Alaska Workers' Compensation Appeals Commission

North Slope Borough,
Appellant,

vs.

Melvin Wood and State of Alaska,
Second Injury Fund,
Appellees.

Final Decision on Reconsideration
Decision No. 059 October 12, 2007

AWCAC Appeal No. 06-017
AWCB Decision No. 06-0142
AWCB Case No. 199104596

Motion for Reconsideration of the final decision of the Alaska Workers' Compensation Appeals Commission, Decision No. 048, issued July 13, 2007, on appeal from Alaska Workers' Compensation Board Decision No. 06-0142, issued June 1, 2006, by Fred Brown, Chairman, Chris Johansen, Member for Industry and Jeff Pruss, Member for Labor.

Appearances: Robin Gabbert, Russell, Wagg, Gabbert & Budzinski for the appellant, North Slope Borough. Talis J. Colberg, Attorney General, and Larry McKinstry, Assistant Attorney General, for the appellee, Second Injury Fund. Melvin Wood, pro se appellee, not participating.

Commissioners: John Giuchici, Stephen T. Hagedorn, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

The commission allowed reconsideration pursuant to AS 23.30.127(f) of its Final Decision[1] following a motion by the Second Injury Fund. The commission limited reconsideration to whether the commission (1) misconceived a material fact respecting its calculation of time, and (2) overlooked a controlling legal principle in the doctrine of invited error and the effect of the stipulation regarding Mr. Monagle's hearing

[1] *North Slope Borough v. State of Alaska, Second Injury Fund and Melvin Wood*, Alaska Workers' Comp. App. Comm'n Dec. No. 048 (July 13, 2007).

testimony. Briefing was invited on the second point and the commission took the matter under deliberation after close of briefing September 13, 2007.[2]

The commission finds that it did miscalculate when 100 weeks prior to December 31, 2002 began, as shown on page 10 of its decision. The commission corrects its error. The correct date is January 30, 2001. The sentences should read as follows:

> In this case, the board found that the Borough's notice was not timely without determining the "start date" of the 100 weeks, except to infer that it must have occurred before January 30, 2001 (100 weeks prior to December 31, 2002). We infer from the board's comments regarding "any possible claim" that the board found that the obligation to give notice of a possible claim began before January 30, 2001; that is that a possible claim existed before that date.

We turn now to the Second Injury Fund's argument that the doctrine of invited error, and the stipulation by the North Slope Borough in the hearing respecting Mr. Monagle's testimony, bar the Borough from complaining of board error. We conclude that the invited error doctrine does not apply in this case. First, board hearings are conducted under AS 23.30.135(a), which provides that in conducting a hearing, "the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter."[3] The invited error doctrine is a procedural rule based on Evidence Rule 103.[4] It bars a party from

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[2] The last brief was filed late by the North Slope Borough, without objection by the Second Injury Fund or Mr. Wood. We allowed the late filed brief by our order dated September 14, 2007.

[3] *See also* 8 AAC 45.120(e): "(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter."

[4] Alaska Rule of Evidence 103(a) provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
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> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of

appealing an erroneous evidence ruling if the error was "invited" by that same party in the trial below, that is, that an appellant may not complain of an error that was the appellant's own fault.[5] Given the nature of board proceedings, we do not apply a rule that deprives a party of the opportunity to challenge board error unless the requirements of the rule are clearly met. The board's decision that

> based on the clear language of AS 23.30.205(f), which requires that the "employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable," as applied to the specific facts of this case, we find we must conclude the employer was required to file a Notice of Possible Claim prior to December 31, 2002,

is a conclusion of law – it is not an evidence ruling of the type addressed by the "invited error doctrine."

