions filed October 31, 2008. Motion for Stay heard November 3, 2008. Notice of board decision no. 08-0212 given November 14, 2008. Status conference held November 14, 2008. Notice of hearing and scheduling order for renewal of Motion for Extraordinary Review and filing cross-motions issued November 17, 2008. Renewed Motion for Extraordinary Review and Motion for Stay filed November 21, 2008. Cross-Appeal of Redi Electric (deemed Cross-Motion for Extraordinary Review) filed November 21, 2008. Opposition to Motions and Cross-Appeal filed November 26, 2008. Hearing on Motions held December 1, 2008. Notice of decision issued December 19, 2008.

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

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

By: Kristin Knudsen, Chair.

Stephen T. Hagedorn, Appeals Commissioner, dissenting in part.

1. Introduction.

These motions for extraordinary review arise from a board order at the conclusion of a hearing on a petition to join a second employer and request for a continuance. The board directed the second employer be joined in the employee's claim against an earlier employer and directed the second employer to pay temporary total disability compensation under AS 23.30.155(d) until his claim was heard. After the commission's hearing on the motion for extraordinary review, the board issued a written decision, again directing the second employer, Alcan Electrical, to pay temporary total disability compensation and also directing the first employer, Redi Electric, to pay for a Second Independent Medical Examination (SIME) under AS 23.30.110(g).

The movants, Alcan Electrical and its insurer, ask the commission to stay the payment of temporary total disability from October 16, 2008, pursuant to AS 23.30.155(d). The movants assert that the board denied it due process because it failed to give them a notice and an opportunity to be heard before ordering payment. The movants also assert that the board failed to accord them due process because no claim was filed against the movants when payment was ordered. Finally, the movants assert that the board violated its own procedures and regulations by considering evidence not in the record at the time of the hearing and by ordering an SIME with an examiner that had opined their employment was the substantial factor in bringing about the need for surgery.

The cross-movants, Redi Electric and its insurer, assert that their due process rights to notice and opportunity to be heard were violated by the board's order directing the cross-movants to pay for an SIME without notice and opportunity to be heard. The respondent, Michael Hope, contests these assertions, and argues that the motion for extraordinary review should not be granted because the issue underlying the objection

to payment of temporary total disability compensation has been settled by the commission's decision in *State, Department of Corrections v. Dennis*. The respondent also argues that cross-movants motion for extraordinary review is defective because it fails to identify the relief it requests. The respondent asserts there has been no violation of due process and requests an award of an attorney fee.

The parties' assertions require the commission to decide if the strong policy against accepting appeals from non-final orders is outweighed for one of the reasons set out in 8 AAC 57.076. The movants and cross-movants argue that they were denied due process; therefore, the commission must decide if the movants and cross-movants demonstrated a strong possibility that the board's order reflects a departure from the board's own regulations and requirements of due process so as to require commission review before a final decision is reached, or the due process issues raised would likely evade review and an immediate decision is needed to provide guidance to the board.

The parties' request for a stay requires the commission to decide if the movants and cross-movants will suffer irreparable harm if they must make the payments ordered by the board and an appeal is decided in their favor. The commission must also decide if, regarding payments under AS 23.30.155(d), the movant demonstrated that the issue is likely to be decided adversely to the recipient, and, regarding payment of an SIME expenses, if the cross-movants raised serious and substantial questions going to the merits of the board's order.

2. Summary of decision.

The commission finds that the sound policy favoring appeals from final orders is outweighed because the movants and cross-movants demonstrated the strong possibility that the board departed from its regulations and requirements of due process so as to call for the commission's power of review by (1) ordering the movants to pay temporary total disability compensation without notice or opportunity to respond to a claim against them, and (2) ordering cross-movants to pay for, and respondent to attend, a Second Independent Medical Examination, without notice. The commission also finds that the issues raised by the motion and cross-motion are likely to evade review and an immediate decision will provide guidance to the board. Therefore, the

commission grants the motion and cross-motion for extraordinary review under 8 AAC 57.76(a)(3) and (4).

Pursuant to AS 23.30.125(c), the commission grants the motion for a stay of the order directing a Second Independent Medical Examination (SIME) pending the outcome of the decision on appeal, unless the parties agree that an SIME is required under AS 23.30.095(k) and one is ordered by the board. The commission majority denies the motion for stay of payment of temporary total disability compensation benefits under AS 23.30.155(d); provided that, insofar as the board's order directed payment of benefits beyond the date of medical stability, the order is stayed effective the date of medical stability, which the recipient's counsel represents will be reached six to eight weeks from the date of hearing. The commission invites the division Director to intervene as the appeal concerns the authority of the board and the interpretation of the Department of Labor and Workforce Development's regulations.

