

Case: *Alcan Electrical and Engineering, Inc. and Seabright Insurance Co. vs. Redi Electric, Inc. and NovaPro Risk Solutions and Michael Hope*, Alaska Workers' Comp. App. Comm'n Dec. No. 112 (July 1, 2009)

Facts: Michael Hope (Hope) was injured in a fall from a ladder in June 2005 while working for Redi Electric, Inc. (Redi). After working for a couple of other employers, Hope worked for Alcan Electrical and Engineering, Inc. (Alcan) from April 2006 to November 2006. Redi voluntarily paid an initial period of workers' compensation but a dispute arose between Hope and Redi after Hope stopped working for Alcan.

Hope testified that his back hurt worse after working for Alcan and an examiner opined that his need for back surgery was a result of his Alcan employment, and so Redi filed a petition to join Alcan as a last injurious employer. No claim was filed against Alcan. Alcan opposed its joinder and stated that it would seek a continuance if joined. Meanwhile, Hope filed a petition for interim compensation. The board heard the joinder and continuance issues on October 16, 2008. After hearing argument, the board excused the parties' attorneys but, along with the board panel, three division staff members remained in the room.

The board directed Alcan to pay interim temporary total disability (TTD) until the board's hearing on the merits, over the objection by Alcan that the parties understood that the only issue to be decided was the petition for joinder and continuance. The board stated that the order was based on the self-executing nature of AS 23.30.155(d) and the assertion of a last injurious exposure defense, not Hope's petition for interim compensation. The board in its written decision also directed that a second independent medical evaluation (SIME) take place under AS 23.30.110(g) and that Redi should pay for it. The board relied on a deposition by Dr. Bald that was not in the record at the time of hearing. 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.

Alcan sought extraordinary review of the board's interim order, which the commission granted in Alaska Workers' Comp. App. Comm'n Dec. No. 097. Alcan argues the board failed to give notice and an opportunity to be heard before ordering it to pay TTD, and erred in ordering payment when no claim had been filed against Alcan. Alcan also objected to an SIME by an examiner who had already formed an opinion and challenged the propriety of division staff being present during the panel deliberations. Redi also sought extraordinary review, which the commission granted, of the board's order directing payment for an SIME without notice and an opportunity to be heard. The commission considers the merits of the parties' arguments on appeal in this decision.

Applicable law: AS 23.30.110(a) gives the board authority to "hear and determine all questions [with] respect to [a] claim." But, the Alaska 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." *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981). See Dec. No. 97 at 7-8 and Dec. No. 112

at 10.

AS 23.30.001(4) states the legislature intends that "hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered."

AS 23.30.110(c) requires the board to "give each party at least 10 days' notice of the hearing," and, once notice of a hearing has been given, "the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board."

8 AAC 45.070(g) provides "Except when 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."

AS 23.30.135(a) provides in part:

In making an investigation or inquiry or 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. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties.

AS 23.30.110(g) provides in part, "An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require."

Bah v. Trident Seafoods Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 073, 5 (Feb. 27, 2008), stated:

Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in the evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties in the dispute before the board.

AS 23.30.105(a) provides that "The right to compensation for disability under this chapter is barred unless a claim for it is filed"

One can infer from 8 AAC 45.040(a) that an employer may file a claim against another employer, stating in relevant part, "a person other than the employee filing a claim shall join the injured employee as a party."

AS 23.30.155(d) provides in 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. 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.

State, Dep't of Corrections v. Dennis, Alaska Workers' Comp. App. Comm'n Dec. No. 036, 11 (Mar. 27, 2007), explained that AS 23.30.155(d) relieves 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 party is liable to pay the compensation.

Issues: Did the board err in directing Alcan to pay TTD until the board's hearing on the merits, in the absence of a claim against Alcan? Does the board have the power to order an SIME under AS 23.30.110(g) without notice to the parties? Did the presence of other division staff during the board panel's deliberations violate the parties' rights to fair consideration of their arguments?