Second, the error must be one "invited" by the appellant. As the pertinent exchange below illustrates, there was no erroneous ruling because the hearing officer ruled on the first objection correctly, that the question to Mr. Monagle from the Second Injury Fund's attorney, "has the North Slope Borough filed a timely Second Injury Fund claim," "called for a conclusion of law." After that ruling, the Second Injury Fund's

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> record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
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> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

[5] *See Barrett v. State*, 772 P.2d 559, 568-69 n. 10 (Alaska App. 1989). This doctrine limits the scope of an appellant's appeal. In Alaska, it has been applied in criminal appeals, which are more adversarial, technical and formal than board proceedings, and it has been mentioned in only one civil case, *Alden H. v. State, Office of Children's Services*, 108 P.3d 224, 230 n. 20 (Alaska 2005). Notwithstanding the informality of board proceedings, the Supreme Court has held that parties may waive a claim of procedural error on appeal through their conduct at a board hearing. *Williams v. Abood*, 53 P.3d 134, 148 (Alaska 2002) ("[F]ailure to make the appropriate objection during the hearing waives the right to appeal procedural errors.").

attorney, Richard Postma, argued that Mr. Monagle could testify that "certain documents . . . would they have alerted him, as the Second Injury Fund administrator, of a possible Second Injury Fund claim." This is a different question than "has the North Slope Borough filed a timely claim?" Mr. Tesche, the Borough's attorney, objected on relevance grounds, pointing out that the board had to decide the question, not based on Mr. Monagle's opinion of the sufficiency of the documents.[6] The hearing officer did not rule on the relevancy challenge. The "invited error doctrine" does not apply in this case, as the appeal does not rest on the challenge to an erroneous ruling requested by the appellant.

Instead of ruling, the hearing officer interrupted Mr. Tesche's second objection and, after further clarification of the questioning Mr. Postma planned, proposed a stipulation to which the Borough acceded:

> Mr. Postma [questioning Mr. Monagle]: Okay. And in your – what I'm going to do is I'm going to ask you what your opinion is about whether this claim was timely filed and then I'm going to go into the basis for it. Okay. In your opinion, has mister – excuse me, has the North Slope Borough filed a timely Second Injury Fund claim?
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> Mr. Tesche: Object to the question for two reasons. First, unless a foundation is shown that Mr. Monagle can prove or show what the adjusters handling this file actually knew or understood, and I don't think he can because he has not testified that he worked in those companies or was privy to those conversations, the only thing Mr. Monagle can do here is offer argument based on the records that the attorney general has kindly supplied to us. I would submit based on the Arctic Bowl case that review of those documents to see if the documents of record here placed the employer on notice in light of that case is something the board can handle, and Mr. Monagle's testimony will not be helpful in that regard. That's a board decision under the Arctic Bowl case.

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[6] The objection may have been that the board could not delegate its decision-making powers to Mr. Monagle by simply accepting his opinion, or that Mr. Monagle's opinion was not relevant to the question of employer knowledge. We assume it was a relevancy challenge in light of the preceding objection.

Hearing Officer: Well, it calls for a conclusion of law, really, your question does.

Mr. Postma: Well, he's the Second Injury Fund administrator. He sees these – this evidence all the time. And what I elicited was whether it's a payable Second Injury Fund claim. And I'm about to ask him, certain documents as they came in to him, would they have alerted him, as the Second Injury Fund administrator, of a possible Second Injury Fund claim.

Mr. Tesche: That's a question that the board is going to decide and I think it's a very important question for the board to decide, not on the basis of the opinion offered by the Second Injury Fund administrator on the sufficiency of these documents when they're . . .

Hearing Officer: How many questions do you have?

Mr. Postma: Basically, I'm – have him explain – go through the evidence and explain why he would have – had he had the evidence at the time, he would have been on notice of a potential Second Injury Fund . . .

Hearing Officer: I think that Mr. Tesche would stipulate that *he would say that he would have thought it had triggered* – would you stipulate that that's what his testimony would be?

Mr. Tesche: Absolutely.

Mr. Potsma: Then we don't need to ask . . .

Mr. Tesche: That's stated – you know, *that's stated in the brief*. I don't object to the board's consideration of that, but I certainly understand and respect that Mr. Monagle will say that in response to questions by counsel.

Mr. Postma: That . . .

Hearing Officer: Do you have any other questions? Any follow-up? I assume you're done, then?