3. Factual background and board proceedings.

The following summary of facts is drawn from the movants' brief, to the extent not opposed by the respondent, the hearing transcript, and the board's decision. When deciding if the commission should grant extraordinary review, the commission does not review the board's findings to determine whether the findings are supported by substantial evidence in light of the whole record. The commission does not have the board record to consult. Therefore, the decision to accept or deny extraordinary review should not be considered as a decision on the merits of the board's decision.

Michael Hope injured his back in a fall from a ladder in June 2005. His employer, Redi Electric, Inc., voluntarily paid an initial period of compensation. Later, a dispute arose and Redi Electric controverted all benefits in March 2007. Hope filed a workers' compensation claim seeking medical benefits and disability compensation from Redi Electric, Inc. in May 2007. The claim was controverted on the grounds that the need for surgery and related disability were not related to the injury in 2005. The parties proceeded toward hearing. In a deposition given in early 2008, Hope said that his back hurt worse after he worked for Alcan Electrical and Engineering, Inc., in 2006.

After Redi Electric's expert witness died, Redi Electric was granted a continuance and opportunity to obtain another expert opinion; Redi Electric also agreed, in return to Hope's consent to the continuance, to pay Hope a short period of temporary compensation benefits. On September 24, 2008, Redi Electric filed a petition to join Alcan Electrical and Engineering as a last injurious employer, although the employee had not filed a claim against Alcan Electrical. Redi Electric also sought a continuance of the hearing scheduled for November 4, 2008. Alcan appeared at a September 30, 2008 "emergency" prehearing conference, but, having not had an opportunity to review the matter, did not take a position before the 20 days permitted to respond to the petition to join. Hope opposed the petition to join.

At a second pre-hearing conference on October 16, 2008, Hope filed a petition for interim compensation. Alcan opposed joinder and advised that if it were joined to the claim, it would request a continuance of the hearing. The workers' compensation officer informed the parties that the petition to join Alcan could be heard the same day at 1:30 p.m. The parties waived notice and appeared shortly afterwards before the board.

After hearing argument, the board excused the parties' attorneys. The workers' compensation officer who had conducted the pre-hearing conference remained in the room. Two other members of the division staff, new hearing officers, also remained in the room. The board called the parties back into hearing and verbally ordered the parties joined. Over an objection by Alcan's counsel, the board verbally directed Alcan Electrical, against whom no claim had been filed, to pay "interim compensation," notwithstanding that the "petition" for interim compensation had only been served that day, no claim had been filed, and the parties understood that the only issue to be decided was the continuance and the petition for joinder.

In the written decision that followed, the board said that the order to pay compensation was based on the self-executing nature of AS 23.30.155(d) and the

assertion of a last injurious exposure defense.¹ It found that “the sole reason for Redi’s current controversion is their last injurious exposure defense.”² It also reviewed the medical evidence,³ including a deposition that was not filed at the time of the hearing,⁴ and sua sponte ordered another SIME.⁵ The board directed that the SIME should be conducted by the same evaluator who previously opined that the work for Alcan was the substantial factor in Hope’s need for back surgery and disability.⁶ No claim had been filed against Alcan Electrical⁷ and Alcan Electrical’s expert had not yet examined Hope.⁸

4. Discussion.

a. Motions for extraordinary review.

These are requests for extraordinary review of a non-final decision and order by the board. The commission exercises restraint in the grant of extraordinary review in order to avoid officious intermeddling in the board process. The commission does not

¹ *Michael Hope v. Redi Electric, Inc.*, Alaska Workers’ Comp. Bd. Dec. No. 08-0212, 43 (November 21, 2008).

² *Id.* at 37 n.215.

³ *Id.* at 2-24, 32-37. Dr. MacDermott’s deposition was taken Oct. 2, 2008, before Alcan was joined as a party. *Id.* at 32.

⁴ *Id.* at 34-37. Dr. Bald’s testimony was taken after the Oct. 16, 2008, hearing on Oct. 17, 2008. *Id.* at 34. The board did not give notice that it was opening the record to consider additional evidence.

⁵ *Id.* at 47. The board based its order on AS 23.30.110(g), which provides:

An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.

⁶ *Id.*

⁷ *Id.* at 40, n.216.