Holding/analysis: First, the commission concluded the board disregarded its obligations to provide notice to the parties of the issues that it would consider and the evidence that it would review. The commission concluded that the board's reaching of issues beyond the joinder petition was contrary to the board's own regulations and was not harmless error, given the extent of the board's departure and the failure to give notice to the parties. The commission concluded that "the board's written decision, with its lengthy review of the medical evidence, extended beyond the bounds of the limited question presented in the hearing. . . . More importantly, the volume of medical evidence detailed in the written decision could have formed very little part of the decision made at the hearing. The members had no opportunity to review the medical evidence *in the detail related in the written decision* before issuing their decision at the hearing." Dec. No. 112 at 13 (footnote omitted). The commission also noted the board erred in deciding entitlement to TTD without giving notice to the parties and the board erred in requiring TTD payments up until its hearing on the merits, without any evidence about when Hope would reach medical stability (AS 23.30.185 ends TTD when a claimant reaches medical stability).

The commission rejected Hope's argument that the parties were not entitled to notice and an opportunity to be heard on the SIME issue because the board was exercising its investigatory powers under AS 23.30.135(a). The commission concluded that the "use of the disjunctive 'or' instead of the conjunctive 'and' in section .135(a) separates the function of making an investigation or inquiry from the function of conducting a hearing. . . . when the board is conducting a hearing, (adjudicating a dispute), the board may not simultaneously make an investigation." Dec. No. 112 at 21-22. Because the purpose of an SIME is to enable the board to decide the legal rights of the parties, the board may only order an examination to resolve issues in dispute when the board is conducting a hearing. *Id.* at 24. Ordering an SIME was improper because (1) the parties had no notice that the board would address that issue and (2) nothing in the record demonstrated a gap in the medical evidence or a lack of understanding of the medical evidence such that the board needed an SIME to decide the joinder issue. The commission also stated, "[t]he board's power to order an examination under

AS 23.30.110(g) is not a substitute for the process in AS 23.30.095(k); it should only be exercised if the party-initiated process is unavailable and the board is unable to adjudicate the dispute before it without an SIME." *Id.* at 26.

The commission decided that the board could not order joinder of Alcan when no claim had been filed against Alcan. Hope's claim was based on an injury on June 28, 2005, when he was working for Redi; a claim needed to be filed regarding the later injury suffered at Alcan that apparently resulted in the Hope's need for back surgery. "[W]here two distinct injuries are alleged to be the source of the disability or need for medical benefits, and the competing allegations of injury result in two potentially liable employers, the appropriate process is *claim* joinder (or consolidation), not simply joinder of *parties* in a single claim." *Id.* at 30. Without knowing the specific allegations against it, Alcan was "deprived . . . of the opportunity to dispute liability on other grounds than that Redi was liable." *Id.* at 33. Moreover, "[t]he commission's decision in *Dennis* does not support extending the reach of AS 23.30.155(d) to employers against whom no claim has been filed, because an employer against whom no claim is filed cannot dispute liability for the claim – either on a variety of grounds or solely on the grounds that another employer is liable." *Id.*

Lastly, the commission decided that even if they were merely a silent audience, the presence of people who were not members of the board panel during deliberations violated the confidentiality of the deliberations and constituted plain error. (Usually the commission only considers claims of procedural error on appeal when the parties objected to the error before the board, but this case involved plain error, which affects a substantial right and is prejudicial to the result, and which does not require the parties' objection at the board hearing.) The commission concluded the board's permitting of others to witness its deliberations required reversal because (1) "Even the presence of a silent audience can affect the deliberations of a quasi-judicial body; members may avoid asking questions that may make them seem ignorant, avoid candor about their opinions on credibility, or be more resistant to compromise." *Id.* at 36-37. And (2) There is no way for the parties to respond to anything the audience may have contributed because the parties have no way of knowing what occurred. *Id.* at 36.

Note: The commission decided to accept the Motion for Extraordinary Review in *Alcan Elec. & Eng'g, Inc., v. Hope*, Alaska Workers' Comp. App. Comm'n Dec. No. 097 (January 23, 2009).