Mr. Postma: That would be it, then.[7]

The Second Injury Fund argues that the Borough's stipulation as to what Mr. Monagle would say effectively conceded that certain medical records provided notice of a possible claim against the Fund based on the combined effects of the injury

[7] Hrg. Tr. 114:10-116:12 (*Emphasis added*)

and pre-existing condition resulting in a substantially greater disability than the injury alone would have done. It urges that the board's failure to identify "the precise date" on which the employer knew the combined effects produced greater disability than the injury alone would do is a harmless error, because Mr. Monagle's opinion supplies the evidence on which the board might have relied.

We disagree. The stipulation proposed by the hearing officer was that "[Mr. Monagle] would say that he would have thought it had triggered." "It" presumably means the obligation to give notice to the Second Injury Fund within 100 weeks. The hearing officer's stipulation is simply a restatement of the Fund's argument as an opinion. In other words, the stipulation was simply a statement that the Administrator would testify that his opinion as Administrator was consistent with the position the Second Injury Fund argued in its brief on the ultimate disputed issue.[8] The stipulation was not, as the Second Injury Fund suggests, evidence on which the board could rely to support a finding of fact that the employer knew or should have known before January 30, 2001, that the combined effects of the pre-existing condition and the injury produced a substantially greater disability than the injury alone.[9]

We are charged to accept the board's findings of fact if they are supported by substantial evidence in light of the whole record.[10] If they are so supported, we adopt

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[8] Asking the Second Injury Fund Administrator his opinion whether the North Slope Borough filed its claim on time is like asking a city permit enforcement officer to express his opinion to a court on whether a builder has a valid permit, in the course of an injunction proceeding against the builder for not having a permit. The validity of the permit is something the court must decide based on evidence. Agreement that the enforcement officer would testify that his own opinion is consistent with the position of the city does not amount to a concession that the permit is, in fact, invalid.

[9] The stipulation did not establish that the Administrator was in a position to know when the employer knew, or when a reasonable employer or insurer's adjuster, applying current standards of practice, would have recognized the basis for a possible claim existed. It only established that the Administrator would testify that *he* would have thought the 100-week notice period had been triggered.

[10] AS 23.30.128(b).

them, and they become the findings upon which our decision rests. However, if the board fails to make adequate findings of fact to reach a conclusion, and if reasonable minds could differ as to the evidence in the record, we must remand. We do so because the legislature has assigned to the board the role of weighing the evidence and deciding the facts.[11] If we were to do what the Second Injury Fund suggests, and make findings of fact in support of the board's decision, we would begin down a path that would only lead to blurring of the sharp line drawn by the legislature between this commission's proper duties and those of the board.

For the reasons discussed above, we conclude that we misperceived a material fact in calculating the dates on page 10 of our decision. We find that 100 weeks prior to December 31, 2002 is January 30, 2001, not December 4, 2000, and we so correct our decision on reconsideration. We conclude that we did not overlook a controlling legal principle in the doctrine of invited error, or in respect to the effect of the stipulation regarding Mr. Monagle's testimony. Except as to the calculation of the date 100 weeks prior to December 31, 2002, we DENY the motion for reconsideration.

Date: __*12 Oct. 2007*__ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
John Giuchici, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final administrative agency decision on the employer's claim for Second Injury Fund reimbursement. This is a final decision of the commission on reconsideration of our decision and order of July 13, 2007, that remanded this case to the board for further proceedings. The effect of the commission decision is to correct a calculation error

[11] Exceptions are limited. AS 23.30.128(c).

and clarify our decision in our July 13, 2007, order and to allow the board to complete its proceedings in this case and issue a final decision on the claim for Second Injury Fund reimbursement. The board may issue a final decision after the remand and the board's final decision then may be appealed to the commission.

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

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

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

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

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 059 in the matter of *North Slope Borough v. Second Injury Fund and Melvin Wood*; Appeal No. 06-017; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *12th* day of *October*, 200*7.*

Signed
L. Beard, Deputy Appeals Commission Clerk

Certificate of Distribution
I certify that on *10/12/07* a copy of this Final Decision on Reconsideration was mailed to: Wood (certified), McKinstry & Gabbert and faxed to McKinstry, Gabbert, AWCB Appeals Clerk & WCD Director.

Signed
L. Beard, Deputy Appeals Commission Clerk