⁸ *Id.* at 47.

grant extraordinary review lightly and will not grant review merely because the board may have made an error. Most errors may be reviewed on appeal from a final decision. The commission grants extraordinary review only when it is persuaded that the standard set in its regulations is met. 8 AAC 57.076(a) provides:

The commission will grant a motion for extraordinary review if the commission finds the sound policy favoring appeals from final orders or decisions is outweighed because

(1) postponement of review until appeal may be taken from a final decision will result in injustice and unnecessary delay, significant expense, or undue hardship;

(2) an immediate review of the order or decision may materially advance the ultimate termination of the litigation, and

(A) the order or decision involves an important question of law on which there is substantial ground for difference of opinion; or

(B) the order or decision involves an important question of law on which board panels have issued differing opinions;

(3) the board has so far departed from the accepted and usual course of the board's proceedings and regulations, or so far departed from the requirements of due process, as to call for the commission's power of review; or

(4) the issue is one that otherwise would likely evade review, and an immediate decision by the commission is needed for the guidance of the board.

The movants and cross-movants assert grounds for review under 8 AAC 57.076(a)(3) and (4).

b. Failure to give notice to the parties that the board would decide certain issues not identified in the pre-hearing.

The movants and cross-movants assert that they did not have notice of the issues that the board decided in the hearing on October 16, 2008, and that this constitutes a denial of due process and violation of the board's procedural regulations. AS 23.30.110(a) gives the board authority to "hear and determine all questions with respect to a claim." But, the Supreme Court limited this grant of authority: "the

language 'all questions' is limited to the questions raised by the parties or *by the agency upon notice duly given to the parties.*"⁹ On the subject of lack of notice of the issues to be decided by the board, the Supreme Court said in *Groom v. State, Dep't of Trans.*,

We have previously held that the crux of due process is the opportunity to be heard and the right to adequately represent one's interests. While the actual content of the notice is not dispositive in administrative proceedings, the parties must have adequate notice so that they can prepare their cases: "[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings." We have also held that defects in administrative notice may be cured by other evidence that the parties knew what the proceedings would entail.¹⁰

The board expressly denied that it had considered the petition for interim compensation filed by Hope the day of the hearing.¹¹ Instead, the board asserted that it based its decision to order Alcan to pay temporary total disability compensation on AS 23.30.155(d). It concluded that once it found that the sole reason Redi Electric disputed payment of compensation was that another employer may be liable, AS 23.30.155(d) required payment of temporary total disability compensation. AS 23.30.155(d) provides that

If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of

⁹ *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981) (emphasis added).

¹⁰ 169 P.3d 626, 635 (Alaska 2007) (footnotes omitted).

¹¹ *Id.* at 43. Although the board did not say so, the petition did not conform to regulation. 8 AAC 45.050(b)(8) bars board action on a petition that is "not in accordance with this paragraph."

the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

In *State, Dep't of Corrections v. Dennis* the commission said that "AS 23.30.155(d) is not applied only to "last-injurious exposure" cases; it is applied in all those cases in which there is no dispute that the employee was injured in employment – and the only dispute is which employment is liable."¹² The commission also said:

In order for there to be a colorable defense that the later employer is the legal cause of the disability, there must be some evidence in the record that would be sufficient to attach the presumption of compensability against the later employment; i.e., that there is sufficient evidence to make, with the aid of the presumption, a prima facie case that the later employer is the legal cause of the disability. If the earlier employer involved asserts other colorable defenses, AS 23.30.155(d) does not apply because the earlier employer's defense is not solely that the last injurious exposure is the legal cause of the disability, and the later employer is no longer assured of reimbursement if it prevails. If the most recent employer has other colorable defenses, AS 23.30.155(d) does not apply against it, because the most recent employer does not dispute liability "solely on the grounds" that another employer is liable.¹³

The effect of AS 23.30.155(d) is to relieve the employee of the wait for temporary compensation *when there is no dispute that he is entitled to the compensation* and the only dispute is which of the other parties is liable to pay the compensation. Thus, before temporary total disability compensation must be paid under AS 23.30.155(d), it must be established (by concession, admission, agreement or board order) that there is no dispute that the employee is entitled to compensation.

¹² Alaska Workers' Comp. App. Comm'n Dec. No. 036, 11 (Mar. 27, 2007).

¹³ Id. at 17.

However, the board in this case ordered payment before Alcan Electrical had an opportunity to respond to the claim to which it had been joined and without notifying the parties that it would decide the issue of the employee's entitlement to temporary total disability compensation. Alcan Electrical had not conceded the issue at the hearing or the prehearing conferences or in written pleadings. Although respondent Hope argues that Redi Electric had withdrawn its earlier controversions, Redi Electric disputed this at hearing on the motions, indicating it continued to assert that even if Alcan Electrical was not the last injurious employer, it was not liable because its employment was not a substantial factor in bringing about the need for surgery and resultant disability.

The board's decision does not state that Redi Electric was notified that the board would decide Hope's entitlement to compensation and make the findings it made in footnote 215 of its decision. Clearly the parties did not believe the employee's petition was to be heard, and the board denies that it acted on the petition. If a party was unaware, or its attorney could not reasonably believe, that the board would decide the disputed issue (if the employee is presently entitled to temporary total disability compensation) in the October 16, 2008, hearing, then the board may have denied the party the right to be heard.

The board's action may have been taken without regard to its own regulations. 8 AAC 45.072(g) provides that, except where the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, "governs the issues and the course of the hearing." A prehearing conference was held in this case. The board's decision does not reflect consideration of unusual and extenuating circumstances for deciding an issue not raised by the parties and with no notice to the parties.

Finally, setting aside the issue of lack of notice, the board relied on the commission decision in *State, Dep't of Corrections v. Dennis*, but it failed to apply the decision completely. It did not examine whether Alcan Electrical disputed the employee's entitlement to compensation solely on the grounds that another employer is liable. The board did not address whether it had power to direct an employer, against

whom no claim had been filed, to pay compensation before the employer had an opportunity to respond to the claim to which it had been joined over its objection.

The cross-movants also claim that the board took up an issue not before it by making findings regarding the medical evidence, including evidence that was not before the board at the time of hearing, and then ordering them to pay for an independent medical examination under AS 23.30.110(g). The board made findings that an independent medical examination would assist it in determining the rights of the parties, but again, the board failed to give prior notice to the parties that it would consider if it should require such an examination.

The movants and cross-movants have raised substantial issues that concern whether the board may make findings on disputed issues and order payment without giving the parties notice that the board will consider the issues and that payment may be ordered without notice to the parties. The commission finds these are issues that may evade review, because the ultimate decision will result in an order of reimbursement or an award of the compensation paid under AS 23.30.155(d), leaving no relief that can be granted by appeal. The examination, once completed, cannot be undone nor, possibly, the cost reimbursed. Because the board ordered the examination and named the examiner without notice, a party is unable to challenge the examiner or need for examination as provided under 8 AAC 45.092. An immediate review may assist the board in the resolution of the case. Therefore, the commission grants extraordinary review. The movants and cross-movants may file an appeal.

c. The cross-movants demonstrated that they faced irreparable harm if the board's order requiring the cross-movants to pay for the examination ordered by the board, but were successful on appeal.

The commission may grant a stay of orders to pay lump sums on appeal upon a showing that the appellants face irreparable harm if the appellants obey the board's order, but the appellants succeed on appeal.¹⁴ Against the appellants' asserted loss, the commission balances the possibility that the appellee will be a future recipient of

¹⁴ AS 23.30.125(c).

compensation from which appellants may recoup the payment ordered, the seriousness of the questions raised on appeal, and the hardships faced by the parties. The harm to the appellant is considered irreparable as a matter of law in workers' compensation appeals when there is no prospect that the sum paid pursuant to board order may be recovered from future compensation paid to the employee (if the movant is successful on appeal), or from the liable employer.¹⁵

In this case, the commission found that the issues raised are serious enough to warrant grant of extraordinary review.¹⁶ Both movants and cross-movants have raised serious and substantial issues going to the merits of the board's order. The cost of an examination under AS 23.30.110(g) is a one-time cost, payable as a lump sum, and is not periodic future compensation payments. Therefore, the cross-movants, who were ordered to pay for an examination under AS 23.30.110(g), need not demonstrate the probability that the decision on appeal will be adverse to the recipient of the future compensation. The cross-movants have no possibility of recovering the cost of the examination from the employee if they prevail on appeal because the board's regulations provide that the cost must be borne by the employer.¹⁷ The cross-movants may not recover the cost of the examination from the other employer, if it is found liable, because the cost of an examination under AS 23.30.110(g) is not a listed legal

¹⁵ *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066-1067 (Alaska 1991).

¹⁶ Issues that are sufficiently serious that they outweigh the strong policy favoring appeals from final decisions are "questions going to the merits [of the board decision] so serious, substantial, difficult and doubtful as to make . . . a fair ground for litigation and thus more deliberate investigation." *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 175-176 (Alaska 1992). See also, *S&W Radiator Shop v. Flynn*, Alaska Workers' Comp. App. Comm'n Dec. No. 005, 4 (Feb. 24, 2006), *Peak Oilfield Services Co. v. Lindgren*, Alaska Workers' Comp. App. Comm'n Dec. No. 003, 3 (Feb. 23, 2006).

¹⁷ 8 AAC 45.090(b) provides that "the board will require the employer to pay for the cost of an examination under AS 23.30.095(k), AS 23.30.110(g), or this section."

cost.¹⁸ Thus, the cross-movants demonstrated that it is possible they will be unable to recover the cost of examination if they prevail on appeal.

The stay of payment for an examination does not deprive the employee of compensation or benefits. The employee will be spared the trip for the examination ordered by the board. If the examination under AS 23.30.110(g) is stayed, the parties still may agree to a similar examination under AS 23.30.095(k), and the board may order such an examination over objection if a medical dispute between the parties' experts exists. Therefore, a stay of the board's order for an examination will not harm the parties, nor deprive them of the right to a second independent medical examination. The commission finds that the cross-movants face irreparable harm and that harm to the cross-movants outweighs the possibility of harm to the other parties. Therefore, it grants the cross-movants' request for a stay of the board's order.

d. Movants demonstrated a possibility of irreparable harm but failed to demonstrate that the likely outcome of the claim for the ordered benefits would be adverse to the recipient of the future periodic compensation ordered.

The commission may grant a stay of a board order pending appeal when the party seeking a stay demonstrates that it would otherwise suffer irreparable harm and, in the case of continuing future periodic payment, the party makes the additional

¹⁸ The cost of deposing an examiner may be recovered, but does not include the cost of the examination itself. 8 AAC 45.180(f)(4). The board *may* include the cost of the examination as "other costs determined by the board," 8 AAC 45.180(f)(17), but an examination under AS 23.30.110(g) is not "necessary and reasonable costs relating to the [applicant's] preparation and presentation of the issues upon which the applicant prevailed." 8 AAC 45.180(f). The examination ordered by the *board* sua sponte is not a cost the future applicants *chose* to incur in order to prepare and present their case. Also, the board ordered Redi Electric to pay for the board's examination under AS 23.30.095(e), *Michael Hope*, Bd. Dec. No. 08-0212 at 48, which requires the employee, "if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon *of the employer's choice* authorized to practice medicine . . . paid for by the employer." (emphasis added). But the board here required the employee to submit to an examination by a physician of the *board's* choice, not the employer's choice. The employer could not have chosen the physician because the board gave the employer no notice.

showing of “the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments.”¹⁹ The commission finds that the payment of temporary total disability compensation under AS 23.30.155(d) is payment of continuing future periodic compensation payments. Therefore, the movants must demonstrate that it is more likely than not that the appeal will be decided adversely to the recipient of the compensation payments.

If the movants’ defense to the employee’s claim on statute of limitations grounds is successful, and the cross-movants are successful in their defense of the claim, then the movants will be unable to recover the compensation they pay the employee. On the other hand, if the movants are successful in their defense and the cross-movants are found liable, the movants will be able to recover the compensation paid pursuant to AS 23.30.155(d).

The outcome of this appeal, however, will not necessarily affect the viability of the employee’s claim and the ultimate decision whether he is entitled to the compensation he claims. The employee has an interest in receiving compensation under the board’s order; but his right to receive it rests on his claim that he is temporarily totally disabled and his disability is compensable. Thus, even if the appeal is decided in the movants’ favor, and the board’s order is reversed, that decision will affect the employee’s right to receive payment under AS 23.30.155(d), but not his right to receive disability compensation under AS 23.30.185²⁰ or AS 23.30.200.²¹

¹⁹ AS 23.30.125(c).

²⁰ AS 23.30.185 provides:

Compensation for temporary total disability. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

²¹ AS 23.30.200 provides:

Temporary partial disability. (a) In case of temporary partial disability resulting in decrease of earning capacity the

The movants present a strong argument that the board failed to provide adequate notice that it intended to take up the issue whether the employee is presently entitled to compensation and whether the sole dispute is which employer is responsible for payment. The movants argue they have strong defenses in the failure of the employee to file a claim and the statute of limitations. They argue there is some evidence in the concurrent receipt of unemployment insurance that the employee's disability is not total and the board disregarded this evidence. However, they presented no evidence or argument the employee will probably not be found to be entitled to compensation in the relevant period as a result of this appeal. Therefore, the majority cannot find that the movants met their burden of demonstrating it is probable that the outcome of the appeal will be adverse to the employee, who, in the majority's view, is the "recipient" of the ordered compensation. The commission majority denies the movants' motion for stay.

compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

(b) The wage-earning capacity of an injured employee is determined by the actual spendable weekly wage of the employee if the actual spendable weekly wage fairly and reasonably represents the wage-earning capacity of the employee. The board may, in the interest of justice, fix the wage-earning capacity that is reasonable, having due regard to the nature of the injury, the degree of physical impairment, the usual employment, and other factors or circumstances in the case that may affect the capacity of the employee to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future.

The commission majority finds the board's order may have exceeded the extent of a permissible order of compensation under AS 23.30.155(d).²² The board stated, "we will award interim compensation until the Board-ordered medical evaluation is completed and we decide the case on its merits."²³ Compensation paid under AS 23.30.155(d) is not a different class of benefit. It is a means of allowing the employee to receive temporary disability compensation to which none of his employers disputes he is entitled, despite their disputes as to who among them is liable for the payment of it. The last potentially responsible employer's obligation to make payments of temporary disability benefits ends when the disability is no longer temporary, even if that point is reached before the resolution of the dispute.²⁴

The board's intent to order payment of compensation "until the Board-ordered medical evaluation is completed and we decide the case on its merits" may result in an order for payment that exceeds the period of the employee's temporary disability. The employee's counsel represented to the commission that medical stability was anticipated in six to eight weeks from the date of hearing on this motion. Therefore, to the extent that the board's order exceeds the board's authority to order payment under AS 23.30.155(d), the board's order is stayed. The short period of payment mitigates, in the majority's view, the hardship represented by the possibility that the movants will be unable to recover the payments made pursuant to the board's order.

²² AS 23.30.155(d) provides in pertinent part: "When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute."

²³ *Michael Hope v. Redi Electric, Inc.*, Bd. Dec. 08-0212, at 44-45. Since these are two different events, which cannot occur on the same date, it is difficult to know which of the two events the board intended to result in termination of the obligation to pay.

²⁴ AS 23.30.185 provides that temporary total disability benefits "may not be paid for any period of disability occurring after the date of medical stability." AS 23.30.200 provides that temporary partial disability benefits "may not be paid for a period of disability occurring after the date of medical stability."

5. Conclusion and Order.

The commission finds the questions raised by the motion and cross-motion outweigh the strong policy favoring appeals from final decisions and orders. Review will provide future guidance to the board. Because the movant does not appeal the order of joinder, commission review need not interrupt the ordinary progress of this case toward a hearing on the claim's merits and a final decision. Therefore, the commission does not take jurisdiction of the entire case, but limits its review to the verbal order issued October 16, 2008, by the Alaska Workers' Compensation Board and its Interlocutory Decision and Order No. 08-0212.

1. The commission GRANTS the motion and cross-motion for extraordinary review of Alaska Workers' Compensation Board Interlocutory Decision and Order No. 08-0212 under 8 AAC 57.76(a)(3) and (4). Other proceedings on the merits of the respondent's claim, not affected by Decision and Order No. 08-0212, may continue before the board.
2. The commission STAYS Interlocutory Decision and Order No. 08-0212, paragraphs 4, 5, and 6, directing a Second Independent Medical Examination (SIME) and ORDERS that the SIME directed by the board is STAYED pending the outcome of the decision on appeal, unless the parties agree an SIME is required under AS 23.30.095(k), and one is ordered by the board.
3. The commission DENIES the motion for stay of payment of temporary total disability compensation benefits under AS 23.30.155(d); provided that, insofar as the board's Interlocutory Decision and Order No. 08-0212, paragraph 3, directs payment of benefits beyond the date of medical stability, the order is STAYED effective the date of medical stability, which the recipient's counsel represents will be reached six to eight weeks after December 1, 2008.
4. The commission invites the division Director to intervene as the appeal concerns the authority of the board and interpretation of statutes and regulations.²⁵

²⁵ In the Notice of Decision issued December 19, 2008, the commission ordered that a notice of director intervention and requests to participate as amicus

5. The commission ORDERS the movants to file a notice of appeal. A cross-appeal may be filed within 15 days of service of the notice of appeal.

Date: 23 Jan 2009

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Jim Robison, Appeals Commissioner

Signed

Kristin Knudsen, Chair

Stephen T. Hagedorn, Appeals Commissioner, dissenting in part.

I agree with the majority to accept the motion for extraordinary review and to stay the board-ordered SIME for the reasons discussed in the majority's decision. I dissent on a single issue, whether Alcan met the standard for a stay of ongoing benefits to the claimant. It is my opinion that it did because of the probability that the board should not have ordered Alcan to pay temporary total disability compensation under AS 23.30.155(d)²⁶ to Hope without notice to Alcan and without first ordering Hope to file a claim against Alcan.

Alaska Statute 23.30.125(c) provides that "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

should be filed with a notice of appeal by January 20, 2009. The movants were directed to file a notice of appeal by the same date.

²⁶ AS 23.30.155(d) provides in relevant part:

When payment of temporary disability benefits is controverted solely on the grounds that another employer . . . may be responsible for all or a portion of the benefits, the most recent employer . . . who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required . . . shall be made within 14 days after the determination.

being decided adversely to the recipient of the compensation payments.”²⁷ Irreparable damage occurs when the employer “is required to make payment to the [claimant] as ordered by the board and is later unable to recoup the sum paid if successful.”²⁸

Alcan seeks reversal of the board order requiring it to pay interim TTD because it was denied due process.²⁹ Due process requires “an opportunity to be heard and for . . . arguments and evidence to be fairly considered.”³⁰ First of all, it is my opinion that the commission will likely decide to overturn the award of temporary compensation under § 155(d) because the board failed to follow the proper procedures, leaving the commission with an incomplete record and denying due process to Alcan. Thus, the merits of this appeal are likely to be decided against the recipient of the compensation payments, even if Hope ultimately receives compensation under § 155(d) when the record is fully developed and the claim is heard.

The board disregarded its regulations and procedures, and failed to give notice to the parties that it was considering whether to award compensation under § 155(d). The Oct. 16, 2008, pre-hearing conference summary limited the issues that the Board

²⁷ See also 8 AAC 57.100(c) that provides:

To stay continuing future periodic compensation payments, a party must also demonstrate by affidavit or other evidence

(1) . . . the inability of the appellant to fully recover the compensation paid; and

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

²⁸ *Peak Oilfield Service Co. v. Lindgren*, Alaska Workers' Comp. App. Comm'n Dec. No. 004, 4 (Feb. 23, 2006). See also *Hope Community Resources v. Rodriguez*, Alaska Workers' Comp. App. Comm'n Dec. No. 041, 10 (May 16, 2007) (finding irreparable damage because the employer could not recoup the costs of a board-ordered medical examination); *Conam Constr. Co. v. Bagula*, Alaska Workers' Comp. App. Comm'n Dec. No. 024 (Jan. 9, 2007) (finding no irreparable harm because the employer could be fully reimbursed).

²⁹ Alcan's Renewed Motion for Extraordinary Review at 1-2.

³⁰ AS 23.30.001(4).

would hear later that same day to the “joinder and request for continuance issues.”³¹ The board regulations provide that this summary “governs the issues and the course of the hearing” unless it is modified or unusual or extenuating circumstances exist.³² Moreover, at the start of the hearing, the chair stated that “the goal today was to find out whether or not we are going to grant the petition to join”³³ During the course of the hearing, the chair agreed that the issue of interim compensation was not before the board.³⁴

The fact that the board decided issues that were not a part of the pre-hearing summary and that the chair agreed were not before the board, in my opinion, violates Alcan’s due process rights. Alcan had no opportunity to address the order to pay compensation under AS 23.30.155(d) and to assert any defenses.

In deciding to award compensation under § 155(d), the board relied on language in *State of Alaska, Dep’t of Corrections v. Dennis* that § 155(d) is “intended to be self-executing.”³⁵ However, § 155(d) applies only when its specific circumstances are met, namely “those cases in which there is no dispute that the employee was injured in employment – and the only dispute is which employment is liable.”³⁶ The provision “is intended to spare the employee the wait for benefits when the only colorable defense by an otherwise responsible employer is that another employer’s employment is the legal cause of the disability.”³⁷ In *Dennis*, the commission laid out a two-part test for determining whether AS 23.30.155(d) applies. First, without weighing the evidence, the board should determine whether there is sufficient evidence to attach the presumption of compensability against both employers. Second, the board should determine

³¹ Movants’ Ex. G,1 (Pre-hearing Conference Summary, F. White, Oct. 16, 2008).

³² 8 AAC 45.065(c), 8 AAC 45.070(g).

³³ Tr. 4:18-20.

³⁴ Tr. 27:16 – 28:11.

³⁵ Alaska Workers’ Comp. App. Comm’n Dec. No. 036 at 8 (March 27, 2007).

³⁶ Alaska Workers’ Comp. App. Comm’n Dec. No. 036 at 11.

³⁷ *Id.* at 8.

whether the only colorable, or legally supportable, defense of both employers is that the other employer is liable for benefits. These requirements ensure that the liable employer can reimburse the benefit-paying employer if the employer required to pay temporary compensation under § 155(d) is ultimately found not liable for benefits.

If Alcan cannot seek reimbursement from Redi-Electric because it is also not liable to Hope, Alcan will suffer irreparable harm. Alcan cannot seek reimbursement from Hope because absent fraud, an employer cannot recoup benefits paid to an employee to whom the employer is not liable.³⁸ However, the board did not consider whether Redi-Electric controverted the claim “solely on the grounds that another employer . . . may be responsible.”³⁹ In addition, Alcan never got an opportunity to advance its defenses because at the time of the hearing on October 16, 2008, it was not even a party. Thus, it is similarly unclear whether Alcan would controvert “solely on the grounds” that Redi-Electric is liable. Moreover, Alcan was denied the typical 20-day window to assert its defenses.⁴⁰

In addition, I am troubled that Hope has not yet filed a claim against Alcan. I do not believe an order can be directed against Alcan to pay temporary compensation under § 155(d), when Hope apparently does not believe Alcan is liable for his injury. It seems to me the board has opened the door for it to independently join employers that the board believes are potentially liable for a worker’s benefits. This broad power lacks a statutory basis, and therefore, I view it as an abuse of discretion. In my opinion, it is a fundamental requirement that an employee files a claim against any employer that he or she feels is responsible to pay workers’ compensation benefits.⁴¹ At no time did the board direct Hope to file a claim against Alcan, which I believe would be necessary to establish a date of a separate injury. I believe Hope’s failure to file a claim against

³⁸ *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064 (Alaska 1991).

³⁹ AS 23.30.155(d).

⁴⁰ See 8 AAC 45.050(c) (providing that an answer to a claim or petition for benefits “must be filed within 20 days” of the date of service of the claim or petition).

⁴¹ See 8 AAC 45.050(b) (providing the procedures for filing a claim).

Alcan is another reason that an order to Alcan to pay temporary compensation under § 155(d) is unlikely to be upheld.

Lastly, it appears to me that the real beneficiary of the order for Alcan to pay benefits is Redi Electric. Since Hope has failed or refused to file a claim against Alcan, it is my opinion that the appropriate payer of any benefits is Redi Electric.⁴²

For the reasons cited above, I dissent on the single issue of whether to stay the board's order directing Alcan to pay temporary compensation under § 155(d).

Date: JAN 23, 2009



Signed

Stephen T. Hagedorn, Appeals Commissioner

APPEAL PROCEDURES

This is not a final decision on the merits of this appeal. The effect of this decision is to allow Alcan Electrical and Engineering, Inc. and Seabright Insurance Co. (the movants) and Redi Electric, Inc. and Novapro Risk Solutions (cross-movants) to appeal a non-final interlocutory board order. This decision is not a final decision on Mr. Hope's claim, which has not been decided by the board. The commission's review does not require proceedings on Mr. Hope's claim to cease.

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

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue

⁴² I note that interim compensation is available only if § 155(d) applies, and that, when it applies, it requires the "most recent employer . . . who is a party to the claim and who may be liable" to pay benefits during the pendency of the dispute.

an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal (or petition for review or hearing) to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

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

RECONSIDERATION

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Memorandum Decision No. 097 on Motions for Extraordinary Review in AWCAC Appeal No. 08-031, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 23rd day of January, 2009.

Signed
L. Beard, Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION

I certify that on 1/23/09 a copy of this Memorandum Decision No. 097 in Appeal No. 08-031 was mailed to: P. Zobel, C. Croft & J. Cooper at their addresses of record and faxed to: P. Zobel, C. Croft & J. Cooper, AWCB Appeals Clerk, & the Director WCD.

Signed
L. Beard, Appeals Commission Clerk